Australian Government

NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

SECOND REPORT

TO THE WORKPLACE RELATIONS MINISTERS' COUNCIL

JANUARY 2009

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The Honourable Julia Gillard MP
Minister for Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

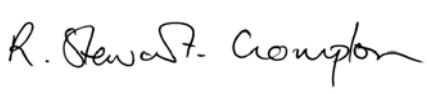
Dear Minister

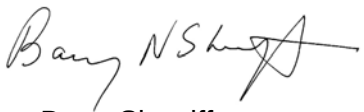
In accordance with clause 13 of the terms of reference for the National Review into Model Occupational Health and Safety (OHS) Laws, we submit to you, in your capacity as the Chair of the Workplace Relations Ministers' Council, our second report containing findings and recommendations on the optimal content of a model OHS Act in the following areas:

- scope and coverage, including definitions;
- workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;
- enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;
- regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional co-operation and dispute resolution;
- permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;
- the role of OHS regulatory agencies in providing education, advice and assistance to duty holders; and
- other matters the review panel has identified as being important to health and safety that should be addressed in a model OHS Act.

Together, our two reports (the first of which was submitted on 31 October 2008) discuss and make recommendations for the optimal structure and content of a model OHS Act.

Yours sincerely





Robin Stewart-Crompton	Stephanie Mayman	Barry Sherriff
(Chair)	(Panel member)	(Panel member)

30 January 2009

TERMS OF REFERENCE

BACKGROUND

1 The health and safety of Australian workers is a key concern of Australian governments at all levels. All workers have the right to a safe and healthy workplace and employers have the right to expect that workers and visitors to their workplaces will co-operate with occupational health and safety (OHS) rules.

2 OHS regulation affects every workplace in Australia. All States, Territories and the Commonwealth have OHS laws that aim to prevent workplace death, injury and disease. Industry specific laws covering workplace safety and laws regulating particular hazards, for example the transport and storage of dangerous goods, also exist in certain jurisdictions.

3 All Australian governments have taken a broadly similar approach to regulating for safer workplaces. The approach involves a principal OHS Act codifying common law duties of care, supported by detailed regulations and codes of practice, and a system of education, inspection, advice, compliance activities and, where appropriate, prosecution.

4 Despite this commonality, there remain differences between jurisdictions as to the form, detail and substantive matters in OHS legislation, particularly in regard to duty holders and duties, defence mechanisms and compliance regimes, including penalties.

5 The importance of harmonised OHS laws has been recognised by the Council of Australian Governments, the Productivity Commission and the States and Territories in their work in this area to date.

6 The Australian Government has committed to work co-operatively with state and territory governments to achieve the important reform of harmonised OHS legislation within five years. Following the recent meeting of the Workplace Relations Ministers' Council, all States and Territories have agreed to work together with the Commonwealth to develop and implement model OHS legislation as the most effective way to achieve harmonisation.

7 The model legislation will consist of a model principal OHS Act, supported by model regulations and model codes of practice that can be readily adopted in each jurisdiction.

8 Harmonising OHS laws in this way will cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties.

9 As the first step in this process the Australian Government has appointed an advisory panel to conduct a national review of current OHS legislation across all jurisdictions, and recommend to the Workplace Relations Ministers' Council the optimal structure and content of a model OHS Act.

SCOPE OF THE REVIEW

10 The panel is asked to review OHS legislation in each State, Territory and Commonwealth jurisdiction for the purpose of making recommendations on the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions. The panel is asked to make its recommendations in two stages, to allow matters critical for harmonisation to be considered by the Workplace Relations Ministers' Council as a matter of priority (refer paragraphs 12 and 13).

11 In undertaking the review, the panel will:

a) examine the principal OHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency;

b) take into account relevant work already undertaken in this area by the Australian Safety and Compensation Council and others (including international developments), and

consider recommendations from recent reviews commissioned by Australian governments relating to OHS laws;

c) take into account the changing nature of work and employment arrangements;

d) consult with business, governments, unions and other interested parties, and invite submissions from the public and other stakeholders on matters relating to the review; and

e) make recommendations on the optimal structure and content of a model OHS Act that promotes safe workplaces, increases certainty for duty holders, reduces compliance costs for business and provides greater clarity for regulators without compromising safety outcomes.

12 The panel should examine and make recommendations on the optimal content of a model OHS Act in the following areas as a matter of priority, and report to the Workplace Relations Ministers' Council by 31 October 2008:

a) duties of care, including the identification of duty holders and the scope and limits of duties;

b) the nature and structure of offences, including defences.

13 The review panel should also examine and make recommendations on the optimal content of a model OHS Act in the following areas, and report to the Workplace Relations Ministers' Council by 30 January 2009:

a) scope and coverage, including definitions;

b) workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;

c) enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;

d) regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional co-operation and dispute resolution;

e) permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;

f) the role of OHS regulatory agencies in providing education, advice and assistance to duty holders;

g) other matters the review panel identifies as being important to health and safety that should be addressed in a model OHS Act.

PRINCIPLES FOR THE REVIEW

14 The review will be guided by the following principles:

a) an inclusive approach to the harmonisation process, where the concerns and suggestions of all jurisdictions and interested stakeholders are sought and properly considered;

b) that the development of model OHS legislation be accompanied by an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions;

c) consideration of the resource implications for all levels of government in administering harmonised laws;

d) the observance of the directive of the Council of Australian Governments that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns.

METHODOLOGY AND TIMEFRAME

15 The review will be undertaken by:

a) Mr Robin Stewart-Crompton – Chair

b) Mr Barry Sherriff – Member

c) Ms Stephanie Mayman – Member.

16 The advisory panel will be supported by a secretariat resourced by the Commonwealth Department of Education, Employment and Workplace Relations. State and territory governments may also provide practical support and assistance to the advisory panel.

17 The following timeframe will apply to the review:

Information gathering, research and consultation with key stakeholders	April – May 2008
Publish issues paper and invite submissions	May 2008
Provide a progress report to Workplace Relations Ministers' Council meeting	May 2008 (expected)
Provide report and recommendations to Workplace Relations Ministers' Council on priority areas outlined in paragraph 12 (duties of care and the nature and structure of offences)	31 October 2008
Provide report and recommendations to Workplace Relations Ministers' Council on remaining matters	30 January 2009

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ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACT	Australian Capital Territory
ACT Act	*Work Safety Act 2008* (ACT)
ACT Review	ACT *Occupational Health and Safety Act 1989:* Scope and Structure Review (2005)
ACTU	Australian Council of Trade Unions
AICD	Australian Institute of Company Directors
AiG	Australian Industry Group
AMMA	Australian Mines and Metals Association
APESMA	Association of Professional Engineers, Scientists and Managers Australia
AQTF	Australian Qualifications Training Framework
ASCC	Australian Safety and Compensation Council
ATC	Australian Transport Council
BCA	Business Council of Australia
CAR	Confirmation of Advice Record
CCI WA	Chamber of Commerce and Industry Western Australia
CCF	Civil Contractors Federation
CEPU	Communications, Electrical and Plumbing Union
CFMEU	Construction Forestry Mining and Energy Union
CMEWA	Chamber of Minerals and Energy of WA
COAG	Council of Australian Governments
CPSU/SPSF Group	Community and Public Sector Union, State Public Services Federation Group
Cwth	Commonwealth
Commonwealth Act	*Occupational Health and Safety Act 1991* (Cwth)
Commonwealth WR Act	*Workplace Relations Act 1996* (Cwth)
DEEWR	Department of Education, Employment and Workplace Relations (Cwth)
DOCEP	Department of Consumer and Employment Protection (WA)
DPP	Director of Public Prosecutions
EEA(SA)	Engineering Employers Association South Australia
ENA	Energy Network Association
ETU	Electrical Trades Union
HIA	Housing Industry Association
HSC	Health and Safety Committee

HSE	Health and Safety Executive (UK)
HSR	Health and Safety Representative
IALI	International Association of Labour Inspection
IC	Industry Commission
IC Report	Industry Commission Inquiry Report: Work, Health and Safety (1995)
ILO	International Labour Organization
Laing Review	Review of the *Occupational Health and Safety Act 1984* (WA) (2002), R Laing
Laing Review (Mine safety)	Final report: Review of the *Mines Safety and Inspection Act 1994,* (WA) R Laing
Maxwell Review	Victorian *Occupational Health and Safety Act* Review (2004), C Maxwell
MBA	Master Builders Australia
MCA	Minerals Council of Australia
McCallum Review	Advice in relation to workplace death, occupational health and safety legislation & other matters - Report to WorkCover Authority of NSW (2004), R McCallum
MCE	Ministerial Council on Energy
MCMPR	Ministerial Council on Mineral and Petroleum Resources
MPMSAA	Master Plumbers' and Mechanical Services Association of Australia
National OHS Strategy	National Occupational Health and Safety Strategy 2002-2012
NMSF	National Mine Safety Framework
NOPSA	National Offshore Petroleum Safety Authority
NSW	New South Wales
NSW Act	*Occupational Health and Safety Act 2000* (NSW)
NSW WorkCover Review	Report on the Review of the *Occupational Health and Safety Act 2000* (2006)
NSW IR Act	*Industrial Relations Act 1996* (NSW)
NT	Northern Territory
NT Act	*Workplace Health and Safety Act 2007* (NT)
NT Review	Review of the NT Work Health Act and Mining Management Act (2007)
NTC	National Transport Commission
NZ	New Zealand
NZ Act	*Health and Safety in Employment Act, 1992,* NZ
OECD	Organisation for Economic Co-operation and Development
OHS	Occupational Health and Safety
OPP	Office of Public Prosecutions
PC	Productivity Commission (previously the Industry Commission)

Qld	Queensland
Qld Act	*Workplace Health and Safety Act 1995* (Qld)
Qld Review	Review of the *Workplace Health and Safety Act 1995*, (2001), Crittall J.
Robens Report	Report of the Committee on Safety and Health at Work (1972), Lord Robens
SA	South Australia
SA Act	*Occupational Health, Safety and Welfare Act 1986* (SA)
SA Review	Review of Workers Compensation and Occupational Health Safety and Welfare Systems in South Australia (2002)
Stein Inquiry	Inquiry into the Review of the *Occupational Health and Safety Act 2000* (2007)
Tas	Tasmania
Tas Act	*Workplace Health and Safety Act 1995* (Tas)
Tas Review	Safe from Injuries and Risks to Health: Review of Workplace Health and Safety in Tasmania – 2006 Interim Report (2007)
UK	United Kingdom
UK Act	*Health and Safety at Work etc Act 1974* (UK)
VACC	Victorian Automobile Chamber of Commerce
VECCI	Victorian Employers Chamber of Commerce and Industry
Vic	Victoria
Vic Act	*Occupational Health and Safety Act 2004* (Vic)
Vic Administrative Review	A Report on the *Occupational Health and Safety Act 2004* – Administrative Review (2007)
WA	Western Australia
WA Act	*Occupational Safety and Health Act 1984* (WA)
WA Review	Final Report: Review of the *Occupational Health and Safety Act 1984* (2006), R Hooker
WA IR Act	*Industrial Relations Act 1979* (WA)
WRMC	Workplace Relations Ministers' Council

SUMMARY

This report is the second of the two reports that we are required to provide under the terms of reference for the National Review of Model OHS Laws. Our first report focused on the priority areas in clause 12 of our terms of reference, being:

- duties of care, including the identification of duty holders and the scope and limits of duties; and
- the nature and structure of offences, including defences.

Our second report addresses the areas in clause 13 of our terms of reference:

- scope and coverage, including definitions;
- workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;
- enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;
- regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional co-operation and dispute resolution;
- permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;
- the role of OHS regulatory agencies in providing education, advice and assistance to duty holders; and
- other matters the review panel has identified as being important to health and safety that should be addressed in a model OHS Act.

Taken together, our reports discuss and make recommendations for the optimal content of a model OHS Act. The first report contains Parts 1 to 5. The second report contains Parts 6 to 12.

We have sought to facilitate access to the content of the reports by including at the start of each report a summary of its findings and a table of recommendations that indicates where each recommendation is to be found in the report concerned.

PART 6: SCOPE, STRUCTURE, OBJECTS AND DEFINITIONS (*CHAPTERS 20-23; R.76-95)*

In Chapter 20 we consider not only the scope and coverage of the principal OHS Acts, but also the overlap with other laws regulating safety in specific industries or in relation to specific hazards. We note that, although a single OHS legislative system would conform to the Robens model, there are some types of industries or hazards where separate legislation may be justified.

Therefore we recommend a wider scope of the principal OHS Act in each jurisdiction, with separate regulation of OHS in specific industries or in relation to specific hazards only where periodically and objectively justified. As far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws.

Where the continuation of separate legislation is not justified, it should be replaced by the model Act within an agreed timeframe. We recognise that the Ministers to whom we are reporting may not be responsible for some of the other OHS related laws and therefore propose that our approach be recommended to COAG.

In relation to the application of the model Act to public safety, we recommend that the underlying OHS objectives of the model Act should be clearly articulated, including the protection of all persons from work-related harm; and that care must be taken to avoid giving it a reach that is

inconsistent with those objectives. Regulators should also provide up-to-date advice and information about how the OHS law applies to public safety.

Chapter 21 describes how the contents of the model Act should be structured, by outlining the key elements of the model Act and the relationships between those elements. We consider that the structure of the model Act should provide more guidance and assistance to duty holders and those whose health and safety is to be protected. This can be helped by the order of the model Act's provisions. We recommend a structure that places the provisions relating to the duties and workplace participation as early as possible in the model Act.

In Chapter 22, we propose that the model Act include six main objects to assist in its interpretation and application. These should be based on those in current OHS Acts and include the aim of ensuring that the model Act facilitates and supports the ongoing harmonisation of Australia's OHS laws. We also support the inclusion of principles, using the Victorian Act as model. We have not recommended the exact content of the objects or principles as this will depend on the final decisions about the model Act's contents.

Chapter 23 discusses the definitions of key terms that may be used in the model Act. Most of these terms arise from recommendations made in our first report. Many of our recommendations relating to the primary duty include the use of the term 'business or undertaking'. Accordingly, we recommend that the model Act provide a definition for 'business or undertaking' that is consistent with the scope of the primary duty and reflects the connection to work. However, we recognise that the term might result in the unintended application of the primary duty to some types of bodies or activities, and therefore recommend that the model Act allow for the exemption of prescribed types of organisations or activities.

We recommend a definition of 'health' to include both physical and psychological health, immediate and long-term health and freedom from disease, illness or incapacity. Other key terms that should be defined are 'officer', 'due diligence', 'OHS service provider', 'plant', 'supply', 'union', 'worker', 'workplace' and 'person with management or control'. We recommend definitions for each of these terms.

PART 7: WORKPLACE CONSULTATION, PARTICIPATION, REPRESENTATION AND PROTECTION (*CHAPTERS 24-29; R.96 – 135)*

In Part 7 we deal with those elements of the model Act that are essential for facilitating and promoting the active involvement of workers in OHS matters. There is considerable evidence that the effective participation of workers and the representation of their interests in OHS are crucial elements in improving health and safety performance at the workplace.

In Chapter 24, we recognise the importance of consultation in facilitating the contribution of information and perspectives by workers, to enable other duty holders to make decisions that are properly informed and more likely to eliminate or minimise risks effectively. This will also encourage participation and co-operation of workers more broadly in health and safety matters. We recommend that the model Act include a broad obligation for the person conducting the business or undertaking who is most directly involved in the engagement or direction of the affected workers to consult with those workers, as far as is reasonably necessary, about matters affecting, or likely to affect, their health and safety.

In the context of OHS, consultation as far as is reasonably necessary is that which provides in a timely manner as much exchange of information as is commensurate with the circumstances and the significance of the issue.

We recommend that the model Act describe what consultation means and outline when it should be undertaken.

Consultation is also essential where there are overlapping or concurrent duties, to enable each duty holder to co-operate and coordinate their activities. We recommend that the model Act

should require each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary.

Chapter 25 examines the mechanisms that the model Act should provide to enable the effective participation and representation of workers in OHS. We recommend that the model Act include a provision for workers collectively to elect health and safety representatives (HSRs) at a business or undertaking. We make recommendations in relation to the establishment of work groups to be represented by HSRs, and the election process. We recommend that the powers and functions of HSRs include inspecting the workplace, representing the work group in relation to OHS, investigating OHS complaints, issuing Provisional Improvement Notices (PINs) in accordance with specified procedures and directing that work cease where there is an immediate threat to health and safety.

To ensure that HSRs can perform their functions effectively, we specify a range of obligations for the person conducting the business or undertaking who is most directly involved in the engagement of the HSR, such as allowing HSRs paid leave to attend approved training. We consider that it is important to have safeguards in place in relation to the powers and functions of HSRs and therefore we recommend that the model Act provide for applications to a court or tribunal to disqualify an HSR on specified grounds. We later deal with the protection of HSRs.

In Chapter 26 we recommend that the model Act allow for the establishment of health and safety committees, but that details regarding their structure, functions and operation be provided for in regulations under the model Act.

In Chapter 27 we discuss the processes for resolving OHS issues that may arise between those conducting a business or undertaking and the workers engaged or directed by them. We define 'issue' as being a dispute or concern about OHS that remains unresolved after consultation between the parties.

The model Act should encourage workers and those conducting a business or undertaking to agree on issue resolution procedures. Default issue resolution procedures should be specified in regulations and should apply where the parties have not agreed on such procedures. We also make recommendations specifying who should be involved in the resolution of OHS issues and what the process should be.

Chapter 28 considers statutory OHS rights to cease or direct the cessation of unsafe work. Although the right of an individual worker to cease unsafe work exists in common law, we recommend that the model Act explicitly include a provision that allows a worker to cease work where the worker has reasonable grounds to believe that to continue to work would expose the worker or any other person to a serious risk arising from the immediate or imminent exposure to a hazard. This would permit a work cessation to prevent, for example,, exposure to a substance which may cause a disease of long latency, correcting a gap in current cease work provisions in OHS laws. Similarly, an HSR should be allowed to direct workers to cease work, but only after consulting with the person conducting the business or undertaking and attempting to resolve the issue in accordance with the issue resolution procedures required by the model Act.

In Chapter 29, we make detailed recommendations to protect workers, HSRs, inspectors and authorised persons from discrimination, victimisation and coercion. This type of inappropriate conduct may have the effect of deterring people from being involved in activities or exercising rights or powers or performing functions that are important to OHS. The model Act should provide both for criminal offences and liability to civil interventions and remedies, for engaging in, authorising, aiding or abetting the proscribed conduct.

An offence related to proscribed discriminatory conduct would be committed where involvement or intended involvement in the relevant activity is the *dominant* reason for the proscribed discriminatory conduct. Civil liability may be incurred where the involvement or intended involvement in the relevant activity is an *operative* reason for the proscribed discriminatory conduct.

We further recommend that a person alleged to have engaged in proscribed discriminatory

conduct should bear the onus in a criminal prosecution of proving on the balance of probabilities that the reason alleged was not the dominant reason for which that person engaged in that conduct. Similarly, that person would bear the onus in civil proceedings of proving that the reason alleged was not an operative reason for the conduct.

A person proven to have engaged in coercion should bear the onus of proving on the balance of probabilities that the person had a reasonable excuse for doing so.

The prosecution should bear the onus of proof in relation to all other elements of an offence of engaging in proscribed conduct, beyond a reasonable doubt.

PART 8: OTHER HEALTH AND SAFETY OBLIGATIONS (*CHAPTERS 30– 34; R.136 – 150*)

In Part 8 of our report we deal with those health and safety obligations that are necessary to support the duty of care, as well as processes that are administrative in nature relating to incident notification and permits and licensing.

In Chapter 30, we discuss the role of the risk management process in the model Act. As we noted in our first report, risk management is essential to achieving a safe and healthy work environment. We found that risk management is implicit in the definition of reasonably practicable, and as such, need not be expressly required to be applied as part of the qualifier of the duties of care. Further, as we discuss in this report, risks can be successfully managed without mandating hazard identification and risk assessment in all cases, particularly where the hazards are well known and have universally accepted controls.

Therefore we recommend that the model Act should not include a specific process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice, as is contemporary practice.

The application of risk management process should however be encouraged and should be included as part of an object of the model Act.

In Chapter 31, we recommend that the model Act include obligations to monitor the health and safety of workers and to monitor the conditions at a workplace for the purpose of preventing fatalities, illnesses or injury arising from the conduct of the business or undertaking.

In Chapter 32, we discuss the importance of access to OHS advice. We recommend that persons conducting a business or undertaking be required, where it is reasonably practicable to do so, to employ or engage a suitably qualified person to advise on health and safety matters. Details of the qualifications should be provided in regulations. We also recommend that there be a requirement along the lines of the Queensland Act for the appointment by persons conducting a business or undertaking of workplace health and safety officers. We also recommend that further consideration be given to how that requirement can be applied to non-traditional work arrangements in which thirty or more workers are normally involved.

Chapter 33 discusses requirements relating to incident notification. Given that a primary purpose of incident notification provisions in the model Act should be to allow regulators to conduct investigations in a timely manner, only the most serious incidents causing, or which could have caused, fatality and serious injury or illness should be notified. Therefore the model Act should place an obligation on the person conducting the business or undertaking to ensure that the regulator is notified immediately and by the quickest means of a fatality, serious injury or illness, as well as dangerous incidents arising out of the conduct of the business or undertaking.

The definitions of ‘Serious Illness’, ‘Serious Injury’ and ‘Dangerous Incident’ for incident notification should reflect a principle that only the most serious events are to be captured. Persons with management and control of the workplace should have an obligation to preserve an

incident site until an inspector attends the incident site, or the regulator directs otherwise, which ever occurs first.

The model Act should also place an obligation on workers to report any illness, injury, accident, risk or hazard arising from the conduct of the work, of which they are aware, to the person conducting the business or undertaking or (where this is a different person) the person with management or control of the workplace.

Our terms of reference required us to make recommendations regarding permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances. In Chapter 34, we refer to permits and licences as 'authorisations' and discuss what is needed in the model Act for the effective operation of permits and licences, particularly in relation to mutual recognition.

Given that authorisations are issued to control activities of high risk, the model Act should create an offence to undertake the activity without the relevant permission from the OHS regulator. The processes of application, issue, renewal, variation, suspension, cancellation, review of decisions and placing conditions on such authorisations should be established by regulation. We also recommend that the regulations establish mechanisms to enable mutual recognition of authorisations and facilitate the sharing of information between jurisdictions relating to them.

PART 9: ROLE OF THE REGULATOR IN SECURING COMPLIANCE (*CHAPTERS 35 – 37; R.151 – 153*)

Part 9 addresses the role of the regulator in securing compliance. In line with our terms of reference, we consider their role in providing education, advice and assistance to duty holders. We also discuss their role in relation to enforceable undertakings and cross-jurisdictional co-operation.

In Chapter 35, we recommend that the model Act should clarify in the objects or principles that education, training and information for duty holders, workers and the community are important elements of facilitating good occupational health and safety and that the regulator should have sufficient authority to promote and support such education, training and information. We also recommend that the model Act authorise the regulator to make guidelines on the way in which a provision of the Act or regulations would, in the regulator's opinion, apply.

In Chapter 36, we recommend that the model Act authorise a regulator to be able to accept, at the regulator's discretion, a written enforceable undertaking as an alternative to prosecution, other than in relation to a category 1 breach of a duty of care. We specify a number of safeguards that should be included in the provisions relating to enforceable undertakings, relating to process, transparency of decision making, reviewability of decisions and enforcement.

In Chapter 37, we note that genuine cross-jurisdictional co-operation at all levels of government is the key factor which will determine the success of efforts to harmonise OHS. We recommend that Ministers note the range of measures designed to reinforce and enhance cross-jurisdictional co-operation which we have identified in this report.

PART 10: ROLE OF INSPECTORS IN SECURING COMPLIANCE (*CHAPTER 38 – 44; R.154-204)*

In Part 10 we make detailed recommendations regarding the role of inspectors in securing compliance with OHS legislation. Inspectors are central to the successful operation of OHS regulation, and their skills, knowledge, expertise and judgement are critical factors in securing compliance under the legislation.

In Chapter 38 we recommend that the model Act make provisions for the appointment of inspectors and allow temporary appointments, subject to strict conditions. We also make

recommendations to enhance cross-jurisdictional co-operation between inspectorates, including by the cross-appointment of inspectors and by allowing for the valid use and admissibility in one jurisdiction of evidence gathered in another. We recommend what should be provided to inspectors as appropriate proof of their authority.

In Chapter 39 we recommend that the model Act clarify that an inspector may provide advice about compliance and provide the powers necessary to enable an inspector to resolve issues and review PINs.

The training, skills, qualifications and experience necessary for inspectors to effectively carry out those roles and functions and ensure public confidence in the capacity of the inspectorate are discussed in Chapter 40.

Chapter 41 examines the powers necessary for inspectors to carry out their roles and functions effectively, including powers of entry to places of work and other premises, powers available upon entry to premises, and the availability of various enforcement tools such as directions and notices (safety direction and infringement, improvement, prohibition and non-disturbance notices), injunctions and other remedial options.

We recommend that the model Act should provide for a consolidation of all of the powers currently provided in OHS Acts in Australia, which may be exercised by an inspector upon entry to a workplace, including the power to issue various notices and directions. In addition the model Act should make provision for the regulator to seek an injunction and take remedial action in specific circumstances.

Chapter 42 addresses the powers of inspectors to compel persons to answer questions and provide documents, and the legal privileges and protections that should be available to persons subject to the exercise of those powers. We recommend a new, two stream approach to balancing the interests of workers and the community with the rights of those required to provide the information.

Under this approach, an inspector making enquiries to secure ongoing compliance and health and safety protection can compel a person to provide information, and the privilege against self-incrimination would not apply. The information obtained could not be used against the person in any proceedings for a breach of the model Act. Where the enquiry is for the investigation of a breach, the person must answer questions but may rely on the privilege against self-incrimination.

We recommend that legal professional privilege apply to all relevant communications and documents. We recommend the introduction of a requirement that a corporation provide answers to written questions, to overcome practical difficulties associated with ‘questioning’ a corporation.

In Chapter 43, we make recommendations regarding the various protections that should be available to inspectors and offences against inspectors performing their roles and functions and exercising their powers. The model Act should provide for immunity of an inspector from personal liability in relation to the bona fide performance or exercise by the inspector of his or her role, functions and powers. There should also be offences for the bribery, assault and intimidation of an inspector, as well as for other actions such as hindering, obstructing and impersonating an inspector.

In Chapter 44 we recommend that the model Act should specifically provide for circumstances in which the authorisation of an inspector may be suspended or cancelled. The model Act should also include a consolidation of provisions presently included in OHS Acts relating to accountability of inspectors, confidentiality of information, and their liability for improper conduct.

PART 11: ROLE OF OTHERS IN SECURING COMPLIANCE (*CHAPTER 45 – 46; R.205-224)*

In this Part, we examine the role of third parties in securing compliance in a proactive manner at the workplace, as well as their role in prosecutions where a breach of the OHS Act has occurred.

In Chapter 45, we note that the majority of Australian OHS Acts confer powers on authorised representatives of unions to enter workplaces for OHS purposes. In making our recommendations relating to the right of entry, we have considered the considerable evidence that exists which underscores the value of trade unions being able to enter workplaces to assist, in various ways, in securing improved OHS performance and effective outcomes, particularly with respect to the provision of support to workers elected as HSRs.

We therefore recommend that the model Act provide for a right of entry for OHS purposes to union officials and/or union employees formally authorised under the model Act. We make recommendations in relation to conditions needed for issuing authorisations, including training requirements.

The model Act should provide authorised representatives of unions with the capacity to investigate a suspected contravention of the model Act or regulations; consult workers on OHS issues and provide advice to workers and the person conducting the business or undertaking on OHS issues. We specify a number of limitations on the right of entry, including that the right of entry be restricted to those areas of the workplace where persons work who are members, or eligible to be members, of the relevant union; and only during working hours.

In order to exercise their right of entry for OHS purposes we recommend that the authorised person should hold a current authorisation under the relevant OHS Act and any other relevant permit required under an applicable Federal or State labour law. They should also be required to provide written notice of at least 24 hours to the person in management or control of the business or undertaking (or other relevant person) where the authorised person is entering to consult or advise workers; or to inspect documents relevant to a suspected OHS breach.

When the authorised person is investigating a suspected breach, however, notice should be provided as soon as reasonably practicable after entry.

The model Act should also have safeguards in place in relation to the powers and functions of authorised persons and therefore we recommend that the model Act allow an authorisation to be suspended, revoked or limitations imposed, and we specify the grounds for such action. Provision should also be made to prohibit a person from refusing entry to the workplace and from delaying, obstructing or intimidating an authorised person. As mentioned above, we deal with protection against discrimination, victimisation and coercion, including in relation to authorised persons, in Chapter 29.

In Chapter 46, we consider the question of who should have standing to bring proceedings for offences under the model Act. We note the fundamental differences in the views about whether any person other than an official should be entitled to take proceedings for a breach of the model Act. We summarise and discuss the views and analyses presented to us by the advocates of the competing positions.

We recommend that the model Act provide that only an official who is acting in the course of a public office or duty may bring a prosecution for a breach of the Act. In the case of an alleged category 1 or 2 breach of a duty of care, we propose that a person may request in writing that the regulator bring a prosecution for the breach and, if no prosecution is to be brought, have the decision of the regulator reviewed by the DPP within specified time limits. The model Act should provide that the DPP is able to bring proceedings for an indictable offence under the model Act notwithstanding any other provisions in the model Act.

PART 12: REGULATIONS, CODES OF PRACTICE AND OTHER MATTERS (*CHAPTER 47 – 49; R.225-233)*

In Chapter 47 we recommend that the model Act should contain broad regulation making powers, which allow for the development of regulations necessary or convenient to carry out or give effect to the provisions of the model Act.

There should also be more specific regulation making powers (that expressly do not limit the

broad general regulation making power) prescribing those matters that are not expressly identified within the scope or objects of the model Act for which regulations may be required.

The model Act should allow the regulations to provide for summary offences with lower penalties.

In Chapter 48 we discuss the role of codes and practice and what their evidentiary status should be under the model Act. We recommend that codes should be developed through a tripartite process, with expert involvement, and approved by the relevant Minister. The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.

In Chapter 49 we discuss a number of other matters that should be addressed in the model Act. In relation to the imputation of conduct, we note that the model Act will contain various duties of care, obligations and prohibitions. The conduct of a person will be a significant matter in determining whether the person has complied with the Act or committed an offence. We recommend that the model Act include a provision:

- imputing to a corporation the conduct or state of mind of an officer, employee or agent acting within the actual or apparent scope of that persons authority; and
- setting out a defence for a corporation if it is proved that the corporation took '*all reasonable and practicable measures'* to prevent the offence occurring.

Our final recommendation is that the model Act should provide for the review of its content and operation and that of the subordinate regulation at least once in each period of five years after the model Act's commencement.

TABLE OF RECOMMENDATIONS

Recommendations		
Chapter20: Scope		**Reference**
76	We recommend that Ministers agree that: a) in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws, (including where they form part of an Act that has other purposes) for particular hazards or high risk industries that are within the responsibility of the Ministers, should only continue where they have been objectively justified; b) even where that justification is established, there should be an on-going, legislative and administrative inter-relationship between the laws and, if there are different regulators, between those regulators; c) as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws; d) where the continuation of the separate legislation is not justified, it should be replaced by the model Act within an agreed timeframe; e) where specific provisions are necessary, they should normally be provided by regulations under the model Act, with specific provision in the model Act relating to the matters previously regulated by the separate legislation kept to a minimum; and f) this approach should be recommended to COAG so that, subject to COAG agreement, it is extended within a reasonable timeframe to other legislation that pertains to OHS but which is within the responsibilities of other Ministers.	Page 13
77	To establish a clearer application of the model Act to public safety: a) the underlying OHS objectives of the model act should be clearly articulated, including the protection of all persons from work-related harm; and b) when the model Act is drafted and when it is amended after it is in operation, care must be taken to avoid giving it a reach that is inconsistent with those objectives.	Page 20
78	To avoid misunderstandings about the protection of public safety, the model Act should facilitate the publication by the regulator of up-to-date advice and information about how the model Act relates to the protection of the safety of the public.	Page 20
Chapter 21: Structure of the Model Act		**Reference**
79	The general structure of the model Act should be: 1. Scope, objects and definition provisions.	Page 22

	2. Duties of care and other obligations. 3. Workplace consultation, participation and representation. 4. Functions and powers of the regulator and inspectors. 5. Legal proceedings. 6. Other matters.	
Chapter 22: Objects and Principles		**Reference**
80	The model Act should contain: a) objects and principles along the lines of those set out in 22.31 which are based on those in existing Australian OHS Acts; and b) a new object that expresses the aim of ensuring that the Act facilitates and supports the ongoing harmonisation of Australia's OHS laws.	Page 31
Chapter 23: Definitions		**Reference**
81	The model Act should define a "business or undertaking".	Page 41
82	The model Act should define a "business or undertaking" in broad terms, but provide for the exemption of specific organisations or activities or specific types of organisations or activities in a Schedule to the model Act or in Regulations.	Page 43
83	The model Act should define a "business or undertaking" to be activities carried out by, or under the control of, a person (including a corporation or other legal entity or the Crown in any capacity): a) whether alone or in concert; b) of an industrial or commercial nature or in government or local government; c) whether or not for profit or gain; and d) in which: i) workers are engaged, or caused to be engaged, to carry out work; or ii) the activities of workers at work are directed or influenced, or iii) things are provided for use in the conduct or work (e.g. a workplace, plant, substances, OHS services); by the person conducting the business or undertaking. For avoidance of doubt, a 'business or undertaking' does not include the engagement of workers solely for private or domestic purposes.	Page 44
84	The model Act should not include a definition of "control".	Page 48
85	To provide certainty that the model Act operates in relation to all aspects of health, the model Act should: a) include objects that clearly relate to the elimination or minimisation so far as is reasonably practicable of risks to physical and	Page 51

	psychological health; and b) contain a definition of "health" that recognises that health relates to: i) both physical and psychological health; ii) immediate and long-term health; and iii) freedom from disease or illness or incapacity.	
86	The model Act should define an "officer" for the purposes of the duty of care of an officer of a body corporate, partnership or unincorporated association: a) to have the meaning given by s.9 of the Corporations Act 2001 (Cwth); and b) to include directors and senior managers of the Crown, public sector agencies and statutory authorities	Page 57
87	The model Act should provide that an officer who is a volunteer is only liable to prosecution and a penalty for a breach of the duty of care of an officer where the breach is a Category 1 offence. **Note***: See Recommendation 55 in our first report for the categories of offence.*	Page 57
88	The model Act should define "due diligence" for the purposes of the duty of care of officers, to provide direction as to the appropriate role of an officer in OHS and how compliance may be achieved. The definition should be stated to include the following elements: 1. The standard for the officer is to be assessed against what a reasonable person in the position of the officer would do 2. The officer is required to take reasonable steps proactively and regularly to ensure: a) up to date knowledge of OHS laws and compliance requirements; b) an understanding of the nature of the operations of the entity and generally the hazards and risks associated with those operations; c) that the entity has available and uses appropriate resources and processes to enable the identification and elimination or control of specific OHS hazards and risks associated with the operations of the entity; d) verification of the implementation by the entity of the matters referred to in c.; and e) a process for receiving, considering and ensuring a timely response to information regarding incidents, identified hazards and risks.	Page 61
89	The model Act should define an "OHS service provider" to include persons engaged by another duty holder to provide any or all of the following ("**OHS service**") in the course of conducting a business or undertaking, (other than in the capacity of a worker or officer):	Page 66

	a) advice or information on any matter related to the health or safety of any person; b) systems, policies, procedures or documents relevant to the management of OHS, broadly or in relation to specific matters; c) training on matters relating to OHS; and d) testing, analysis, information or advice (including, but not limited to, mechanical, environmental or biological matters) but **not** to include: a) a person providing an OHS service as part of the performance or exercise of a function, role, right or power under the model Act; or b) a person providing an OHS service while undertaking activity specifically required or authorised by or under any Act or regulation; or c) a member or employee of an emergency service organisation, providing advice or information during the course of responding as a matter of urgency to circumstances giving rise to a serious risk to the health or safety of any person; or d) a legally qualified person practising as a barrister or solicitor when, and to the extent only to which, that person is providing advice to which legal professional privilege may apply.	
90	The model Act should define "plant", using the definition in s.5 of the Vic Act as a model.	Page 68
91	The model Act should define "supply" to be, and occur at the time of, passing of physical possession of a relevant item: a) directly or through an intermediary; b) whether by way or sale, re-supply, exchange, lease, hire or hire-purchase or otherwise; c) including by sale of business assets including the relevant item or all of the shares in a company that owns the relevant item; d) but not including an act by which the owner resumes possession at the conclusion or termination of a lease or other agreement.	Page 69
92	The model Act should define the term 'union' so that it covers: *an association of employees (or whatever term is locally used) registered or taken to be registered under the relevant Commonwealth or State industrial relations Act.*	Page 72
93	The model Act should define a "worker" for all purposes of the model Act consistently with the definition of that term in the NT Act, with appropriate modification to replace references to 'employer' to 'person conducting a business or undertaking'.	Page 75
94	The model Act should define a "workplace" to be any place at or in or upon which work is being undertaken (including during recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work.	Page 78

	For avoidance of doubt, workplace should specifically include a vehicle, ship, aircraft and other mobile structures when used for work. **NOTE**: *Recommendation 28 in our first report regarding the exclusion of domestic premises unless included by regulation.*	
95	The model Act should adopt s.15B of the Qld Act to define a person with management or control of a workplace.	Page 81
Chapter 24: Consultation rights and obligations		**Reference**
96	The model Act should include a broad obligation for the person conducting the business or undertaking most directly involved in the engagement or direction of the affected workers to consult with those workers (and their representatives), as far as is reasonably necessary, about matters affecting, or likely to affect, their health and safety. Consultation should occur when any of the following activities is undertaken: a) identifying hazards and assessing risks arising from the work performed or to be performed at the business or undertaking; b) making decisions about ways to eliminate or control those risks; c) the adequacy of facilities for the welfare of workers; d) proposing changes that may directly affect the health and safety of workers; e) making decisions regarding procedures for the resolution of health and safety issues, consultation mechanisms, monitoring the health of workers and conditions at the workplace; and f) the provision of information and training for workers.	Page 87
97	The model Act should make it clear that consultation that is 'reasonably necessary' is that which enables the person conducting the business or undertaking to make timely, informed decisions about matters affecting, or likely to affect, the health and safety of their workers.	Page 87
98	The model Act should include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary.	Page 87
99	The model Act should define "consultation" and the definition should provide for: a) sharing relevant information with workers and other persons directly affected by the health and safety matter; b) providing workers and other persons directly affected by the health and safety matter with a reasonable opportunity to express their views and to contribute to the resolution of OHS issues; and c) taking into account those views. **Note**: *Consultation does not imply agreement.*	Page 87

Chapter25: Health and Safety Representatives		Reference
100	The model Act should contain a provision for workers to collectively elect health and safety representative(s) (HSRs) to represent them in health and safety matters.	Page 91
101	The model Act should provide for: a) workers to initiate the election of HSRs by advising the person conducting the business or undertaking most directly involved in the engagement or direction of the workers that they wish to elect HSR(s) for that workplace; and b) a person conducting the business or undertaking most directly involved in the engagement or direction of affected workers to commence the process for the election of HSRs.	Page 92
102	The number of HSRs to be elected at a workplace should not be limited by the model Act, but rather determined following discussions between the workers who wish to be represented and the person conducting the business or undertaking who is most directly involved in the engagement or direction of the workers.	Page 93
103	a) The model Act should provide that workers be grouped in *work groups* for the purposes of representation by one or more HSRs and that work groups may include workers engaged at more than one workplace and the workers engaged by more than one person conducting a business or undertaking. b) Within a reasonable period of time following a request from worker(s) for work groups to be determined, the workers (and any person authorised to represent them) and the person conducting the business or undertaking (or each of them if more than one) most directly involved in the engagement or direction of the workers are to conduct discussions to agree the number of work groups. c) The purpose of the discussions is to determine: i) the number and composition of work groups to be represented by HSRs; ii) whether a deputy HSR may also be elected by a work group; and iii) the workplace or workplaces at which the work group(s) will apply; and iv) if more than one business or undertaking to which work groups will apply – the grouping, into one or more work groups at one or more workplaces d) The diversity of workers and their work must be taken into account when determining the workgroups to be represented by HSRs ensuring any worker within a work group has ready and timely access to an HSR familiar with the work and the hazards and risks to which the workers may be exposed. e) The range of matters to be considered in determining work groups may be specified in regulations under the model Act.	Page 97

104	The model Act should provide that a) an HSR for a work group is to be elected by the members of that work group; and b) the members of the work group are to determine how an election is to be conducted; c) the majority of members of a work group may request a union or other person or organisation to assist them in the conduct of the election; d) where the number of candidates for election as a health and safety representative equals the number of vacancies, an election need not be conducted and each candidate is to be taken to have been elected as a health and safety representative for the work group; and e) as soon as practicable after being informed of the election of a HSR the members of the affected work group are to be informed by the person conducting the business or undertaking most directly involved in engaging the affected workers of the election outcome.	Page 101
105	a) The term of an elected health and safety representative is 3 years unless: i) the HSR resigns; or ii) the HSR is disqualified; and b) An HSR may be re-elected.	Page 101
106	The functions, rights and powers of HSRs should be specified in the model Act. For the purposes of representing the members of their work group, an HSR should have rights and powers to: a) inspect the workplace or any part of the work area where a member of the work group works— i) after giving reasonable notice to person conducting the business or undertaking or their representative; or ii) immediately, in the event of an incident or any situation involving an immediate risk to the health or safety of any person. b) accompany an inspector during an inspection of the work area they represent; c) to be present with a member or a work group (with the member(s) consent) at an interview concerning OHS between the member(s) and an inspector or the person conducting the business or undertaking (or their representative); d) request the establishment of an HSC for the business or undertaking; e) receive information affecting the OHS of workers; f) request the assistance of an inspector at the workplace; g) monitor measures taken by the person conducting the undertaking or their representative in compliance with the model Act, or	Page 103

	regulations; h) represent the members of the work group in matters relating to OHS; i) investigate OHS complaints; j) enquire into anything that appears to be a risk to the health or safety of members of the work group, arising from the conduct of the undertaking; k) issue a provisional improvement notice ; and l) where an issue involves an immediate threat to the health and safety of any person to direct that work cease . An HSRs rights, powers and functions are limited to the work group whom they were elected to represent, unless: a) a member of another work group requests the HSR ‘s assistance; or b) there is an immediate risk to health or safety that affects or may affect a member of another work group and the HSR (and any deputy HSR) for that other work group is determined after reasonable enquiry to not be available.	
107	The model Act should provide that a person conducting a business or undertaking most directly involved in the engagement of the HSRs is required to: a) consult with HSRs on OHS matters; b) allow HSRs access to information relating to OHS hazards at the workplace, and the health and safety of workers; c) allow HSRs to accompany a worker during an OHS interview between the worker and an inspector or the person conducting the business or undertaking (with the consent of the worker); d) allow HSRs to take paid time off normal work as is reasonably necessary to perform their functions and to attend approved training; e) provide resources, facilities and assistance as are necessary or prescribed by the regulations to enable HSRs to perform their functions; f) allow a person assisting HSRs to have access to the workplace where that is necessary to enable the assistance to be provided; g) permit an HSR to accompany an inspector during an inspection of any work area in which a member of the work group works; and h) provide any other assistance that may be required by regulations under the model Act.	Page 106
108	The model Act should provide that an HSR have the power to issue a Provisional Improvement Notice (PIN) to a person where the HSR has reasonable grounds to believe the person: a) is contravening the model Act or regulations; or b) has contravened in circumstances that make it likely such	Page 110

	contravention will continue or be repeated.	
109	The provisions relating to Pins may usefully be modelled on the provisions contained in ss.60-66 of the *Occupational Health and Safety Act 2004* (Vic) or the amendments recently made to the *Workplace Health and Safety Act 1995* (Qld) with the following modifications: a) the PIN should clearly state the person required to comply with it; and b) a PIN that has been affirmed by an inspector (with or without modifications) shall be deemed to be an improvement notice of the inspector.	Page 110
110	The model Act should provide that an HSR, as soon following their election as is reasonable in the circumstances of the business or undertaking in which they are engaged, must attend training which is subject to the following requirements: a) The training must consist of an initial five (5) day competency based training course, approved by the regulator (an 'approved course'); b) The approved course may be either of the HSRs choice or as directed by an inspector; c) The HSR is entitled to paid leave to attend training; and d) The training is to be at a time agreed with the person conducting the business or undertaking, having regard for the duties and functions of the HSR in meeting their obligations under the model Act, or otherwise as directed by an inspector.	Page 114
111	The model Act provide that an HSR may attend and receive paid leave for: a) one (1) day's refresher training per year after the first year, being a course approved by the regulator; and b) such further attendance (as considered reasonable having regard for the circumstances of the business) at an approved training course as: i) may be agreed with the person conducting the business or undertaking in which the HSR is engaged; or ii) directed by an inspector. The HSR must first consult with, and attempt to reach agreement with, the person conducting the business or undertaking in which they are engaged, as to the timing and costs of the training. Any issue in relation to the details of the training, or payment, must be resolved in accordance with the issue resolution procedures required by the model Act, or referred to an inspector for decision.	Page 114
112	The model Act include a provision protecting HSRs from incurring civil liability when in good faith performing or omitting to perform, or properly exercising or omitting to exercise a right or power of an HSR.	Page 115
113	A relevant court or tribunal may, on application, disqualify or suspend	Page 119

	an HSR or suspend the right of the HSR to exercise a power for a specified period, for: a) repeatedly neglecting their HSR functions; or b) exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or c) acting unreasonably in the performance of their functions and exercise of their powers as a HSR. Persons able to make such applications include: a) a person detrimentally affected by the performance or failure to perform the functions or the exercise of powers by the HSR (e.g. a person conducting the business or undertaking); or b) the regulator; or c) a member of the HSRs work group. The onus in such proceedings is on the applicant to prove, on the balance of probabilities that the grounds exist for disqualification or suspension.	
Chapter 26: Health and Safety Committees		**Reference**
114	The Model Act should provide that a workplace HSC: a) must be established: i) where requested by an HSR; or ii) where requested by 5 or more workers; or iii) if initiated by one or more persons conducting businesses or undertakings; or iv) If specified by regulation; or v) in workplaces with 20 or more workers; or b) may be established in any business or undertaking; and c) must include equal membership of workers (excluding managers or supervisors) and managers.	Page 125
115	The details of the structure and functions, minimum frequency of meetings and other operational matters relating to an HSC be provided for in regulations to the model Act.	Page 125
Chapter 27: Issue resolution		**Reference**
116	The model Act should define an “issue” for the purposes of issue resolution at a workplace, as being a dispute or concern about OHS that remains unresolved after consultation between the affected worker(s) and the representative of the person conducting the relevant business or undertaking most directly involved in the engagement or direction of the affected worker(s).	Page 134
117	The following persons should be entitled to be involved in the resolution of an OHS issue at a workplace:	Page 135

	a) any HSR elected to represent the affected worker(s), in consultation with the affected worker(s); b) where there is no relevant HSR, the affected worker(s); c) a representative of the person conducting a business or undertaking at the workplace that is involved in the engagement or direction of the affected worker(s) and if more than one relevant business or undertaking, a representative or representatives appointed by them for the purpose. Any party should be entitled to obtain assistance from or be represented by a person nominated or authorised on their behalf, who should thereby be entitled to enter the workplace for that purpose.	
118	The model Act should require all parties to, or authorised to be involved in consideration of, an OHS issue (including inspectors, courts and tribunals) to make all reasonable endeavours to achieve a timely, final and effective resolution of the issue.	Page 136
119	The model Act should encourage workers and those conducting businesses or undertakings at a workplace to agree procedures by which OHS issues are to be resolved, should they arise, where they are able to do so. The model Act should provide for default issue resolution procedures, as specified in regulations, to be adopted where the parties have not agreed issue resolution procedures. The model Act, or regulations, should provide for the matters that must, as a minimum, be provided for in an agreed issue resolution procedure (referred to in paragraph 27.85).	Page 137
120	The following process should apply to the resolution of issues at a workplace: 1. The parties should meet to determine the nature and scope of the issue. 2. The parties should seek to resolve the issue as soon as possible in accordance with: a) an agreed procedure; or b) where there is more than one relevant business or undertaking at the workplace, a procedure agreed between all parties; or c) where a procedure has not been agreed or cannot be agreed, a default procedure prescribed by the regulations. 3. If the issue remains undetermined or unresolved after reasonable attempts have been made, any party can: a) seek the attendance at the workplace of an inspector, as soon as possible, to assist in resolution of the issue; or b) bring proceedings in a court or tribunal with powers to hear and determine such matters and exercising powers of conciliation and arbitration, such proceedings to be brought and determined in accordance with a process to be determined by regulations.	Page 138

	4. The referral of an issue to an inspector or court or tribunal should not prevent the exercise of the right of a worker to cease unsafe work, or prevent the exercise of power by a HSR to direct a work cessation or issue a provisional improvement notice (PIN). 5. A court or tribunal may not hear a matter relating to an OHS issue with respect to which a PIN has been issued: a) where processes have been commenced under the model Act for the review of the PIN; or b) until the time has elapsed for taking steps under the model Act for the review of the PIN other than to the extent that the issue is broader than the matters dealt with by the PIN, or by the consent of the parties. Formal processes under the model Act for the review of a PIN should not prevent a court or tribunal, or the parties, from taking steps to resolve the issue by conciliation.	
Chapter 28: Rights to cease unsafe work		**Reference**
121	The model Act should provide that: a) a worker(s) may cease work where they have reasonable grounds to believe that to continue to work would expose them or any other person to a serious risk to their health or safety or that of another person, emanating from immediate or imminent exposure to a hazard; b) a worker(s) who exercises their right to cease unsafe work in accordance with (a) is required as soon as possible to inform the person conducting a business or undertaking most directly involved in the engagement of the affected worker(s); c) the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s) may require suitable alternative work to be undertaken by the worker(s) until they resume their usual work; d) a worker who refuses to work as mentioned in section (a) is entitled to the same pay and other benefits, if any, to which they would have been entitled if they had continued to do their usual work; e) the procedures for the determination of any disputes relating to the provision of payment and/or entitlements may be referred to a relevant court or tribunal for consideration; and f) any issue arising under this section of the model Act may be referred to the issue resolution process for the business or undertaking, required by the model Act.	Page 146
122	The model Act should provide that: a) where an HSR has reasonable grounds to believe there exists a serious risk to the health or safety of a worker(s) represented by the HSR, emanating from immediate or imminent exposure to a hazard worker, the HSR may direct the worker(s) to cease work, subject to the following:	Page 147

	i) the HSR must first consult with the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s), unless the risk is so serious and imminent that it is not reasonable to do so, in which case that consultation should occur as soon as possible after the direction of the HSR for the work to cease; ii) the HSR must attempt to resolve the issue of concern with the person conducting the business or undertaking, in accordance with the issue resolution procedures required by the model Act; and iii) the person conducting the business or undertaking will be entitled to direct the worker(s) to undertake suitable alternative work, if available; and iv) the worker(s) would be entitled to the payments and/or benefits they would have received had they continued to carry out their normal work. b) the HSR or the person conducting the business or undertaking most directly involved in the engagement of the worker(s) may request an inspector attend the workplace to resolve any issue arising in relation to the cessation of work.	
Chapter 29: Discrimination, victimisation and coercion		**Reference**
123	The model Act should protect the exercise or intended exercise of rights, functions or powers, and the taking of action, under the model Act by prohibiting discrimination, victimisation and coercion relating to those activities.	Page 153
124	Provisions relating to discrimination, victimisation and coercion should provide protection of and remedies for all persons who have been, are, or intend to be, involved in any of the following activities ("*relevant activities*"): a) exercising a right, role or power, or performing a function under the model Act; b) taking action to seek compliance with any duty or obligation under the model Act; c) being involved in raising or resolving, or both, an OHS concern or issue; and d) communicating with or assisting any person exercising a power or performing a function under the model Act and specifically including: a) workers and witnesses; b) health and safety representatives and members of health and safety committees; c) inspectors; and d) authorised persons.	Page 153
125	The following conduct by any person ("***proscribed conduct***") should be prohibited by the model Act:	Page 156

	a) **Discrimination and victimisation** Directly or indirectly putting a person, or intentionally causing another person to put a person, to their detriment in employment, prospective employment or commercial arrangements, or threatening to do so, because the person has been, is, or proposes to be, involved in any of the relevant activities **Note:** *We discuss later whether the reason should be the dominant or a substantial reason or whether another requirement should apply.* b) **Coercion** Without reasonable excuse, coercing, requiring, authorising, intentionally causing or inducing a person to i) take action detrimental to the health or safety of any person; ii) refrain from exercising a right or power or performing a function under the model Act or not exercise or perform it in a particular way; iii) refrain from seeking , or continuing to, undertake a role under the model Act; iv) engage in any unlawful discriminatory conduct, as defined. c) **Aiding and abetting discrimination, victimisation or coercion.** **Note***: Drafting conventions relating to the use of 'reasonable excuse' will need to be observed, while meeting the intention of this recommendation.*	
126	The model Act should provide for criminal offences and liability to civil interventions and remedies, for engaging in, authorising, aiding or abetting proscribed conduct.	Page 157
127	The model Act should provide that an offence related to proscribed discriminatory conduct is committed where involvement or intended involvement in the relevant activity is the dominant reason for the proscribed discriminatory conduct.	Page 159
128	A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in a criminal prosecution of proving on the balance of probabilities that the reason alleged was not the dominant reason for which that person engaged in that conduct. A person alleged to have engaged in coercion should bear the onus of proving on the balance of probabilities that the person had a reasonable excuse for doing so. The prosecution should bear the onus of proof in relation to all other elements of an offence of engaging in proscribed conduct, beyond a reasonable doubt.	Page 159
129	An offence of engaging in proscribed conduct should be a Category 3 offence (see Recommendation 55 in our first report).	Page 159
130	The model Act should provide for civil action against a person who has engaged in, authorised, aided or abetted proscribed conduct.	Page 163

131	A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in civil proceedings of proving, on the balance of probabilities, that the reason alleged was not one of the operative reasons for the conduct. A person alleged to have engaged in coercion should bear the onus of proving the person had a reasonable excuse for doing so. The person bringing a civil claim should bear the onus of proof in relation to all other elements of the action, on the balance of probabilities.	Page 163
132	The model Act should permit a person authorised by a claimant to have standing before a court or tribunal to represent that person and to bring a civil claim on the person's behalf in relation to proscribed conduct.	Page 163
133	A relevant court or tribunal should be able to make the following orders in relation to a person who has suffered loss or damage as a result of proscribed conduct: a) an injunction to restrain the continuation of the proscribed conduct; and/or b) compensation; and/or c) reinstatement of employment or, in relation to a prospective employee, employment in a similar position; and/or d) other relief as considered necessary save that a person should not be able to recover compensation or other relief under the model Act and under any other applicable Commonwealth, State or Territory legislation.	Page 163
134	The model Act should provide that a person may not: a) commence or proceed with a civil claim under the model Act if they have commenced proceedings for the same subject matter under another law and those proceedings have not been determined or withdrawn; or b) recover any compensation under the model Act if they have received compensation for the same subject matter under another law; or c) commence or proceed with a civil claim under the model Act if they have previously commenced and failed in a claim relating to the same subject matter under another law.	Page 163
135	The model Act should provide that it would be a defence to a prosecution or civil action against a person (body corporate, partnership or individual) relating to proscribed conduct engaged in by another person, to prove on the balance of probabilities that they had taken reasonable precautions to prevent that other person from engaging in the proscribed conduct.	Page 165
Chapter 30: Risk management		**Reference**
136	The model Act should not require a process of hazard identification	Page 170

	and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.	
Chapter 31: Monitoring workplace etc		**Reference**
137	The model Act should include an obligation for persons conducting a business or undertaking to ensure, as far as is reasonably practicable, the health of workers engaged by them or under their direction, is monitored for the purpose of preventing fatalities, illnesses or injury arising from the conduct of the business or undertaking.	Page 174
138	The model Act should include an obligation for persons with management and control of a workplace to ensure, as far as is reasonably practicable, that conditions at that workplace are monitored for the purposes of preventing fatalities, illness or injury.	Page 174
Chapter 32: Obtaining advice		
139	The model Act should provide that persons conducting a business or undertaking must, where reasonably practicable, employ or engage a suitably qualified person to provide advice on health and safety matters. The qualifications of persons providing such advice should be addressed in the regulations. Provision should be made along the lines of the Queensland Act for the appointment by persons conducting a business or undertaking of WHSOs and further consideration should be given to how that requirement can be extended to non-traditional work arrangements that normally involve thirty or more workers.	Page 179
Chapter 33: Incident notification		**Reference**
140	The model Act should place an obligation on the person conducting the business or undertaking to ensure that the regulator is notified immediately and by the quickest means, of a: a) fatality of any person, b) 'serious injury' to any person, c) 'serious illness' of any person; or d) a 'dangerous incident' arising out of the conduct of the business or undertaking.	Page 183
141	A written record of the incident must be provided to the regulator within 48 hours of the obligation holder reporting the incident.	Page 183
142	Definitions of 'Serious Illness', 'Serious Injury' and 'Dangerous Incident' for incident notification should reflect the principle that only the most serious events are to be captured as outlined in paragraph 33.21.	Page 183
143	The model Act should contain all provisions governing incident	Page 184

	notification, including associated provisions such as site preservation. Related definitions should be placed in a schedule to the model Act.	
144	Persons with management and control of the workplace should have an obligation to ensure an incident site, including any plant, substance or other item associated with the incident, is not disturbed until an inspector attends the incident site, or the regulator directs otherwise, which ever occurs first.	Page 187
145	The obligation to preserve an incident site does not preclude any activity: a) To assist an injured person; b) To remove a deceased person; c) Considered essential to make the site safe or to prevent a further incident; d) Associated with a police investigation; or e) For which an inspector has given permission.	Page 187
146	The model Act should place an obligation on workers to report any illness, injury, accident, risk or hazard arising from the conduct of the work, of which they are aware, to the person conducting the business or undertaking or (where this is a different person) the person with management or control of the workplace. The obligation should also make clear that it in no way impinges on a worker's ability to report an OHS issue to the regulator at any time.	Page 188
Chapter 34: Permits and licensing		**Reference**
147	The model Act should include provisions that make it an offence: a) to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation; b) to contravene any conditions placed on an authorisation; or c) for a person conducting a business or undertaking to direct or allow a worker to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation.	Page 193
148	The regulation-making power in the model Act should allow for: a) the automatic recognition of equivalent licences, permits and registrations issued under a corresponding OHS law, and include safeguards to ensure jurisdictions can make case by case exceptions where there are concerns about fraud. b) the sharing of information with other government agencies in relation to the issue, renewal, variation, revocation, suspension and cancellation of authorisations.	Page 194
149	The regulation making powers in the model Act should allow for the processes of application, issue, renewal, variation, suspension, cancellation, review of decisions and placing conditions on such	Page 194

	authorisations to be established via regulation.	
150	Decisions for the types of activities that may need authorisations should be justified at the national level based on the level of risk and a cost-benefit analysis.	Page 194
Chapter 35: Functions and Powers of the Regulator		**Reference**
151	The model Act should: a) subject to the final decisions about its objects and principles, make clear in the objects or principles that education, training and information for duty holders, workers and the community are important elements of facilitating good occupational health and safety; b) include in the enumerated powers and functions of the regulator sufficient authority for the regulator to promote and support education, training and information for duty holders, workers and the community; c) as recommended in our discussion of the role of inspectors, make clear that an inspector may provide advice about compliance with the model Act; d) authorise the regulator to make guidelines on the way in which: i) a provision of the model Act or regulations would, in the regulator's opinion, apply to a class of persons or to a set of circumstances; or ii) a discretion of the regulator under the model Act or regulations would be exercised.	Page 199
Chapter 36: Enforceable Undertakings		**Reference**
152	The model Act should authorise a regulator to be able to accept, at the regulator's discretion, a written enforceable undertaking as an alternative to prosecution, other than in relation to a Category 1 breach of a duty of care. The provisions relating to enforceable undertakings should provide for the safeguards relating to process, transparency of decision making, reviewability of decisions and enforcement that are outlined in paragraph 36.54. If the power to do so does not already exist, a court should be given the discretion under the model Act to release an offender, after conviction, who gives a health and safety undertaking to the court. This judicial discretion should not be available in respect of a Category 1 offence.	Page 208
Chapter 37: Cross-jurisdictional Co-operation		**Reference**
153	We recommend that Ministers note the range of measures designed to reinforce and enhance cross-jurisdictional co-operation which we have identified in this report.	Page 210

Chapter 38: Appointment of Inspectors		Reference
154	The model Act should make specific provision for the process of appointment of inspectors.	Page 215
155	Inspectors should ordinarily be public servants appointed on an ongoing basis.	Page 215
156	The model Act should provide for the temporary appointment of inspectors, subject to strict conditions.	Page 215
157	The model Act should, subject to written agreement between ministers or regulators, specifically permit: a) inspectors to be appointed in more than one geographical or industry/activity-based jurisdiction; or b) inspectors appointed in one jurisdiction to be authorised to perform functions and exercise powers in, or for the purposes of, another jurisdiction.	Page 218
158	The model Act should clearly set out the scope and limits (if any) of the cross-jurisdictional appointment or authorisation.	Page 218
159	The model Act should provide for the valid use and admissibility of evidence gathered by an inspector exercising cross-jurisdictional authority.	Page 218
160	The model Act should make specific provision for ID cards for inspectors, containing at least the information specified at s.48 of the NSW Act.	Page 220
161	The model Act should provide that it is an offence to forge an inspector ID card, or to alter or deface it without authorisation.	Page 220
Chapter 39: Role and Functions of Inspectors		**Reference**
162	The model Act should: a) specify the roles and functions of an inspector, including: i) providing information and advice to duty holders; ii) undertaking specific industry, occupational or hazard and risk based interventions (e.g. advice, risk management and enforcement in relation to the industry, occupation or hazard and risk concerned); iii) assisting in the resolution of issues at workplaces; iv) reviewing PINs and the appropriateness of work stoppage on safety grounds; v) securing compliance with the model Act and regulations through the exercise of various powers, including the issuing of notices and giving directions; and vi) investigating suspected breaches and assisting in the prosecution of offences; and	Page 224

	b) allow the appointment of an inspector for all, or only specified roles and functions.	
163	The model Act should make clear that an inspector may provide advice about compliance with the model Act and that an inspector's power of entry and the powers that an inspector can exercise upon entry are available for the provision of advice.	Page 227
164	The model Act should provide powers necessary to enable an inspector to effectively carry out the roles and functions of issue resolution and review of provisional improvement notices.	Page 230
165	A provisional improvement notice should be taken to be a notice issued by an inspector, upon affirmation of the notice, with or without modification.	Page 230
Chapter 40: Qualifications and Training		**Reference**
166	The model Act should provide for inspectors to have such nationally consistent qualifications and training (including ongoing training) as mandated by or under the legislation.	Page 233
Chapter 41: Powers Required to Perform Inspectors Roles		
167	The model Act should provide for the right of an inspector to enter a workplace during such times as the business conducted thereat is operating or the workplace is accessible to members of the public, and at other times if the inspector reasonably believes that an immediate risk to the health or safety of any person exists from activities or circumstances at the workplace.	Page 240
168	The model Act should provide inspectors with the authority to obtain and execute search warrants.	Page 240
169	The model Act provide requirements on an inspector to: a) at all times during entry to a workplace, display or have available for examination, such identification and authorisation card or documentation as required by the model Act; b) notify as soon as practicable after entry: i) the person with apparent management or control of the workplace; and ii) any person conducting a business or undertaking at the workplace in respect of whom the inspector proposes to exercise functions or powers; and iii) a health and safety representative (if any) representing workers undertaking work as part of the relevant business or undertaking at the workplace of the entry and the purpose of the entry. c) provide a written notice to each of those mentioned in (b), upon or as soon as practicable after leaving the workplace, specifying: i) the purpose of the entry; ii) relevant observations; iii) any action taken by the inspector; and	Page 240

	iv) the procedure for seeking a review of any decision made by the inspector during the entry.	
170	The model Act should provide for (a consolidation of) all of the powers currently provided in OHS Acts in Australia, that may be exercised by an inspector upon entry to a workplace, in relation to the following: a) inspection, examination and recording, including i) taking samples of substances and things (including biological samples); ii) taking measurements and conduct tests (e.g. noise, temperature, atmospheric pollution and radiation); iii) taking photographs and make audio and video recordings; iv) requesting assistance from owners, employers and others at a workplace in exercising their powers and functions; and b) access to documents; (subject to each of the matters recommended by Maxwell, the request being in writing unless circumstances of urgency otherwise require, and allowing reasonable time for the person to consider and respond to the request); c) testing, analysis, seizure and forfeiture of plant (but not operation of it) and substances; d) the taking of affidavits; and e) the taking of persons who are providing assistance to an inspector in the proper exercise of a power or function, to a workplace for the purpose of providing such assistance (e.g. interpreters and technical experts). ***Note:*** *The exercise of some of these powers may be subject to the availability of legal professional privilege or the privilege against self-incrimination* ***Note:*** *Powers to ask questions, and associated rights and privileges, are the subject of Recommendations 179 to 199*	Page 248
171	The model Act should provide power to an inspector to issue the following notices and directions upon entry to a workplace: a) safety directions; b) infringement notices; c) improvement notices; d) prohibition notices; and e) direction to leave a site undisturbed.	Page 264
172	The model Act should clearly state: a) the circumstances in which notices or directions may be issued; b) on whom they may be issued; c) requirements for confirmation in writing of any direction given orally;	Page 264

	d) procedures for service and display of written notices or directions; and e) the availability of processes for review of a decision by an inspector to issue any notice or direction.	
173	The model Act should provide that an inspector may, at their discretion, make recommendations and provide advice and assistance in improvement and prohibition notices, and that the actioning of such recommendations and advice is not compulsory.	Page 265
174	For improvement notices, the model Act should provide that: a) the minimum timeframe for compliance with an improvement notice should not be less than the timeframe provided to seek a review of the notice; and b) an application for review of an improvement notice should automatically stay the notice.	Page 265
175	For prohibition notices, the model Act should provide that: a) the issuing of prohibition notices should be dependent on the 'severity of the risk', not the immediacy; b) an application for review of a prohibition notice does not stay the operation of the notice.	Page 265
176	Inspectors should be provided powers to make minor amendments or modifications to notices, including: a) to extend the timeframe for compliance with the notice; b) for improving clarity; c) for changes of address or other circumstances; and d) to correct errors (e.g. date) or references (e.g. to a section of an Act or Regulation). Such decisions should not substantially change the effect of the notice and should be open to review.	Page 265
177	The model Act should make provision for the regulator to seek an injunction to: a) restrain ongoing breach of a prohibition notice; or b) compel compliance with an improvement notice after the time for compliance has expired.	Page 268
178	The model Act should allow a regulator to take remedial action where: a) there is an immediate and serious risk to the health or safety of any person; and b) the person conducting the relevant business or undertaking in which that risk arises is unavailable, or they or another person fails or refuses to comply with proper and reasonable directions of an inspector in respect of that risk and the action taken by the regulator; and	Page 268

	c) the person is first informed of the intention of the regulator to take such action and recover the costs of the regulator from that person. The costs of the regulator should be recoverable from the person conducting the relevant business or undertaking, or such other person to whom an inspector has properly issued a notice or direction in respect of the risk, but: a) the person from whom recovery is sought shall be entitled to challenge in a court or tribunal the necessity for and reasonableness of the action and/or cost; and b) that person shall have the onus of proving the action and/or cost was not necessary or was not reasonable.	
Chapter 42: Questioning and Related Privileges and Rights		**Reference**
179	The model Act should include a requirement that a person must answer questions and provide information requested by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.	Page 279
180	A person should not be entitled to rely on a privilege against self-incrimination in response to a request for information by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.	Page 279
181	The requirement that a person answer questions, and the unavailability of a privilege against self-incrimination, for the purpose of enforcing ongoing compliance and securing health and safety, should be subject to: a) a specific prohibition against the use of the information in any proceedings against the person providing the information for a breach of the model Act or Regulations; b) the inspector being required to inform the person from whom the information is sought that: i) the information is required for the purpose of ensuring compliance and ongoing health and safety protection; ii) the person must answer the questions and provide the information; iii) the privilege against self incrimination is not an excuse for failing to answer the questions or provide the information; iv) the information may not be used in any proceedings against the person for a breach of the model Act or Regulations; and v) legal professional privilege may apply to the information that it is being sought; c) in the absence of the inspector providing the information referred to in b. above, it should be assumed that the information has been requested for the purposes of the investigation of a breach of the model Act or Regulations; and d) if the inspector does not provide the information noted in b. above, any information obtained or discovered by reason of the provision	Page 281

	of the information by the person shall not be able to be used in proceedings against that person for a breach of the model Act or Regulations.	
182	A request for documents, for whatever purpose it is made under the model Act, would not be subject to a privilege against self-incrimination.	Page 281
183	An inspector may ask questions about the circumstances in which a document came into existence and the means by which the document may be verified, and such questions would not be subject to a privilege against self-incrimination.	Page 281
184	Questions relating to matters referred to within a document would be subject to the provisions relating to the asking of questions, as are applicable to the purpose for which the questions are asked.	Page 281
185	The model Act should explicitly provide that nothing in the model Act shall in any way affect the availability of legal professional privilege.	Page 282
186	Legal professional privilege should be confirmed to apply: a) to companies and to natural persons; and b) to documents as well as statements.	Page 282
187	If legal professional privilege is not explicitly confirmed in the model Act, then any provision that allows for a 'reasonable excuse' for not complying should explicitly include the availability of legal professional privilege as a reasonable excuse.	Page 282
188	The model Act should require that a person answer questions asked by an inspector investigating a breach of the model Act or regulations.	Page 284
189	The privilege against self incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.	Page 284
190	Legal professional privilege should be available to a natural person or corporation in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.	Page 284
191	The requirement that a person answer questions for this purpose should be subject to the requirement in Recommendation * that the inspector provide a warning to the person from whom the information is sought.	Page 284
192	The model Act should make clear that a corporation does not enjoy any right to silence or privilege against self incrimination and must respond, through its authorised officers, to requests for documents or information by the regulator or requests for documents by an inspector, subject to the availability of legal professional privilege.	Page 287
193	The model Act should make clear that the members and officers of a partnership or unincorporated association do not enjoy any right to	Page 287

	silence and must respond, directly or through their authorised officers, to requests for information from the regulator or an inspector. Such requests may be subject to the privilege against self-incrimination and legal professional privilege.	
194	An inspector should have the power to require, by written notice, the production of documents from a corporation, partnership or unincorporated association. Such a request may be subject to legal professional privilege.	Page 287
195	The regulator should have the power to ask questions as to facts (but not law), in writing, of a corporation, partnership or unincorporated association and answers in writing must be provided, subject to the availability of legal professional privilege or (in the case of members or officers of a partnership or unincorporated association) the privilege against self-incrimination.	Page 287
196	Legal professional privilege should be available to a natural person or corporation in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.	Page 287
197	The requirement in the model Act that a person answer questions relating to the investigation of breaches should be subject to a requirement that the inspector warn the person from whom the information is sought: a) that the information is being sought or the questions are being asked for the purpose of an investigation of a breach of the model Act or Regulations by that person, or may (depending upon the information or answers) give rise to an investigation of a breach by that person; b) the person must provide the information or answer the questions unless a relevant privilege is available to that person; c) the person shall not be required to provide the information or answer a question if to do so may tend to incriminate them; d) legal professional privilege may apply in respect of the information sought; and e) the person is entitled to seek and obtain legal advice with respect to the request for information.	Page 288
198	The model Act should provide that in the event of a failure by an inspector to give a required warning before requesting information from a person in the course of investigating a breach, a use immunity and derivative use immunity will apply to all information obtained by reason of the request.	Page 289
199	The model Act should make clear that a person shall not be taken to fail or refuse to comply with a requirement, request or direction, or to hinder or obstruct an inspector in the exercise of powers under the Act, merely by seeking and taking a reasonable time to obtain legal advice. **Note**: *This recommendation is supported by Recommendation 181 and Recommendation 197 in relation to the provision of information*	Page 290

	and warning to a person of whom a request is made, and Recommendation 198 providing for a use immunity and derivative use immunity for a failure to provide that information and warning.	
Chapter 43: Protection and Offences Relating to Inspectors		**Reference**
200	The model Act should provide for immunity of an inspector from personal liability in relation to the bona fide exercise by the inspector of his or her role, functions and powers.	Page 293
201	The model Act should provide a consolidation of the offences for assault and intimidation etc of an inspector in current OHS Acts. The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered: a) for a corporation – $250,000; and b) for an individual – $50,000 and/or 2 years imprisonment.	Page 295
202	The model Act should provide for the following additional offences: a) hindering or obstructing an inspector in the exercise of functions and powers; b) impersonating an inspector; c) concealing from an inspector the existence or whereabouts of a person, document or thing; and d) making false or misleading statements or providing false or misleading documents. The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered: a) for a corporation – $50,000; and b) for an individual - $10,000.	Page 295
Chapter 44: Accountability of Inspectors		**Reference**
203	The model Act should specifically provide for circumstances in which the authorisation of an inspector may be suspended or cancelled.	Page 299
204	The model Act should include a consolidation of provisions presently included in OHS Acts relating to accountability of inspectors, confidentiality of information, and their liability for improper conduct.	Page 299
Chapter 45: Authorised right of entry		**Reference**
205	The model Act should provide right of entry for OHS purposes to union officials and/or union employees formally authorised for that purpose under the model Act.	Page 309
206	Authorised persons for right of entry purposes are those persons who are elected officers and/or employees of unions registered under relevant State or Federal labour law and:	Page 311

	a) hold current authorisation under the OHS Act; and b) hold current authorisation required under any other relevant law. **Note***: union is defined in the chapter containing the definitions*	
207	The authorising authority must be satisfied that the union official and/or union employee who is the subject of an application to be an authorised person (applicant) is competent in: a) the right of entry requirements of the model Act, regulations and guidance notes; b) issue resolution under the model Act; c) an understanding of the duties and framework of the model Act; d) how to apply risk management principles at a business or undertaking; and e) the relationship between the model Act and any relevant labour laws.	Page 312
208	At the first periodic review of the model Act, the issue of whether mutual right of entry authorisations (able to be exercised across jurisdictions but subject to the same limitations) should be introduced.	Page 312
209	A union (as defined) may apply for authorisation on behalf of persons who are elected officers and/or employees of the union to the specified court or tribunal within the jurisdiction. The application must include a statutory declaration confirming that the applicant: a) has satisfactorily achieved the training required under the model Act; b) meets the fit and proper person test specified in the model Act; c) holds or will hold a current permit under any other relevant law; and d) has not within the previous three years, had their OHS authorisation revoked or suspended; or e) has not within the previous three years, had a permit to enter workplaces under state or Federal labour law revoked.	Page 313
210	The process of authorisation (including term, approved forms, training, refresher training, procedure for application and any issue relevant to the process) should be contained in regulations under the model Act.	Page 314
211	The model Act should provide that: a) authorisation for right of entry for OHS may be issued for up to three years; b) application for a further authorisation may be made prior to the conclusion of the three year period; c) in circumstances where the elected official or employee leaves the union the authorisation automatically lapses; d) the union in such circumstances is to advise the regulator of officials/employees' changed circumstances as envisaged by (c);	Page 314

	and e) the regulator is to keep an up-to-date, publically available, register of authorised persons.	
212	The model Act should provide authorised persons with the capacity to: a) investigate a suspected contravention of the model Act or regulations; b) consult workers on OHS issues; and c) provide advice to workers, and consult with the person in management or control of a business or undertaking or relevant workplace area, on OHS issues.	Page 316
213	The model Act should limit right of entry by authorised persons to: a) areas of the workplace where work is being carried out as part of a business or undertaking by workers who are members or eligible to be members of the relevant union; b) consultation with, and/or provide advice to, any worker within the eligible group referred to in (a) (subject to that person's consent); and c) where necessary, advice and/or consultation with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on the resolution of OHS issues and/or the suspected breach of the model Act and, be subject to: a) the right being exercised during working hours; and b) ensuring there is no undue disruption to any business or undertaking at the workplace; and c) reasonable OHS requirements that may apply to the workplace being followed by the authorised persons.	Page 317
214	The authorised person is prohibited from the exercise of powers under the model Act at domestic premises unless: a) such entry is provided for under a regulation under the model Act, or the premises are otherwise declared by regulation to be a business or undertaking; or b) such entry is permitted by the owner or other person with the management or control of the premises.	Page 317
215	The exercise of a right of entry for OHS purposes under the model Act by an authorised person will be subject to: a) current authorisation of the authorised person under the relevant OHS Act; and b) any other permit required under relevant Federal, or state labour law for the authorised person to enter the workplace; and c) written notice of at least 24 hours by the authorised person to the person conducting a business or undertaking who is most directly	Page 319

	involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to consult or advise workers; or d) notice as soon as reasonably practicable after entry to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is investigating a suspected breach, unless to do so would defeat the purpose for which the premises were entered; or unreasonably delay the authorised person in a case of urgency; or e) written notice of at least 24 hours to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to inspect documents relevant to the suspected breach of the model Act or regulations.	
216	An authorised person exercising a right of entry under the model Act may do any of the following: a) consult with or advise those workers who are members of or eligible to be members of the union, subject to written notice of 24 hours; b) consult with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on an OHS issue; c) inspect work systems, plant or processes contained within the area where relevant workers work; d) investigate a suspected breach of the model Act or associated subordinate instrument(s), subject to the provision of proof of authorisation to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union unless to provide such proof of authorisation would defeat the purpose of the investigation or, it is considered by the authorised person to be an urgent case; e) inspection of documents of the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union relevant to a suspected breach of the model Act or regulations, subject to: i) provision of 24 hours written notice with a reasonable time given for the person from whom the documents are requested to produce them; and ii) written notification to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union of details of the particular contravention suspected; and iii) a list of the documents sought being provided with the request.	Page 322

	f) warn any person that the authorised person reasonably believes to be exposed to a significant and immediate risk of injury; g) request an inspector visit the workplace to determine whether a notice should be issued; and h) have the right to seek a review of the action taken by the inspector (including a decision of the inspector to not take any action). Any right exercised by an authorised person is limited to matters affecting the health or safety of those workers who are members of or eligible to be members of the authorised representative's union.	
217	A relevant court or tribunal may deal with a dispute relating to the exercise or purported exercise by an authorised person of a right of entry under the model Act. The process may involve conciliation, mediation and, where necessary, arbitration.	Page 324
218	Authorisation of an authorised person under the model Act may be suspended or revoked, in whole or in part, or limitations imposed where, after providing the authorised person a reasonable opportunity to be heard it is determined by a court or tribunal (civil process) that such action should be taken.	Page 326
219	Grounds for suspension, revocation or the taking of alternative action (including imposing limitations) should include where: a) the authorised person has ceased to satisfy the requirement under relevant Federal labour law, in which case the action to be taken is subject to the operation of the decision of the relevant Federal labour tribunal; or b) a relevant court or tribunal determines it is satisfied the authorised person has: i) acted or purported to act in an improper manner in the exercise of the rights conferred under the model Act; or ii) unduly and/or intentionally hindered a person conducting a business or undertaking or the workers during working hours; or iii) no longer meets the fit and proper person test required for authorisation under the model Act. Where action has been taken under (a) by the Federal labour tribunal, the OHS court or tribunal is to convene to enable the authorised person to show cause why complementary action ought not be taken under the model Act. In proceedings brought under (b) the onus is on the applicant.	Page 326
220	In determining whether to revoke or suspend or impose limitations on the authorisation of an authorised person the court or tribunal shall have regard for: a) the seriousness of any findings of the court or tribunal having regard to the objects of the model Act; and b) the requirement for an authorised person to continue to meet the fit and proper person test; and c) any other matter considered relevant.	Page 327

	In proceedings initiated under this provision the onus is on the authorised person to show cause why complementary action should not be taken.	
221	A provision be inserted in the model Act prohibiting a person from: a) refusing an authorised person gaining entry to the workplace in accordance with the provisions of the model Act; or b) delaying, obstructing, intimidating or threatening an authorised person acting in accordance with the provisions of the model Act, or inducing or attempting to induce another person to do so.	Page 328
222	An authorised person must not contravene any limitation imposed by the issuing authority on their right of entry authorisation; and It is an offence for any person to impersonate an authorised person under the model Act.	Page 329
223	Any specific requirements on union right of entry, additional to those contained in the model Act, are to be specified in regulations. Guidance material on right of entry is to: a) be drawn up by the regulator in consultation with the relevant tripartite body; and b) issued and distributed in that jurisdiction.	Page 330
Chapter 46: Who may prosecute		**Reference**
224	We recommend that the model Act provide that: a) only an official who is acting in the course of a public office or duty may bring a prosecution for a breach of the Act; b) in accordance with the process and time frame described in our discussion of Option 4, in the case of an alleged category 1 or 2 breach of a duty of care, a person may request in writing that the regulator bring a prosecution for the breach and, if no prosecution is to be brought, have the decision of the regulator reviewed by the DPP; and c) the model Act should provide that the DPP is able to bring proceedings for an indictable offence under the model Act notwithstanding any other provisions in the model Act.	Page 343
Chapter 47: Regulation making powers		**Reference**
225	The model Act should contain broad regulation making powers, which allow for the development of regulations necessary or convenient to carry out or give effect to the provisions of the model Act.	Page 347
226	There should also be more specific regulation making powers (that expressly do not limit the broad general regulation making power) prescribing those matters that are not expressly identified within the scope or objects of the model Act for which regulations may be required.	Page 347

227	To assist in identifying the specific matters mentioned in Recommendation 226, the range of existing regulation making powers in each jurisdiction's OHS Acts should be consolidated into a workable list of more broadly worded, specific regulation making powers. This should be used to settle the specific matters to be included in the model Act's regulation making power. **Note***: The range of such matters will only able to be finalised once the extent of matters that will be dealt with by the model Act are finalised.*	Page 348
228	The model Act should allow the regulations to provide for summary offences with lower penalties.	Page 348
Chapter 48: Codes of practice		**Reference**
229	The model Act should provide for codes to be developed through a tripartite process, with expert involvement, and approved by the relevant Minister.	Page 355
230	The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.	Page 355
231	The model Act should make it clear that a duty holder may achieve and demonstrate compliance with relevant provisions of the Act and regulations by ways other than the ways set out by an approved code of practice.	Page 355
Chapter 49: Other matters		**Reference**
232	The model Act should provide for: 1. the imputation to a corporation of the conduct and the state of mind of officers, employees and agents of the corporation acting within the scope of their actual or apparent authority; and 2. a defence for a corporation if it is proved that the corporation took 'all reasonable and practicable measures to prevent the offence occurring.	Page 359
233	The model Act should provide for the review of its content and operation and that of the subordinate regulation at least once in each period of five years after the model Act's commencement. The review must be part of or take account of any national review of the content and operation of the principal OHS Acts. Any persons who are affected by the operation of the model Act and regulations must be given a reasonable opportunity to provide their views for the purposes of the review. The report of the review must be presented to the responsible Minister and presented to the Parliament within a reasonable time after the Minister has had an opportunity to consider it.	Page 360

PART 6

SCOPE, STRUCTURE OBJECTS AND DEFINITIONS

- Scope
- Structure of the Model Act
- Objects and principles
- Definitions

CHAPTER 20: SCOPE

20.1 We are required to examine and make recommendations about the optimal content of a model OHS Act in relation to, among other things, its "scope and coverage".[1]

20.2 Accordingly, in this chapter we consider not only the scope and coverage of the principal OHS Acts, but also the implications of there being many different laws that regulate OHS in several specific industries and dealing with particular hazards and risks separately from the principal OHS laws. Overlaps between the laws are dealt with in various ways and there is generally more than one Ministerial portfolio in each jurisdiction with general or specific OHS responsibilities.

20.3 The chapter is structured in two sections. In the first section, we consider the question of how widely the model Act should extend in relation to industries and hazards, and what the implications are for separate regulation of specific industries and hazards. In the second section, we consider the question of the application of the model Act to public safety.

20.4 In making our recommendations, we have taken account of the fact that the Ministers to whom we are reporting may not be responsible for some of the other specific areas of OHS regulation.

THE EXTENT OF THE MODEL ACT'S APPLICATION TO INDUSTRIES AND HAZARDS

Current arrangements

Scope of the Principal OHS Acts

20.5 The principal Acts do not have uniform scope or coverage. Notwithstanding the variations in their structure and the terms they use, the Acts are all based on the 'Robens model' (discussed in our first report) and in all cases there are general duties placed on 'employers', the self-employed, variously described 'upstream' duty holders, and employees. There are some differences in whether duties are placed on persons in control of workplaces, and the extent to which duties apply outside a workplace. The widest existing approach places duties on persons conducting a business or undertaking (Qld and ACT) rather than on 'employers', and on workers rather than employees (ACT and NT).

20.6 In short, key differences relate to:

a) who is a duty holder;

b) the nature of the duties;

c) the operational and geographical reach of the duties;

d) the industries and hazards that are covered; and

e) the relationships with other regulation.

20.7 In our first report, we examined the various duties and made recommendations about a new, three tiered structure for the general duties. In this report, we deal with certain definitions and other matters that pertain to the duties. If the recommendations in our first report are accepted, the model Act will have a wide coverage in respect of work-related OHS. We do not need to re-examine those matters here.

20.8 The main issue that we now consider is whether the model Act should continue to be supplemented or replaced for the purposes of OHS regulation in relation to specific industries or hazards that would otherwise come within its scope.

[1] Terms of Reference, 13(a)

The scope of other Acts regulating OHS

20.9 As in various other countries with similar systems of regulating OHS, Australia has a variety of statutory systems of regulation that affect OHS.[2] The OHS of workers is protected by the principal Commonwealth, state and territory OHS Acts, unless their operation is excluded by specific legislative provisions. There is also a wide range of other laws (including the common law) that provide such protection.

20.10 The 2008 Comparison of Occupational Health and Safety Arrangements Report, published by WRMC,[3] provides a useful comparison of Acts that have OHS or OHS-related provisions.

20.11 The Queensland Government also provided in their submission a useful comparative table which outlines the types of separate legislation that are found in the various Australian jurisdictions.[4] This table is reproduced below.

TABLE 18: OHS laws in Australian jurisdictions

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
General OHS Act	✓	✓	✓	✓	✓	✓	✓	✓	✓
Mining	✓	✓	✓	✓	✓	–	✓	–	–
Dangerous Goods	–	✓	✓	✓	✓	✓	✓	✓	–
Electrical Safety	–	–	✓	✓	–	–	–	–	–
Explosives	–	–	✓	–	✓	–	–	–	–
Maritime	✓	✓	✓	✓	✓	✓	✓	–	✓
Radiation	✓	✓	✓	✓	✓	✓	✓	–	–
Petroleum and Gas	✓	–	✓	–	–	–	–	–	✓
Miscellaneous	✓	✓	–	✓	–	–	–	✓	–

20.12 Broadly described, the relevant statutes (which may be administered in various portfolios) other than the principal OHS Acts tend to have been developed to address:

a) health and safety in particular industries; and/or

b) particular hazards or risks.

20.13 Examples are the various separate laws that specifically provide for OHS:

a) in the mining industry;

b) at or near offshore petroleum facilities; and

[2] For example, the British HSE administers not only the *Health and Safety etc at Work Act 1974* but another 15 Acts dealing with a variety of industries and hazards in such areas as agriculture, resources (mining, offshore petroleum, explosives, chemicals), various work environments, and in relation to certain vulnerable workers. Other British regulatory bodies also have OHS-related responsibilities, for example, the Office of Rail Regulation, the Maritime and Coastguard Agency, the Civil Aviation Authority, and the Department of Transport.

[3] WRMC, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, 5th edition, 2008. The list may not be comprehensive.

[4] Queensland Government, *Submission No.32*, p.8

c) in various modes of transport (road, rail, air, maritime).

20.14 Further examples are provided by separate laws that regulate the health and safety hazards and risks associated with:

a) the storage and transport of dangerous goods;

b) the production, distribution and use of energy (electricity, gas, petroleum);

c) radiation;

d) explosives; and

e) major hazard facilities.

20.15 The extent to which such Acts address OHS varies markedly.[5] Some statutes that regulate industries such as mining or petroleum create a substantial OHS regime involving duties on employers and others, and providing for compliance through an inspectorate.

20.16 In some instances, the Acts may have OHS as their main objective, for example, in the NSW and Qld mining safety Acts.[6] In others, the regulation of OHS may be one element of an Act that also deals with other matters, for example, business operations under Acts regulating the petroleum industry.[7] Other industry-focused Acts, such as the rail safety legislation, have OHS provisions may operate alongside other transport safety laws that include public safety as a primary purpose.[8]

20.17 Acts that regulate hazards such as explosives, dangerous goods, electrical safety or radiation often have public safety as a primary objective. Nonetheless, they may also place specific duties on employers or workers in relation to their working safely, including by being appropriately licensed. In these Acts, duties placed on persons in relation to safe use, transport or storage are also OHS duties to the extent that they apply in a work situation.

20.18 Where the relevant laws co-exist with the principal OHS Acts, the relationship may entail one of the following:

a) the principal OHS Act and the separate Act both apply but the principal OHS Act prevails where there is inconsistency. For example, the *Coal Mine Health and Safety Act 2002* (NSW) and the *Rail Safety Act 2006* (Vic);

b) the principal OHS Act is expressly excluded from operating in relation to an area or matters covered by the separate Act. For example, the *Coal Mining Safety and Health Act 1999* (Qld); or

c) the relationship may not be clear and the consequences of overlap may need to be identified on a case by case basis.

20.19 A common feature of most of the separate laws is that, like the principal OHS laws, they identify duty holders and, in spelling out their duties, require them to take action to eliminate or minimise hazards and risks inherent in, arising from, or associated with, the matters with which the laws deal.

Recent Reviews

20.20 In its 1995 report, the Industry Commission (IC) found that there were serious problems arising from inconsistency in OHS regulation and its enforcement between, and even within,

[5] Generally, the regulator for these laws is not the OHS regulator – the main exceptions are the explosives and dangerous goods Acts which are often administered by the OHS regulator.
[6] For example, the *Coal Mine Health and Safety Act 2002* (NSW) and the *Coal Mining Safety and Health Act 1999* (Qld)
[7] *Offshore Petroleum Act 2006* (Cwth)
[8] This is the case in NSW, Vic and WA.

jurisdictions. The IC drew attention to the then more than 150 legal instruments providing for OHS protection, apart from separate mine safety laws.[9]

20.21 The IC observed that:[10]

> *"Different obligations are placed on employers, employees and suppliers. Exposure limits for some hazards, such as noise and asbestos, differ. There are quite different rules for hazardous plant and equipment (for example, boilers, lifts and cranes, electrical equipment) and work processes (for example, demolition, working with compressed air). There are differences in the enforcement of OHS legislation ... (F)inally, inconsistencies may be introduced by Federal industrial relations legislation over-riding state and territory OHS law."*

20.22 The IC found the national level problems to be:

a) the inequity in the differing levels of protection; and

b) economic inefficiency for businesses operating in more than one jurisdiction.[11]

20.23 On the other hand, the IC recognised that many SMEs operated only under one OHS regime and that there could be benefit in having different regulatory regimes, so that a regime that best suited the circumstances of such a business could be available. The IC also acknowledged that some inconsistency in OHS regulation might allow greater regulatory innovation. A move to greater uniformity was seen to carry the risk of stifling such innovation.[12]

20.24 Of particular interest, from the perspective of our review, is the fact that the IC found that industry-specific regimes at the state or territory levels were not justified. The IC found that they could lead to duplication, confusion and failure to keep the industry-specific law up to date. Any need for specialised regulatory regimes could, the IC suggested, be addressed without a separate regime.[13]

20.25 The Maxwell Review examined, among other things, possible changes to the then OHS legislative framework to remove unnecessary duplication and unnecessary regulatory burden on business, without compromising safety. In so doing, Maxwell drew attention to previous analyses of the wide array of regulatory instruments (Acts, regulations, codes of practice and guidelines) that existed and applied to duty holders in relation to OHS.[14]

20.26 In particular, Maxwell considered whether certain Victorian Acts that applied to OHS[15] should be consolidated with the then Vic Act, especially since they were administered by the same regulator. In the event, Maxwell concluded that they should not. He considered that the statutes had a 'different focus', with the then Vic OHS Act being concerned with workplace health and safety (protecting persons at work or affected by the carrying on of work), whereas the other safety Acts were concerned with the 'risks created by things' (goods and equipment).

20.27 Maxwell stated that there would be:[16]

> *"…no benefit at all in an omnibus Workplace and Public Safety Act (because) … what are now recognisably separate safety codes would become individual parts of a much larger and much more unwieldy piece of legislation."*

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[9] IC Report, p.147
[10] ibid
[11] ibid, p.148
[12] ibid, pp.149-150
[13] ibid, pp.168-169
[14] Maxwell Review, p.79 and following
[15] For example, the *Equipment (Public Safety) Act 1994* (Vic), the *Dangerous Goods Act 1985* (Vic) and the *Road Transport (Dangerous Goods) Act 1995* (Vic).
[16] Maxwell Review, p.87, paras.328-329

Stakeholder views

20.28 Although there was strong support for a model Act with wide coverage of industries, stakeholders and expert commentators did not have a unanimous view on:

a) whether there should continue to be specific industry safety legislation; or

b) if such legislation existed, what its relationship with model Act should be.

20.29 These issues attracted a considerable amount of comment, both in submissions and in our consultations with stakeholders. We summarise some of the points made to us, which should be seen as representing views expressed to us, not as an exhaustive examination of them.

Government

20.30 The Queensland Government saw public merit in simplifying the current complex arrangements to ensure greater consistency of OHS law across industries and hazards.[17] This was seen as a means of securing greater transparency and certainty for all OHS stakeholders without reducing OHS outcomes for workers. Our attention was drawn to the 2003 Laing Review of WA mine safety which found that there was no logical or sensible reason for having different standards or arrangements between industries.[18] Similar conclusions were reached in later reviews.[19]

20.31 The Queensland Government recommended that the duties and defences should apply consistently to all undertakings, industries and hazards. [20] Even so, the Queensland Government also recognised that specific industries had special regulatory requirements, for example, differing needs for safety management systems, safety cases or accreditation. Thus, there might be industry-specific legislation to accommodate the unique requirements of particular industry sectors. In the view of the Queensland Government, such industry specific legislation should, where possible, be formulated nationally and adopted consistently by each jurisdiction. Such an approach was proposed by the National Mine Safety Framework (NMSF).

20.32 In addition, the Queensland Government proposed that states and territories that had OHS functions spread across several agencies should have in place appropriate mechanisms for co-ordinating the OHS effort within those jurisdictions.[21]

20.33 The Western Australian Government considered that the general duties of care should apply to all workplaces, that is, anywhere work is undertaken.[22]

20.34 The South Australia Government (in a consensus position with industry and unions) contended that the model Act should cover and be applicable to all work related activities and cover all workplaces in both the private and public sectors. This would accord with the Robens principles on which current OHS legislation was based, but might need to be pursued over time.[23] Regulations and codes of practice under a model OHS Act could provide for specific areas of high risk or unique work, as now done by regulations on amusement devices, electrical safety, mining, construction and opal mining.[24]

20.35 According to the Tasmanian Government, the model legislation should encompass all areas relating to health and safety of persons in workplaces. A means of accommodating industry requirements would be through the inclusion of specific divisions in legislation or through the use of separate regulations[25]

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[17] Queensland Government, *Submission No.32,* p.8
[18] R Laing, Final Report: Review of the *Mines Safety and Inspection Act 1994,* Perth, 2003, p.47
[19] See also the IC Report, p.168
[20] ibid, p.8
[21] ibid
[22] Western Australian Government, *Submission No.112*, p.4
[23] South Australian Government, *Submission No.138*, pp.9-10
[24] ibid
[25] Tasmanian Government, *Submission No.92*, p.4

20.36 The Victorian Government saw value in bringing industry legislation under one regime of OHS law. Its reasons included:

a) the continued existence of industry specific OHS law could result in inconsistent OHS outcomes for affected workers and undermine the principles of OHS which the model OHS legislation would introduce nationally;

b) the general perception in Australian workplaces that workplace hazards should be addressed in the same way (workplace parties rarely made a practical distinction in addressing hazards depending on the applicable safety legislation);

c) the international trend to consolidate chemical safety into one scheme applicable across a broad range of industries and workplaces;[26]

d) employers were likely to derive economic benefits and greater confidence in their ability to comply by establishing approaches to health and safety management that dealt with all hazards in the workplace.

20.37 Accordingly, to ensure a uniform standard of protection for all people at work, the Victorian Government supported the model OHS Act applying to all workplaces, and for any industry specific OHS issues to be addressed (where necessary) by subordinate instruments. The Victorian Government also supported the model OHS Act having primacy in dealing with workplace health and safety in all Australian workplaces.

Government organisations

20.38 The National Transport Commission (NTC) [27] counselled considerable caution towards any proposal to fold transport laws based on model legislation promulgated by the NTC into an omnibus legislative scheme. This was especially so for heavy vehicle safety regulation, which was now, after much time and effort, covered by nationally agreed and uniform road transport legislation.

20.39 At the same time, the NTC acknowledged that the benefits of a single national legal formulation of general duties in the model Act appeared unarguable. The NTC considered that the duties might reflect the obligations in its model laws or provide for the relationship between the model Act and the road transport safety laws.

20.40 On the question of the transport of dangerous goods, the NTC strongly recommended that the model Act give responsibility to the OHS regulators.

Industry

20.41 The ACCI stated that a model Act must be generically focused. It would be unhelpful for it to incorporate industry-specific regulation. It would be more difficult to take this approach because different jurisdictions had adopted different approaches on which industries required specific safety legislation and its content. [28]

20.42 Another issue was that industry-specific statutes or legislative provisions introduced complexity and potential inconsistency, particularly where the statutory provisions or definitions in an industry-specific statute differed from those in the principal legislation. There should be a presumption towards all industries being subject to the same legislative scheme, except in highly exceptional circumstances where an industry-specific issue required its own regulatory response.[29]

[26] For example, see UN's Globally Harmonised Scheme (GHS) for unifying the classification, labelling and safety communication of DG and hazardous substances.
[27] NTC, *Submission No.234*, pp.2-3
[28] ACCI, *Submission No.138*, pp.15-16
[29] ibid

20.43 The ACCI supported industry specific subordinate regulation (e.g. codes of practice) where required.[30]

20.44 In the view of the AiG and EEA(SA), model OHS legislation would not be achieved if the status quo were maintained.[31] On principle, a single OHS model law should operate in all industries. Even within existing arrangements, the general OHS legislation applied to a very wide range of industries with varying hazard profiles.

20.45 All persons should have the right to equal legislative protection with respect to OHS. A sound model Act, combined with effective and innovative enforcement protocols, would deliver outcomes that would work in every industry. State-based regulatory differences in relation to industries should be avoided, either jurisdictionally or by co-operative efforts.

20.46 The current significant variation between the jurisdictions regarding industry specific safety legislation could be addressed by:

a) the AiG and EEA(SA)'s preferred option of rolling existing industry specific legislation into the model OHS Act, with industry specifications being covered in regulations; or

b) allowing separate health and safety legislation for specific industries, with the principal Act for each industry based as far as possible on the model OHS Act.

20.47 Australian Mines and Metals Association (AMMA) observed that the development of separate mine specific safety laws inevitably resulted in inconsistencies between the individual states and with the principal OHS laws, as reforms for mine safety laws could lag behind the reform of the principal OHS laws, or vice versa.

20.48 The mining industry would, in AMMA's view, benefit greatly from a model OHS Act that could apply nationally and which removed the duplication, complexity, cost and uncertainty experienced by companies that operating in multiple jurisdictions. Moreover, a single national OHS Act would ensure that improved OHS was the key focus, rather than duty holders dealing with multiple administrative burdens and having to spend time spent understanding and educating employees on multiple OHS laws. This was particularly pertinent for employees who had to work on multiple mine sites in more than one jurisdiction.[32]

20.49 The Minerals Council of Australia (MCA) observed that the multiplicity of inconsistent state and territory OHS legislative regimes applying to the minerals sector resulted in inefficiency, excessive cost, complexity, uncertainty and, above all, suboptimal safety and health performance. Because a large component of any OHS legislation was applicable across all industries and all workplaces, the MCA supported a single Act. Where particular hazards occurred in particular industries or workplaces, they could be addressed through specific regulations.[33]

20.50 According to the NSW Minerals Council, the status quo should not be maintained. Covering all industries under a single law would greatly assist in clarifying responsibilities and ensuring that employers could not be prosecuted for the same offence under different Acts. More specific industry based guidance should be placed in model regulations, model codes of practice and other explanatory documentation.[34]

20.51 The Chamber of Minerals and Energy of WA (CME WA) supported there being one principal OHS Act that was consistently implemented in all jurisdictions and applied to all industries. The Act should, however, also facilitate the continuation of industry specific OHS legislation that was consistent with it.

20.52 There should be no duplication at the framework level but there should be scope for suitably amended industry specific OHS legislation (such as the *WA Mines Safety and Inspection*

[30] ibid
[31] AiG and EEA(SA), *Submission No.182*, p22
[32] AMMA, *Submission No.118*, pp.11-12
[33] MCA, *Submission No.201*, pp.11-12 The MCA also stated that it actively supports the NMSF as a "critical component of the OHS reform agenda."
[34] NSW Minerals Council, *Submission No.183*, p.6

Act) to be maintained, as well as relevant subordinate regulations and codes. Industry specific harmonisation initiatives such as the NMSF should be maintained and extended to address subordinate requirements.[35]

20.53 The Energy Networks Association (ENA) considered that a national energy safety regulatory agency should be established with a similar structure to the National Offshore Petroleum Safety Authority (NOPSA). Otherwise there should only be one general safety regulator in Australia.[36]

Unions and union organisations

20.54 The ACTU opposed a 'complete takeover' of all other industry-specific OHS laws. Industries that currently had specific OHS laws (electrical, mining, maritime, offshore oil and gas) should retain them. The ACTU drew attention to a variety of reasons in support of its position, including existing harmonisation activities (NMSF and the ATC's support for a single national system for maritime safety regulation), coronial criticism of the failure by Tasmania to have specific mine safety laws, and better standards of protection in the industry-specific laws.[37]

20.55 The ETU (Qld) supported the harmonisation of the general OHS laws, but advocated a separate and distinct legislative framework for health and safety in the electricity industry.[38] The CEPU likewise opposed subsuming electrical safety regulation in a general OHS Act, but supported harmonising the various electrical safety laws.[39]

20.56 Having expressed its support for the retention of specific maritime safety laws and their regulators (Seacare, NOPSA), the ACTU indicated support for harmonising them based on a model law, provided the harmonisation '…revolved around the highest standards of regulatory practice as proposed by the ACTU.'[40]

20.57 The Australian Rail Tram and Bus Union (ARTBU) indicated its support for rail safety legislation continuing to co-exist with harmonised principal OHS legislation on the ground that the former dealt with particular safety matters in the rail industry.[41]

20.58 The CFMEU Mining Division strongly proposed, among other things, that:

a) the model Act should not incorporate all current safety specific legislation, and particularly not for the mining industry;

b) if the status quo for mine safety laws in Qld, NSW and WA was not maintained, the model Act should contain detailed mining specific provisions or provision should be made to exempt mining from the model Act so mining specific legislation could be developed in line with the outcomes of the NMSF.[42]

Academic and legal

20.59 Johnstone et al commented that, in principle, all Australian business operators, regardless of size and industry, and all workers, should be governed by the same general duties, defences, worker participation requirements and inspection and enforcement provisions. Even so, consistent with the findings of the Maxwell Review and the Queensland Government's submission to this review, they accepted that specific industries had special regulatory requirements, such as specific safety management systems, safety cases or accreditation.

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[35] CME WA, *Submission No.125*, p.5. The CME WA also provided a useful summary of what mining industry safety legislation should contain.
[36] ENA, *Submission No.165*, p.30
[37] ACTU, *Submission No.214*, pp.10-16
[38] ETU, *Submission No.223,* p.2
[39] CEPU, *Submission No.229,*pp.2-5
[40] ACTU, *Submission No.214*, p.13
[41] ARTBU, *Submission No.228,* p.3
[42] CFMEU Mining Division, *Submission No.224*, pp.11-12

Nonetheless, such requirements could, in their view, be addressed through industry specific regulations as was done for Major Hazard Facilities.[43]

20.60 The Law Council of Australia considered that general duties that applied across all industries would facilitate a common approach and understanding of OHS duties, and reduce the potential for confusion and legal argument as to whether particular workplaces fell into one industry or another. Even so, the Law Council saw a place for industry-specific regulation to sit alongside the general duties to address particular OHS issues relevant to that industry.[44]

20.61 The Law Society of NSW considered that the model OHS Act should maintain the status quo in each jurisdiction regarding industry specific safety legislation. The model OHS legislation should be the predominant safety legislation in all workplaces, but the specific industry legislation should be maintained. Under this proposal, there would, however, be a single workplace prosecutor within each state.[45]

Discussion

Scope of model Act

20.62 As described above, all jurisdictions differ in some material respects in:

a) how broadly their principal OHS Acts apply; and

b) where there are discrete Acts dealing with particular hazards or industries outside the principal OHS Acts, what the relationship is between the Acts in the jurisdictions concerned.

Advantages and disadvantages of regulating OHS under multiple Acts

20.63 Although there are shortcomings (see below) in having multiple Acts and regulatory arrangements relating to OHS, we recognise that the existing position has some strengths. These include:

a) the law and its administration are generally well settled and are familiar to the affected parties;

b) the specific laws may be more closely focused on the special features of the industry or hazard concerned; and

c) continuing such arrangements avoids transition and other opportunity costs.

20.64 On the other hand, there are problems. For example:

a) as the Robens Committee noted about the British system at the time of the Robens inquiry, there is ‘too much law’ and ‘too much fragmentation of administrative jurisdictions’;[46]

b) resources may not be used efficiently;

c) the laws and regulatory responsibilities may overlap, creating the risk of inconsistency and potential for confusion both within and between jurisdictions;

d) there is potential for regulatory capture in areas of specialised regulation; and

e) there may be increased compliance costs, particularly where a duty holder is subject to more than one regulatory regime in respects of different parts of a business or undertaking.

[43] R. Johnstone, L. Bluff & M. Quinlan, *Submission No.55*, p.7
[44] Law Council of Australia, *Submission No.163*, p.7
[45] Law Society of NSW, *Submission No.113*, p.3
[46] Lord Robens, *Safety and Health at Work Report,* Her Majesty’s Stationery Office, London, 1972, pp.7 and 9

20.65 We do not consider that this situation should be ignored. At a minimum, it will create an imbalance in the harmonised laws if the scope of the principal OHS Acts is markedly different between jurisdictions. This will flow on to affect duty holders who operate in more than one state or territory and who may find themselves having to comply with a different range of laws and obligations depending on the jurisdiction in which they are operating their business or undertaking.

20.66 On the other hand, we recognise that the current situation could not be easily changed and should not be altered if OHS outcomes suffer. One practical obstacle to change is that, as we outlined earlier, the administrative responsibilities for the laws are held in various portfolios. At the national level, different Ministerial committees are responsible for the various areas of regulation, most of which have recently undergone, or are currently undergoing, reform.

Options

20.67 Our terms of reference do not extend to considering the case for or against a single national OHS law. Accordingly, we have examined four other options:

1. No change to the scope of the various Acts that relate to OHS in each jurisdiction but improved coordination and co-operation between the responsible regulators in each jurisdiction (and between jurisdictions).
2. A uniform approach to the relationship between the principal OHS Act and other Acts that relate to health and safety in each jurisdiction.
3. Wider scope of and coverage by the principal OHS Act in each jurisdiction, with separate regulation of OHS in specific industries or of OHS hazards only where periodically objectively justified by reference to specified criteria.
4. All OHS regulation in each jurisdiction to be provided by a single Act, with specific high risk industries and hazards addressed under subordinate legislation or schedules to the Act.

Consideration of options

20.68 *Option 1 - Improved coordination and co-operation.* This involves the least change. It would require minimal legislative action. The various regulators could be required to set out in their annual reports what action they had taken to improve coordination and co-operation with other regulators to secure better OHS outcomes and regulatory performance (from the perspective of those who are regulated). While the WRMC could agree on such action for regulators (within their competence), it would be necessary to approach other national ministerial councils (directly or through COAG) to request similar action in the legislation for which they have administrative responsibilities. Whole of government decisions might be taken to establish a co-ordinated and interlocking set of co-operative arrangements. This would be documented in publicly available memoranda of understanding.

20.69 Although this option could be implemented by administrative means, we consider that it would be susceptible to some breaking down of the relationships over time without the legislative discipline of consistent, transparent reporting on the outcome of such coordination and co-operation.

20.70 This minimalist approach would at least compel attention being given on an ongoing basis, but it does nothing to overcome the problems that may exist in having multiple sources of OHS regulation and the potential inefficiency in having multiple regulators. Accordingly, this is not our preferred option.

20.71 *Option 2 - A uniform approach to the relationship between the principal OHS Act and other Acts that relate to health and safety in each jurisdiction.* This would require a decision to be taken on whether the principal OHS Act was to apply concurrently to each area of OHS regulation that is subject to a separate piece of legislation.

20.72 As we have identified earlier, this already is the case in some jurisdictions and in relation to certain pieces of legislation. On the other hand, there are some important instances of stand alone regulation (e.g. the mine safety Acts in Qld and the Commonwealth's offshore petroleum safety legislation in respect of facilities).[47]

20.73 Putting aside the question of whether such arrangements are justified, we note that another approach is to provide that the principal OHS Act is paramount (e.g. the NSW OHS Act operates concurrently with that state's *Mine Health and Safety Act*, but prevails to the extent of any inconsistency; a similar approach is taken under the model rail safety legislation).[48] This goes some way to addressing the problems of inconsistent laws, but does not necessarily prevent problems of confusion or uncertainty about which obligations apply.

20.74 *Option 3 - Separate and specific OHS laws for particular hazards or high risk industries only where objectively justified.* This recognises that there may be understandable and valid reasons for there being such separate legislation. Many stakeholders have claimed that this is the case. Nonetheless, we consider that any such claims should be tested and periodically reviewed to determine whether the justification for that approach continues to exist. Where separate legislation was permitted, in the event of any overlap or inconsistency, the model Act should be paramount, other than in exceptional and specified circumstances. As far as possible, the separate legislation should adopt and apply the key requirements of the model Act (e.g. general duties of care). This is our preferred option.

20.75 *Option 4 - All OHS regulated under a single Act, with specific provisions for particular hazards or industries provided by subordinate legislation or schedules to the Act.* This assumes that there are no instances where separate legislation is warranted. We are not confident that this is the case. We note that in 1995, the IC had similar reservations. This option, although representing an ideal under the Robens' model, is, in the Australian regulatory context, unrealistic.

Giving effect to our preferred option

20.76 We have already referred to the range of reforms that are under way in areas that affect OHS. These are being advanced by various means:

a) the Business Regulation and Competition Working Group (BRCWG) established by COAG has broad oversight of many of these initiatives, including rail safety regulation reform and chemicals and plastics regulatory reform;[49]

b) the NMSF is being taken forward by the Ministerial Council on Mineral and Petroleum Resources (MCMPR);[50]

c) the COAG Reform Council[51] and the Australian Transport Council (ATC) has responsibility for reforms in relation to rail safety;[52]

d) the ATC has responsibility for reforms in relation to maritime safety;[53] and

e) the Ministerial Council on Energy (MCE) has oversight of harmonising safety and technical regulation in the energy supply industry.[54]

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[47] *Coal Mine Health and Safety Act* 1999 (Qld); *Mining and Quarrying Safety and Health Act 1999* (Qld); WHS Act 1995 (Qld), s.3(1) *Offshore Petroleum Act 2006* (Cwth), Part 1.4, s.68

[48] *Mine Health and Safety Act 2004* (NSW), ss.15-17. *Rail Safety Bill*, model provisions, 10 April 2006, clauses 12 and 13 (see http://www.ntc.gov.au/filemedia/Reforms/RailSafetyBillApprovATCJune2006.pdf).

[49] BRCWG's *Commonwealth State Implementation Plan and Forward work Program*, March 2008 is at http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/docs/brcwg_implementation_plan.pdf. Our review is part of that plan.

[50] MCMPR, *Communiqué*, 16 July 2008, 'Ministers will consider any recommendations from the (National Review into model OHS laws) which will improve mine health and safety legislation', available at http://www.ret.gov.au/

[51] COAG Reform Council, *Report to COAG March 2008*, http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/docs/CRC_report_to_COAG_2008.pdf

[52] ATC, *Joint Communiqué*, 2 June 2006: http://www.atcouncil.gov.au/communique/atc23.aspx

[53] ATC, *Record of Outcomes*, 25 July 2008, available at http://www.atcouncil.gov.au/

20.77 Self-evidently, there would be considerable challenges in coordinating the reform agendas, let alone securing agreement to bringing together the various regulatory arrangements.

20.78 Even so, we propose that the objective of a single OHS legislative system should be the touchstone for meaningful reform in this area. Where separate regulation of OHS is contemplated or proposed to be continued, it should be demonstrated that it would produce better OHS results than coverage by the nationally implemented model Act. Even where that could be shown, there should be an on-going, legislative and administrative inter-relationship. This could only be achieved by a decision of COAG. Accordingly, we consider that WRMC should consider proposing such a template to COAG. A realistic time frame for working towards a rationalised system of safety regulation using such a template would be not less than five years after the entry into force of the IGA for regulatory and operational reform in OHS (i.e. June 2013).

RECOMMENDATION 76

We recommend that Ministers agree that:

a) in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws, (including where they form part of an Act that has other purposes) for particular hazards or high risk industries that are within the responsibility of the Ministers, should only continue where they have been objectively justified;

b) even where that justification is established, there should be an on-going, legislative and administrative inter-relationship between the laws and, if there are different regulators, between those regulators;

c) as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws;

d) where the continuation of the separate legislation is not justified, it should be replaced by the model Act within an agreed timeframe;

e) where specific provisions are necessary, they should normally be provided by regulations under the model Act, with specific provision in the model Act relating to the matters previously regulated by the separate legislation kept to a minimum; and

f) this approach should be recommended to COAG so that, subject to COAG agreement, it is extended within a reasonable timeframe to other legislation that pertains to OHS but which is within the responsibilities of other Ministers.

THE EXTENT OF THE MODEL ACT'S APPLICATION TO PUBLIC SAFETY

Current arrangements

20.79 The term *public safety* has a wide meaning. Broadly, it refers to protecting members of the community from harm from various risks, such as natural disasters, civil disruption, and other harmful incidents and events that jeopardise the health and safety of the public.

20.80 In the context of OHS regulation, public safety is typically addressed by provisions that seek to protect third parties from harm occurring from the performance of work or from the escape of harmful things at or from a workplace. Such provisions may be general or specific. Examples of each are given in Tables 19 and 20.

[54] MCE, *Communiqué*, December 2008, available at http://www.mce.gov.au/ The MCE noted the potential links between the outcomes of our review and the work in relation to energy technical and safety regulation.

TABLE 19: Examples of general protection of public safety

State	Section	Provision
NSW	s.8	An employer must ensure that people, other than the employer's employees, are not exposed to risks to their health and safety arising from the conduct of the employer's undertaking while they are at the employer's place of work (defined as premises where people work as employees or self-employed persons).
Vic	s.23	An employer must ensure, so far as is reasonably practicable, that persons other than the employer's employees are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking.
Qld	s.28	A person conducting a business or undertaking must ensure that workers and other persons are free from the risk of death injury or illness created by the workplace, any adjacent area or part associated with the use of a place or part as a workplace, work activities or plant or substances.[55]
Cwth	s.17	• An employer must take all reasonably practicable steps to ensure no exposure to risk to the health and safety of persons who are not the employer's employees or contractors and who are at or near a workplace under the employer's control.

TABLE 20: Examples of specific protection of public safety

State	Section	Provision
NSW	s.135	Various powers and functions under the Act (e.g. investigations and notices) are extended to 'plant affecting public safety', such as boilers and pressure vessels, lifts, and scaffolding.[56]
Tas	s.15[57]	A person who has control of a temporary public stand must ensure so far as is reasonably practicable that the stand is safe and without risk to health and safety.

20.81 Regulators may publish policies to provide some guidance on how OHS provisions relating to public safety may be applied. For example, WorkSafe Victoria has published such guidance. That information indicates that, by working with emergency services and other government agencies delivering public safety programs, WorkSafe focuses on particular areas of risk and on vulnerable groups.[58]

20.82 Under s.3 of the UK Act, general duties are placed on employers and the self-employed towards people other than their own employees. The then HSC's 2004 *Strategy for workplace health and safety in Great Britain to 2010 and beyond* (currently under review) discussed the HSC's priorities, including in respect of public safety. The HSC's policy approach was that the HSE should not intervene in areas of public safety that were better regulated by others, including civil law. Instead, the HSE should focus on the proper management of risks in 'major hazards industries'. The HSC sought, through debate with government departments and local authorities,

[55] This is described in the Qld Act as *ensuring workplace health and safety* and is defined in s.22 of the Qld Act. The term *relevant workplace area* is used and defined in s.15A. The description of the scope of s.28 as used in the table draws on the definitions.

[56] Section 135(4)(c) of the NSW Act makes it clear that the Act applies to public safety.

[57] Section 15 of the Tas Act also covers control of premises, plant and substances.

[58] *How does WorkSafe protect the public?* Available at: http://www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Safety+and+Prevention/Health+And+Safety+Topics/Public+Safety/About+the+issue/How+does+WorkSafe+protect+the+public/

to ensure a coherent overall approach to public safety and to identify gaps that needed to be filled by other means.[59]

20.83 The HSE has further explained its approach in an HSE policy, which builds on the former HSC's strategy and emphasises co-ordination with other authorities.[60]

20.84 Some OHS regulators provide information in relation to public safety on their websites. For example, SafeWork SA publishes guidance for safety at public events such as fetes, fundraisers, country fairs, cultural and artistic festivals, exhibitions and gatherings.[61] WorkSafe Victoria provides information on public safety and the role it has in protecting the general public from hazards associated with work activities.[62]

Recent Reviews

20.85 The 1972 Robens Report commented on the importance of integrating the approaches to control of the working environment with those for the control of the general environment. The committee noted that many health problems of those environments emanated from the same sources within workplaces.[63] Accordingly, control arrangements should not be divided.

20.86 The 1995 IC Report proposed that governments consider harmonising and, if appropriate, consolidating legislative provisions concerning OHS, public health and the environment.[64] The IC was concerned that there may be inconsistencies between protection afforded by OHS laws and other laws (e.g. exposure standards for the purposes of OHS and for broader environmental purposes).

20.87 Stanley concluded that it was not appropriate for the SA Act to regulate public safety matters and proposed no change. Even so, the report acknowledged that the SA Act had been invoked to investigate various incidents at shopping centres and involving amusement structures. Evidence gathered had also drawn attention to the risks to the public of poorly controlled asbestos removal. [65]

20.88 Maxwell considered whether a number of separate legislative regimes under Victorian Acts that regulated OHS, the safety of prescribed equipment, and dangerous goods should be consolidated. Each was administered by the OHS regulator. He noted that while the former OHS Act was focused on OHS for persons at work and safe work environments, the other Acts (concerning dangerous goods and certain items of equipment) were focused on risks, regardless of where they occurred. Nonetheless, s.22 of the former Vic Act imposed a duty directed to public safety, by requiring employers to ensure that non-employees were not exposed to risks to their health and safety arising from the conduct of the undertaking.[66] Maxwell concluded that the separate Acts should continue, but that there should be greater consistency.

20.89 Maxwell also considered the practical question of multiple regulators, finding that without:

> *"…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."*

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[59] HSC, *Strategy for workplace health and safety in Great Britain to 2010*, 2004 available at http://www.hse.gov.uk/aboutus/strategiesandplans/strategy2010.pdf

[60] HSE, *Section 3 of the Health and Safety at Work etc Act 1974 - HSE Policy*, September 2008, available at: http://www.hse.gov.uk/enforce/opalert.htm

[61] www.safework.sa.gov.au/show, OHS page

[62] www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Safety+and+Prevention/Health+And+Safety+Topics/Public+Safety/

[63] Robens Report, p.34

[64] IC, W*ork, Health and Safety*, Report No.47, 1995, Vol 1, p.280

[65] ibid, Vol.2, pp.444,458 and 465 During the inquiry many participants used the example of asbestos to illustrate the point that governments were slow to implement controls about regulation of chemicals.

[66] Maxwell Review, p.84, para.314, pp.87 and 88, paras.328-336

20.90 The solution proposed was memoranda of understanding between the regulators.[67]

20.91 In its 2005 Final Report on the scope and structure of the ACT Act, the Occupational Health and Safety Council found a risk that too broad a scope for the OHS Act in relation to public safety, and too broad a role for the OHS regulator could reduce the Act's overall effectiveness and impact. The resources required to enforce legislation were considered to be already stretched without extending the scope to include peripheral matters beyond the OHS Act's core purpose.[68] The report also proposed a number of measures to address safety at public events, which recognised that this issue is a whole of government matter.[69]

Stakeholder views

Government

20.92 The Queensland Government identified four common circumstances where the regulator could play a role in managing public safety. These were where a member of the public was exposed to risks of injury, ill health or death:

a) directly as a result of a work activity or in an incident involving high risk plant;

b) while being a spectator at an activity which forms part of a business or undertaking – for example, when members of the public were injured while viewing a fireworks display or motor car racing;

c) while actively participating in a high risk activity using equipment provided by the business operator; or

d) while actively participating in a high risk activity where the member of public used their own equipment or where the business owner/operator had limited control over the level of risk to the participants – e.g. amateur car racing, rodeo ventures and particular varieties of adventure parks.

20.93 The first three categories were seen to provide a more clearly identifiable link between the conduct of a business or undertaking and the risk to the public. In the fourth category, the work or workplace connection was often remote. These were seen to be situations with a voluntary assumption of risk, direct or implied, by members of the public. In many, the only connection with the business might be the payment of money to use premises which may (or may not) have been subject to some intervention by the obligation holder (e.g. by providing facilities such as ramps, jumps, barricades and so on).

20.94 Accordingly, the Queensland Government considered that an appropriate regime should be built into the model legislation which limited a facility operator's liability in accordance with tests which sought to determine the scope of the operator's undertaking, the degree of control the operator had over the activities of any participant and the level of a participant's voluntary assumption of any risk inherent in the undertaking.[70]

20.95 The Tasmanian Government submitted that the model Act should provide requirements extending duty of care to members of the public not only as a visitor at a workplace but also to situations where hazards generated in a workplace extend to persons outside of that workplace. It was noted that the rationale and development of the Robens style legislation evolved as a result of the impact of activity at a workplace on a community. Our attention was drawn to how environmental dangerous goods legislation also covered many aspects that might affect the public.[71]

[67] ibid, pp.88-89
[68] ACT Review, part 19.1
[69] ibid, recommendation 43
[70] Queensland Government, *Submission No.32*, p.9
[71] Tasmanian Government, *Submission No.92*, p.5

20.96 We were informed by the South Australian Government that its OHS regulator, SafeWork SA, was also responsible for the administration of other workplace and public safety and industrial relations laws.

20.97 The South Australian Government considered that a broad duty of care strengthened the protection of members of the public who may be exposed to a significant potential for harm associated with the use of high-risk plant and dangerous substances. Examples were given of the failure of a large crane which might kill or injure a single employee and also also many bystanders or residents of an adjacent building; failure of a lift in a building which has the potential to severely injure or kill many workers or members of the public; a chemical (e.g. ammonia) leak or explosion of a pressure vessel which might endanger employees as well as those living or working nearby or passing in the street.[72]

20.98 The South Australian Government illustrated the need in OHS legislation for public safety protection from high-risk plant in relation to amusement devices with the example of the 'Spin Dragon' case, an amusement device that collapsed at the Adelaide Show. Although no workers were injured, twenty-seven young members of the public were injured, some severely, when the damaged plant fell onto them.[73]

20.99 In the South Australian Government's view, the OHS legislation had appropriate coverage, and the OHS authorities had the necessary skills, expertise and ability, to administer such high-risk plant, thus reducing the potential for harm and increasing the protection to both workers and the public. The tripartite structure of OHS legislation provided for by Robens style legislation, which allowed input from those exposed to the risks (the workers) additionally protected the public who might otherwise have no input into management of the risks to which they were exposed when, for example, using lifts and amusement rides. The SA Act demonstrated (s.22) how this could be provided in the model Act.[74]

20.100 The Victorian Government proposed a rationalisation of laws relating to public safety, noting that in its State, three Acts protected the public from risks to their health and safety arising from workplace hazards, including at places other than workplaces.[75] In practice, administration had been rationalised, with a single inspectorate and the strategic use of the legislation, e.g. the OHS Act used to make sure that dangerous goods in workplaces were safe. Bringing such laws together was in the public interest, by having a single clearer law with a common approach to duties and regulatory requirements. Overlap and inconsistency would be overcome and a stronger outcomes-based approach achieved.

20.101 On the other hand, the standards of protection are not uniform. Legislative change would be required to achieve that outcome, but would be subject to significant legal, technical and public policy challenges, particularly where more than one portfolio or regulator is involved. A particular problem was that any such move could jeopardise the national harmonisation of OHS laws.

20.102 The solution, in Victoria's view, is a staged approach, with a particular focus on laws with a public safety application but which were within the field of OHS regulation (examples given were laws applying to dangerous goods and plant and equipment used at workplaces).[76]

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[72] South Australian Government, *Submission No.138*, p.12

[73] ibid

[74] ibid

[75] The Vic Act, which provides in ss.23 and 24 for protection from risks to public health and safety from the conduct of an undertaking; the *Equipment (Public Safety) Act 1994*, which provides for safety in relation to various actions and the use of prescribed equipment and equipment sites; and the *Dangerous Goods Act 1985*, which provides for personal and property safety in relation to various actions and the use of dangerous goods and the import of explosives.

[76] Victorian Government, *Submission No.139*, pp.12-14

Employers, employer organisations and industry

20.103 There was no clear consensus on this issue among employers, employer organisations and industry representatives. Some supported a duty of care to the public, but with limitations on the duty owing to the difficulty for an employer in determining the scope of the obligation and because public safety was more appropriately dealt with by public liability and common law. For example, ACCI suggested that the model Act should only be extended to members of the public if an incident or accident had occurred in connection with persons at work or in relation to the use or operation of plant. The focus had to remain the workplace.

20.104 Industry has raised concerns with the extension of the employer duty of care to 'any person who could be exposed to health and safety risks from work carried out in the conduct of a business or undertaking'. This was because the notion of business or undertaking had been construed extremely broadly and it was difficult for employers to identify the scope or limits of their obligation. Furthermore, these duties could overlap in a potentially problematic way with the liability an employer might have as a result of the common law and tortious liability.[77]

20.105 VECCI noted that in situations such as aged care, restaurants, retail stores and hospitals, persons other than workers are always present. While the employer should have a duty to control risks to persons other than workers resulting from performance of work, the OHS Act should not stray into areas such as food safety and medical practices and so on.[78]

20.106 The AiG and EEA(SA) considered that extending the general duty of care to the conduct of the undertaking (as in s.23 of the Vic Act) was too open ended, but that the NSW Act [s.8(2)] had the right balance between the responsibility of a business not to cause harm in the conduct of its operations, and the need to protect businesses from an unlimited exposure to areas more appropriately covered by tort law.[79] The critical factor in the NSW provision was that the employer's duty was to ensure that people (other than the employees of the employer) were not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they were at the employer's place of work.

Unions and union organisations

20.107 Unions and union organisations agreed that duties under the OHS laws should extend to the public.

20.108 The ACTU noted that the duty should deal with health as well as safety and that there are a variety of circumstances where the OHS Act should cover public safety. These include:

a) where the distinction between public health and safety and occupational health and safety is not always clear (e.g. persons riding on a ski chair or visiting a fair or shop);

b) situations where the public is placed at risk, even when not present at a workplace (e.g. persons passing a construction site);

c) places that are workplaces at some times and not others (e.g. where home-based work occurs); and

d) systems of work which can also impact on persons others than workers.[80]

20.109 Unions NSW supported the duty of care provision applying to public safety, both in and in the vicinity of work premises.[81]

[77] ACCI, *Submission No.136,* pp.16-17
[78] VECCI, *Submission No.148*, p.9
[79] AiG & EEA(SA), *Submission No.182*, p.24
[80] ACTU, *Submission No.214*, pp.16,17
[81] Unions NSW, *Submission No.108*, p.18

Academics

20.110 Johnstone *et al* strongly considered that persons conducting a business or undertaking should be required to follow risk management processes to ensure that nobody is exposed to risk from it. In their view, the touchstone should be preventing exposure to risk arising from the conduct of the undertaking, regardless of whether the person placed at risk by the duty holder is at the workplace or away from it, and regardless of whether the person exposed to risk is working or not working.[82]

Discussion

20.111 The core issue is not whether OHS laws should protect public safety (this was not seriously questioned) but how wide the protection should be. There was some support for a narrow operation [e.g. the NSW Act's approach –s.8(2)] and for a wide application.

20.112 Concern was expressed to us that unacceptable opportunity costs might arise if OHS regulators have to address public safety where there is not a direct or immediate connection with the performance of work or a workplace. This was seen to arise because resources might be diverted to the protection of public safety to the detriment of protecting OHS.

20.113 We have kept in mind that the primary purpose of OHS laws is to protect people from work-related harm. In our view, the status of such people is irrelevant. It does not matter whether they are workers or have some other work-related status or are members of the wider public. They are entitled to that protection. At the same time, the OHS laws should not have an operation that affords such protection in circumstances that are not related to work. There are other laws, including the common law, that require such protection and provide remedies where it is not supplied.

20.114 There should not be a narrow approach to such protection. It is for this reason that there are general duties, and, like those that already exist, the duties that we have recommended are intended to operate in a work context.

20.115 We do not, however, believe that the duties should be limited to particular geographic areas (such as a static workplace). The duties will apply where work is performed or processes or things are used for work.

20.116 Inevitably, the question arises of where and how an appropriate boundary should be drawn between the proper scope of the model Act and the wider protection of public safety. In our view, there is no simple formula that allows this to be done. Almost every aspect of work and how it is performed is subject to ongoing and sometimes remarkable change. The attendant hazards and risks similarly change.

20.117 Even so, the model Act should not ordinarily have an operation beyond the protection of the health and safety of any person, including the wider public, from exposure to hazards and risks that are inherent in, or emanate from:

a) the performance of work;

b) anything that is provided or used for or in the performance of work, or intended to be so provided or used; or

c) a workplace, in its capacity as a workplace.

20.118 These are elements that can be reflected in the model Act, not only by the careful drafting of obligations and the terms used in the Act, but by suitably articulated objects and principles (see Chapter 22).

20.119 We believe that the expectations and understanding of obligation holders and the wider public can be guided by the publication by the regulator of readily accessible information and advice about how the OHS law applies to public safety.

[82] Johnstone, Bluff and Quinlan, *Submission No.55*, p.7

20.120 Finally, we note that questions were raised with us about:

a) rationalising existing work-related safety laws that have a public safety focus, and

b) improving co-operation and coordination between the OHS regulators and other authorities that are responsible for public safety.

20.121 The first question is covered by the first section of this chapter. The second is not a matter for the model Act.

RECOMMENDATION 77

To establish a clearer application of the model Act to public safety:

a) the underlying OHS objectives of the model act should be clearly articulated, including the protection of all persons from work-related harm; and

b) when the model Act is drafted and when it is amended after it is in operation, care must be taken to avoid giving it a reach that is inconsistent with those objectives.

RECOMMENDATION 78

To avoid misunderstandings about the protection of public safety, the model Act should facilitate the publication by the regulator of up-to-date advice and information about how the model Act relates to the protection of the safety of the public.

CHAPTER 21: STRUCTURE

21.1 We are required by Clause 10 of our Terms of Reference to recommend the optimal structure of a model OHS Act.

Current arrangements

21.2 The principal Australian OHS Acts broadly contain similar content; however there are some marked structural variations, including the placement of 'definitions', provisions relating to the establishment of the Authority, and 'duties'.

21.3 For example, in some OHS Acts the definitions used throughout the Act are provided in the early provisions of the Act[1]. In other Acts, the definitions appear in a schedule or dictionary at the end.[2] In our first report, we also drew attention to the quite different approaches taken to the location of penalties in the Acts.

Discussion

21.4 As we have reviewed the provisions of current OHS Acts relating to various issues considered by us, we have been struck by the difficulties that a reader can encounter in navigating the legislation. We have often found important provisions placed in parts of the legislation where one might not have first thought to look. In some Acts, what we consider to be important provisions are not in a prominent place. We have often found that inter-related issues are not situated near to each other.

21.5 We are strongly of the view that the structure of the model Act is an important tool to assist all who must understand and comply with it, or perform functions under it.

21.6 The structure of the model Act can also demonstrate clearly to its readers, the significance to be placed on its specific elements.

21.7 Particular weight should be given to ensuring that the model Act is an effective guide for duty holders and those whose health and safety is to be protected as to the objects of the legislation, the outcomes that should be achieved under it and the standards that must be met. The scope, objects and principles should therefore be placed at the start of the model Act.

21.8 Definitions must be placed early in the model Act. We recommend that terms only be defined where they do not have their ordinary meaning, or where they are critical to understanding a duty or obligation or process. The definitions should, therefore, be easy to find. As they are used throughout the model Act, they too need to be located at the beginning of the model Act, before they are first used.

21.9 The duties of care are the keystone to the model Act. They not only provide the basis for enforcing OHS standards, they set the standards. The duties are intended to inform and guide the duty holders as to what is expected of them in protecting health and safety in the workplace. In our view, that is at least as important, if not more so, than the role of the duties in allowing enforcement.

21.10 The duties of care should in our view be placed as early in the model Act as possible, following only the essential introductory sections, scope and objects, and definitions. We particularly recommend that all of the duties be able to be found in one place. This will allow all duty holders to appreciate that all who participate in the conduct of work and providing things for work have duties of care. The common practice of placing officer liability provisions very late in OHS Acts is, in our view, not conducive to promoting the importance of the role that officers must play in OHS. Our recommendation that officers have a positive duty of care also makes it more logical for the provisions relating to them collocated with those of other duty holders.

[1] See the NSW Act, Vic Act, WA Act, SA Act, Tas Act, NT Act and Cwth Act.
[2] See the Qld Act, andACT Act.

21.11 The diagram included in the discussion of the definition of 'officer' which sets out the relationship between the duties of care, should be used as a guide to the order in which the duties of care should appear in the model Act.

21.12 Other obligations should immediately follow the duties.

21.13 Workplace participation is important for ensuring the effective management of health and safety in the workplace. The provisions relating to workplace participation accordingly support the duties of care and that part should immediately follow the duties of care.

21.14 Next should be the provisions relating to the regulator, the inspector and right of entry of authorised persons. These provide the mechanisms and processes for supporting health and safety in the workplace and its enforcement.

21.15 The administrative or 'mechanical' provisions and those relating to legal proceedings should be near the end of the model Act. This may help to reinforce that the main focus of the model Act is prevention, with enforcement being the ultimate consequence of non-compliance.

21.16 We have prepared an example of an index to a model Act that represents this structure at Appendix D. The example structure is based broadly on the recommendations that we make throughout our reports as to the content of a model Act and is provided for guidance.

RECOMMENDATION 79

The general structure of the model Act should be:

1. Scope, objects and definition provisions.
2. Duties of care and other obligations.
3. Workplace consultation, participation and representation.
4. Functions and powers of the regulator and inspectors.
5. Legal proceedings.
6. Other matters.

CHAPTER 22: OBJECTS AND PRINCIPLES

22.1 In this chapter, we discuss and make recommendations about the inclusion of objects and guiding principles in the model Act.

Current arrangements

22.2 The use of a section (referred to as an *objects clause*) setting out objects is now commonplace in Australian OHS statutes.[1] Queensland and the NT also have specific 'purposes' for particular Divisions in their Acts, thereby providing general and specific objects. Tasmania relies on its Act's long title [2] and the Vic Act complements its objects with explicit principles[3] (see discussion below).

22.3 Broadly, in an objects clause, a Parliament provides guidance on how the Act concerned is intended to apply and operate. The clause aids interpretation and guides decision-makers about what is to be taken into account when they exercise powers or perform functions under the Act.[4] As Hooker observed in his 2006 Review of the WA Act, it is an accepted principle of statutory interpretation that a construction that would promote the purpose or object underlying an Act is to be preferred to a construction that would not.[5]

22.4 Principles are values or norms that the legislature wishes to promote or take into account in devising a program or a rule.[6] An Act's principles are usually implicit. They may, nonetheless, be articulated to explain more directly how the law should be administered and understood. This approach has been taken in the Vic Act.

22.5 We have identified six broad groups of objects in the existing principal OHS Acts. There are many common elements, but there are some differences between the objects in each Act. The six broad groups of objects seek:

1. to protect people against work-related hazards and risks;
2. to provide for workplace representation, consultation, co-operation and issue resolution;
3. to promote OHS advice, information, education and awareness;
4. to provide for effective compliance and enforcement;
5. to ensure accountability of persons exercising powers or performing functions under the Acts;
6. to ensure up to date and effective OHS regulation.

22.6 We have provided an analysis of existing objects by type in Table 21 at Appendix C. The table broadly describes the purpose of each of these types of objects, identifies the relevant provisions in the various Acts and briefly shows the differences of approach. In part, the differences reflect the varying definitions of key terms and drafting styles.

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[1] Section 6 of the ACT Act; s.3 of the Cwth Act; s.3 of the NSW Act; s.3 of the NT Act; s,7 of the Qld Act; s.3 of the SA Act; s.2 of the Vic Act; s.5 of the WA Act.

[2] The long title of the Tas Act is as follows: *An Act to provide for the health and safety of persons employed in, engaged in or affected by industry, to provide for the safety of persons using amusement structures and temporary public stands and to repeal certain enactments.*

[3] Section 4 of the Vic Act.

[4] See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* 6th ed, Butterworths, Sydney 2006

[5] WA Review, pp.11-12, para. 1.20. As Hooker noted, such provisions exist in all Australian statutory interpretation Acts.

[6] ILO, *Labour Legislation Guidelines*, 2001, Chapter 9, available at: http://www.ilo.org/public/english/dialogue/ifpdial/llg/noframes/intro.htm

22.7 As noted, the objects of the Vic Act are supplemented by principles of health and safety protection that are expressly intended to be considered in the administration of the Act.[7] The principles of the Vic Act are:

a) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.

b) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.

c) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.

d) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.

e) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

Recent Reviews

22.8 In 2004, Maxwell accepted the then existing objects of the former Victorian *Occupational Health and Safety Act 1985* [8], but proposed the addition of two new objects, namely, the protection of the public against risks created by workplace activities[9] and the right of all persons at work to a healthy physical and psychosocial work environment.[10] The Vic Act deals with these at s.2(1)(c) and by the definition of *health* in s.5 (which is defined to include 'psychological health').

22.9 Maxwell also favoured principles of workplace safety. These were based on principles in the *Environment Protection Act 1970* (Vic). Maxwell endorsed the comments made by the responsible Minister when introducing them: *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.*

22.10 Against that background, Maxwell proposed that the Vic Act provide for the precautionary principle. The precautionary principle states that, in cases of serious or irreversible threats to the health of humans or ecosystems, acknowledged scientific uncertainty should not be used as a reason to postpone preventive measures.[11] Maxwell did not explain how the principle should operate in the OHS context. Maxwell also recommended principles of accountability,[12] enforcement; shared responsibility; paramountcy ('if an activity cannot be carried on safely, it should not be carried on at all'); consultation, representation and participation; elimination of risk at source; and the systematic management of risk in the workplace.

22.11 The Victorian Act does not include all of those recommended principles. According to the Victorian Government, those that were omitted would have introduced uncertainty or been unnecessary or implied an obligation that did not exist.[13]

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[7] Sub-section 2(2) states that it is the Parliament's intention that in the administration of the Act and regulations regard should be had to the principles of health and safety protection set out in section 4.

[8] *Occupational Health and Safety Act 1985* (Vic)

[9] Maxwell, p.21, para. 33

[10] ibid, p.45, para. 141

[11] M. Martuzzi, J. Tickner (eds), *The precautionary principle: protecting public health, the environment and the future of our children*, WHO, 2004, p.7

[12] ibid, pp.25 and.23: '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.'

[13] Victorian Government, *Submission No.139*, pp.5-6.

22.12 The NSW WorkCover Review commented that:

> *"'It is ... important to ensure that the objects are clear, unambiguous and reflect contemporary occupational health and safety public policy objects as they are a central statement of principles and describe the overriding philosophy of the OHS Act. The objects can also play an important role in clarifying the intent of a provision of the OHS Act or regulations."*

22.13 After endorsing the then existing objects, the report went on to recommend additional objects that clearly articulated WorkCover's OHS prevention, advisory, assistance and educational functions; clarified the risk management process; and emphasised the active role of all persons at a place of work in protecting themselves and others against risks to health or safety.[14]

22.14 In 2006, Hooker supported the objects of the WA Act and recommended two new objects. The first was the encouragement and promotion of consultation and co-operation between participants at the workplace. The second was an object to require the resolution of occupational safety and health issues, so far as reasonably practicable, at the workplace.[15]

22.15 On the other hand, the interim report on the Tas Act reached a different conclusion about objects. The review found that, while detailed objectives written into the Act may be helpful to the courts if there were any ambiguity contained in the provisions themselves, they were not strictly necessary. The review believed that the objective of the Tas Act to prevent injury, illness or death was sufficiently clear and saw no benefit in including specific objectives in the Act.[16]

Stakeholder views

22.16 The submissions generally supported the inclusion of objects in the model Act. While the objects of the NSW Act and Qld Act were often seen as suitable models, those in the Vic Act appeared to be widely supported.

22.17 The ACCI supported the inclusion of objectives, provided they accurately reflected the intention of a Robens-style system of OHS regulation (self-management of workplace hazards and risks with a focus on prevention).[17]

22.18 The AiG and EEA(SA) supported objects, but counselled against providing too many. It was important that they were succinct and general in nature, clearly reflecting the Act's intention. They should be broad enough to capture the key agendas without so much detail that they became overwhelming and ineffective in identifying the Act's key messages for the behaviour of workplace parties.[18]

22.19 A small number of key objectives were proposed by the MCA, which, like a number of other stakeholders, supported continuous improvement as an object.[19]

22.20 Several union organisations and individual unions (including Unions NSW, the ACTU and the AMWU) favoured the NSW Act's objects. There was some support from academics for the approach taken in the Qld Act. Some submissions which supported the Qld Act's objects remarked on their clarity and simplicity. Many respondents also provided examples of what might be included in an objects clause of the model Act.

22.21 The key objects, however expressed, that were common to almost all submissions were:

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[14] NSW WorkCover Review, p.27. The report referred to the objects of the NSW Act and the related *Workplace Injury Management and Workers Compensation Act 1998.*
[15] WA Review, recommendations 10 and 11
[16] Tas Review, p.107, para.266
[17] ACCI, *Submission No.136*, p.13, para. 49
[18] AiG and EEA(SA), *Submission No.182*, p.15.
[19] MCA, *Submission No.201*, p.9.

a) protect persons at or near workplaces from risks to health arising out of the activities of persons at work (some submissions sought to limit this to 'people at work', 'persons engaged in work' or similar terms, thus omitting persons at or near the workplace and not actually engaged in work);

b) ensure that risks to OHS are identified, assessed and eliminated or controlled; and

c) provide for consultation and co-operation between employers and employees on health, safety and welfare at work.

22.22 Other commonly suggested objects were along the following lines:

a) promote an occupational environment that is adapted to health and safety needs;

b) develop and promote community awareness of OHS issues;

c) provide a legislative framework that allows for high standards of workplace health and safety; and

d) involve industry in the development of strategies and regulation relating to OHS.

22.23 Many submissions recommended the principles contained in the Vic Act. The Federal Safety Commissioner's 2006 *Safety Principles and Guidance* document was also mentioned by some as a suitable model.[20] The ACTU and AMWU recommended the principles contained in the Swedish *Work Environment Act* in addition to those in the Vic Act.[21] Many respondents also gave examples of what they would like to see in a principles clause of the model Act. Many of those reflected the principles in the Vic Act.

22.24 Those who opposed including principles in the model Act typically expressed concern that principles might distract from the objects or the duties.[22]

Discussion

Objects

22.25 There is broad agreement about the value of including objects in the model Act. The main purpose is to assist its interpretation and application. They are also an important tool in educating duty holders and the community about the purpose of the legislation and in fostering confidence in the legislative framework.

22.26 We support the use of objects but we consider that care needs to be taken in their development. Their purpose must be kept in mind. They must not unintentionally narrow the operation, application or interpretation of the model Act, nor relate to matters that are outside the scope, content and actual effect of the substantive provisions. Accordingly, in recommending the objects of the model Act, we have kept in mind our other recommendations about its optimal content.

22.27 We see value in each of the six broad groups of objects that we identify above (see current arrangements). We consider that, as objects, they would reflect the inter-related elements of the model Act and enlighten all interested persons about why those elements are included in the statute. More details could be given within those generic objects, which could be complemented by principles.

22.28 So that the benefit of existing jurisprudence is not lost, we prefer, where appropriate, to draw on the existing objects. We note that there are some gaps in the range of objects in each Act.

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[20] See Mirvac, *Submission No.168*, p.5; Stockland, *Submission No.220*, p.2; and National Safety Professionals, *Submission No.129*, p.8

[21] ACTU, *Submission No.214,* p.9; AMWU, *Submission No.217,* p.6

[22] AiG and EEA(SA), *Submission No.182*, p.17; CME of WA, *Submission No.125*, p.5; Law Society of NSW, *Submission No. 113*, p2

22.29 Consideration should be given to three matters that are not presently objects in the OHS Acts:

a) reinforcing an underlying aim of the model Act, namely, the harmonisation of Australia's principal OHS laws[23];

b) expressing the aim that the principle of graduated enforcement be applied in securing compliance with the model Act; and

c) recognising Australia's commitment to international standards concerning OHS and that the operation of the model Act should be consistent with them.

22.30 Each could come within the reach of the generic objects, but a principle such as graduated enforcement could readily be included in a list of principles that underpin the model Act.

22.31 Against this background, we propose that there be six main objects, which should be expressed so that they have the following broad aims:

1. to protect people against harm to their health and safety from work-related hazards and risks;
2. to provide for fair and effective workplace representation, consultation, co-operation and issue resolution;
3. to promote OHS advice, information, education and awareness;
4. to provide for effective compliance and enforcement;
5. to ensure the accountability of persons exercising powers or performing functions under the Act; and
6. to ensure up to date and effective OHS regulation.

22.32 The main objects should be expressed at a high level, but it should be clear that they are intended to cover the matters that are described in Tables 22 to 27 below. The tables also refer to particular existing objects as models for these elements in the main objects.

22.33 We have not sought to spell out the final terms of the proposed objects, as this might only be finally and appropriately determined when the content of the model Act is settled.

22.34 We also consider that some of the existing, more specific objects could be expressed as principles, to complement the main objects.

TABLE 22: Proposed Object 1 – To protect people against harm to their health and safety from work-related hazards and risks

Matters intended to be covered by Object 1	Relevant existing object that deal with a matter intended to be covered by Object 1
Protect workers from risk of harm to their health or safety from: • work-related activities; or • dangerous goods, substances or plant.	Our suggested model for incorporation in this object: NSW Act, s.3(a), (h): *(a) to secure and promote the health, safety and welfare of people at work,* *(h) to deal with the impact of particular classes or types of dangerous goods and plant at, and beyond, places of work.*
Protect other persons and the public from risk of harm to their health or safety at or near a workplace.	Our suggested model for incorporation in this object: ACT Act, s.6(1)(b), (c): *(b) eliminate, at their source, risks to work safety*

[23] See Chapter 30 for our discussion on the application of risk management processes.

Matters intended to be covered by Object 1	Relevant existing object that deal with a matter intended to be covered by Object 1
	whether of people at work or others; *(c) protect people from the risks to work safety resulting from the activities of people at work.*
Eliminate hazards and risks at their source.	Our suggested model for incorporation in this object: ACT Act, s.6(1)(b): *(b) eliminate, at their source, risks to work safety whether of people at work or others*
Encourage duty holders to undertake appropriate hazard and risk identification, assessment, elimination or minimisation.	Our suggested model for incorporation in this object: NSW Act, s.3(e): *(e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled*
Promote a safe and healthy work environment	Our suggested model for incorporation in this object: NSW Act, s.3(c): *(c) 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*

TABLE 23: Proposed Object 2 – To provide for fair and effective workplace representation, consultation, co-operation and issue resolution

Matters intended to be covered by Object 2	Relevant existing object that deal with a matter intended to be covered by Object 2
Encourage and facilitate consultation and co-operation between: • duty holders, where more than one person has a duty of care or other obligation in relation to the proposed or actual performance of particular or related work activities; • primary duty holders and workers and their representative organisations. [**Note**: the provision should extend to consultation and co-operation between primary duty holders at a workplace.]	Our suggested model for incorporation in this object: ACT Act s.6(1)(e): *(e) foster co-operation and consultation between employers and workers, and organisations representing employers and workers.*
Encourage and support the representation of workers in relation to the protection of their OHS.	Our suggested model for incorporation in this object: NT Act, s.49.
Resolve OHS issues at the workplace	Our suggested model for incorporation in this object: Qld Act, s.65(c): *(c) a process under which employers, principal contractors and workers identify and resolve issues affecting or that may affect the workplace health and safety of persons at workplaces.*
Balance the rights and obligations of duty holders and their representative bodies	As above

TABLE 24: Proposed Object 3 – To promote OHS advice, information, education and awareness

Matters intended to be covered by Object 3	Relevant existing object that deal with a matter intended to be covered by)bject 3
Promote education and awareness on matters relating to OHS for: • duty holders; • workers; • representative bodies of industry and workers; • the community.	Our suggested model for incorporation in this object: NSW Act, s.3(a),(c), (f): *(a) to secure and promote the health, safety and welfare of people at work,* *(c) 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,* *(f) to develop and promote community awareness of occupational health and safety issues*
Provide advice to duty holders.	We propose an object along the lines of: *Ensure that expert advice is available on (OHS) matters for duty holders [based on the Cwth Act, s.3(c)].*

TABLE 25: Proposed Object 4 – To provide for effective compliance and enforcement

Matters intended to be covered by Object 4	Relevant existing object that deal with a matter intended to be covered by Object 4
Provide effective remedies for non-compliance	We propose an object along the lines of: *Provide for effective remedies if obligations are not met [based on the Cwth Act, s.3(g)].*
Support the graduated enforcement of OHS obligations.	There is no equivalent OHS object in existing OHS Acts. We propose a provision along the lines of: *Secure compliance with obligations under this Act by an approach that is (a) appropriate for the particular circumstances in which an obligation arises and (b) graduated so that actions to compel such compliance or to impose a sanction are only taken where other means of securing such compliance are not appropriate.*

TABLE 26: Proposed Object 5 – To ensure the accountability of persons exercising powers or performing functions under the Act

Matters intended to be covered by Object 5	Relevant existing object that deal with a matter intended to be covered by Object 5
Provide for the accountability of persons exercising powers and performing functions under the Act	There are no directly relevant objects in the OHS Acts.

TABLE 27: Proposed Object 6 – To ensure up to date and effective OHS regulation

Matters intended to be covered by Object 6	Relevant existing object that deal with a matter intended to be covered by Object 6
Continuous improvement in OHS.	Our suggested model for incorporation in this object: ACT Act, s.6(1)(f) *(f) provide a framework for continuous improvement and progressively higher standards of work safety, taking into account changes in technology and work practices.*
Facilitate and support the harmonisation of the content and application of Australian OHS laws.	Our suggested model for incorporation in this object: A combination of the NT Act, s.3(e) and the WA Act, s.5(f)[24] would provide a basis for supporting harmonised laws within a jurisdiction, but would not relate to support for national harmonisation. Accordingly, we propose a new object along the lines of: *To maintain and strengthen the national harmonisation of laws relating to occupational health and safety and to facilitate a consistent, properly coordinated and coherent approach to occupational health and safety in [this jurisdiction].*
Assist in giving effect to Australia's obligations under international treaties relating to OHS.	A number of Commonwealth Acts contain objects of this type (typically where the constitutional external affairs power has been relied upon to support all or part of the legislation concerned).[25] We propose an object along the lines of: *Assisting in giving effect to Australia's international obligations in relation to occupational health and safety.*

Location of objects

22.35 There is a question of whether the objects should be in one place, as occurs in some Acts, or distributed across the Act, with general objects in an initial objects clause and more specific objects collocated with the subject matter to which they relate. Our preference is for all of the main objects to be in a single section or part of the model Act. We consider that this would assist persons using the Act to understand its aims and facilitate the ready location of the objects when it becomes necessary to refer to them.

Discussion of principles

22.36 Although views were divided on the value of principles and there were some concerns that objects and principles together may create confusion, we consider that clear drafting should allow an effective differentiation. We consider that it would be desirable for the model Act to include a provision that sets out its principles. This is because a statement of principles would:

a) reinforce the underlying aims and values of the model Act;

b) encourage and support the consistent application of the model Act and hence assist in realising the benefits of harmonisation; and

[24] Section 3(e) of the NT Act: to achieve a consistent, properly coordinated, and coherent approach to occupational health and safety in the Territory; s.5(f) of the WA Act: to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health.

[25] Examples are s.3(n) of the *Workplace Relations Act 1988* and s.3(4) of the *Aviation Transport Security Act 2004.*

c) be a valuable tool in educating all persons who are affected by the model Act.

22.37 As is the case for the objects, we consider that it would be useful to draw on an existing provision providing for principles, namely, that in the Vic Act.

22.38 As we have mentioned in the earlier discussion, we consider that some of the more specific existing objects could be expressed as principles. This would provide a useful complement to the more widely expressed main objects.

RECOMMENDATION 80

The model Act should contain:

a) objects and principles along the lines of those set out in paragraph 22.31 which are based on those in existing Australian OHS Acts; and

b) a new object that expresses the aim of ensuring that the Act facilitates and supports the ongoing harmonisation of Australia's OHS laws.

CHAPTER 23: DEFINITIONS

23.1 In relation to each term considered in this chapter, we will consider two issues:

1. whether the term should be defined or not; and
2. if the term should be defined, how.

23.2 Definitions have an important role in legislation, however not all terms need to be defined. Where the ordinary meaning of a term is appropriate to the use to which it is put in the model Act, it does not require definition. Where a term is not defined, a Court may be called on to define it. Terms used within a definition may, unless defined, also need to be defined by a Court.

23.3 A definition is required where the ordinary accepted meaning (or judicial interpretation in similar usage) of the term is to be modified or limited. A term may then be given a specific definition in an Act or regulation.

23.4 The starting point of defining a term that is not defined in the legislation is the normal and ordinary usage of that term, which may be found in dictionaries. Consideration must then be given to whether or not the context in which the term is used within the Act or section, or the way in which it has been interpreted in other legislation (particularly of the same nature), may alter the normal and ordinary usage of the term.

23.5 Definitions may be applicable wherever the defined term is used throughout the model Act or may be specific to particular provisions. Where definitions are generally applicable, they may be set out in a definitions provision near the commencement of the model Act, and where only applicable to particular provisions may be located in a specific section.

23.6 Some terms are critical to the scope or application of a duty or obligation. They may be defined (in the section or elsewhere) or may not need to be defined if the definition is set out within the obligation or duty.

23.7 In this chapter we will therefore indicate terms that may be appropriately treated in this way. For example, workplace may be defined so as to not include domestic premises unless they are under the management or control of a person as part of the conduct of a business or undertaking by that person; or the duty of a person with management or control of a workplace could specifically be stated to be owed by a person with management or control of a workplace as part of the conduct of a business or undertaking by that person.

23.8 Many terms may require definition only to ensure that the application of the model Act does not extend beyond ‘occupational’ health and safety and encroach on private or domestic affairs. For example, terms that identify a person owing a duty or having an obligation may only require definition to limit the holding of that duty or obligation to a person conducting a business or undertaking. An alternative to defining such terms, where they are otherwise well understood and in common usage, may be to have a section, near the start of the model Act, noting that listed terms only apply where the relevant person is a person conducting a business or undertaking.

23.9 The final decision on what terms need to be defined in the model Act will depend how it is drafted. The following is a list of terms that we consider should, as a minimum, be defined.

BUSINESS OR UNDERTAKING

Current arrangements

Usage

23.10 Our recommendations include the use of the term ‘business or undertaking’ to determine:

- who will owe the primary duty of care[1]
- who will be a worker[2]
- to what activities and at what place the primary duty may apply[3]
- who may be involved in issue resolution and consultation[4]; and
- who may be required to notify incidents;[5]

23.11 OHS Acts in Australia currently use the term, or a part of it, as follows:

- Cwth Act – '*conduct of the employer's undertaking;*[6]
- NSW Act – *'conduct of the employer's undertaking'*[7] and *'conduct of the person's undertaking;*[8]
- Vic Act – *'conduct of the undertaking';*[9]
- Qld Act – *'conduct of the relevant person's business or undertaking;'*[10]
- NT Act – *'conduct of the employer's business';*[11]
- ACT Act – *'conducting a business or undertaking'.*[12]

Current definitions

23.12 Current OHS legislation only defines the term 'business or undertaking', or any part of it, as provided in Table 28 below:

TABLE 28: Definition of 'Business or Undertaking'

Jurisdiction	Definition
ACT[13]	***'business or undertaking'*** *includes -* *(a) a not-for-profit business; and* *(b) an activity conducted by a local, state or territory government*

[1] Recommendations 10 to 15 in our first report.
[2] Recommendation 16 in our first report relating to the primary duty of care and Recommendation 33 relating to the definition of worker.
[3] Recommendations 17, 19 and 20 in our first report.
[4] Recommendations 116-120.
[5] Recommendations 140-146.
[6] See s.17 of the Cwth Act – duty of care to persons other than employees or contractors.
[7] See s.8(2) of the NSW Act – duty of care to persons other than employees.
[8] See s.9 of the NSW Act – duty of care owed by a self-employed person to others.
[9] See s.23 of the Vic Act – duty of care of employers to persons other than employees; and s.24 - duty of self-employed persons to others.
[10] See s.28 of the Qld Act – duty of care of a person who conducts a business or undertaking to the person, the person's workers and other persons.
[11] See s.55 of the NT Act – duty of an employer to workers and others.
[12] See s.21 of the ACT Act – duty of persons conducting a business or undertaking to self and other people. Note also *'conducting of the employer's undertaking'* in s.38 of the (currently still operating) ACT Act 1989 – duty of employers in relation to third parties.
[13] See s.11 of the ACT Act. The Explanatory Memorandum for the Bill noted:
Clause 11 - Meaning of business or undertaking
This clause defines business or undertaking for the purpose of the Bill to include 'a not-for-profit business; and an activity conducted by a local, state or territory government'. This is to convey that 'business or undertaking' should be interpreted expansively.
The term appears in the principal safety duty in clause 21 that applies to a person conducting a business or undertaking and is also used throughout the Bill. People conducting a business or undertaking would include employers, the self-employed, principal contractors, sub-contractors, franchisors and principals of labour-hire firms.

Jurisdiction	Definition
NT[14]	***'business' –*** *means:* *(a) an industrial or commercial undertaking or activity (whether carried on for profit or on a not-for-profit basis); or* *(b) an undertaking or activity of government or local government*
Qld	s.28(3) provides in relation to the duty of a person conducting a business or undertaking that: *(3) The obligation applies -* *(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person, or otherwise; and* *(b) whether or not the business or undertaking is conducted for gain or reward; and* *(c) whether or not a person works on a voluntary basis.*

23.13 Dictionary definitions of 'business' consistently identify the characteristics of:

- the carrying on of an occupation, profession, or trade;
- a 'going concern' or commercial enterprise;
- the carrying out of work as a whole (rather than as a distinct item of work); and
- being a 'serious pursuit' rather than a pastime, pleasure or recreation.

23.14 Dictionary definitions of '*undertaking*' are similar, referring to an enterprise, a project or work undertaken or to be undertaken. Definitions of '*enterprise*' refer to a project, especially one of some importance, a company organised for commercial purposes, work taken in hand, and an undertaking.

Case law

23.15 OHS Acts predominantly impose the duty of care relating to a conduct or undertaking on an employer or self-employed person[15]. An *'undertaking'* has in this context understandably been limited to commercial enterprises. The person owing the duty is therefore clear and unrelated to what constitutes a '*business or undertaking'* or *'undertaking*'. Those terms are therefore used to determine the scope of the undertaking (the matters falling within the duty), not the identity of the duty holder.

23.16 This has presented some difficulty to us in determining what has been intended to be encompassed as part of the business or undertaking. It requires us to pay particular attention to the underlying objectives of the model Act and the duty of care.

23.17 '*Business'* is a term which is generally well understood and applied in most contexts consistently with the dictionary definitions above. It clearly connotes the carrying on of a trade or profession, engaging in commercial activity, usually intended to be carried on for profit or gain. The term '*undertaking'* is not as well understood.

23.18 The most direct statement of what is meant by the term *'undertaking'* in the context of an OHS duty of care is that of Stuart-Smith, LJ in *R v Associated Octel Co Ltd*[16] :

[14] See s.4 – Definitions, of the NT Act

[15] With the exception of NT Act, ACT Act and Qld Act (although the connection to an employer is maintained through the definition of a worker, used in s.28)

[16] [1994] 4 All ER 1051, at 1061 – 1062, when considering whether activities of an employer were part of the conduct of the undertaking of the employer for the purposes of the duty of care in s3(1) of the *Health and Safety at Work etc Act 1974* (UK). This was not disturbed by the House of Lords on appeal in *R v Associated Octel Co Ltd* [1996] 4 All ER 846.

*"…In our judgement, Mr Carlisle is right. The word '**undertaking' means 'enterprise' or 'business'**. The cleaning, repair and maintenance of plant, machinery and buildings necessary for carrying on business is part of the conduct of the undertaking, whether it is done by the employer's own employees or by independent contractors…" (emphasis added).*

23.19 Both the Court of Appeal and the House of Lords noted the clear connection between what is the conduct of an undertaking, control and reasonably practicable. While this is relevant to determine the question of 'conduct' of an undertaking, it could be said to follow that for something to be an undertaking of a person, that person must be able to exercise control over the relevant matter.

23.20 Less direct but informative comments in cases refer to an undertaking in the following ways:

"…conducting its business, its enterprise, its activity, that is, its 'undertaking'…"[17]

"…with a meaning such as 'the work undertaken', or a substantive noun such as 'enterprise'…"[18]

"…so connected with the business and activities of the defendant that they occurred in the course of the 'undertaking' of the defendant"[19]

"…The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section 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… 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…"[20]

"…the examination of performance of work in the circumstances of a particular case…"[21]

23.21 The most recent case on a 'conduct of the undertaking' obligation is that of *Victorian WorkCover* Authority *v Horsham Rural City Council*[22] . Her Honour noted that on a hypothetical example of a 'private person' who is an employer only by reason of employing a housekeeper or bookkeeper, and who is a landlord who lets out a property to an organisation for its use, the duty of care of an employer in relation to the conduct of an undertaking would not apply as:

"…it is not clear to me that, merely by leasing the property, he would be conducting an undertaking which gave rise to the relevant risk to health or safety…"[23]

23.22 The case of *Asbury v The Council of the Northern Melbourne TAFE* (unreported, Magistrates' Court of Victoria, 6 March 2002) identifies different undertakings when considering who is conducting which undertaking. Mr Reynolds SM noted:

"…The Defendant's undertaking is the provision of vocational education and the conduct of such undertaking includes the placing of students with an employer…In my opinion

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[17] *Workcover Authority of NSW (Insp Keenan) v Technical and Further Education Commission* [1999] NSWIRComm 218.
[18] *Workcover Authority of New South Wales (Inspector Hughes) v Boral Montoro Pty Limited* [1997] NSWIRComm 190.
[19] *Workcover Authority of NSW v CSR Limited* [1995] NSWIRComm 294.
[20] *Whittaker v Delmina Pty Ltd* [1998] VSC 175.
[21] *Inspector Campbell v James Gordon Hitchcock* [2004] NSWIRComm 87.
[22] [2008] VSC 404, Supreme Court of Victoria, Hollingworth J. This case dealt with whether the council was an employer for the purposes of s.23 of the Vic Act; that is, whether the council was a duty holder and not what the '*undertaking'* was. Her Honour accepted the principles enunciated in *R v Associated Octel Co Ltd* and *Whittaker v Delmina Pty Ltd*, above.
[23] [2008] VSC 404 at paragraph 39.

once the placement has been effected, however, it cannot be said that the undertaking of the Defendant extends to the operations of the host employer while the student engages in his placement…"

23.23 Undertaking in other contexts tends not to be defined, other than by limitation such as 'commercial undertaking', 'insurance undertaking' etc and definitions are related to the specific context in which the term is used. The definitions tend to connote an element of commercial or economic activity, although that is probably because the term is ordinarily used in relation to such activities, rather than private or social activities. The following comments are consistent with the interpretation of *'undertaking'* in contexts other than OHS:

"…Frequently the word 'undertaking' is used in circumstances where it could be interchanged with either the word business or enterprise and with varying shades of meaning... sometimes as a synonym for business…"[24]

"…in Community competition law the definition of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed…"[25]

Stakeholder views

23.24 The NSW Minerals Council[26] provided with its submission details of OHS cases (including some of those noted above) in which this term has been considered, and also noted the following:

"The word 'undertaking' in the definition of 'industry' in the Industrial Conciliation and Arbitration Act 1972 SA, is to be read in its widest natural sense as connoting any enterprise or activity whatsoever, be it of a commercial nature or otherwise, in which person are employed or engaged for remuneration or reward – Tertiary Institutions Staff (Jurisdiction) Case 40 SAIR 229."

23.25 The Queensland Government[27] suggested:

"Consideration should also be given to whether certain activities undertaken by homeowners come within the ambit of an undertaking. The most predominant relate to:

a) owner builders, who hold a licence and organise tradespeople to undertake various work activities relating to the construction of their home; and

b) homeowners who have a requisite licence and undertake the removal of more than 10 square metres of bonded asbestos containing material in contravention of the national asbestos removal code of practice."

23.26 The view of the Department of Employment and Industrial Relations in Queensland on the meaning and application of this term may be significant, given the wording of s.28 of the Qld Act and the comment that interpreting that section *'has not been a problem'*[28]. We understand the view of the Department to be that:

a) a business involves a degree of organisation, system and continuity;

b) clubs and not-for-profit organisations may be conducting a business when they are generating income (other than subscriptions);

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[24] *Top of the Cross Pty Ltd v Commissioner of Taxation (Cth)* (1980) 50 FLR 19.
[25] The European Court of Justice in *Federacion Espanola de Empresas de Tecnologia Sanitaria v Commission of the European Communities* (Case C-205/03 P).
[26] NSW Minerals Council, *Submission No.183*, Annexure A
[27] Queensland Government, *Submission No.32, p.11*
[28] See above at paragraph 23.11 and footnote 10.

c) *an undertaking is an enterprise, which also implies organisation, system and, possibly, continuity;*

d) *the difference between business and undertaking is therefore only the element of profit making;*

e) *arrangements for the provision of domestic services are not an undertaking; and*

f) *home owners doing work on their own premises, even under an owner-builder licence, are not conducting an undertaking.*[29]

Recent Reviews

23.27 We have not been assisted by recent OHS reviews. Although some have considered the need for a duty of care by a person conducting a business or undertaking, only Maxwell considered the definition of the term, commenting[30]:

> *' 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:*
>
> > *"…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. …" '*

23.28 Maxwell noted[31] the limitation on the coverage of the 'conduct of the undertaking' duty by reference to an employer and self-employed person. He referred to a private company involved in building residential units as an example of a person who may be conducting an undertaking but not be an employer or self-employed person. Maxwell recommended[32] the adoption of a term 'proprietor' to overcome this limitation. This is consistent with a view that the duty apply only to activities in the nature of a business or enterprise.

Discussion

23.29 The first issue we have considered is whether or not the term '*business or undertaking'* should be defined in the model Act, or should be left to interpretation by the courts.

Options and associated issues

23.30 We have identified six options, as follows:

> ***Option one –*** leave the term undefined in the model Act and therefore very broad, subject to the interpretation of the courts (noting that it is limited in the duty by the reference to worker and work).
>
> ***Option two –*** define the term in the model Act, by noting the characteristics that make something a business or undertaking
>
> ***Option three –*** define the term in the model Act to be very wide but with specific exclusions.

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[29] This is set out in a document provided by the Department of Employment and Industrial Relations, November 2008, entitled "Origins, Operation and Implications of the Concept of 'Business or Undertaking' in Queensland under the *Workplace Health and Safety Act 1995*".
[30] Maxwell Review, p.140, para.610
[31] ibid, p.137, para.593-597
[32] ibid, p.137, para.598

Option four – define the term in the model Act to be very wide but with specific activities included.

Option five – define the term in the model Act by what it includes and what is excluded.

Option six – define the term in the model Act very broadly, but allow for exemption for specific organisations in a Schedule to the model Act or in Regulations.

23.31 The definition of this term, whether in the model Act or by the courts, will set the limits of the scope of the primary duty and to a significant degree the scope of the model Act. The following discussion should be read with our earlier discussion on scope at Chapter 20.

23.32 There are two considerations which will determine the scope of the primary duty and the definition of '*business or undertaking'*, and which should be recognised in defining the term, whether expressly in the model Act or by the courts:

1. the scope of the model Act[33]; and
2. what the primary duty is intended to cover; the context in which words are used in a statute will dictate their meaning.[34]

23.33 At paragraph 22.31 we note the six broad groups of objects that we recommend be included in the model Act, being:

a) to protect people against work-related hazards and risks;

b) to provide for workplace representation, consultation, co-operation and issue resolution;

c) to promote OHS advice, information, education and awareness;

d) to provide for effective compliance and enforcement;

e) to ensure accountability of persons exercising powers or performing functions under the Act; and

f) to ensure up to date and effective OHS regulation.

23.34 It is clear that the objects we recommend, consistent with those in current OHS Acts are directly related to and limited to work and things associated with it.

23.35 The long title to an Act may provide guidance on its intended scope and the interpretation of terms within the Act. The long title of the Tas Act is perhaps the most demonstrative of its intended scope, being:

> *"An Act to provide for the health and safety of persons* ***employed in, engaged in, or affected by industry****, to provide for the safety of persons using amusement structures and temporary public stands and to repeal certain enactments."* (emphasis added).

23.36 The long title of the SA Act is:

> *"An Act to provide for the health, safety and welfare of persons* ***at work****; and for other purposes."* (emphasis added).

23.37 The long titles of other OHS Acts, where used, are consistent with these and are all clearly limited to the conduct of work and its consequences.

23.38 The primary duty that we recommend is based to some degree on s28 of the Qld Act. Section 7(1) of the Qld Act states[35]:

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[33] In interpreting a section, a construction which would promote the purpose or object underlying the Act is to be preferred to a construction that would not; per Hollingworth, J in *Victorian WorkCover Authority v Horsham Rural City Council* [2008] VSC 404, noting s35(a) of the Interpretation of Legislation Act 1984 (Vic).

[34] See *Gidaro v Secretary, Department of Social Security (1998) 154 ALR 550; Repatriation Commn v Vietnam Veterans' Association of Australia NSW Branch Inc (2000) 171 ALR 523*

[35] See s.7(1) of the Qld Act

> *"The objective of this Act is to prevent a person's death, injury or illness being caused by **a workplace, by a relevant workplace area, by work activities**, or by plant or substances for use at a workplace."* (emphasis added).

23.39 That objective is consistent with the scope that we recommend for the model Act and the primary duty.

23.40 We intend the primary duty that we recommend apply to those able to direct or influence the way in which work is done and the things associated with it[36].

23.41 Our approach to the detail of the primary duty has been to ensure that it is not limited to or by a link with employment relationships. We are concerned to ensure that the duties of care currently owed by an employer or self-employed person extend in the model Act to cover:

- all 'employment like' relationships and arrangements where a person is able to direct or influence the way in which work is done; and
- the specific classes of duty holders referred to in Chapter 7 of our first report, who otherwise than in an 'employment like' arrangement, undertake activities that may materially affect the health and safety of persons at work or from the undertaking of work.

23.42 This is consistent with the following comment of the Robens Committee (at paragraphs 129-130) that the legislation should:

> *"…establish clearly in the minds of all concerned that the preservation of safety 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…"* (emphasis added).

23.43 In the Qld Act, where the duty is currently closest to the primary duty that we recommend, s.29 (while expressly not limiting s.28) demonstrates the 'employment like' matters that are to be the subject of the duty. The explicit elements of the primary duty recommended by us in the first report (Recommendation 19) and the example clause we provide at paragraph 6.125 demonstrate this intended link.

23.44 We do not intend that the primary duty extend duties of care currently owed under OHS legislation, other than to capture 'employment like' arrangements and relationships that to date may not have been subject to a duty of care, because of the link to employment or self-employment.

23.45 Some concern has been raised in consultation that the primary duty may inappropriately apply to the activities of clubs or organisations of a social, charitable, sporting or community nature. We note, however, that the current duties of care across Australia relating to the conduct of an undertaking are capable of applying to such clubs, subject to the limiter that they are an employer or self-employed person (which will be the case for many of the types of clubs specifically raised with us). The duty of care will limit the circumstances in which it will apply to such clubs. The application of the qualifier of reasonably practicable, will assist in determining how the duty must be complied with in relation to such activities as may fall within the scope of the duty.

23.46 The primary duty being limited to work and work activities as noted above, would mean that it would continue to apply to such clubs, but only in relation to the activities of those clubs that fall within the intended scope. The primary duty would not apply to purely social, private or domestic activities. We note the definition of '*undertaking'* for the purposes of Welsh State aid[37]

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[36] See our discussion of the primary duty of care in Chapter 6 of our first report.

[37] *"…An undertaking is defined as an entity, regardless of its legal status, which is engaged in economic (commercial/competitive) activity where there is a market in comparable goods or services. It does not have to be profit-making as long as the activity carried out is one which in principle has commercial competitors. It can include voluntary and not-profit-making public or private bodies when they are engaged in economic activity. Charities,*

refers to the application of the definition to *not-profit-making public or private bodies when they are engaged in economic activity.* This is an example of the application of the law and administrative rules and is consistent with the scope of current Acts and duties of care, and the scope of the model Act and the primary duty that we recommend.

23.47 It is clear from the cases that the activities of the following should be considered to be part of an undertaking:

- those engaging contractors and sub-contractors;
- franchisors;
- labour hire organisations;
- those engaging home-based workers; and
- those arranging for practical placement of students.[38]

Define or not

23.48 The discussion above identifies the intended scope of the term '*business or undertaking'* and how the term should be interpreted by the courts. It may be argued that this is sufficiently clear that the term need not be defined in the model Act – this is the first option.

23.49 The definition of a term in an Act, may limit the intended scope or application of the term, unless the definition is carefully drafted. This is an argument in favour of not defining a term that is intended to result in the broad application of the duty that the term defines or 'scopes'.

23.50 The converse may also be true. A term which is not defined in the Act, may be given a meaning and application that is far broader, or more limited, than that intended by the drafters of the legislation.

23.51 We consider a key issue therefore to be whether the breadth and limitations of the term, and through it the primary duty, are sufficiently clear as to permit an interpretation by the courts that is consistent with that intended, as we have noted in the discussion above.

23.52 As was noted in a submission proposing a broad duty, of the nature of the primary duty we recommend:[39]

> *"…We submit that a far more modern and sensible approach is taken in the Queensland Act, where the duty (in section 28) is simply imposed on 'a person who conducts a business or an undertaking'.* ***The disadvantage of this is that there may be early complications in interpreting 'business' and 'undertaking' in this context*** *– although this has not been a problem in Queensland. In any event, the case law on whether a person is an 'employer' or 'employee' is notoriously complex…".* (emphasis added)

23.53 A further issue is whether there are benefits, additional to ensuring the intended interpretation of the term by the courts, from defining the term in the model Act. Those benefits may be to ensure consistency in interpretation and the availability of guidance for duty holders and others.

23.54 We have concluded that it is preferable for the term '*business or undertaking'* to be defined in the model Act, for the following reasons:

1. Concerns expressed in consultation with us following our first report suggest that the scope of the primary duty and particularly what will be *'the conduct of a business or*

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universities, research institutions, voluntary entities, social enterprises and public sector bodies may be deemed to be undertakings when they are engaged in economic activity…"

[38] For a further consideration of the application of the law to these activities, see R. Johnstone, , "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking", *Australian Journal of Labour Law*, 1999 , vol.12.

[39] Johnstone et al, *Submission No.55*, p.12

undertaking' may be capable of a broader interpretation than we intend. Defining the term will assist in ensuring the scope of the primary duty is as we intend.

2. Our Terms of Reference (cl 14(b)) require us to ensure that the development of the model OHS legislation be accompanied by an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions. Harmonisation of the legislation without harmonisation (through consistency) of enforcement and judicial interpretation may undermine the intention and efficacy of the harmonisation process.

   Defining this key term will minimise the potential for inconsistent interpretation by the Courts and better ensure consistent application across jurisdictions.

3. Those who may be subject to the primary duty and those required to enforce it need to know who is subject to it and the scope of its operation. As this is a new formulation of a duty, there is no guidance available as to its intended scope. Concerns raised with us during consultation indicate the potential for inconsistency in perceptions as to the scope and application of the duty. Defining the term would assist in providing guidance to duty holders and regulators and the courts.

   While such guidance can be provided in guidance material issued by the regulators, which is of considerable value in other contexts, we do not consider that to be a sufficient answer to the issue here, because:

   a) the person must be aware of the existence of the guidance material and gain access to it;

   b) the definition of the term is fundamental to understanding the operation of this key duty of care and should therefore be found in the model Act rather than elsewhere;

   c) guidance material is subject to the interpretation of the regulator issuing it, which may result in inconsistency between jurisdictions, or a broader than intended application of the primary duty;

   d) guidance material can be readily changed by the regulator, without being subject to the same requirements of public scrutiny and consultation as apply to legislation; and

   e) guidance material is of no legal force; it cannot alter the application of the section but may mislead people as to how it will be applied by the courts. [40]

4. Although the courts will, over time, define the term and how the primary duty will be applied, there is in our view a need to provide that clarity when the duty commences to operate, not after several years of operation. Also, decisions of courts are not readily known to, or available to, those who would be duty holders.

23.55 Defining this term is consistent with the comment of the Robens Committee (at paragraphs 129-130) that the legislation should:

> *"…establish clearly in the minds of all concerned that the preservation of safety 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…"*

RECOMMENDATION 81

The model Act should define a "business or undertaking".

[40] We note that a regulator should be expected to act in accordance with guidance material issued by the regulator about how the operation and application of a section may be understood by the regulator and how the regulator may exercising a discretion in relation to it (see, for example, s.12 of the Vic Act).

How should the term be defined?

23.56 Having determined that the term 'business or undertaking' should be defined in the model Act, leaves options two to six above, which deal with how the term should be defined.

23.57 Typical of the comments in a number of submissions is the comment by Professor Richard Johnstone, in an earlier paper[41]

> *'… there is a need for the law to deal with what are described as "fractured, complex and disorganised work processes, weaker chains of responsibility and buck-passing"…'*

23.58 Johnstone also warns[42] that:

> *"…While the analysis shows that at least in Victoria and Queensland the OHS general duties protect the OHS of all kinds of workers, this level of protection is not clear in the other jurisdictions, particularly where there are significant gaps in statutory protection, particularly in relation to dependent or semi-dependent workers who are not technically employees, and volunteers working at remote workplaces, including their homes and vehicles…"*

23.59 A broad duty of care relating to 'employment like' arrangements is s.23E of the WA Act, the title of which is "*Labour arrangements in general*". The key defining elements for the application of that section are:

- a worker carries out work for another person for remuneration; and
- that other person *"has the power of direction and control in respect of the work in a similar manner to the power of an employer under a contract of employment".*

23.60 That provision appears to set out to achieve an objective that we propose the recommended primary duty achieve, being to capture all arrangements by which a worker undertakes work for, or at the direction or influenced by, another person, regardless of the legal relationship between them. We have, however, been made aware during consultation of significant limitations on the application of s.23E, with doubts whether it does cover all 'employment-like' arrangements, particularly where there is no clear basis for finding a payment of 'remuneration', for example, share farming, share fishing, and bartering. This demonstrates the need for clarity in the duty of care and defined terms within it.

23.61 Providing for a duty of care to cover the range of work relationships and arrangements is often sought to be achieved by deeming provisions, particularly deeming someone to be an employee for the purposes of a duty of care. It should be noted, however, as it was in the issues paper published for the Qld Review in 2001 (at paragraph 4.1.3):

> *"…The legislative interpretations regarding complex working arrangements and the difficulties surrounding the current interpretations of the control test make this whole area extremely complicated. The issues are compounded when one considers the obligations of volunteers and persons who are members of organisations for which they do work.*
>
> *The application of deeming provisions creates its own set of problems and should not be seen as a panacea for this issue…"*[43]

23.62 The successful operation of deeming provisions, and terms which purport to limit or extend a duty of care, are subject to the way in which the courts interpret and apply them, unless they are clearly defined in the legislation.

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[41] In R. Johnstone, *"Regulating Occupational Health and Safety in a Changing Labour Market",* at page 619 in Chapter 32 of C. Arup et al (Eds), *Labour Market and Labour Market Regulation,* Federation Press, 2006

[42] Ibid, p.625

[43] Qld Review, para. 4.1.3

23.63 While Johnstone has noted[44] that deeming provisions have tended to be broadly interpreted by the courts, we consider that the model Act provisions should not require court interpretation, as:

- that may lead to uncertainty;
- the provisions may not extend as far as intended, or may extend further than intended; and
- this will not assist a duty holder to understand that they are a duty holder.

23.64 Defining this term by reference to what is specifically included, should not be necessary if it is expressed in sufficiently broad terms.

23.65 If the definition of the term in the model Act is carefully drafted to provide for the limitation to work and the consequences of work, and the factors that we note below, there should not be a need to provide for exclusions within the definition or the section containing the primary duty.

23.66 The application and interpretation of the primary duty may, over time, result in the unintended application to certain bodies or activities. Providing in the model Act for specific organisations or activities to be excluded by inclusion in a Schedule to the model Act, or in regulations, would provide a means by which unintended application of the primary duty can be avoided.

23.67 Taking all of these considerations into account, we recommend that the approach set out in option six be adopted for the definition of '*business or undertaking'* in the model Act, being to define the term very broadly, but allow for exemption for specific organisations or activities in a Schedule to the model Act or in Regulations.

RECOMMENDATION 82

The model Act should define a "business or undertaking" in broad terms, but provide for the exemption of specific organisations or activities or specific types of organisations or activities in a Schedule to the model Act or in Regulations.

The characteristics or elements of a 'business or undertaking' to be included in a definition

23.68 We note the view of the Department of Employment and Industrial Relations in Queensland on the meaning and application of this term, referred to in paragraph 23.11. This is consistent with the various elements identified in various definitions and case law and the discussion above.

23.69 We propose that the following characteristics or elements of a '*business or undertaking'* should be included in a definition of the term, to give it a clear meaning that is consistent with the objects and scope of the model Act and the intended scope of the primary duty, as we recommend them:

> *Activities carried out by, or under the control of, a person (including a corporation or other legal entity or the Crown in any capacity)*
>
> *a) whether alone or in concert with others;*
>
> *b) of an industrial or commercial nature;*

[44] *"Regulating Occupational Health and Safety in a Changing Labour Market",* at p.622.

c) whether or not for profit or gain;

d) in which:

i) workers are engaged, or caused to be engaged, or

ii) the activities of workers at work are directed or influenced, or

iii) things are provided for use in the conduct of work (eg a workplace, plant, substances, OHS services)

by the person conducting the business or undertaking.

23.70 For the avoidance of doubt, a business or undertaking should not include the engagement of workers solely for private or domestic purposes.

RECOMMENDATION 83

The model Act should define a "business or undertaking" to be activities carried out by, or under the control of, a person (including a corporation or other legal entity or the Crown in any capacity):

a) whether alone or in concert;

b) of an industrial or commercial nature or in government or local government;

c) whether or not for profit or gain; and

d) in which:

i) workers are engaged, or caused to be engaged, to carry out work; or

ii) the activities of workers at work are directed or influenced, or

iii) things are provided for use in the conduct or work (e.g. a workplace, plant, substances, OHS services);

by the person conducting the business or undertaking.

For avoidance of doubt, a 'business or undertaking' does not include the engagement of workers solely for private or domestic purposes.

CONTROL

Current arrangements

Usage

23.71 Our recommendations include the use of the term 'control':

- in the common features of all duties of care[45]; and
- to determine the person conducting a business or undertaking who has management or control of a workplace (or things within it) to determine
  - who will owe the duty of care in relation to the state or condition of the workplace, fixtures, fittings or plant, etc and the means of entering and exiting the workplace [46]

[45] Recommendation 2(e) in our first report.

[46] Recommendations 23, 24 and 25 in our First Report.

- to whom a worker may be required to notify an incident or unsafe circumstance[47];
- to whom an authorised person may be required to give notice of entry to a workplace[48] ;and
- who may be required to notify incidents[49].

23.72 The consistent element of each of these uses is the requirement for 'control' over relevant workplace, thing or activity.

23.73 OHS Acts in Australia currently use the term 'control', to determine:

- when the Act may operate or other legislation may be excluded[50];
- who will owe the duty of care in relation to the state or condition of the workplace, fixtures, fittings or plant or substance and the means of entering and exiting the workplace ;[51]
- who will owe a duty of care in relation to design or manufacture or import or supply of plant or a structure[52];
- where a person is a duty holder, the subject matter of the duty of care[53];
- the extent of the duty of care owed to contractors[54];
- in relation to what concurrent duty holders owe a duty[55]; and
- whether or not a defence applies[56].

Current definitions

23.74 Control is not defined in any of the current OHS Acts. This is perhaps not surprising, given the variety of uses to which the term is put and the difficulty in defining the term in a way that is relevant to all such uses.

23.75 Dictionary definitions of 'control' consistently refer to the following characteristics:

- command or direct;
- regulate, check or restrain;
- dominate.

23.76 This clearly connotes that control involves cause and effect – the exercise of control by one person will have an effect on the conduct of another or on outcomes.

Case law

23.77 The term 'control' has been considered in many cases in various jurisdictions and for the various uses to which it is put in the legislation, as noted above.

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[47] Recommendation 146
[48] Recommendation 215
[49] Recommendations 140 and 146
[50] Section 14 of the Cwth Act which provides that control of a workplace by a contractor for construction for maintenance purposes will determine the extent to which that Act applies in the relevant circumstances.
[51] See s.17 of the Cwth Act; s.26 of the Vic Act; s.10 of the NSW Act; s.22 of the WA Act; ss.30,34C and 34D of the Qld Act; s.23 of the SA Act; s.15 of the Tas Act; ss.22 and 23 of the ACT Act; and s.56(2) of the NT Act (by the definition of "owner" and "occupier" in s.4)
[52] See ss.24, 25 and 26 of the ACT Act
[53] The workplace, plant or substance over which the duty holder has control; s.16 of the Cwth; s.21(2)(c) and s.22(1)(b) of the Vic Act; s.8(1)(a) of the NSW Act; s.19(3)(h) of the SA Act; s.9(2)(h) of the Tas Act.
[54] Matters over which the duty holder has control; s.21(3) of the Vic Act; s.23E and s.23F of the WA Act; s.4(2) of the SA Act.
[55] See s.24(3) of the Qld Act
[56] See s.28(b) of the NSW Act; s.37(2) of the Qld Act; and s.11(2)(b) of the Tas Act.

23.78 The interpretation of the term has depended upon the use to which it has been put and the jurisdiction in which that is being considered. This has produced a range of interpretations which, while have some consistent elements, are in many respects inconsistent.[57]

23.79 The following elements appear to be clear from the cases, and applicable to the uses that we propose for 'control' in the model Act:

> *'"…control" … must, it seems to us, have about it the sense of not mere "sway", "checking" or "restraint" but rather controlling in the sense of "directing action" or "command" – the ability of the person to compel corrective action to secure safety…"*[58]*;*
>
> *"control may be present where the person has an exercisable legal ability or the practical ability to direct the conduct of another;"*[59]
>
> *"control may be found not to exist in a principal over the expert activities of a contractor, where the principal does not possess the necessary expertise to exert influence;"*[60] *and*
>
> *"more than one person may have control over the relevant matter at the same time."*[61]

Recent Reviews

23.80 An extensive consideration of the issue of control in recent reviews was undertaken by Maxwell, who devoted a chapter to the issue.[62] Maxwell considered that there should be a definition of control in OHS legislation, because:

> *'…. 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…*
>
> *...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.'* [63]

23.81 Maxwell recommended that control be included in the list of factors in determining 'practicability' and defined to include the capacity to control, whether exercised or not, and noting that the ability to influence decisions is a species of control.[64]

23.82 The NSW WorkCover Review referred briefly to concerns of stakeholders about the need for clarity in who has the obligations of a controller of work premises, but made no recommendations on the issue.[65] Other recent reviews have not considered the issue.

Stakeholder views

23.83 Many stakeholders expressed views on the issue of control.. Although some proposed that the term be defined in the model Act, the balance of views was significantly against doing so.

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[57] An analysis of a number of these cases is in "The concept of control in determining OHS responsibilities: A need for clarity", B Sherriff, 2007, 35 ABLR 298

[58] *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464, at 480.

[59] *Stratton v Van Driel Ltd* [1998] VSC 75; *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; *Moore v Adelaide Brighton Cement Ltd* [2004] SAIRC 78

[60] *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; *R v Associated Octel Limited* [1994] 4 All ER 1051; *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84

[61] *WorkCover Authority (NSW) (Inspector Mansell) v Ove Arup Pty Ltd* [2006] NSWIRComm 240; *Inspector Dall v Brambles Australia Ltd* [2006] NSWIRComm 213

[62] Maxwell Review, Chapter 11

[63] Maxwell Review, p.115, paras.481 and 482

[64] Maxwell Review, p.118, para.496. Note the recommendation of Maxwell was not adopted in the Vic Act

[65] NSW WorkCover Review, pp.32 and 34

23.84 Those who opposed defining control did so because:

- it may have the perverse outcome of focusing attention of duty holders on eliminating their control to avoid liability, rather than on the positive safety outcome of eliminating hazards;[66]
- it would be difficult to have a definition which would apply with certainty to all of the circumstances in which it may be used;[67] and
- simply that it is not needed as the law is currently clear.[68]

23.85 Those who preferred that the term be defined, did so on the basis that it would provide certainty and supported the codification in the model Act of the current case law, consistent with the summary noted above at paragraph 23.79.[69]

Discussion

23.86 The first issue to be considered by us is whether or not the term 'control' should be defined in the model Act. If a recommendation is made to define the term, we must then consider the contents of that definition.

23.87 The options available are:

Option one – leave the term undefined in the model Act and therefore very broad, subject to the interpretation of the courts.

Option two – define the term in the model Act, by stipulating the characteristics that together represent control.

Option three – define the term in the model Act to be very wide but with specific exclusions.

Option four – define the term in the model Act to be very wide but with specific characteristics or elements included.

Option five – define the term in the model Act by what it includes and what is excluded.

23.88 We refer to our earlier discussion in relation to the term 'business or undertaking' on the potential benefits and detriments of defining a term or not doing so.

23.89 We have considered at length whether to recommend that the term 'control' be defined in the model Act. We have been impressed by the arguments both ways and have been greatly assisted by the submissions and the comments made and examples given to us during consultation.

23.90 We have reached the view that we should recommend that the term **not** be defined in the model Act, for the following reasons:

1. While there has been inconsistency in the interpretations by the courts of the term, we consider this has to a significant degree arisen from the numerous uses to which the term has been put in OHS legislation. The approach that we have recommended be taken to the duties of care has limited the uses to which the term is to be put. This should allow the courts to define and apply the term consistently under the model Act
2. The courts have been sufficiently consistent in their interpretations of the term in the contexts in which it would be used in the model Act for duty holders to have confidence in

[66] ACTU, *Submission No.214,* p.23; Qld Council of Trade Unions, *Submission No.212,* p.6

[67] Johnstone et al, *Submission No.55,* p.11; Business SA, *Submission No.22,* p.35; BCA, *Submission No.56,* p.3; Unions NSW, *Submission No.108,* pp.26-27; Western Australian Government, *Submission No.112,* pp.6-7; AICD, *Submission No.187,* p.4; Victorian Government, *Submission No.139,* p.20

[68] RCSA, *Submission No.123* p.21; Western Australian Government, *Submission No.112,* pp.6-7

[69] ACCI, *Submission No.136*; MBA, *Submission No.9*; Law Council of Australia, *Submission No.163*; ANSTO, *Submission No.11*; Public Transport Authority WA , *Submission No.28*; DEEWR, *Submission No.57*; Independent Contractors of Australia, *Submission No.67*; National Safety Professionals, *Submission No.129*.

how it will be interpreted and applied. We expect that it would be applied consistently with our conclusions at paragraph 23.79 in our discussion of the case law.

3. There is considerable force in the concerns raised with us about the difficulty in providing a definition that would be sufficiently clear and applicable to all circumstances, while not narrowing what should be the wide scope of 'control'.

RECOMMENDATION 84

The model Act should not include a definition of "control".

HEALTH

Current arrangements

Usage

23.91 The primary objective of the model Act would be to protect the health and safety of all persons from risks associated with the conduct of work. Health is a primary subject matter for the model Act, each of the duties of care, other obligations and supporting provisions.

23.92 This is also the position with all current OHS legislation.

23.93 Health is the subject matter of specific obligations in OHS legislation and regulations, such as the general obligation for the monitoring of the health of workers[70] and biological health monitoring of workers' health in relation to certain hazards.

Current definitions

23.94 The term 'health' is not defined in current OHS legislation,[71] other than in the Vic Act, which provides: [72]

> *"**health**" includes psychological health.*

23.95 Dictionary definitions of health consistently refer to the state or condition of the human body or mind, with reference to a state of well-being, soundness, freedom from disease or illness or incapacity.

23.96 The World Health Organisation defines 'health' as follows:

> *"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".*[73]

23.97 The context in which health is used in OHS legislation is ordinarily not understood to include social well-being, but limited to physical and mental well-being.

[70] For example, see s.16(5) of the Cwth Act; s.22(1)(a) of the Vic Act; s.19(3)(a) of the SA Act.

[71] Note, however, that the objects of the NSW Act refer in paragraph 3(c) to promoting 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.

[72] See Definition of s.5 of the Vic Act

[73] We note that this definition has remained unchanged since 1948. It has been criticised for implying, through the reference to 'social well-being', a balance between personal and social factors and being too subjective.

Case law

23.98 As health is a well understood concept, it has not often been necessary for the term to be considered by the courts. Where the courts have done so, they have given it a meaning consistent with the definitions noted above. For example:

> *'…although "health" is not defined, I take it to mean the ordinary dictionary definition…of "soundness of body", rather than confining it to something like "freedom from illness or infection"…'.*[74]

Recent Reviews

23.99 OHS legislation, and the focus of regulators, is said to have been directed predominantly to physical safety. While this may be understandable given the clear and immediate consequences of physical risks and incidents, it is not a focus that adequately deals with the hazards and risks of this century. Mechanical hazards that give rise to incidents causing physical trauma are being better understood and controlled. Changes to the nature of work and work organisation have, however, increased the psychosocial hazards and psychological injury resulting from them. The community is now more aware of the long term physical effects of exposure to various substances.

23.100 The Maxwell Review considered at length issues associated with psychosocial hazards and what he described as occupational stress[75], when discussing emerging risks. Maxwell noted:

> *'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.'*[76]

23.101 The issue of psychosocial hazards and injury was noted in the ACT Review[77] and occupational diseases of long latency were considered by the SA Review.[78] No recommendations were made in relation to the definition of health.

Stakeholder views

23.102 Wendy MacDonald of La Trobe University[79] recommended that the WHO definition of health be adopted in the model Act.

23.103 The Victorian Government[80] and Deborah Vallance[81] each submitted that the definition of health in the Vic Act be adopted to *"…place it beyond doubt that the general duties also extend to psychological health, capturing issues such as work-related stress, fatigue, bullying and occupational violence…".*

23.104 While the Law Council of Australia[82] considered that the term health should be defined, it did not otherwise comment.

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[74] *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255 at 267.
[75] Maxwell Review, pp.31-45.
[76] Maxwell Review, p.45, para.141
[77] ACT Review, p.20
[78] SA Review, p.60
[79] Centre for Ergonomics & Human Factors, La Trobe University, *Submission No.119*
[80] Victorian Government, *Submission No.139*
[81] Deborah Vallance, *Submission No.144*.
[82] Law Council of Australia, *Submission No 163*.

23.105 We have, during the course of consultation received a number of comments on the need to emphasise the reach of the model Act to cover health and the benefit of a definition of health in doing so. The concerns have been both for psychological health[83] and physical health[84]. The following is a summary of the concerns that have been expressed to us.

Discussion

Options and issues

23.106 With the exception of the Vic Act, OHS legislation does not define 'health' and its meaning is well understood.

23.107 We consider, however, that there is merit in the suggestions that have been made in submissions and during consultation for the importance of occupational health, including psychological health, to be made more prominent in the model Act than it is in current OHS legislation.

23.108 Concerns expressed to us that the duties of care recommended by us do not sufficiently relate to health, reflect a general impression that OHS legislation is primarily concerned with physical safety and not health. The duties of care that we recommend provide, as do those in current OHS legislation, for health as well as physical safety. The duty to supervise is as much to ensure that persons are not exposed to psychological risks as physical risks. Systems of work must provide for the means for ensuring so far as reasonably practicable that the allocation and organisation of work activities does not put workers to risk to their psychological health. The monitoring of workplace conditions is important to eliminating or minimising exposure to substances that may have long term health effects. Each of these are elements of the primary duty that specifically relates to the health of workers and others, not just to their safety.

23.109 We do not consider it necessary, and it may be unnecessarily cumbersome, to refer specifically to psychological health and long-term physical health issues in the duties of care and other obligations. We do, however, agree that it would be useful for the model Act to more effectively promote these issues and place them more 'front of mind'.

23.110 We consider there to be three options for achieving this outcome:

> ***Option One*** - to provide a clear statement in the objects of the model Act, identifying clearly the objective of eliminating or minimising risks to the immediate and long-term physical and psychological health of all persons associated with the conduct of work.
>
> ***Option Two*** – to include a definition of health that refers to immediate and long-term physical and psychological health.
>
> ***Option Three*** – both options one and two.

23.111 We consider that Option Three should be adopted in the model Act.[85]

23.112 The elimination or minimisation of risks to physical and psychological health must be acknowledged as a primary object of the model Act. The changing nature of work has meant that health is an increasingly significant issue, from improvements in the control of risks to immediate physical safety, the increase in exposure to substances in respect of which there is limited experience of long term exposure effects[86], the move from a focus on manufacturing to service industries with associated psychosocial issues as noted by Maxwell.[87]

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[83] Given the increase in or at least appreciation of psychosocial stress and associated issues.

[84] Particularly with the increase of diseases of long latency and other diseases from exposure to chemicals and irritants etc.

[85] See also our recommendation relating the the first of the six main objects that we propose be included in the model Act.

[86] The growth of nanotechnology, together with the ongoing identification of long latency health risks from past substance exposure have highlighted this issue.

[87] Maxwell Review, pp.31-45

23.113 A definition of health would not only assist in highlighting health as a key element of the model Act, it would also assist in demonstrating the breadth of what is meant by health.

What should a definition contain?

23.114 We consider that a definition of health would be most useful if it identified each of the elements of health, being:

- physical and psychological;
- immediate and long-term; and
- freedom from disease or illness or incapacity.

RECOMMENDATION 85

To provide certainty that the model Act operates in relation to all aspects of health, the model Act should:

a) include objects that clearly relate to the elimination or minimisation so far as is reasonably practicable of risks to physical and psychological health; and

b) contain a definition of "health" that recognises that health relates to:

i) both physical and psychological health;

ii) immediate and long-term health; and

iii) freedom from disease or illness or incapacity.

OFFICER

Current arrangements

Usage

23.115 Our recommendations include placing a duty of care on a person described as an 'officer'[88] and imputing to a corporation the conduct of an officer[89].

23.116 OHS Acts in Australia currently use the term 'officer' in relation to the following:

- offences by officers of corporations or partnerships or unincorporated bodies[90]; and
- imputing the conduct or state of mind of an officer to a corporation[91].

We considered the relevant provisions relating to offences by an officer in our first report.[92]

Current definitions

23.117 Current OHS laws define an officer (subject to minor variations) in one of the following ways:

[88] Recommendations 40 to 43 in our first report.
[89] Recommendation 86. *sets out the definition including the definition of officer of a body that is neither an individual or corporation (i.e. partnership or association).*
[90] See s.26 of the NSW Act; ss.144 and 145 of the Vic Act; s.167 of the Qld Act; ss.59C and 61 of the SA Act; s.55 of the WA Ac; ss.10, 11 and 53 of the Tas Act; s.86 of the NT Act; s.219 of the ACT Act.
[91] See s.143 of the Vic Act; s.166 of the Qld Act; s.59A of the SA Act; s.85 of the NT Act.
[92] See pp.79 - 80 of our first report.

- adopting the meaning of 'officer' given by section 9 of the *Corporations Act 2001* (Cwth)[93]; or
- providing a specific definition (in a definition section or within the section providing the offence) which includes directors and the secretary of the corporation and each person 'concerned in the management of the corporation'[94]; or
- setting out each person, by title, including directors[95], secretary, manager or other officer or person purporting to act in such a capacity[96] and may include a liquidator or receiver or manager[97].

23.118 We note that while the Vic Act adopts the *Corporations Act 2001* meaning of officer, an officer who is a volunteer is specifically excluded from the liability of an officer of a corporation[98,] partnership or unincorporated association[99]

23.119 Section 9 of the *Corporations Act 2001* (Cwth) applies to corporations and to unincorporated associations and partnerships. In addition to the directors and others noted specifically in the third dot point above, the definition includes persons:

- who make or participate in the making of decisions that affect the whole or a substantial part of the business of the corporation; and
- in accordance with whose instructions or wishes the directors are accustomed to act.

Case law

23.120 There are a number of cases that have considered who is a person with management or control of a workplace for the purposes of s26 of the NSW Act and the equivalent in s.52 of the *Occupational Health and Safety Act 1985* (Vic) and equivalent provisions in other legislation. While Stein considered the meaning of the term to be well settled[100], that view is not universal[101]. What is clear is that the term has been given a wide meaning and has resulted in middle level managers being found to fall within that description.

23.121 As the definition of an officer under s.9 of the *Corporations Act 2001* is used for numerous purposes under various statutes, there is a significant body of case law that provides clear guidance on its application.

Recent Reviews

23.122 The Maxwell Review considered the definition of officer at length and recommended that the definition in s.9 of the *Corporations Act 2001* be adopted[102]. That review also recommended that the definition of, and liability of, officers extend to officers of a partnership or unincorporated association[103]. The review recommended that officers who are volunteers should

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[93] See s.5 of the Vic Act; and s.4 of the NT Act which refers in a note to the Corporations Act and also includes a workplace safety officer;

[94] See s.26 of the NSW Act; the approach in the Qld Act is similar in defining 'executive officer' (in the dictionary in Schedule 3) as a person who is concerned with or takes part in the corporations management, whether or not they are a director or given the name of executive officer. We also note that this was the definition used in Victorian 1985 Act.

[95] Section 53 of the Tas Act applies only to directors, although other persons may be subject to liability under s.11 as a 'responsible officer' appointed under s.10.

[96] See s.55 of the WA Act

[97] See s.4 of the SA Act

[98] See s.144(5) of the Vic Act

[99] ibid, s.145(5)

[100] Stein Inquiry, p.46

[101] M. Tooma in "Tooma's Annotated Occupational Health and Safety Act 2000", 2nd Ed, Thompson, 2004 states at page129 that *"The meaning of the phrase "person concerned in the management of a corporation" is not yet settled by the courts…".;* Thompson in "Understanding New South Wales Occupational Health and Safety Legislation" noted at page 80 that this is a difficult question and noted inconsistent application of the term in decided cases.

[102] Maxwell Review , p.172, para.769

[103] Maxwell Review, pp.173-174, paras.774 -777

be exempted from the provisions imposing liability on an officer, as not to do so may discourage people from taking up volunteer officer positions, which are of '*great public benefit'*[104]. While the recommendation by Maxwell for a positive duty on officers was not adopted, the recommendations relating to the definition of officers were adopted in the Vic Act.

23.123 The NSW WorkCover Review considered the definition of 'officer' and recommended[105] that the Vic Act definition (including the exemption of volunteers) be adopted. The Stein Inquiry considered the issue and recommended that s.26 of the NSW Act remain[106] and that an exemption not be provided for volunteers[107].

23.124 The NT Review considered the liability of officers and recommended the adoption of the Vic Act s144, including the definition of officer in s.9 of the Corporations Act.[108] It did so in part because the definition is wide enough to include holding companies in corporate groups[109]. While not expressly doing so, the NT Review by inference adopted the volunteer exemption in s.144 of the Vic Act.

Stakeholder views

23.125 A number of submissions dealt with the definition of an officer.. The submissions generally fell into two groups:

- those who considered that the definition in the *Corporations Act 2001* should be adopted[110]; and
- those who considered that the approach currently in the NSW Act and Qld Act, including a person 'concerned in the management' of the corporation, should apply[111].

23.126 The submissions and comments made to us in consultation, including by governments, academics, industry and safety professionals, overwhelmingly favoured the adoption of the *Corporations Act 2001* definition.. Their reasons included the certainty provided by that definition, the familiarity of those who would be subject to the duty of care being familiar with it, and the potential for the definition to capture more clearly directors of holding companies and franchisors. It was also considered that the expression "concerned in the management" of the corporation was too wide and may extend to those in middle management positions with only limited ability to influence the decisions that determine the capability or performance of the corporation.

23.127 Those who preferred the NSW approach did so on the basis that they considered the Corporations Act definition to be too limited and to omit some who may be involved in determining relevant matters.

Discussion

Discussion of options and associated issues

23.128 We have recommended[112] that an officer of a corporation, unincorporated association, or partnership and equivalent persons representing the Crown have a positive duty to exercise

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[104] ibid, p.174, para.778

[105] NSW WorkCover Review, p.43

[106] Stein Inquiry, p.46. Stein considered that the meaning of 'concerned in the management' was now settled.

[107] ibid, p.62. Stein reached this conclusion partly on the basis that the removal of the reverse onus of proof, placing it on the prosecution, would *'go some way to alleviating concerns held by those who are acting in director or management positions on a voluntary basis."*

[108] NT Review, p.59

[109] ibid, p.58

[110] AiG and EEA(SA), S*ubmission No.182*; AICD, *Submission No.187*; Victorian Government, *Submission No.139*; Qld Government, *Submission No.32*; WA Government, *Submission No.112*; Law Society of NSW, *Submission No.113*; Safety Institute of Australia, *Submission No.128*; Johnstone et al, *Submission No.55*; NSCA, *Submission No. 180*; Master Builders' Association, *Submission No.9*; Alan Wollard, *Submission No.10*; National Safety Professionals, *Submission No.129*

[111] For example, see ACTU, *Submission No.214*; Barrie Marr, *Submission No.14*; Neil Foster, *Submission No.30*.

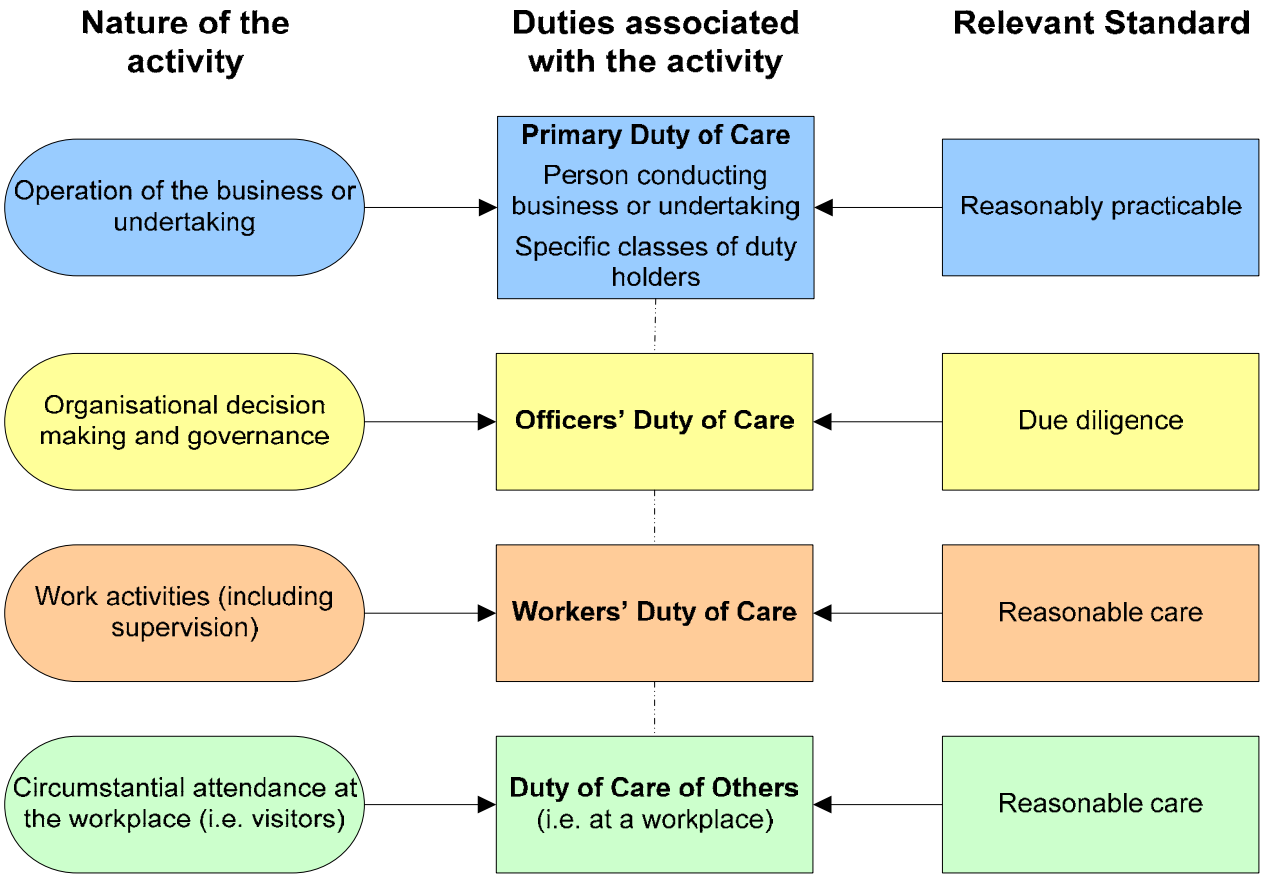
due diligence to ensure the compliance by the relevant entity with the duties of care of that entity under the model Act.

23.129 We have recommended[113] that officers should be those persons who act for, influence or make decisions for the management of the relevant entity.

23.130 The reason for our recommendation of the duty of care of an officer, and where that duty fits into the duties of care overall, are important determinants of who should be an officer and what is required of the officer to meet that duty of care.

23.131 The following diagram places into context the activities which may give rise to or contribute to risks to health and safety, the duties of care and duty holders associated with those activities, and the standard required to be met by each duty holder.

Relationship between recommended duties of care



23.132 As we noted in our first report[114] a corporation is an artificial entity that cannot make decisions or act other than through individuals. A corporation cannot comply with a duty of care placed upon it, unless those who manage the corporation make appropriate decisions to ensure necessary actions are taken. They are known as officers.

23.133 Those who attend to the governance of the corporation, making decisions for it, should have a duty to ensure that it is governed in a way that enables the corporation to comply with its

[112] Recommendations 40 and 42 in our first report.
[113] Recommendation 41 in our first report.
[114] On page 79.

duties. They are appropriately placed immediately beneath the corporation (the operating entity) in the diagram above.

23.134 The role of an officer in the governance of a corporation is clearly different from the role of providing information upon which the decision makers will act, or implementing the decisions. There is a clear difference between making decisions that provide for the governance of the entity, and making decisions on action to be taken in relation to an item of work or specific activity. The definition of officer should not blur the line between these different roles.

23.135 We have recommended that the standard to be met by an officer be 'due diligence' which, as we will note when discussing how that term should be defined[115], is directly associated with the governance of the corporation and is a high standard to be reached. It does not place the officer directly in the position of the corporation[116], but requires the officer to be actively engaged in the governance of the corporation.

23.136 The standard of due diligence is significantly higher than the standard of reasonable care[117] that we have recommended be applied to a worker[118]. The lower standard for a worker recognises that the decisions that can be made and action taken in relation to particular work will be subject to decisions made in relation to the overall management of the corporation[119].

23.137 As the standards that are required for these two levels are clearly different, so must be the definition of who the duty holder is at each level[120]. It would, in our view, be inappropriate for a person who is not sufficiently empowered to affect the key decisions of a corporation to be subject to an onerous duty relating to the making of those decisions.

How should the term be defined?

23.138 This discussion demonstrates the importance of having a clear definition of the expression 'officer'.

23.139 The question then becomes how an 'officer' is to be defined for the purposes of the model Act. The options for the definition are:

> ***Option one –*** adopt the definition in s.9 of the *Corporations Act 2001; or*
>
> ***Option two –*** adopt a definition that is consistent with s.26 of the NSW Act; or
>
> ***Option three –*** adopt the approach taken in the SA Act and Tas Act of having a 'responsible officer'[121];
>
> ***Option four –*** adopt a new definition of 'officer'.

23.140 Having considered the discussions raised in previous reports, submissions and consultation, we have concluded that Option One should be adopted, for the following reasons,

1. The definition is well known, particularly by those who would be likely to be officers within its meaning. There is a significant body of case law to assist in determining if a person is an officer within that definition. Those who are in sufficiently senior positions to fall within the definition will have access to, and be likely to obtain, lprofessional advice to confirm that the officer duty applies to them.

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[115] See the discussion from paragraph 23.165 to 23.177.

[116] As there may be many who collectively act for the corporation and whose ability to act is affected by the decisions and conduct of others.

[117] To the standard associated with criminal negligence.

[118] Recommendations 46 and 47 in our first report. We note that a manager may be a worker, by performing work.

[119] For example, the allocation of resources for an area of the business.

[120] This does not mean that a person who is an officer cannot also be a worker, if they are performing work, and owe a duty to take reasonable care in that context, in addition to the duty to exercise due diligence in relation to the governance of the corporation.

[121] Which also requires the definition of other officers as those responsible if a responsible officer is not appointed (SA Act) or in addition to the responsible officer.

2. There is greater clarity in the expression *'make or participate in the making of decisions that affect the whole or a substantial part of the business of the corporation'* [122] than the expression *'concerned in the management of the corporation'.* The former is far less likely than the latter to have unintended application to middle managers or other workers.
3. The Corporations Act definition is more likely to capture 'shadow directors', holding companies, franchisors and others that direct the decisions made by the corporation[123].
4. While we acknowledge that the SA Act and Tas Act provisions for appointment of responsible officers may assist in focusing attention on OHS compliance in an organisation, we also note:
    a) concerns that this may allow others in key positions to avoid taking an active role in OHS matters;
    b) this would still require that 'officers' be defined to capture circumstances where a responsible officer is not appointed; and
    c) it is inconsistent with usual concepts and current best practice of ensuring all key people are involved in the governance of a company[124].
5. A new definition may be hard to express in a way that is broad and clear. This also has the disadvantage of imposing a new definition at a time when the model Act will introduce other significant changes. Unless the new definition is well drafted and clear, it will require interpretation by the courts, which will take some time.

23.141 We are persuaded by the discussion in the Maxwell Report as to the appropriateness of extending the duty of care of an officer of a corporation to an officer of a partnership or unincorporated association. The Corporations Act definition includes relevant references for application to these 'non-corporate' entities.

Should volunteer officers be exempted?

23.142 The Corporations Act definition of an officer would clearly apply to a person who holds a title or acts within the scope of the definition on a voluntary basis. Volunteer officers would accordingly be subject to the duty of care of an officer unless specific provision is made to limit or exclude the operation of the definition or duty of care in relation to them.

23.143 We acknowledge that this is a very difficult issue, in which there are significant competing considerations.

23.144 Maxwell noted the concern that providing potential liability for volunteer officers may dissuade persons from undertaking this role of *great public benefit*[125]. In the current economic circumstances, we are reminded of society's reliance on volunteer organisations and volunteering individuals.

23.145 Many have expressed concern that all persons who may adversely affect the health or safety of others from their conduct should be accountable for putting people at risk. Volunteers are often involved in activities where the risks are high[126]. A person should not be any less protected by the law in relation to health and safety simply by reason that the person making key decisions is a volunteer.

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[122] As used in the *Corporations Act 2001* definition.

[123] This was an issue of concern raised in submissions and consultation. We also note the comment of Johnstone, R "…*I urge the Panel to ensure that the definition of "corporate officers" is broad enough to include "shadow directors", so that responsibility for contraventions by corporations of the general duties in the model Act can be sheeted home to entities such as holding companies and franchisors…" .* in "Harmonising Occupational Health and Safety Regulation in Australia: the First Report of the National OHS Review", Working Paper 61, National Research Centre for OHS Regulation, December 2008.

[124] This is considered important to not only assist a positive, compliance culture, but also to avoid neglect or improper conduct going undetected.

[125] Maxwell Review, p.174, para.778

[126] Such as those dealing with persons affected by drugs or alcohol, violent youths etc

23.146 We consider that a balance can be reached between these competing considerations. We recommend that a volunteer not be excluded from the definition of 'officer' or the operation of the duty of care of an officer. We recommend, however, that the duty of care of an officer provide that an officer who is a volunteer is only liable to prosecution and penalty for a Category 1 offence[127], being one where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent. This will ensure that a volunteer officer is held accountable for such recklessness or gross negligence, but is not liable for a less serious failure representing a lower level of culpability.

Representatives of the Crown

23.147 For the avoidance of doubt, we recommend that the definition of 'officer' specifically include directors and senior managers of the Crown, public sector agencies and statutory authorities.

RECOMMENDATION 86

The model Act should define an "officer" for the purposes of the duty of care of an officer of a body corporate, partnership or unincorporated association:

a) to have the meaning given by s.9 of the Corporations Act 2001 (Cwth); and

b) to include directors and senior managers of the Crown, public sector agencies and statutory authorities

RECOMMENDATION 87

The model Act should provide that an officer who is a volunteer is only liable to prosecution and a penalty for a breach of the duty of care of an officer where the breach is a Category 1 offence.

Note*: See Recommendation 55 in our first report for the categories of offence.*

DUE DILIGENCE

Current arrangements

23.148 This definition is closely associated with the definition of 'officer'. The discussion at this point should be read together with our discussion in relation to the definition of 'officer'.

Usage

23.149 Our recommendations include the use of the term 'due diligence' to determine what is required to be done to meet the duty of care of an officer.[128]

23.150 OHS Acts in Australia currently use the term to determine whether an officer has met the standard necessary to obtain the benefit of a defence to a breach of the duty of care of an officer[129].

[127] See Recommendation 55 in our first report.
[128] Recommendation 40 in our first report.
[129] See s.26(1)(b) of the NSW Act; s.167(4) of the Qld Act, which uses the term 'reasonable diligence'; s.11(2)(c) and s.53(1)(b) of the Tas Act

Current definitions

23.151 The term 'due diligence' is not defined in current OHS laws.

23.152 The term is used in various other laws relating to the conduct of the corporation, but is used in a way that applies to the specific context.

23.153 The ACT Act requires an officer to take 'reasonable steps' to prevent a contravention by a corporation, identifying[130] the following matters to which the court must have regard:

> *(a) any action the officer took directed towards ensuring the following (to the extent that the action is relevant to the act or omission):*
>
> > *(i) that the corporation arranged regular professional assessments of the corporation's compliance with the contravened provision;*
> >
> > *(ii) that the corporation implemented any appropriate recommendation arising from such an assessment;*
> >
> > *(iii) that the corporation's employees, agents and contractors had a reasonable knowledge and understanding to comply with the contravened provision;*
>
> *(b) any action the officer took when the officer became aware that the contravention was, or might be, about to happen.*

23.154 While s.180(1) of the *Corporations Act 2001* does not define 'due diligence', the terms in which it imposes an obligation on an officer to exercise care and diligence, provide a guide to what this term means and is consistent with case law. That section provides:

> *(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:*
>
> > *(a) were a director or officer of a corporation in the corporation's circumstances; and*
> >
> > *(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.*

Case law

23.155 Cases dealing with the due diligence defence under s.26 of the NSW Act tend to give limited guidance on what is meant by due diligence, as they are usually concerned only with culpability on sentencing, or in the limited number of contested cases, deal with the question of whether the officer was in a position to influence the conduct of the corporation in relation to the contravention[131] , and they have tended to be determined on their facts.

23.156 The most notable recent case is that of *Inspector Ken Kumar v David Aylmer Ritchie*[132]. In that case Haylen J commented:

> *"…Mr Ritchie relies upon the extensive systems of safety operated by the company and also his own significant involvement in the creation and maintenance of that system. None of that evidence, however, demonstrates to the civil standard that Mr Ritchie had used all due diligence to prevent the contravention by the corporation. His ignorance of… (the specific hazards and risks from the operations on site)…means that it is quite impossible to make a finding that he used all due diligence in this regard*.."[133]

[130] See s.219(4) of the ACT Act.
[131] This issue and that of due diligence have tended to be somewhat merged.
[132] [2006] NSWIRComm 323
[133] Ibid, para 177

23.157 While it appears that this was considered in relation to the control defence, the following apparently did not provide a due diligence defence:

> *"…This did not necessarily involve him or require him to become involved in day to day operations in a hands-on way but required effective reporting lines and recommendations from those with expertise in aspects of this specialist operation……he had to be active and diligent in requiring information about the nature of that business… the risks thrown up…obtaining expert advice as to the best way to remove risks from the operation…"*[134] *(para 173)*

> (it was not an excuse that) "…*He was remote from the site, lived in another country, was Chief Executive of the Group and had numerous businesses within his responsibility and, as it was suggested, could not be expected to be across the type of detail that would allow him to be involved in the creation, application and enforcement of the company's safe system of working. This was properly to be performed, so it was said, by those at a lower level who had the expertise to do so and who occupied positions that allowed them to be much more closely involved in the day to day operations of the company…"*[135]

23.158 This may be contrasted with the acquittal of a director[136] in an earlier case, where Maidment J commented:

> *"…I am of the view that Mr Coster has demonstrated that he used all due diligence to prevent any such contravention by the company. He was at the peak of a hierarchical system which was responsible to ensure the safety of the project and, as such, had to rely upon the activities of others. The evidence discloses that he quickly responded to concerns...(attended the site).. He had full time safety personnel of whom he required vigilance…and bearing in mind the proactive and substantial safety personnel deployed by him on the site.. "* [137]

23.159 and in another case in respect of 'all due diligence' under environmental laws:

> *"…Whether a defendant took the precautions that ought to have been taken must always be a question of fact.. objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such a person to say that he did his best given his particular abilities, resources and circumstances…"*[138]

23.160 The test applied for due diligence in other contexts appears to be less strict:

> *"…in order to establish the defence, would be that it had laid down a proper system to provide against the contravention or the Act and that it had provided adequate supervision to ensure the system was properly carried out…"*[139]

23.161 A test for due diligence commonly referred to is that spelt out in *R v Bata Industries Ltd (No 2)*[140] , which according to Tooma[141] requires that a defendant director must show in relation to OHS that:

1. they were familiar with their occupational health and safety obligations and relevant codes of practice and industry standards;

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[134] Ibid, para 173
[135] Ibid, para 174
[136] Under s.50 of the NSW 1983 Act, equivalent to s.26 of the NSW Act.
[137] *Workcover Authority of NSW (Insp Dowling) v Barry John Coster* [1997] NSWIRComm 154
[138] *State Pollution Control Commission v Kelly* (1991) 5 ASCR 607 at 609.
[139] *Universal Telecaster (Qld) Ltd v Guthrie* (1978) 18 ALR 532 at 534; a case under the Trade Practices Act 1974 (Cwth).
[140] (1992) 7 CELR 245.
[141] M. Tooma, "*Tooma's Annotated Occupational Health and Safety Act 2000*", 2nd Ed, Thompson 2004, p.130.

2. they had a system in place to manage occupational health and safety risks and that they adequately supervised compliance with that system;
3. the system complied with industry standards and practices;
4. company officers reported back to the board on the operation of the system and safety concerns were reported in a timely manner;
5. they reacted personally and immediately upon becoming aware of the system failure.

Stakeholder views and recent reviews

23.162 The ACTU[142] stated its support for the CFMEU[143] position that the term 'due diligence' should be 'tight'. The CFMEU provided a well researched submission on the issue of the liability of an officer, including following note on due diligence[144]:

> *'The concept of due diligence in Roman law (Bird, 1983) had two grades that was "all possible" and "that which is usually employed by someone in their own affairs". Any use of this concept in regards to OHS would need to refer to the former meaning. To that end in the following section of the Criminal Code Act 1995 (Cwth) has had an additional limb of due diligence added as follows;*
>
> *"inadequate corporate management, control or supervision of the conduct of OHS management systems, policies, procedures and practices in respect to all workers engaged for the undertaking." '*

23.163 A group of lawyers experienced in matters under the NSW Act commented[145]:

> *'…the "all due diligence" defence. The way in which this defence operates in NSW is to impose upon an individual the onus to demonstrate that the individual has used "all due diligence" in relation to a particular and specific contravention. For large organisations, the imposition of such a burden on an individual is unfair and, in many respects, unworkable…'*

23.164 A similar concern has been expressed to us in consultation, that it is an overly onerous and unrealistic burden on an officer to be aware of and involved in the minutiae of the specific circumstances at a workplace, at a point in time that gave rise to an incident representing a breach by the corporation.

Discussion

23.165 We refer to the diagram at paragraph 23.131 in which we set out the relationships between the duties of care that we recommend, and how each duty of care relates to the role and activities of the duty holder. We also refer to our earlier comments when discussing who should be an officer and why.

23.166 We consider that the standard of conduct required of a duty holder should directly relate to that person's role and what a reasonable person in the position of the duty holder would do in the circumstances.

23.167 As we noted at paragraph 8.42 in our first report, the standard of due diligence should be no more stringent than that of 'reasonable care', except that due diligence would require the officer to be proactive and take reasonable steps to identify what the entity must do and ensure that it is done. Reasonable care (as required of a worker) may only require enquiries and action in relation to what is known or ought to be known by them about particular circumstances.

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[142] ACTU, *Submission No.214*
[143] CFMEU, *Submission No.218*
[144] ibid, at para 99
[145] Hodgkinson et al, *Submission No.199*

23.168 We note the significant differences between the standards required of the duty holders and the much higher level of penalties that may be applied to an officer than to a worker. These are matters that make clarity of compliance requirements for an officer more important than under current OHS laws. We were asked on a number of occasions during consultation to make clear what is required for compliance.

23.169 We are not confident that the case law regarding due diligence in OHS is sufficiently clear to provide consistent and fair outcomes, or to assist officers to understand what they must do to comply with their duty of care. As an officer will have a positive duty of care to exercise due diligence, it is important that the officer be aware of what that requires them to do.

23.170 We therefore propose that the term 'due diligence' be defined in the model Act to provide that clarity.

23.171 The standard of due diligence by an officer must be very high, but achievable. It should be directly related to the role and influence of the officer within the entity.

23.172 The definition of due diligence should be expressed to include certain matters, This would provide guidance to the duty holder, while not limiting what may be required in specific circumstances.

23.173 We note that the most recent OHS legislation, the ACT Act, sets out some of the matters that are within the scope of the role of an officer and with respect to which the officer should take reasonable steps.

23.174 As the role of the officer is the governance of the entity and making decisions for its management, what is required of the officer should be directly associated with that. The standard should be a high one, requiring ongoing enquiry and vigilance, to ensure that the resources and systems of the entity are adequate to comply with the duty of care of the entity – and are operating effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

23.175 An officer should take all reasonable steps to ensure that the officer receives timely information about incidents or hazards and risks that are not minimised so far as is reasonably practicable, and for appropriate action to be taken in relation to those matters. The officer should not be required to make herself or himself aware of the specific day to day circumstances in workplaces of the entity, or specific risks, unless:

- in receipt of information identifying a significant issue to be addressed or a failure of the OHS processes of the entity; or
- the officer is directly involved in specific activities of the entity (in which case he/she would have the duty of care of a worker in addition to that of an officer) .

23.176 We have included in our recommendation the various elements, in broad terms, that should be required for due diligence by an officer. Each of these matters are consistent with, but more detailed and proactive in nature than, the matters noted in s219(4) of the ACT Act.

23.177 Further consultation prior to the drafting of the definition may be beneficial.

RECOMMENDATION 88

The model Act should define "due diligence" for the purposes of the duty of care of officers, to provide direction as to the appropriate role of an officer in OHS and how compliance may be achieved.

The definition should be stated to include the following elements:

1. The standard for the officer is to be assessed against what a reasonable person in the position of the officer would do

2. The officer is required to take reasonable steps proactively and regularly to ensure:
   a) up to date knowledge of OHS laws and compliance requirements;
   b) an understanding of the nature of the operations of the entity and generally the hazards and risks associated with those operations;
   c) that the entity has available and uses appropriate resources and processes to enable the identification and elimination or control of specific OHS hazards and risks associated with the operations of the entity;
   d) verification of the implementation by the entity of the matters referred to in c.; and
   e) a process for receiving, considering and ensuring a timely response to information regarding incidents, identified hazards and risks.

OHS SERVICE PROVIDER

Current arrangements

Usage

23.178 Our recommendations include placing a duty of care on a person described as an 'OHS service provider'[146].

23.179 Only the Tas Act currently uses the term.[147]

Current definitions

23.180 The Tas Act defines 'service provider' to mean a person who –

> *(a) is engaged to provide a service at, or in connection with, a workplace; or*
>
> *(b) is licensed, registered or holds a certificate issued by the Director under the regulations.*

Stakeholder views and recent Reviews

23.181 The definition of an OHS service provider, or the scope of the duty of care, were not commented on in submissions, or in recent reviews.

23.182 During consultation following our first report, some concerns were raised with us about the scope and application of the proposed duty of care for service providers. We were asked to ensure that the duty of care did not apply to:

- inspectors providing advice or giving directions in the exercise of their roles and powers under the model Act;
- union officials providing advice either as part of the exercise of their powers upon entry to a workplace, or in their role under industrial law of representation and exercising freedom of expression and association;
- lawyers providing legal advice which would be subject to legal professional privilege (although this is a privilege of the client, not of the lawyer, the concern is that lawyers

[146] Recommendations 37 to 39 in our first report.

[147] In s.21 – duty of persons conducting a business or undertaking to self and other people. Note also *'conducting of the employer's undertaking'* in s.38 of the (currently still operating) ACT Act 1989 – duty of employers in relation to third parties.

would be reluctant to provide this advice if subject to a duty of care and duty holders may thereby be left without advice on the application of a duty of care to them and what they must do to comply);

- safety consultants who assist duty holders to understand the practical requirements of duties of care and assist duty holders to meet the duties of care; and
- individuals who are providing advice as part of their employment or engagement within a business or undertaking.

23.183 We have also been told that the duty of care we recommend would be inappropriate and unfair as OHS service providers cannot compel a duty holder to do anything. Our comment at paragraph 7.105 in our first report that a provider of OHS services can *'materially influence health or safety by directing or influencing things done or provided for health or safety'* was disputed. Some were concerned that compliance with the duty of care would be unachievable because of a lack of influence or control by the service provider.

23.184 This term has not been considered in any recent reviews of OHS Acts.

Discussion

Should the term be defined?

23.185 We will in this discussion comment on the concerns raised during consultation. It is clear from those concerns, that the term '*OHS service provider'* should be defined in the model Act to identify the scope and intended application of the duty of care. We also note that the duty of care is relatively new and that there is no guidance in cases on how it may be interpreted and applied. That guidance may be provided in a definition of the duty holder.

23.186 We propose that the term '*OHS service provider'* be defined in the model Act.

Will the duty of care be unfair or unable to be complied with?

23.187 We note first that some of the concerns noted above may be addressed by considering the duty of care, its relationship to the primary duty of care, duties of care under current OHS Acts, and the application of the qualifier of 'reasonably practicable'. If these concerns are addressed, it is more appropriate that the term be given a broad meaning. If the concerns are valid, then they may suggest the term and application of the duty of care should be limited.

23.188 The primary duty of care would require a person providing advice, information, systems etc for OHS purposes in the conduct of a business or undertaking to ensure so far as is reasonably practicable, that in doing so workers and others are not exposed to a risk to their health or safety. The separate duty of care for OHS service providers does not provide any additional duty on such a person. The separate duty of care is intended to make clear that such persons do have a duty of care when undertaking the relevant activities.

23.189 Where the person providing OHS services is an employer or self-employed person, and the services are provided as part of the conduct of a business or undertaking, the service provider is subject to a duty of care under most current OHS Acts that is equivalent to the primary duty of care and the duty of care of an OHS service provider.

23.190 Our recommendation for the duty of care of an OHS service provider accordingly does not require anything more than is required under current OHS Acts.

23.191 The issue of causation is an important practical limiter on the duty of care of an OHS service provider. The recommended duty of care would require the service provider to ensure so far as reasonably practicable that persons are not exposed to risks to their health and safety *from the provision of the services*. If persons are put to a risk because the advice or recommendations of the service provider are not followed, then it cannot be said that the risk was from the provision of the services.

23.192 It is also important to note that the duty of care we recommend[148] specifically refers to things provided *that are relied on by other duty holders* to comply with their obligations under the model Act. The duty of care would not lead to liability of the service provider where the service was not relied on.

23.193 There will be many circumstances where a service provider may expose people to a risk, should the services not be provided competently and completely[149]. The provider should be accountable if the advice or information was followed and it was incorrect.

23.194 Some have expressed concern that the ability of the service provider to meet the duty may be compromised by inaccuracy or inadequacy of instructions or information provided to them by the person requesting the services. As noted in our discussion of reasonably practicable in Chapter 5 in our first report, what the duty holder knows is an element of what is reasonably practicable. It is also evident that what a person can do, and can reasonably be expected to do, will be limited by the knowledge and information available to them. This does not mean that a person can refrain from seeking information or challenging clearly inaccurate information, where that information is significant to the service they are to provide.

23.195 A service provider would therefore not be in breach of the duty of care if the provision of services puts a person at risk, where that results from inadequate or inaccurate instructions or information and the service provider could not, or could not reasonably be expected to, know of that inaccuracy or inadequacy.

23.196 We therefore consider that there are sufficient safeguards against inappropriate application of the duty of care of an OHS service provider, for it to be given a broad scope through a wide definition of the duty holder.

What services should be included in the definition?

23.197 The range of services provided by a person to another duty holder is very wide and will change over time. A definition of an OHS service, through the definition of an OHS service provider, should therefore be broad and not limiting.

23.198 An inclusive definition, identifying in broad terms the types of things which may fall within the duty (but not limiting the duty to those listed items) may provide guidance to duty holders. These may usefully include:

- advice or information on any matter related to the health or safety of any person;
- systems, policies, procedures or documents relevant to the management of OHS, broadly or in relation to specific matters;
- training on matters relating to OHS; and
- testing, analysis, information or advice (including, but not limited to, mechanical, environmental or biological matters).

Should any persons be excluded from the definition?

23.199 We have noted above, the submissions made to us during consultation that certain persons or classes of persons should be excluded from the definition of an OHS service provider. Some of those persons may appropriately be excluded, while the application of the duty of care may appropriately limited in relation to others.

23.200 The duty of an OHS service provider is, in effect, a sub-category of the primary duty of care. It must be consistent with that duty of care. We intend that the OHS service provider must be someone who is providing the service in the conduct of a business or undertaking. For the

[148] Recommendation 37 in our first report.

[149] For example, atmospheric testing, provision of risk management systems, risk assessments undertaken on items of plant, training in risk assessment processes, advice on available and suitable risk controls.

reasons noted in our first report[150] in relation to the primary duty, we recommend that the duty of care of an OHS service provider specifically exclude workers and officers to the extent that they are not conducting a business or undertaking in their own right. We again note that such persons will owe the duties of care applicable to them as a worker or officer, when undertaking their tasks.

23.201 This would mean, for example, that a person employed by a corporation to provide OHS advice, would not be subject to this duty of care and subject to the requirement to do proactively all that is reasonably practicable. They would be subject to the duty of a worker to take reasonable care. To provide otherwise may make people reluctant to take on OHS roles within an organisation.

23.202 Consistent with duty being associated with the conduct of a business or undertaking, we propose that the definition include the reference found in the Tas Act definition that the provider is engaged to provide the services.

23.203 The duty is intended to apply to persons who are providing services as part of the conduct of a business or undertaking. Where advice or information or other relevant services are provided in the course of exercising a role or power under the model Act, then such activities should not be the subject of the duty. The provider would not have been engaged to provide the services. This may apply to an inspector, or a health and safety representative or person assisting them, or an authorised person exercising powers on entry to a workplace. We also note that each of these individuals will be a worker and therefore excluded by definition from the duty of care.

23.204 While the qualifier of 'reasonably practicable' should work to prevent liability being inappropriately incurred by emergency services personnel who give advice or instruction when responding to a serious and immediate risk, we recommend that the definition of OHS service provider specifically exclude them in such circumstances. Should they provide services on engagement, in other circumstances, then the duty should apply to them.

23.205 The ACTU has submitted that the definition of OHS service provider should exclude registered industrial organisations and peak union councils. They are representative organisations providing advice and information to workers and act to further and defend the interests of workers. The ACTU is concerned that to impose the duty of care on these organisations may curtail the rights of freedom of expression and association provided by the ILO Declaration of Philadelphia which underpins ILO C87 Freedom of Association and Protection of the Right to Organise Convention 1948. The ACTU also notes Article 19(c) of ILO C155 that states:

> *"…representatives of workers in an undertaking are given adequate information on measures taken by the employer to secure occupational safety and health and may consult their representative organisations about such information provided they do not disclose commercial secrets."*

23.206 We are grateful to the ACTU for drawing this issue to our attention and we have considered the matters raised. As noted above, the duty would not apply to the individual workers, or where roles or powers under the model Act are being exercised. We consider, however, that in circumstances where a union organisation is engaged to provide services as part of a business or undertaking conducted by the organisation, the duty of care should apply to it. An example is the provision of paid training courses.

23.207 We do not consider that applying the duty of care to union organisations in such limited circumstances would be contrary to the ILO Declaration or Conventions.

23.208 The final matter for consideration is whether lawyers should be excluded from the duty of care where they are providing advice or other services relating to OHS. The argument for their exclusion is as follows.

[150] Paragraphs 6.56 to 6.62.

23.209 It is said that it is essential that duty holders seek and obtain advice on the meaning and application of the duties of care and obligations under the model Act, and how to comply with those duties and obligations. This is in essence the main justification for the availability of legal professional privilege[151]. That is a privilege of the client (not the lawyer) and may be waived by the client. If the client faces an allegation of a breach of a duty, where it followed the advice of the lawyer, then it may be expected that the privilege may be waived by the client. The release of the advice of the lawyer may lead the lawyer to being found in breach of the duty of care of an OHS service provider. Faced with this possibility, lawyers may be reluctant to provide OHS related advice and the ability of duty holders to understand and comply with the model Act will be compromised.

23.210 We can see some merit in this argument, although the qualifier of reasonably practicable should be noted as a limiter on the potential liability. Notwithstanding that the qualifier should greatly limit the prospects of an unfair application of the duty of care, the support and maintenance of legal professional privilege is considered to be so important as to suggest that privileged communications should not be the subject of the duty of care.

23.211 This does not in our view mean that lawyers should be excluded from the definition of OHS service provider. The lawyers may provide services that go beyond strict legal advice that would be subject to legal professional privilege. To enable them to avoid the application of the duty of care entirely may place them in a position of advantage over other providers (although we again note that they would be subject to the primary duty of care).

23.212 We accordingly recommend that the definition of an OHS service provider exclude lawyers when they are providing advice to which legal professional privilege may apply.

23.213 We note that the primary duty may apply in any event to the lawyer providing privileged advice. While we are not in favour of any limitations on the primary duty, this is a matter that may be appropriately considered by the drafters of the model Act.

RECOMMENDATION 89

The model Act should define an "OHS service provider" to include persons engaged by another duty holder to provide any or all of the following ("**OHS service**") in the course of conducting a business or undertaking, (other than in the capacity of a worker or officer):

a) advice or information on any matter related to the health or safety of any person;

b) systems, policies, procedures or documents relevant to the management of OHS, broadly or in relation to specific matters;

c) training on matters relating to OHS; and

d) testing, analysis, information or advice (including, but not limited to, mechanical, environmental or biological matters)

but **not** to include:

a) a person providing an OHS service as part of the performance or exercise of a function, role, right or power under the model Act; or

b) a person providing an OHS service while undertaking activity specifically required or authorised by or under any Act or regulation; or

c) a member or employee of an emergency service organisation, providing advice or information during the course of responding as a matter of urgency to circumstances giving rise to a serious risk to the health or safety of any person; or

d) a legally qualified person practising as a barrister or solicitor when, and to the extent only

[151] See the discussion on this privilege in Appendix E and in Chapter 42 relating to Questioning by an inspector.

to which, that person is providing advice to which legal professional privilege may apply.

PLANT

Current arrangements

Usage

23.214 Our recommendations include the use of the term 'plant' to determine who will owe duties of care, identified as being within a specified class of duty holder, relating to the design, manufacture or supply of plant.[152]

23.215 OHS Acts in Australia currently use the term to identify who owes duties similar to those that we recommend in relation to plant.

Current definitions

23.216 'Plant' is currently defined in a number of OHS Acts[153]. It is defined consistently in an inclusive manner, to enable it to be interpreted broadly, with the definitions appearing to be included to confirm the intended broad application.

23.217 Plant is most broadly defined in the Vic Act[154] to include:

> *"(a) any machinery, equipment, appliance, implement and tool; and*
>
> *(b) any component of any of those things; and*
>
> *(c) anything fitted, connected or related to any of those things."*

23.218 The definitions make clear that 'plant' is not only large, static, items of complex machinery but also includes manually held and manually powered tools.

Stakeholder views and recent reviews

23.219 While a small number of submissions[155] referred to the definition of plant, these mainly indicated that the term should be defined, with indications for definitions being consistent with or by reference to, existing definitions.

23.220 This term has not been considered in any recent reviews of OHS Acts.

Discussion

23.221 We consider it to be beneficial for the model Act to include a definition of plant to make clear the broad application of that term.

23.222 We consider the definition of plant in the Vic Act[156] to be a good model for the definition.

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[152] Recommendations 29 to 35 in our first report.

[153] See s.5 of the Cwth Act; s.4 of the NSW Act; s.5 of the Vic Act; Dictionary to the ACT Act; s.3 of the WA Act; s.3 of the Tas Act; s.4 of the SA Act; and Schedule 3 to the Qld Act

[154] See s.5 of the Vic Act

[155] For example, see Johnstone et al, *Submission No.55*; DEEWR, *Submission No.57*; Unions NSW, *Submission No.108*; Western Australian Government, *Submission No.112*; Law Society of NSW, *Submission No.113*; National Safety Professionals, *Submission No.129*.

[156] See s.5 of the Vic Act

RECOMMENDATION 90

The model Act should define "plant", using the definition in s.5 of the Vic Act as a model.

SUPPLY

Current arrangements

Usage

23.223 Our recommendations include the use of the term 'supply' to determine who will owe the duty of care of a supplier[157] and when that duty will arise.

23.224 OHS Acts in Australia currently use the term, or the related term 'supplier' for the same purpose.

Current definitions

23.225 The ACT Act defines supply by what it includes:

> *"supply, or resupply, by sale, exchange, lease, hire or hire-purchase, whether as principal or agent"*[158]

and in the duty section[159] by including supply of a structure if the person owns the structure or is in control of the structure. The ACT Act provides that a person is not in control of the supply of a thing if they are a 'passive financier'[160].

23.226 The NSW Act does not define 'supply' but the duty section contains provisions[161] relating to its operation (and therefore supply for the purposes of the Act) including the matters noted in italics above in the ACT Act, and that the supply must be in the course of a trade, business or other undertaking (whether for profit or not).

23.227 The duties of care in the Qld Act of a supplier of plant[162] or substances[163] are stated to not include a manufacturer when supplying, but to include an importer when supplying.

23.228 The WA Act defines 'supply' similarly to the italicised phrase above, but also includes the disposal of assets of a business that include any plant or substances, and the disposal of all of the shares in a company that owns any plant or substance.[164]

23.229 The Tas Act also defines 'supply' similarly to the italicised phrase above.[165]

Case law

23.230 We note that while each of the definitions deal with the transactions by which supply occurs, they do not indicate the time at which supply occurs. This issue has been considered,

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[157] Recommendations 30, 35 and 36 in our first report.
[158] See Dictionary of the ACT Act
[159] ibid, s.26(5)
[160] ibid, s.26(4). 'Passive financier' refers to a person financing the buying or use of a thing by another person, without taking possession of it or doing so only to pass possession to the other person. Similar exclusions are found in the Vic Act, see s.30(2); and NSW Act, see s.11(2)(f)
[161] See s.11(2) of the NSW Act
[162] See s.32B(5) of the Qld Act
[163] ibid, s.34A(3)
[164] See s.3 of the WA Act
[165] See s.3 of the Tas Act

although not clearly resolved in two NSW cases[166] from which we are able to draw the following conclusions:

1. Supply is likely to occur at the time of physical delivery;
2. Each act of supply is a single event; and
3. Supply could 'conceivably' occur at a time later than the passing of possession, such as when title to the item passes.

Recent Reviews

23.231 The Maxwell Review noted that 'supply' was not defined in the Vic 1985 Act but stated that the term did not require definition[167]. He did, however, recommend the passive financier exclusion from the supplier obligation.

Stakeholder views and recent reviews

23.232 Most of the submissions on the definition of supply supported a broad definition consistent with the italicised phrase above, either setting out these characteristics or referring to the current provisions that contain them.[168] Some emphasised that supply should be defined to occur each time an item changes hands[169], or control is passed[170].

23.233 The ACCI considered that there was no need to have a category of duty of a supplier, but if so, then supply should be given its natural meaning.[171]

Discussion

23.234 We note that supply is defined with some consistency in most current OHS Acts. The definitions indicate the types of transactions by which supply occurs. We consider it would be useful for these provisions to be contained in the model Act, to provide certainty to duty holders.

23.235 We are aware that the obligations of a supplier of plant are often overlooked upon the sale of a business. We consider the definition should therefore include the WA Act provisions relating to the sale of business assets or shares.

23.236 The definitions of supply in current OHS Acts do not make clear when supply occurs, only the transactions by which it occurs. As the significance of supply is the potential exposure of persons to risk to their health and safety from the plant or substance, supply for the purposes of the duties of care should occur at the time of passing of physical possession of the item.

23.237 We make the following recommendation for the definition of supply in the model Act.

RECOMMENDATION 91

The model Act should define "supply" to be, and occur at the time of, passing of physical possession of a relevant item:

a) directly or through an intermediary;

b) whether by way or sale, re-supply, exchange, lease, hire or hire-purchase or otherwise;

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[166] *Inspector Forster v Osprey Manufacturing Pty Ltd* [2003] *NSWIRComm 161; Inspector Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 298.
[167] Maxwell Review, p.188, para 841
[168] For example, see MBA, *Submission No.9*; SIA, *Submission No.128*; National Safety Professionals, *Submission No.129*; NSCA, *Submission No.180*.
[169] Queensland Government, *Submission No.32*; Western Australian Government, *Submission No.112*; Law Society of NSW, *Submission No.113*;
[170] AiG and EEA(SA), *Submission No.182*
[171] ACCI, *Submission No.136*

c) including by sale of business assets including the relevant item or all of the shares in a company that owns the relevant item;

d) but not including an act by which the owner resumes possession at the conclusion or termination of a lease or other agreement.

UNION

Current arrangements

Usage

23.238 Our recommendations include the use of the term 'union' for the purposes of:

- right of entry of an authorised person[172]
- representation of a worker in a civil action under the model Act for discrimination, victimisation or coercion[173]

23.239 OHS Acts in Australia currently use the term, or an equivalent expression, as follows:

- ***NSW Act*** – in relation to an 'industrial organisation of employees' being involved in representation of employees in determining consultation arrangements[174], and for the authorisation of an 'authorised representative' for the purposes of workplace entry[175], and instituting proceedings for offences[176];
- **Vic Act** – in relation to workplace entry by an employee or officer of a 'registered employee organisation' as an 'authorised representative'[177];
- **Qld Act** – in relation to workplace consultative arrangements[178]; and 'employee organisation' in relation to authorised representatives to enter a workplace and exercise powers[179];
- **WA Act** – a trade union is entitled to be provided with advice by the Commission[180] and the trade union must not discriminate against a HSR or member of a health and safety committee[181]
- **NT Act** – Division 7 of Part 4 provides for authorised union[182] representatives for the purpose of workplace entry;
- **SA Act** – a 'registered association' may assist in the formation of work groups[183] and disputes relating to the election of health and safety representatives[184];

[172] Recommendation 209.
[173] Recommendation 132.
[174] See s.17(3) of the NSW Act
[175] Division 3 of Part 5 of the NSW Act; s76 relating to the definition of 'authorised representative'.
[176] See s.106(1)(d) of the NSW Act
[177] See Part 8 of the Vic Act
[178] See Part 7 of the Qld Act. This includes representation of workers by a union during negotiations relating to workplace health and safety representatives (sections 70 and 76) and conduct of elections (section 74) and as to health and safety committee membership (section 87).
[179] See Part 7A. of the Qld Act
[180] See s.14(1)(d) of the WA Act
[181] See s.56(2) of the WA Act
[182] This term appears interchangeably with 'employee association' throughout the Division but is not defined.
[183] See s.27(4) of the SA Act
[184] See s.28(8) of the SA Act

- **ACT Act** – Division 4.4 provides for an employee or office holder of a 'registered organisation' to be an authorised representative for entry to a workplace.

Current definitions

23.240 The following Table 29 provides definitions that are used for the relevant term in current OHS Acts:

TABLE 29: Definition of 'Union'

Jurisdiction	Definition
NSW[185]	*an 'industrial organisation of employees' means* *an industrial organisation of employees registered, or taken to be registered, under Chapter 5 of the Industrial Relations Act 1996.*
Vic[186]	*s79 defines a 'registered employee organisation' to mean* *an organisation, of which some or all of the members are employees, that is registered, or taken to be registered, under Schedule 1B to the Workplace Relations Act 1996 of the Commonwealth.*
Qld[187]	*'union' means* *an employee association registered, or taken to be registered, as an organisation under the Industrial Relations Act 1999.*[188] *'employee organisation' means* *(a) an employee organisation under the Industrial Relations Act 1999; or* *(b) an organisation of employees under the Workplace Relations Act 1996 (Cwth).*
WA[189]	*'registered association' means* *(a) and association registered under the Fair Work Act 1994 or the Industrial Relations Act 1988 of the Commonwealth; or* *(b) the United Trades and Labor Council.*
SA[190]	*'trade union' means* *(a) an organisation registered under section 53 of the Industrial Relations Act 1979; or* *(b) an organisation registered under the Industrial Relations Act 1988 of the Parliament of the Commonwealth and having employees as its members, or a branch of any such organisation.*
ACT[191]	*'registered organisation' means* *an organisation registered under the Workplace Relations Act 1996 (Cwlth), schedule 1 (Registration and Accountability of Organisations).*

Recent Reviews

23.241 Although the Maxwell Review and the NT Review each considered the issue of right of entry for employee representative organisations, they did not discuss or make any recommendations on the definition of a union or representative organisation for that purpose.

185 See s.5 of the NSW Act
186 See s.79 of the Vic Act
187 See s.90B of the Qld Act
188 See s.66 of the Qld Act
189 See s.4 of the WA Act
190 See s.3 of the SA Act
191 See the Dictionary of the ACT Act

23.242 Similarly, while the NSW WorkCover Review considered the powers and protections of authorised employee representatives, it did not consider the definition of the relevant organisations.

Discussion

23.243 As we recommend specific roles, associated powers and responsibilities for unions and their officials or employees, the model Act should clearly define what organisations will be included.

23.244 A notable characteristic of definitions of 'union' and similar terms in current OHS Acts is that they are each quite different. This results from the jurisdictional basis for the qualification of a relevant body and the application of the relevant OHS Act to them.

23.245 Another characteristic is that many have become redundant by the passage of time and amending or repealing legislation. Further change is proposed with the introduction of the Fair Work Bill 2008.

23.246 A definition in the model Act must meet the circumstances and requirements of each jurisdiction in which it will be adopted. It should be flexible enough to accommodate change in legislation or union organisation or arrangements, while being clear enough to ensure that those intended to be the subject of the model Act (and not others) are brought within the definition.

23.247 We consider that references to unions in the model Act should be to unions that are registered or taken to be registered under industrial laws. This is because such bodies have legal personality, rules, officers, employees and the capacity and resources to play their part under the legislative scheme. For this reason we propose that each Act define a union as an association of employees (or whatever term is locally used) registered under the relevant Commonwealth or State industrial relations Act.

23.248 We therefore make the following recommendation for the definition of 'union' in the model Act.

RECOMMENDATION 92

The model Act should define the term 'union' so that it covers:

> *an association of employees (or whatever term is locally used) registered or taken to be registered under the relevant Commonwealth or State industrial relations Act*.

WORKER

Current arrangements

Usage

23.249 Our recommendations include the use of the term 'worker' to determine:

- who will owe the duty of care of a worker[192]
- who will be a worker to whom the primary duty of care is owed;[193]

[192] Recommendations 10 to 15 in our first report.

[193] Recommendation 16 in our first report relating to the primary duty of care and Recommendation 93 relating to the definition of worker.

- who will have the obligation to report an incident or unsafe circumstance at a workplace to a relevant person;[194] and
- who may be involved in the determination of work groups, election of health and safety representatives, health and safety committees, issue resolution and consultation.[195]

23.250 Most OHS Acts in Australia currently use the term 'employee' with its usual legal meaning[196]. We have indicated in our first report[197] that we propose to use a wider term 'worker'. While some Acts extend 'employee' to include contractors, a broader defined term 'worker' is only currently found in the NT, ACT and Qld Acts, as provided in Table 30 below.

TABLE 30: Definition of ''Worker'

Jurisdiction	Definition
Qld[198]	*If the person works, other than under a contract for services, for or at the direction of an employer*[199] *and* *A person may be a worker even though the person is not paid for work done by the person.*
NT[200]	*a) any person who works in the employer's business;* *i. as an employee; or* *ii. as an apprentice or person undergoing on-the-job training; or* *iii. as a contractor or sub-contractor; or* *iv. as an employee of a contractor or a sub-contractor; or* *v. as an employee of a labour hire company who has been assigned to work for the employer; or* *vi. as a volunteer; or* *vii. in any other capacity;* *b) if the employer is a natural person who works in the employer's business – the employer him/herself.*
ACT[201]	*An individual who carries out work in relation to a business or undertaking, whether for reward or otherwise, under an arrangement with the person conducting the business or undertaking.* Examples are also provided that are similar to some of the categories in the NT definition.

Recent Reviews

23.251 The NT Review considered the issue of coverage of the legislation and noted that it should cover the *"broadest range of workers as is practicable, and that contractors and other*

[194] Recommendations 17, 19 and 20 in our first report.
[195] Recommendations 96-99, 100-104 and 116-120.
[196] A person employed under a contract of service.
[197] For example Recommendations 10 and 16. See the discussion in particular at paragraphs 6.89 to 6.93.
[198] See s.11 of the Qld Act
[199] The section contains a note that a subcontractor works under a contract for service and is not a worker under the Act.
[200] See s.4 of the NT Act
[201] See s. 9 of the ACT Act

types of contingent workers needed particular consideration".[202] That is reflected in Recommendation 7 of the NT Review and the definition of 'worker' in the NT Act.

23.252 While the NSW WorkCover Review considered the coverage of the NSW Act[203], it did not make any recommendations relevant to the definition of worker, appearing to maintain the use instead of employee.

23.253 The ACT Review considered the need for OHS legislation to deal with the changing labour market[204] and recommended that reform *"be guided by the need to address contemporary changes to work and employment arrangements (including sub-contracting, labour hire, and franchising)"*.[205] After detailed discussion on "*Who is a 'worker'*" [206] the ACT Review recommended[207]

> *(c) That the OHS Act be drafted to broaden coverage to all persons who have a worker-like relationship with an employer or principal along the lines of the Crimes (Industrial Manslaughter) Amendment Act 2003 in relation to employees, independent contractors, outworkers, and apprentices and trainees.*
>
> *(d) That the OHS Act be drafted to provide a mechanism for the coverage of volunteers who work in employment-like settings.*

23.254 The Maxwell Review also considered this issue and recommended that a new term 'worker' be introduced[208] in the following terms:

> *"worker" means:*
>
> *(i) in relation to an employer – an employee or a person working in the employer's undertaking.*
>
> *(ii) in relation to a proprietor – a person working in the proprietor's undertaking."*[209]

Stakeholder views and recent reviews

23.255 The definition of 'worker' was the subject of comment in a number of submissions. Most of those who commented proposed a broad definition of worker, which would include the various persons noted in the NT definition, or adopting the NT or ACT definitions[210]. No submission other than the Victorian Government[211] suggested retaining a definition limited to the employment relationship.

Discussion

23.256 Recognising the changing nature of work relationships, we have recommended a primary duty of care that is not reliant on the traditional employment relationship. Consistent with that change in the duty holder, is a change that we have recommended that a broad definition of 'worker' be adopted, in place of 'employee'.

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[202] NT Review, p.35
[203] NSW WorkCover Review, pp.31-40
[204] ACT Review at p18 and p23
[205] ibid, Recommendation 1, p.24
[206] ibid, pp.47-50
[207] Recommendation 13 on page 50
[208] Maxwell Review, p.136, paras 589-590
[209] Maxwell Review, pp.139-140, para 609
[210] See ACTU, *Submission No.214*; Queensland Government, *Submission No.32*; Johnstone et al, *Submission No.55*; Qld Council of Trade Unions, *Submission No.212*; SIA, *Submission No.128*; Deborah Vallance, *Submission No.144*; DEEWR, *Submission No.157*; MBA, *Submission No.9*.
[211] Victorian Government, *Submission No.139* , p.19. This was suggested on the basis that other provisions of the legislation provided coverage of contractors, labour hire workers, franchisees and others.

23.257 The definition of 'worker' is to be used not only for the duties of care owed to and by such persons, but also for various other purposes such as workplace consultation and issue resolution. Just as persons who are undertaking work and subject to risk may not be employees, so too may persons with a genuine and valid interest in consultation and issue resolution at a workplace, not be employees.

23.258 We consider that the same definition of 'worker' can be used for all of the purposes under the model Act for which 'employee' has been the designated person.

23.259 The essential element to determining who should be a worker is the undertaking of work. As hazards and risks do not discriminate based on a legal relationship or whether a person is paid, nor should the definition of the person who is to be owed a duty of care, owe a duty of care, and be involved in OHS matters at a workplace.

23.260 We remain of the view expressed in our first report [212] that the NT Act definition is a good example of a sufficiently clear and broad definition of 'worker'. We recommend that the model Act adopt a definition of 'worker' based on the NT Act definition, the only changes being:

- the expression 'the employer's business' should be replaced with the expression 'a business or undertaking'
- the expression 'the employer' should be replaced with 'the person conducting the business or undertaking'.

23.261 This definition would mean that volunteers are owed the various duties of care owed to a worker. They would also have the duty of care of a worker to take reasonable care for their own safety and that of others[213], and to co-operate with the person conducting the business or undertaking. We consider it to be appropriate that they should have that duty of care, if they are undertaking work. Any concern that this may deter people from volunteer work may be minimised by noting the standard of reasonable care is to that applied for negligence under the criminal law.[214]

RECOMMENDATION 93

The model Act should define a "worker" for all purposes of the model Act consistently with the definition of that term in the NT Act, with appropriate modification to replace references to 'employer' to 'person conducting a business or undertaking'.

WORKPLACE

Current arrangements

Usage

23.262 Our recommendations include the use of the term 'workplace' to determine:

- the application of elements of the primary duty of care[215]
- the area in relation to which a person with management or control of a workplace owes a duty of care;[216]

[212] At paragraph 6.90.
[213] Recommendation 46 in our first report.
[214] Recommendation 47 in our first report. A breach of the duty would only occur upon the volunteer falling so far short of the standard of a reasonable man in their position as to merit criminal punishment.
[215] Recommendation 19(c) in our first report

- the person conducting a business or undertaking that is required to be involved in processes of consultation and issue resolution [217]
- the place at which a person must be to have placed on them the duty of care of an other person present at a workplace[218];
- who may be required to notify incidents[219]; and
- the place at which the powers of entry of an inspector or authorised person may be exercised.[220]

23.263 OHS Acts in Australia currently use the term throughout for the various uses that we propose using it in the model Act.

Current definitions

23.264 'Workplace is defined in all current OHS Acts except the NT Act. The definitions[221] consistently provide that a workplace is a place at which designated persons 'work'.

23.265 There are variations in some definitions, to provide for a workplace to include where work is to be performed[222] or has been performed[223], any place where a person goes while at work[224], or are likely to be in the course of their work[225], or to specifically include various structures and vehicles, ships, aircraft etc[226] .

23.266 The definition of a workplace is limited in its application to domestic premises in some OHS Acts[227] and under some regulations.

Case law

23.267 The term 'workplace' has been considered by courts on a number of occasions in many jurisdictions. The courts have consistently given a wide meaning to a term and definitions that are quite clear in their words and intent.

23.268 The term has been the subject of a number of cases under s8.(2) of the NSW Act, to determine whether a risk to the health and safety of a 'non-employee' occurred at the employer's place of work. These are not relevant to the definition of 'workplace' other than that they confirm the broad and ordinary meaning of the term.

23.269 A question that has arisen in cases, with inconsistent outcomes, is the time at or during which a place is a workplace. There is a line of cases that suggest that a place is only a workplace while work is being done[228] while in a recent case a pit and pit lid, in and on which

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[216] Recommendations in 23 to 28 in our first report
[217] Recommendations 96-99 and 116-120
[218] Recommendations 48 and 49 in our first report
[219] Recommendations 140 and 146
[220] Recommendations 167 and 212-216
[221] See s.5 of the Cwth Act; s.4 of the NSW Act; s.5 of the Vic Act; s.9 of the Qld Act; s.4 of the SA Act; s.3 of the WA Act; s.3 of the Tas Act; s.12 of the ACT Act
[222] See s.9 of the Qld Act; s.12 of the ACT Act
[223] See s.12 of the ACT Act
[224] See s.4 of the SA Act
[225] See s.3 of the WA Act
[226] See s.5 of the Vic Act; s.4 of the SA Act; s.3 of the WA Act; s.3 of the Tas Act
[227] Section 10(3)(b) of the NSW Act provides that the duty of care of controllers of work premises does not apply to premises occupied only as a private dwelling; Section 34C(2) of the Qld Act is of similar effect.
[228] In *Workcover Authority of NSW (Inspector Paine) v Boral John Perry Industries Pty Ltd t/as Boral Elevators* (unreported, Industrial Relations Commission of NSW, 8 August 1996) Justice Maidment found that a lift was only a workplace when work was being carried out on it; that decision has been approved and applied in numerous cases since; see also *Workcover of NSW (Inspector Maltby) v AGL Gas Networks Limited* [2003] NSWIRComm 370 in which it was held that a gas pipeline is only a workplace when work is being undertaken on it.

work had not been undertaken for a lengthy period of time, was found to have remained a workplace at all times[229].

Recent Reviews

23.270 The question of definition of a workplace was briefly discussed in the ACT Review and resulted in a recommendation that a broad definition be adopted[230].

Stakeholder views and recent reviews

23.271 Most of the submissions[231] supported maintaining a definition of workplace that is broad and applicable to all places at which a person may work. Some submissions suggested that the conduct of work, rather than where that occurs, is the important consideration and workplace should therefore not be of primary importance[232].

Discussion

23.272 We consider it is useful (and common practice) for the term 'workplace' to be defined. A definition will allow a demonstration of the broad reach of the term and the various structures (including mobile and temporary structures) that are properly to be regarded as workplaces.

23.273 We recommend a definition be included in the model Act that includes reference to the various structures that may be a workplace[233], and that a workplace may include not only where work is actually done, but also where a worker may be expected to be during the course of work.[234]

23.274 We recommended in our first report that domestic premises be excluded from the definition of 'workplace' unless specifically included by regulation[235]. This will need to be taken into account in drafting the definition.

23.275 This leaves only the question of when a place is a workplace; whether it is only when work is being done, or at other times. The relevance of a workplace is significant to a consideration of when a place should be a workplace for the purposes of the model Act.

23.276 The duty of care of a person with the management or control of a workplace is associated with the state or condition of the place and access or egress to it. The state or condition may be affect the health or safety of persons performing work, or accessing the place to do so. The work undertaken at the place may affect the health or safety of persons present at the workplace. Notification of incidents at the workplace, consultation and issue resolution at the workplace and entry of inspectors or authorised persons all relate to the conduct of work.

23.277 Without expressing any view on the correctness of either line of conflicting authority on the point, we consider it beneficial for the issue of when a place is a workplace for the purposes of the model Act, to be dealt with in the definition.

23.278 There may be unintended obligations and liabilities associated with defining a place to be a workplace at all times, once work has been undertaken at that place. We consider it preferable that the model Act limit the definition of workplace to the time at which work is being done. That period should include recesses or breaks during a continuous period of work (e.g. lunch or tea breaks, overnight and weekends).

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[229] *Telstra Corporation Limited v Smith* [2008] FCA 1859; this decision is currently the subject of appeal.
[230] ACT Review, pp.50 to 51 and Recommendation 14
[231] For example, see Law Council of Australia, *Submission No.163*; AICD, *Submission No.187*; Victorian Government, *Submission No.139*; South Australian Government, *Submission No.138*; Western Australian Government, *Submission No.112*; Unions NSW, *Submission No.108*.
[232] Qld Council of Trade Unions, *Submission No.212*; Queensland Government, *Submission No.32*; William Shannon, *Submission No.8*
[233] Consistent with the definitions in the Vic Act, SA Act, WA Act and Tas Act.
[234] An example is contained in s.3 of the WA Act.
[235] Recommendation 28 in our first report

23.279 An inspector would still be able to gain access to a workplace before work, to ensure that it is safe for work to commence, as the inspector's power of entry to a workplace would specifically provide for this. A duty holder may still be accountable for the ongoing consequences of work undertaken to a place when it was a workplace, as the primary duty of care is not restricted to the time during which work is being done.

23.280 We accordingly make the following recommendation for the definition of 'workplace'.

RECOMMENDATION 94

The model Act should define a "workplace" to be any place at or in or upon which work is being undertaken (including during recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work.

For avoidance of doubt, workplace should specifically include a vehicle, ship, aircraft and other mobile structures when used for work.

NOTE: *Recommendation 28 in our first report regarding the exclusion of domestic premises unless included by regulation.*

PERSON WITH MANAGEMENT OR CONTROL OF A WORKPLACE

Current arrangements

Usage

23.281 Our recommendations include the use of the term 'person with management or control of a workplace' to determine:

- who will owe the duty of care of a person with management or control of a workplace[236]
- to whom a notice of entry by an inspector or authorised person must be given[237]
- to whom an incident or unsafe circumstance at a workplace must be notified by a worker[238]; and
- who may be required to notify incidents[239]

23.282 OHS Acts in Australia currently use the term for similar purposes to those we recommend.

Current definitions

23.283 The ACT Act defines a person in control of premises[240] to be:

> *"anyone who has control of the premises, including anyone with authority to make decisions about the management of the premises"*

23.284 While not defining what is meant by management or control of a workplace, the Cwth Act provides[241] that a workplace is not taken not to be controlled by a contractor simply because

[236] Recommendations 10 to 15 in our first report
[237] Recommendations 17, 19 and 20 in our first report
[238] Recommendations 146
[239] Recommendations 140
[240] See s.13(a) of the ACT Act
[241] See s.14(2) of the Cwth Act

of the presence at the workplace of an employee of the employer for which the contractor is performing work if that employee has no right to direct the work of the persons working for the contractor.

23.285 The NSW Act defines an 'occupier of premises' to include

> *"a person who, for the time being, has (or appears to have) the charge, management or control of the premises, or…of any operation conducted on the premises"*[242]

23.286 The NSW Act provides that a person who has control of premises includes a person who has only limited control[243] and:

> *"a person who has, under any contract or lease, an obligation to maintain or repair the premises … (in which case any duty under this section applies only to the matters covered by the contract or lease)"*[244]*.*

23.287 The WA Act includes a similar provision[245] for a person with an obligation to maintain or repair to be a person that has control of that workplace or means of access or egress.

23.288 The Qld Act provides that the person in control of a relevant workplace area is the owner of it[246]. However, if there is a lease, contract or other arrangement that provides, or has the effect of providing, for another person to have effective and sustained control of the relevant workplace area, that other person and not the owner is the person in control of the relevant workplace area.[247]

Case law

23.289 We refer to the case law and our discussion more broadly on the definition of 'control'.[248] Many of the cases referred to deal with the issue of management or control of a workplace and the conclusions drawn by us in that discussion are relevant to this issue.

23.290 The well accepted and applied notion of what is meant by control was stated in *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464 as:

> *"…the applicable meaning of "control" … must, it seems to us, have about it the sense of not mere "sway", "checking" or "restraint" but rather controlling in the sense of "directing action" or "command" – the ability of the person to compel corrective action to secure safety, having in mind the context and purpose of the statute, clearly seems to be necessary in order to enable safety to be ensured. If it were otherwise then the alleged controller would be simply unable to assume the strict duty cast by the section…"*[249]

23.291 There has, however, been some inconsistency in the application of that principle.

23.292 The Full Bench of the Australian Industrial Relations Commission has found[250] that control may exist over a workplace where the terms of a contract, although vesting a level of control in a contractor, nevertheless allows 'ultimate control' to be retained by the principal. In other case the operator of a business was found not to have been in control of a workplace during maintenance and repairs[251].

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[242] See s.5 NSW Act
[243] ibid, s.10(4)(a)
[244] ibid, s.10(4)(b)
[245] See s.22(2) of the WA Act
[246] See s.15B(1) of the Qld Act
[247] ibid, s.15B(2)
[248] See paragraphs 23.77 to 23.90
[249] *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464 at 480
[250] *Telstra Corp Ltd v Comcare Australia Pty Ltd* [2007] AIRC FB 438
[251] *WorkCover Authority (NSW) (Inspector Callaghan) v Rowson* (unreported, Industrial Relations Commission, NSW,CT93/1156, 30 June 1994), referred to in *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464 at 479; *WorkCover (NSW) v Rowson* [1994] NSWIRC 76.

23.293 The cases confirm that more than one person may have control over a workplace at one time and control may shift from one person to another.[252]

Recent Reviews

23.294 The NSW WorkCover Review[253] considered issues associated with controllers of work premises. It noted there to be a general lack of clarity about who is covered by the controller obligations and how those obligations ought to be discharged, particularly when the responsibilities are shared or when work is undertaken in 'non-workplace' premises such as private homes or public places[254]. The Review did not, however, make any recommendations relevant to defining who is a person with management or control of a workplace.

23.295 The ACT Review considered the approach taken in the Qld Act[255] and Vic Act[256] and recommended that a person in control of a workplace can include an owner of premises.[257]

Discussion

23.296 We refer to our discussion on the definition of 'control'[258] and our conclusions on that issue. After much consideration, we reached the view that the term 'control' should not be defined, in part because of concerns about the difficulty in providing a definition that would be sufficiently clear and applicable to all circumstances, while not narrowing what should be the wide scope of 'control'.

23.297 'Person with management or control of a workplace' has a more limited use and may be more capable of being defined for that limited use.

23.298 We consider the options available to be as follows:

> ***Option one –*** not define the term and leave it to the courts to determine who is such a person for the purposes of the model Act
>
> ***Option two –*** define the term to identify the characteristics that mean a person has management or control
>
> ***Option three –*** Define the term by deeming a person to be the person with management or control, subject to a contract or agreement, as it is defined in s.15B of the Qld Act.

23.299 We consider that there would be some benefit to duty holders in this term being defined and therefore do not propose that Option One be adopted.

23.300 Of the remaining options, Option Three has the appeal of being clear and will ordinarily mean that there will be no doubt who would be the person with management or control of the workplace. A person who would be deemed to be the person in control of the workplace instead of the owner, must by definition have *the effective and sustained control of the relevant workplace area* that would be required to enable that person to meet the duty of care and obligations imposed by the model Act. That person would be appropriate to receive a report of an incident, make a report of an incident to the regulator, and so far as is reasonably practicable ensure that the workplace and means of entering and leaving are safe and without risks to health.

23.301 The passing of effective and sustained control of a workplace by the owner to another would occur in circumstances where a contractor is engaged for construction at the premises. If that occurs in only a part of the premises, then the owner remains the person with management or control over the remaining parts of the workplace.

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[252] *Inspector Dall v Brambles Australia Ltd* [2006] NSWIRComm 213.
[253] NSW WorkCover Review, pp.31 to 37
[254] ibid, p.34
[255] See s.15B of the Qld Act
[256] See s.26 of the Vic Act
[257] ACT Review,p.39, Recommendation 6(b)
[258] Paragraphs 23.86 to 23.90.

23.302 We accordingly propose that the model Act adopt s.15B of the Qld Act or an equivalent, to provide clarity in determining who is the person with the management, or control of the workplace for the purposes of the model Act.

23.303 If this recommendation is not accepted, we consider an appropriate definition of the term would be:

> *"any person who has the ability, whether exercised or not, to influence or direct activities relating to the state or condition of the workplace (and if more than one person, then each of them to the extent to which each person has that ability)."*

RECOMMENDATION 95

The model Act should adopt s.15B of the Qld Act to define a person with management or control of a workplace.

PART 7

WORKPLACE CONSULTATION, PARTICIPATION, REPRESENTATION AND PROTECTION

- Consultation rights and obligations
- Worker representation and participation
- Issue resolution
- Rights to cease unsafe work
- Discrimination, victimisation and coercion

CHAPTER 24: CONSULTATION RIGHTS AND OBLIGATIONS

24.1 The Robens Committee considered that:[1]

> *"…the involvement of employees in safety and health measures is too important for ....legislation to remain entirely silent on the matter."*

24.2 Subsequently the Committee recommended;[2]

> *"…that 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 arrangements for the participation of employees in the development of such measures."*

24.3 This chapter discusses rights and obligations related to consultation in the workplace in terms of who should have an obligation to consult and with whom, what consultation means, and when it should occur.

Current arrangements

24.4 All Australian OHS Acts require employers to consult with their employees, workers, health and safety representatives and/or committees about certain aspects of health and safety at work. However, only four OHS Acts provide a separate duty on employers to consult employees or workers about OHS matters[3] (NSW, Vic, NT and ACT). In NSW and Tasmania, the duty is confined to employees, while in Vic, NT and ACT, it has a broader scope by referring to workers and specifically including contractors and their employees (VIC and NT). In four jurisdictions (SA, WA, Tas and Cwth), there are provisions within the general duty of care to consult on OHS, for example, with respect to the development of OHS policies or similar[4]. All provisions, other than in the NT, have penalties attached. The Qld Act includes a provision that outlines broadly the purpose of consultation and states that it occurs both at industry and workplace levels

24.5 Most Acts include specific provisions for employers to consult HSRs or HSCs – generally about changes to work that might affect employees. The Commonwealth Act includes a provision that, if requested by a HSR, employers must consult HSRs about changes to the workplace that may affect the health and safety of the employees (See Table 31 at Appendix C).

24.6 The separate duty to consult provisions have a degree of commonality in that they all outline what is meant by consultation, the situations or matters that are required to be the subject of consultation, what consultation means and with whom the consultation will occur. The provisions all provide some flexibility, for example, allowing the process to be agreed between employers and their employees/workers. The key differences in the provisions are the reasonably practicable qualification included in the Vic, Tas, Cwth and ACT provisions, the stated purpose of the provisions (all but Vic), and whether or not there is a penalty for non-compliance (all except in the NT where it is regulatory offence). In addition, the NT Act places a reciprocal duty on workers to participate in the consultation, including bringing OHS issues to the employer's attention.

24.7 In those OHS Acts with separate duty to consult provisions, the matters on which consultation is required include risk management, adequacy of facilities and change to premises, systems or conduct of work, plant and substances. All include provisions for consultation procedures, and the Vic and ACT Acts also include provisions for issue resolution and providing information to employees. (See Table 31 at Appendix C).

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[1] Lord Robens, *Report of the Committee on Safety and Health at Work*, HMSO, London, 1972, p.22
[2] ibid, p.22
[3] See ss.13-19 of the NSW Act; ss.35-36 of the Vic Act; ss.29-32 of the NT Act; ss.47-57 of the ACT Act.
[4] The Cwth Act includes a duty to develop health and safety management arrangements in consultation with employees, or if requested, their representatives.

Recent Reviews

24.8 Specific consultation provisions were inserted into the Vic, NT and ACT OHS Acts following recent legislative reviews.

24.9 Following Maxwell's recommendations for increased flexibility for employers and employees to work out consultative and representational arrangements, the Vic Act now provides for consultation between employers and all employees, rather than limiting this to consultation between the employer and HSRs.

24.10 The previous ACT Act included provisions that were similar to those in other jurisdictions in regard to consulting about development of OHS policies and with HSRs. However, the 2005 review of the Act noted that it provided only limited guidance on what constitutes 'consultation' and when consultation was required. This has now been addressed by ss.54-57 of the new ACT Act.

24.11 The WA Review proposed that consultation should occur during every stage of the risk management process, before changes are made to any aspect of the work process or organisation that may have implications for OHS, when any changes are proposed to existing consultation arrangements, and be properly documented to demonstrate that genuine efforts have been made to consult[5] .

24.12 The NT Review recommended including a general obligation to consult, as well as defining consultation and when it is to occur.[6] Similarly, the Tas Review recommended that the Tas Act include a definition of consultation and a general duty to consult 'relevant' persons, thus expanding the duty beyond employees.[7]

Stakeholder views

24.13 Most employer and industry organisations supported consultation provisions. Some, including AiG[8] and the ACCI[9] supported a specific duty to consult provision, with flexibility about the method of consulting. Such flexibility was noted by some as important to reflect the differences in the size and nature of businesses. Employers generally consider that consultation with employees helps to promote health and safety in the workplace. However, a number of employers expressed concern that the triggers for consultation in current legislative provisions were too broad.

24.14 All Government submissions supported a duty to consult provision in the model Act. Victoria specified that it should be qualified by reasonable practicability.[10]

24.15 Most union submissions supported a clear statutory duty to consult, with the provisions outlining when and how it should occur. A number also noted that all workers, rather than employees, should be involved and that the employer should not have the ability to dictate what parties were involved in the consultations.

24.16 A number of other submissions, for example from employer organisations and Governments[11], also specifically addressed the issue of consulting all workers rather than just employees. WA and Tasmania considered that consultation should be with other persons affected by the work where appropriate, for example, WA suggested that this be qualified by the degree of control that the employer had.[12]

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[5] WA Review, p.96
[6] NT Review, p105
[7] Tas Review, p.231
[8] AiG, *Submission No.182*, pp.39 and 42
[9] ACCI *Submission No.136*, pp.35-36
[10] Victorian Government, *Submission No.139*, p.48
[11] See Commonwealth Government, *Submission No.57*, p.4, and Queensland Government, *Submission No.32*, p.23
[12] Western Australian Government, *Submission No.112*, p.18

Discussion

Who should consult, and with whom?

24.17 A person conducting a business or undertaking is responsible for making decisions regarding health and safety, but may not have a full understanding of the finer detail or subtleties of the work or working conditions. It is therefore important that the person conducting a business or undertaking obtain information from those workers who are most directly involved in the work of the business or undertaking, before making changes or implementing measures which may adversely affect health and safety. It is also important that the workers are informed of those measures and their significance to health and safety, so that they can implement them, and also understand the importance of doing so.

24.18 Clearly, there should be an ongoing exchange of information between the person conducting the business or undertaking and the workers, directly or through their representatives.

24.19 Given the importance of consultation in contributing to health and safety and the recent amendments made to OHS Acts to clarify the rights and obligations regarding consultation, the model Act should include a general obligation to consult, including a clear definition of consultation.

24.20 We consider that the person conducting a business or undertaking should have a general obligation to consult with those workers most directly involved in the work of the business or undertaking.

24.21 The consultation should be required as far as is reasonably necessary to ensure that the person conducting the business or undertaking is properly informed when making decisions that may affect health and safety, and that workers are aware of the reasons for and the significance of specific requirements, particularly in relation to eliminating or minimising risks. We propose that the expression ‘reasonably necessary’ be used rather than ‘reasonably practicable’ which has a different meaning for the purposes of qualifying the duties of care, and its use in this context might lead to confusion.

24.22 The degree or extent of consultation which is reasonably necessary must be that which will ensure that the person conducting the business or undertaking has all relevant available information, including the views of the workers (e.g. in relation to the means by which risks may be controlled) and can thereby make a properly informed decision.

24.23 The consultation should also ensure that the workers are aware of the reasons for decisions made by the person conducting the business or undertaking and, even if they do not agree with the decisions, can understand and respect them. This will make compliance with systems of work, including the use of protective devices or equipment provided, more likely to occur and be effective.

24.24 Consulting an HSR may be sufficient to meet these objectives. The person conducting the business or undertaking might, however, find it necessary to consult other workers if the HSR lacks skill or knowledge relevant to the issue, or does not have the confidence of a significant proportion of the workers in the work group.

24.25 Further, what is reasonably necessary must depend on the circumstances. This may include the urgency of the requirement to change the work environment, plant or systems, etc., and the availability of the workers most directly involved or their representatives.

24.26 To summarise, consultation that is reasonably necessary may be considered that which provides in a timely manner as much exchange of information as is commensurate with the circumstances and the significance of the issue.

24.27 Consultation is also particularly important where there are overlapping and concurrent duties. As recommended in our first report, a common feature of all duties of care should be that

each duty holder must consult, and co-operate and co-ordinate activities, with other persons having a duty in relation to the same matter.[13]

24.28 A person conducting a business or undertaking should, therefore, not limit consultation to workers engaged or directed by them, but should also consult with those conducting other businesses or undertaking directly affected by or that may have an affect on the work. We recommend that the model Act provide an obligation for that to occur.

Defining consultation

24.29 Consultation must be meaningful if it is to result in constructive participation in OHS matters. Consultation is most effective when:

- workers are informed about OHS matters in a timely manner;
- the information provided is adequate; and
- workers are provided with an opportunity to digest, understand and respond to the information.[14]

24.30 As Maxwell noted, consultation must involve a dialogue between the parties, but it does not require consensus or agreement.[15] The definition of consultation should be simple and flexible to suit different types and sizes of businesses. It should not prescribe how consultation is to be undertaken. Small business operators in particular may find it more practical to consult directly with their workers. The model Act should allow the parties at the workplace to decide on the consultation mechanism that best suits the workplace.

24.31 We recommend that the model Act define consultation, and that the definition provide for

- sharing relevant information with workers and other persons directly affected by the health and safety matter;
- providing workers and other persons directly affected by the health and safety matter with a reasonable opportunity to express their views and to contribute to the resolution of OHS issues; and
- taking into account those views, noting that consultation does not mean reaching agreement.

When should consultation be undertaken?

24.32 The list of matters for which consultation is required should reflect the key activities at work which may affect the health and safety of workers, or which may affect other duty holders. The obligation should apply when any of the following activities are undertaken:

- identifying hazards and assessing risks arising from the work performed or to be performed at the business or undertaking;
- making decisions about ways to eliminate or minimise those risks;
- the adequacy of facilities for the welfare of workers;
- proposing changes that may directly affect the health and safety of workers;
- making decisions regarding procedures for the resolution of health and safety issues, consultation mechanisms, monitoring the health of workers and conditions at the workplace; and
- the provision of information and training for workers.

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[13] See p.19 of our first report

[14] D. Walters, and T. Nichols, Representation and consultation on health and safety in chemicals – an exploration of limits to the preferred model, *Employee Relations*, 2006, Vol.28(3), pp230-254

[15] Maxwell Review, p.203

RECOMMENDATION 96

The model Act should include a broad obligation for the person conducting the business or undertaking most directly involved in the engagement or direction of the affected workers to consult with those workers (and their representatives), as far as is reasonably necessary, about matters affecting, or likely to affect, their health and safety. Consultation should occur when any of the following activities is undertaken

a) identifying hazards and assessing risks arising from the work performed or to be performed at the business or undertaking;

b) making decisions about ways to eliminate or control those risks;

c) the adequacy of facilities for the welfare of workers;

d) proposing changes that may directly affect the health and safety of workers;

e) making decisions regarding procedures for the resolution of health and safety issues, consultation mechanisms, monitoring the health of workers and conditions at the workplace; and

f) the provision of information and training for workers.

RECOMMENDATION 97

The model Act should make it clear that consultation that is 'reasonably necessary' is that which enables the person conducting the business or undertaking to make timely, informed decisions about matters affecting, or likely to affect, the health and safety of their workers.

RECOMMENDATION 98

The model Act should include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary.

RECOMMENDATION 99

The model Act should define "consultation" and the definition should provide for:

a) sharing relevant information with workers and other persons directly affected by the health and safety matter;

b) providing workers and other persons directly affected by the health and safety matter with a reasonable opportunity to express their views and to contribute to the resolution of OHS issues; and

c) taking into account those views.

Note: *Consultation does not imply agreement.*

CHAPTER 25: HEALTH AND SAFETY REPRESENTATIVES

25.1 There is considerable evidence that the effective participation of workers and the representation of their interests in OHS are crucial elements in improving health and safety performance at the workplace. This representation occurs through the use of health and safety representatives (HSRs), elected by the workers to represent them in relation to OHS. No two jurisdictions have the same provisions for HSR arrangements. The requirements vary in relation to how and when such arrangements can be initiated and who can be represented and the number of HSRs for each workplace.

25.2 The main mechanisms to facilitate participation in Australian OHS laws are the provisions for HSRs and Health and Safety Committees (HSCs).

25.3 The objects of the current OHS Acts generally include the promotion of co-operation and consultation between employers and workers. By way of example, the QLD Act includes a requirement as a specified objective:

> *'providing for the election of workplace health and safety representatives and the establishment of workplace health and safety committees'*

25.4 HSCs are addressed in Part 7, Chapter 26.

Duty to Consult

25.5 The rights and obligations relating to consultation have been discussed in Chapter 24.

SHOULD THE MODEL ACT PROVIDE FOR HSRS?

Current Arrangements

25.6 All jurisdictions currently have provisions that allow for employees to elect HSRs[1]. Some jurisdictions[2] also provide specific mechanisms to resolve matters where discussions about the conduct of elections or the establishment of work groups to be represented fail to result in a consensus, referring parties to an external agency (e.g. the regulator or Industrial Commission).

Recent Reviews

25.7 The NT Review reported that:

> "*contemporary Australian practice provides for the election/appointment of occupational health and safety representatives and to provide them with rights and powers (and for employers to owe them obligations) that enable them to perform their functions effectively*" and recommended the provision for employees, including contractors and other workers, to collectively elect HSRs[3].

25.8 Other recent legislative reviews have not specifically addressed the provision of HSRs, rather, addressed entitlements and empowerment of HSRs, and the representation and participation of all workers at a workplace, reinforcing the ideal that having a mechanism for representation and participation of workers is a fundamental requirement of effective OHS. For example, the Laing Review said:

> *"The election of safety and health representatives and the constitution of safety committees are fundamental if genuine consultation is to develop in workplaces. Without*

[1] See NSW Act, s.50 of the ACT Act, s.44 of the Vic. Act, s.32 of the Tas. Act, s.36 of the NT Act, s.27 of the SA Act, s.29 of the WA Act, and s.25 of the Cwth Act.
[2] See s.57 of the ACT Act, s.27, 28, 31 of the SA Act, s.16 of the Commonwealth Act.
[3] NT Review, p112, Recommendation 28

the authority provided under the Act, almost any other consultative approach will result in unequal relationships and consultation may be one sided or tainted by the incapacity to openly and fearlessly put the necessary issues for discussion. As a consequence, while there may be considerable talk there may be little consultation."[4]

25.9 Nonetheless, recent reviews have affirmed support of broader participation and representation mechanisms. For example, the NSW Workcover Review recommended clarifying in the objects of the Act that all persons at a place of work should be encouraged to play an active role in protecting themselves and others against risks to health or safety in the workplace[5].

25.10 The Maxwell Review recommended enshrining the principles of consultation, representation and participation in legislation, reporting universal agreement that employee participation is a necessary condition of the effective regulation of workplace safety[6]

Stakeholder Views

25.11 There was strong support across all stakeholder groups for the election of HSRs. Many submissions recognised that HSRs play an important role in the application of systematic workplace OHS arrangements. The Queensland government in its submission said of HSRs:

"The value of health and safety representatives in relations to health and safety performance is supported by unions, employers and regulators alike. Walters' (1996: 629-634) comprehensive review of British worker participation research indicated that the effectiveness of joint arrangements in improving OHS outcomes is supported by:

- *legislative provisions for workers' representation actively supported by regulatory inspectorates;*
- *management commitment both to better health and safety performance and participative arrangements, coupled with the centrality of the provisions for preventative OHS strategies and efficiency of production;*
- *worker organisation at the workplace that prioritises OHS and integrates it in other aspects of representation on industrial relations;*
- *support for workers' representation from trade union outside workplaces, especially in the provision of information and training;*
- *consultation between worker health and safety representatives and constituency they represent*
- *well-trained and well-informed representatives.*

There should be provisions in the national model OHS laws establishing Health and Safety committees (HSC) and Health and Safety Representatives."[7]

25.12 The National Union of Workers said:

"Worker participation is one of the central pillars of performance legislation so any legislation must have strong provisions to support the involvement and participation of workers in determining their own OHS standards and needs. This means supporting and protecting their right to have an elected representative who is able to speak up and act on their behalf."[8]

[4] Laing Review, p.155
[5] NSW WorkCover Review, p27, supported in the Stein Inquiry, p.25
[6] Maxwell Review, pp.9 and 23
[7] Queensland Government, *Submission No.32*, p.24
[8] National Union of Workers, *Submission No.213*, p15

25.13 The ACTU noted that:[9]

"Workplace health and safety representatives are fundamental to achieving improvements in health and safety.

Studies undertaken shortly after the initial introduction of post-Robens OHS laws showed conclusively that the presence of HSRs lifted the general standard of OHS management in workplaces where they were present. This is supported by international research too. "

25.14 The Western Australian Government stated:[10]

"Recognising, valuing and supporting the role played by elected workplace health and safety representatives is the key to improving workplace safety…"

25.15 OneSteel said in its submission:

"OneSteel believes that representation underpins consultation, which is fundamental to achieving safe and healthy workplaces. …. There needs to be a valid mechanism for consultation, which may include HSRs and HSCs, but these are only two models.

The principles of consultation, participation and representation should be contained in the model OHS Act, whilst the processes and prescription should be contained in subordinate regulations or codes of practice."[11]

25.16 The main qualification to this support came from employer organisations, industry representatives and companies who were of the view that it should not be compulsory to have HSRs. A number of stakeholders expressed the view that there needed to be flexibility in the provisions, for example to enable them to be applicable to organisations of different size.

25.17 ACCI stated:

"ACCI does not believe it is appropriate that a model Act should mandate the formation of HSRs. HSRs may not be an effective vehicle for consultation in many workplaces and industry reports that they can often function in an overly bureaucratic way. "[12]

25.18 AiG & EEASA noted that if there was a mandatory requirement for HSRs then an employer would be non-compliant if there were no HSRs even if there was no interest amongst workers in becoming one.[13]

Discussion

25.19 Overwhelmingly, stakeholders and regulators alike are of the view that provision should be made in the model Act for workers to elect HSRs. The election of HSRs has been a common feature in OHS legislation for many years and represents contemporary practice. The benefits of effective representation through HSRs have been demonstrated.

25.20 We recommend that the model Act make provision for the election of HSRs to represent workers.

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[9] ACTU, *Submission No.214*, p. 36, para.126

[10] WA Government Media Office Ministerial Media Statements, "Elected workplace health and safety representatives key to workplace safety: Minister", 29/10/04.

[11] OneSteel, *Submission No.115*, p13

[12] ACCI, *Submission No.136*, p.37

[13] AiG and EEASA , *Submission No.182*, p. 42

RECOMMENDATION 100

The model Act should contain a provision for workers to collectively elect health and safety representative(s) (HSRs) to represent them in health and safety matters.

ESTABLISHING HSRS

25.21 In this section we deal how the process for the election of HSRs at a business or undertaking and identifying who they are to represent is determined. This involves:

- initiating the process;
- undertaking discussion on the number of work groups to apply to the business or undertaking, or businesses or undertakings;
- the election process; and
- an HSRs term of office.

Initiating Representation

Current arrangements

25.22 While all current OHS Acts provide for the election of HSRs, the means by which that process is initiated differ between the jurisdictions.

25.23 Generally, the current provisions provide that workers may initiate a process for the election of HSRs by notifying their employer. For example, the Commonwealth Act provides that an employee may request the formation of a Designated Work Group (DWG), for which an HSR may be elected. Further, if there is a vacancy in the office of HSR for a DWG, the employer must invite nominations for election as the HSR for the group. If the employer fails to invite nominations, the Commission may direct the employer to do so. Some legislation limits this provision for HSRs to workplaces with 10 or more employees. The NSW Act provides that WorkCover can direct that the election of an HSR. The NT, NSW, Qld and WA provisions allow for an employer to initiate the process of discussion on the number of HSRs. The different processes for initiating the establishment of HSRs are provided in Table 32 below.

TABLE 32: Initiation of HSR process

Jurisdiction	Workers Initiative	Employers' initiative	Direction from Regulator
QLD	Yes	Yes	–
NSW	Yes	Yes	Yes
ACT	Yes	–	–
Vic	Yes	Yes	–
Tas	Yes – 10 or more employees	–	–
NT	Yes – 10 or more employees	Yes	–
SA	Yes	–	–
WA	Yes	–	–
C'lth	Yes – an employee representative, on request, may initiate on their behalf	–	–

Discussion

25.24 We have considered three options to initiate the appointment of HSRs.

25.25 The first option is mandating that every workplace must have an HSR. This option is not preferred because it could create a situation of a 'compulsory volunteer' (nomination as an HSR should be voluntary). The role of an HSR is an important one which requires commitment. It is a role which may bring the HSR into disagreement with the person conducting the business or undertaking, inspectors or even the workers they represent. It should not be undertaken reluctantly, or imposed on a person. Where a workplace does not have any workers who want to be an HSR, it would be incongruous to have an obligation on the person conducting the business or undertaking to ensure workers partake in a voluntary mechanism for representation. The empowerment of the OHS regulator to direct the election of an HSR would create this same incongruence and is not supported.

25.26 A second option is to provide workers with the right to request the process be commenced for the election of an HSR. The making of such a request confirms the desire of the workers to be represented formally by an HSR, and is likely to mean that one or more of the workers is willing to undertake the role.

25.27 A third option is to provide to provide workers the right to request the process be commenced for the election of an HSR, with a further provision allowing for the person conducting the business or undertaking to initiate, of their own accord, the HSR process. The person conducting the business or undertaking may consider it convenient and beneficial to the interests of health and safety for consultation with the workers to be organised through a representative. The workers may not be aware of their entitlement to initiate this process, or the benefits of it. This option allows this to occur in such circumstances.

25.28 We consider option three be adopted.

RECOMMENDATION 101

The model Act should provide for:

a) workers to initiate the election of HSRs by advising the person conducting the business or undertaking most directly involved in the engagement or direction of the workers that they wish to elect HSR(s) for that workplace; and

b) a person conducting the business or undertaking most directly involved in the engagement or direction of affected workers to commence the process for the election of HSRs.

Should there be limitations on the number of HSRs?

25.29 Tasmania is the only jurisdiction that appears to allow for no more than one HSR. Generally, other Acts allow for there to be more than one HSR at a workplace . The legislation in Qld and NSW provides for an HSR at a workplace, with workers and the employer able to agree to additional HSRs. Provisions in Tas and NT Acts require a minimum of 10 workers at a workplace for the workers to be entitled to elect an HSR .

25.30 In relation to the provisions currently applying to the HSR election process Johnstone et al said:

> *"It is also our submission that these processes for negotiating work groups and electing HSRs should not include any restrictions on the sizes of businesses or undertakings that*

can participate, as such restrictions work against small business (see Johnstone, Quinlan and Walters, 2005, 104 and 109).”[14]

Discussion

25.31 We consider that there should not be a limit on the number of HSRs that can be agreed by a person conducting a business or undertaking and the workers engaged or directed by them. The circumstances and requirements relating to health and safety differ from one workplace to another. While one HSR may be able to adequately represent all of the workers at one workplace, there may be a need for several HSRs at another, due to the size of the workplace or the diversity of activities carried out within it.

25.32 We therefore recommend that the model Act does not limit the number of HSRs able to be agreed at a workplace , allowing consideration to be given by the workers and the persons conducting the business or undertaking to the wide range of workplace and contractual arrangements, including:

- the conduct of multiple businesses or undertakings at single workplaces (health industry, construction sites);
- the differing role of workers and the nature of their work; and
- the placement of workers in the course of their work.

RECOMMENDATION 102

The number of HSRs to be elected at a workplace should not be limited by the model Act, but rather determined following discussions between the workers who wish to be represented and the person conducting the business or undertaking who is most directly involved in the engagement or direction of the workers.

Undertaking discussion on work groups

25.33 As we have recommended, and as is common practice, there may be several HSRs elected to represent workers at a workplace. It is important that the workers and the person conducting the business or undertaking are aware of who is being represented by which HSR. This is also important for determining when an HSR may perform functions or exercise powers, and over what.

25.34 The parties must, therefore, determine the basis by which the representation of the workers will be organised, and the manner in which elections may be conducted. This is commonly achieved through identifying groups of workers (work groups) who will each be represented by an HSR. The work groups are commonly determined by discussion between the person conducting the business or undertaking and the workers engaged or directed by them.

Current arrangements

25.35 Under existing arrangements, there are a number of issues that must be agreed between the employer or person conducting a business or undertaking and the workers employed or engaged by them, in relation to work groups. These matters vary between the jurisdictions but include:

- the number of HSRs to be elected at a workplace (which may in part be determined by the number of work groups);

[14] Johnstone, Bluff and Quinlan, *Submission No.55*, p.30-31

- the areas of representation of each HSR (who they will each represent);
- the manner in which an election will be conducted; and
- mechanisms to resolve issues that arise during such discussions.

25.36 Generally, provision for HSRs, including their area of representation, is provided through the construct of work groups, most commonly referred to as designated work groups[15] (DWGs) (see Table 33 below). Other terminology includes worker consultation unit, area of representation or work groups. Tasmania does not specifically provide for more than one HSR and therefore the whole workplace is the area for representation by the HSR.

25.37 Existing legislative provisions vary in their requirements for how negotiations or discussions to determine the number of HSRs, the areas of responsibility and how elections will be conducted, are to be undertaken. Provisions range from detailed requirements for consultation with elected worker delegates (WA) or persons appointed by interested employees (SA) or simply by agreement between the employer and the employees (VIC). The NT Act provides that the Authority may, if it considers appropriate, itself decide how a workgroup is to be constituted.

TABLE 33: Provision to determine HSRs area of representation

Jurisdiction	Provision for Work Group	Parties for discussions about election of HSRs and formation of work groups
NSW	No	(regulations may be specified)
Vic	Yes – s.43, designated work groups	determined by negotiation between employer and workers
Qld	Yes – s.69, area of representation	workers may request discussions with employer
WA	No However, an election scheme, may provide for the election of HSR for any group of employees that constitutes a distinct unit of the workforce	employer and the delegate or delegates (appointed by the workers as to determine such matters)
SA	Yes – s.27, work group	employer and any interested employees; or a person appointed by interested employees
Tas	No	NA
NT	Yes – s.33, *work groups*	employer/s and the workers who are to be members of the proposed group The Authority may, if it considers appropriate may itself decide how the workgroup is to be constituted and establish the workgroup.
ACT	Yes – s.46, worker consultation unit	employer to consult with all workers
Clth	Yes – s.24, designated work groups	employers enter into consultation with the employees or (at the employees request) an employee representative

[15] See s.69 of the Qld. Act, s.46 of the ACT Act, s.43 of the Vic. Act, s.33 of the NT Act, s.27 of the SA Act, S.24 of the Cwth Act.

Stakeholder views

25.38 The Vic Government argued for the need for flexibility in the arrangements to facilitate formation of work groups for HSRs. As workplaces vary considerably across Australia, consideration needs to be given as to how flexibility in establishing work groups can be provided effectively. If mechanisms are to facilitate genuine worker representation, workers must be entitled under law to request and negotiate the formation of work groups with an employer. The Vic Government recommended that model legislation provide a basic set of criteria for establishing work groups, including the matters to be taken into account during negotiations to ensure that the groups are established on a reasoned basis[16].

25.39 The Vic Government was supportive of provisions that would enable designated work groups of multiple employers to be established. Such a provision currently exists in the Vic Act. This is supported by AiG & EEASA, provided participation by employers is voluntary[17].

25.40 The ACTU considers multi-employer work groups to be an option to provide for representation of all workers in workplaces that for many reasons do not have formal worker representation such as HSRs within the discrete businesses. However, the ACTU preferred that the model Act include provisions for the appointment of roving or regional safety representatives, with appropriate supporting mechanisms (and drawing on the Swedish model)[18].

Discussion

25.41 Work groups should be established that best and most conveniently enable the workers' OHS interests to be represented and safeguarded; and that best take account of the need for an HSR to be accessible to each member of the group. Each worker should be able to have access to an HSR that is conveniently available and who understands the work of that worker and the associated hazards and risks. Similarly, a person conducting a business or undertaking should be able to identify the person representing the workers involved in work with respect to which consultation is required or issues have arisen that require resolution.

25.42 The determination of how workers are to be grouped for the purposes of best achieving effective resolution should be reached by discussion between the parties at the workplace.

25.43 The number of work groups will determine the number of HSRs. As we recommend that HSRs be entitled to training and facilities provided at the cost of the person conducting the business or undertaking, that person should be involved in determining how many HSRs will be permitted.

25.44 As an HSR for a particular work group may not be available at all times (e.g. due to illness or taking leave) it may be appropriate for the parties to agree to the election of deputy HSRs able to perform the functions and exercise the powers of the HSR in their absence. That is also a matter that should be discussed and agreed between the parties.

25.45 Existing legislation[19] details a range of matters which should be considered in deciding on workgroups, to ensure that an HSR is able to perform his or her functions effectively and conversely, that an employer is able to fulfil his or her responsibilities to the HSR effectively. Such matters include:

- the number and grouping of workers;
- workers' working hours, (i.e. overtime and shift-workers)
- the times at which particular work is performed;

[16] Victorian Government, *Submission No.139*, p.49
[17] AiG & EEA, *Submission No.182*, p42
[18] ACTU, *Submission No.214*, p39. Regional or roving representatives are persons employed by a union for the purpose of representing workers in a particular region or industry.
[19] See s.49 of the ACT Act, s.48 of the Vic Act, s.27 of the SA Act.

- patterns of work, to enable representation of part-time, casual, seasonal or short-term workers;
- the areas or places where each type of work is performed, including the geographic location of workplaces i.e. dispersed locations, home-based work or transport work;
- the extent to which any employee must move from place to place while at work;
- the nature of different kinds of work carried out by workers, work arrangements and the levels of responsibility (i.e. the hazards or risks to work safety at the workplace;
- workers' characteristics, including gender, ethnicity, age and special needs;
- the interaction of workers with the workers of other employers

25.46 The Vic Act also provides for the agreement of work groups comprising employees of a number of employers[20] ('multi-employer work groups') and for work groups comprising employees of an employer at more than one workplace[21]. Agreement for such work groups must be reached between the workers and each of the relevant employers. Whether multi-employer or multi-workplace work groups are appropriate should also be a matter for discussion and agreement.

25.47 We have identified two options for determining work groups.

25.48 The first option would be to insert the process for discussions and all the detail necessary to determine work groups in the model Act. Given the varying types of work and the variety of employment arrangements that operate across Australian workplaces in 2009, to adopt such an approach would, in our view, be complex and require detail that is inappropriate to an Act.

25.49 The second option would be to establish the principles in the model Act for the discussion process, which should include such matters as:

- speedy commencement of discussions following initiation by worker;
- development of work groups that reflect the diversity of workers and the variety of work, ensuring any worker within a work group has ready and timely access to an HSR familiar with the work, and the hazards and risks to which the workers may be exposed;
- the persons to be included in the discussions (including representation of the workers in those discussions);
- the objective of discussions being to reach agreement on work groups to be represented by HSRs, and whether a deputy HSR will be elected for the work group.

25.50 Included as part of the second option would be the establishment of regulations under the model Act to reflect the range of matters to be taken into account in determining work groups. The regulations should specify that all persons present in discussions will take into account:

- the number and range of workers at the workplace;
- each type of work performed by the workers;
- the need for a HSR to be able to perform their functions effectively;
- the areas or places where each type of work is performed;
- the extent to which workers move from place to place during working hours;
- the times at which work is performed;
- shift-work arrangements;
- cultural issues present in the workplace;

[20] See s.47 of the Vic Act.
[21] See ss.43 and 47 of the Vic Act.

- the nature of risks involved in each type of work;
- whether deputy HSR'(s) will be required;
- the differing types of work performed by workers and the different levels of responsibility;
- where there are a number of businesses or undertakings in the same work area how the work groups will be applied across the workplaces, e.g construction sites, public hospitals.
- the pattern of work carried out by the workers including any home-based work or work carried out in dispersed locations & representation of part-time, seasonal, casual or short term workers ; and
- any other relevant matter.

25.51 Matters that remain unresolved should be referred to the resolution of issues process required under the model Act[22] which may involve seeking the advice or decision of an inspector or, where necessary, referred for review or to a relevant court or tribunal (See Part 7, Chapter 27 'Issue Resolution').

25.52 We consider the second option is the most suitable, as it provides for a clear process and guidance to the workers and the person conducting the business or undertaking, without including detail in the model Act.

RECOMMENDATION 103

a) The model Act should provide that workers be grouped in *work groups* for the purposes of representation by one or more HSRs and that work groups may include workers engaged at more than one workplace and the workers engaged by more than one person conducting a business or undertaking.

b) Within a reasonable period of time following a request from worker(s) for work groups to be determined, the workers (and any person authorised to represent them) and the person conducting the business or undertaking (or each of them if more than one) most directly involved in the engagement or direction of the workers are to conduct discussions to agree the number of work groups.

c) The purpose of the discussions is to determine:

   i) the number and composition of work groups to be represented by HSRs;

   ii) whether a deputy HSR may also be elected by a work group; and

   iii) the workplace or workplaces at which the work group(s) will apply; and

   iv) if more than one business or undertaking to which work groups will apply – the grouping, into one or more work groups at one or more workplaces

d) The diversity of workers and their work must be taken into account when determining the workgroups to be represented by HSRs ensuring any worker within a work group has ready and timely access to an HSR familiar with the work and the hazards and risks to which the workers may be exposed.

e) The range of matters to be considered in determining work groups may be specified in regulations under the model Act.

[22] See the discussion in Chapter 27.

The Election Process

25.53 The workers who are to be represented by an HSR should be entitled to be involved in the process by which the HSR is determined. That is currently be election of the HSRs by members of the work groups to be represented by them.

Current arrangements

25.54 Provisions in current OHS Acts relating to the conduct and arrangements for elections include:

- providing an entitlement to all members of a work group to vote in an election:
- not requiring a ballot if the number of candidates is equal to the number of vacancies;
- allowing for external persons to conduct an election (including a relevant union); and
- providing for the intervention of the OHS Authority to resolve issues.

25.55 See Table 34 below for additional detail.

TABLE 34: Requirements for elections of HSRs

Jurisdiction	Requirements for the election of HSRs
NSW	An election must be conducted in a manner that is consistent with recognised democratic principles. An election may be conducted by a union if requested by a majority of the employees concerned.
Vic	All members of the work group are entitled to vote in an election. The members of the work group may determine how an election is to be conducted. Failing agreement within a reasonable time, the Authority may be asked to arrange for an inspector to conduct the election; or appoint another person to conduct the election. An election must be conducted in accordance with the procedures (if any) prescribed by the regulations. If the number of candidates equals the number of vacancies, an election need not be conducted and each candidate is to be taken to have been elected.
Qld	An employer must facilitate an election of an HSR if asked by the workers by, at the least, the not hampering the election process; and allowing the employer's workers to conduct the election at the workplace during ordinary working hours. The workers may ask any union to conduct the election. If a union agrees to conduct the election, it must conduct it for all workers at the workplace.
WA	HSR shall be elected in accordance with any determination made between the employer and the delegate or delegates as to how an HSR vacancy is to be dealt with; and the person by whom and the manner in which the election is to be conducted; or, in accordance with a scheme established by written agreement between the employer and delegate or delegates, for the election of an HSR. An election shall be by secret ballot. If only one eligible candidate is nominated for election to an office of safety and health representative a ballot need not to be held and that candidate shall be deemed to have been duly elected. Every relevant employee is entitled to vote at an election.
SA	HSR election to be conducted by a person selected by agreement of at least one-half of the work group. Failing selection within a reasonable time, by a person nominated by the Advisory Committee. Election of HSR must be carried out in accordance with procedures prescribed by regulations. The election must be carried out by secret ballot if any recognised member of the work

Jurisdiction	Requirements for the election of HSRs
	group so requests. If there is only one candidate for election a ballot need not be held; and the candidate is taken to have been duly elected. Every member of the work group is entitled to vote.
Tas	May elect one of their number to be an HSR
NT	A work group may, in accordance with the relevant regulations, elect a health and safety representative.
ACT	A regulation may prescribe anything else in relation to an election.
CIth	A person is to be taken to have been selected as the HSR for a work group if all of the members of the group unanimously agree to their selection or the person is elected. The employer must invite nominations from all employees in the group for election as the health and safety representative of the group. An employer must conduct, or arrange for the conduct of an election (at their expense) if there is more than one candidate. If there is only one candidate for election at the close of the nomination period, that person is taken to have been elected. Must conduct an election in accordance with regulations (if requested) and must comply with any directions issued by the Commission. All the employees in the work group are entitled to vote in the election.

Stakeholder views

25.56 Most submissions did not discuss the detail of election processes, or how work groups should be set up. A number commented that HSRs should be elected by the workers that the HSR would represent. Some stakeholders clarified this to mean workers who are "regularly engaged in that DWG"[23],' "permanent employees"[24] , or those who do not have management responsibilities[25].

25.57 In its submission the ACTU suggested HSRs:

> *"…be democratically elected by a process determined by workers, in conjunction with their union…"*[26]

25.58 During consultations the ACTU suggested that the Victorian OHS Act provided a good guide to the election of HSRs.

25.59 The AiG & EEASA considered that there was a place for the employer to initiate elections, for example when an HSRs terms of office expires.[27]

25.60 In relation to the detail of provisions currently applying to the HSR election process Johnstone et al said:

> *"The provisions in most of the statutes, however, seem to be overly legalistic and they should be streamlined and simplified in the Model Act. Given the evidence that trade union support significantly improves the effectiveness of OHS consultation processes, we submit that the Model Act should make explicit the important roles of unions in both stages of the process. And given that HSRs are elected to represent workers, employers*

[23] AiG & EEA, *Submission No.182*, p.44
[24] AAA, *Submission No.207*, p.13
[25] NUW, *Submission No.213*, p.16
[26] ACTU *Submission No.214*, p37
[27] AiG & EEA, *Submission No 182*, p.44

should be required to support and encourage the process of election, but should play no role in the election process…." [28]

25.61 The Minerals Council of Australia suggested an election process for HSRs:

"Employees should be able to collectively select safety representatives. Alternatively, the workplace may choose another arrangement provided such an arrangement is agreed to by a majority of employees. Prescription will limit site-specific preferences….If an election is the mechanism to enable the workforce to collectively select safety and health representatives, any person that will be represented by an elected person should be entitled to vote."[29]

Discussion

25.62 The model Act should ensure that all of the workers of a work group are able to be involved in an election to select one of them to be their representative. The manner of electing an HSR must be fair and genuinely reflect the consensus of a majority of the group.

25.63 There are two options for the provision, in the model Act, for the election of HSR.

25.64 One option is the inclusion in the model Act of a set of process requirements for the election of HSRs. These measures could include:

- election to be by secret ballot conducted by a body, such as an electoral authority;
- all members of the work group being entitled to vote; and
- where number of candidates is equal to number of vacancies an election need not occur.

25.65 A second option for the election of HSRs would be allowing as much flexibility as possible, so that the workers themselves may determine the arrangements of the election. This flexibility could be provided in the model Act by:

- enabling workers to determine how the election will be conducted;
- allowing, at the request of the majority of workers, union involvement or the involvement of any other person or organisation in the conduct of elections, and
- referring any disputes over an election to the issue resolution process to be required under the model Act.[30]

25.66 We consider the second option, allowing workers themselves to determine the manner in which they may select a representative the best way to ensure that a work group is truly represented. This option allows the particular circumstances and needs of the workplace and the work group to be taken into account, including the degree of formality that may be desirable.

25.67 Matters that remain unresolved may be referred to the resolution of issues process to be required under the model Act, which may involve seeking the advice or decision of an inspector.

25.68 Maxwell considered that the term of office for an HSR should not be unlimited, but should be fixed to 3 years, after which they are eligible for re-election[31]. That recommendation has been adopted in s.55 of the Vic Act. The same period is provided in s.30 of the SA Act, while the term of office of an HSR is 2 years under the NT Act[32], the Qld Act[33] and the WA Act[34]. We agree with the contemporary practice of limiting the term of office of an HSR, to enable the

[28] Johnstone, Bluff, Quinlan, *Submission No.55*, p.30-31
[29] Minerals Council of Australia, *Submission No.201*, p.26
[30] See Chapter 27.
[31] Maxwell review, p.209, para.961
[32] See s.37 of the NT Act
[33] See s.84 of the Qld Act
[34] See s.32 of the WA Act

workers to regularly consider whether the HSR remains the person they wish to represent them. The members of the work group may change significantly over time, or the performance of the HSR in the role and the exercise of powers may be relevant to the appropriateness of them continuing in the role. Other workers may wish to stand for election to the role.

25.69 We do not see any compelling reasons to adopt a particular term rather than another. A term of 3 years would be, in our view, sufficiently frequent while not requiring the workers to undertake the election process too frequently.

25.70 We recommend that the term of office of an HSR be fixed in the model Act as 3 years, with the HSR being entitled to be re-elected.

RECOMMENDATION 104

The model Act should provide that:

a) an HSR for a work group is to be elected by the members of that work group; and

b) the members of the work group are to determine how an election is to be conducted;

c) the majority of members of a work group may request a union or other person or organisation to assist them in the conduct of the election;

d) where the number of candidates for election as a health and safety representative equals the number of vacancies, an election need not be conducted and each candidate is to be taken to have been elected as a health and safety representative for the work group; and

e) as soon as practicable after being informed of the election of a HSR the members of the affected work group are to be informed by the person conducting the business or undertaking most directly involved in engaging the affected workers of the election outcome.

RECOMMENDATION 105

a) The term of an elected health and safety representative is 3 years unless:

   i) the HSR resigns; or

   ii) the HSR is disqualified; and

b) An HSR may be re-elected.

FUNCTIONS, RIGHTS AND POWERS OF HSRS

25.71 There will be many aspects to the role of an HSR in representing the workers, including involvement in consultation, issue resolution and enforcing compliance with the duties and obligations under the model Act. They will need various rights and powers to enable them to effectively undertake the role. The various functions and powers of the HSR should be specified in the model Act.

Current Arrangements

25.72 Existing provisions for HSRs include details of the functions, rights and powers of an HSR, to ensure that the role of the HSR is clearly identified and the HSR is sufficiently empowered to effectively represent the workers in their work group.

25.73 The current duties and functions of HSRs as contained in the Acts in Australia are detailed in Table 35 in Appendix C.

Recent Reviews

25.74 The NT Review is the only recent review of OHS legislation broadly addressing the issue of functions, rights and powers of HSRs[35], noted:[36]

> *"the most recent, and probably the best model, is that of Victoria, under Part 7, Divisions 5 and 6 of the Occupational Health and Safety Act 2004."*

Stakeholder Views

25.75 Stakeholders presented a range of opinions on the rights, powers and functions of HSRs. Some submissions listed the range of functions they considered should be mandated for HSRs[37] . AiG & EEASA considered that the list of functions in the model Act should be short, preferring detail be provided in regulation[38].

25.76 The main issue commented on was whether HSRs should have the power to issue provisional improvement notices (PINS), which is discussed separately in paragraphs 25.95-25.127 of Chapter 25.

25.77 Some stakeholders considered that the HSR role should be more of an advisory role[39] . ACCI envisaged HSRs as an information conduit from employees to inspectors, and as a means for effective communication between employers and employees[40].

25.78 Another issue raised by stakeholders was the provision of a right for HSRs to direct workers to cease work. The right to cease work and the power of an HSR to direct that work cease are discussed separately in Chapter 28.

25.79 Johnstone et al said of the rights and obligations of HSRs:

> *"Most of the powers and functions of Australian HSRs are similar to those vested in HSRs under the UK Health and Safety at Work Act 1974, and include:*
>
> - *the right to inspect the workplace;*
> - *the right to be consulted where workplace changes affect OHS;*
> - *the right to be present, with the consent of the employee, at interviews between an employee and employer/inspector;*
> - *the right to accompany an inspector on an inspection (or at least to be told of the presence of an inspector at the workplace);*
> - *the right to information affecting the OHS of employees;*
> - *OHS training and facilities;*
> - *time off work to perform HSR functions;*
> - *the right to assistance from OHS experts (but not in the Queensland, Tasmanian, Western Australian or ACT OHS statutes); and*
> - *the right to investigate complaints about OHS-related issues.*
>
> *It is our submission that all of these rights and powers (and the correlative duties upon persons conducting a business or undertaking) should be included in the Model OHS Act. We are of the view that the provisions in the Victorian Act would provide the best starting*

[35] Although we note that the Maxwell Review considered specific issues relating to the powers of an HSR to issue a provisional improvement notice and to direct a cessation of unsafe work.
[36] NT Review, p.112, Recommendation 28
[37] For example, see: VECCI, *Submission No. 148*, p.19, Victorian Automobile Chamber of Commerce, *Submission No. 152*, p.21-22
[38] AiG and EEASA, *Submission No. 182*, p45
[39] For example, see Master Builders Australia, *Submission No. 9*, Part 3, p33
[40] ACCI, *Submission No. 136,* p.37

point for the Panel to develop the provisions governing the rights, powers and function to be given to HSRs. [41]

Discussion

25.80 HSRs should have clear functions consistent with their role of worker representation at the workplace on OHS issues. They should have powers that enable them to most effectively represent the interests of the members of the work group and provide for the contribution of the workers into OHS matters at the workplace/s.

25.81 While existing functions, rights and powers of HSRs are provided in both Acts and regulation, they are generally similar, and widely accepted. The exceptions are the powers of HSRs to issue PINs and to direct workers to cease work. These matters are discussed separately (in paragraphs 25.95-25.127 and in Chapter 28).

25.82 As an HSR is elected to represent a group of workers, it is appropriate that the extent to which they may exercise their functions is limited to that representation. That is, an HSRs may only exercise rights and powers in respect of matters that affect workers in the work group represented by them, and for the purpose of representing those members concerning OHS. Exceptions to such a limitation would be appropriate where there is need for immediate action in another work group, where their assistance has been requested. This may occur where there is an HSR elected for another work group within the same business or undertaking, but the elected HSR for that other work group is unavailable. The workers have clearly determined that they wish to be represented by an HSR, and circumstances of urgency may render appropriate the exercise of power of an HSR to ensure ongoing health and safety and compliance with the model Act and regulations. In such circumstances, after it has been determined on reasonable enquiry that the HSR elected to represent that other work group (and any deputy HSR for that work group) is unavailable, an HSR should be able to exercise rights and powers necessary in the circumstances.

25.83 Options for providing for the rights, powers and functions of HSRs are specifying these matters in a model Act or specifying the rights, powers and functions of HSRs in model regulations.

25.84 We consider the first option is the most suitable. The exercise of rights and powers by an HSR may have significant practical and legal consequences and should accordingly be set out in the principal legislation. It is also important that the model Act clearly support the role of HSRs by articulating the functions, rights and powers of an HSR, highlighting the critical role of HSRs in participation and representation of workers in relation to health and safety.

25.85 Issues that may arise in the performance of these functions and exercise of rights and powers, that remain unresolved, should be referred to the resolution of issues process required under the model Act (see Chapter 27) which may involve seeking the advice or decision of an inspector or, where necessary, referred for review or to a relevant court or tribunal.

RECOMMENDATION 106

The functions, rights and powers of HSRs should be specified in the model Act.

For the purposes of representing the members of their work group, an HSR should have rights and powers to:

a) inspect the workplace or any part of the work area where a member of the work group works—

   i) after giving reasonable notice to person conducting the business or undertaking or their

[41] Johnstone, Bluff, Quinlan, *Submission No. 055*, p.31

representative; or

ii) immediately, in the event of an incident or any situation involving an immediate risk to the health or safety of any person.

b) accompany an inspector during an inspection of the work area they represent;

c) to be present with a member or a work group (with the member(s) consent) at an interview concerning OHS between the member(s) and an inspector or the person conducting the business or undertaking (or their representative);

d) request the establishment of an HSC for the business or undertaking;

e) receive information affecting the OHS of workers;

f) request the assistance of an inspector at the workplace;

g) monitor measures taken by the person conducting the undertaking or their representative in compliance with the model Act, or regulations;

h) represent the members of the work group in matters relating to OHS;

i) investigate OHS complaints;

j) enquire into anything that appears to be a risk to the health or safety of members of the work group, arising from the conduct of the undertaking;

k) issue a provisional improvement notice ; and

l) where an issue involves an immediate threat to the health and safety of any person to direct that work cease .

An HSRs rights, powers and functions are limited to the work group whom they were elected to represent, unless:

a) a member of another work group requests the HSR 's assistance; or

b) there is an immediate risk to health or safety that affects or may affect a member of another work group and the HSR (and any deputy HSR) for that other work group is determined after reasonable enquiry to not be available.

OBLIGATIONS OF PERSON CONDUCTING A BUSINESS OR UNDERTAKING TO HSRS

25.86 The proper and effective performance of the role and functions of an HSR may require significant time and the availability of various resources for use by the HSR. The HSR will need to have skills and knowledge that allow the HSR to effectively carry out the role and properly exercise the rights and powers given to the HSR under the model Act.

25.87 As the HSR may not have access to the training and facilities necessary for the proper performance of the role and functions, they may need the assistance of the person conducting the relevant business or undertaking. That person(s) is commonly given obligations to provide that assistance. We consider issues relating to the training of HSRs later in paragraphs 25.128-25.151.

Current Arrangements

25.88 Existing provisions for the provision of assistance to HSRs include various obligations on the employer or person conducting the business or undertaking. The current obligations of employers or persons conducting the business or undertaking are detailed in Table 36 in Appendix C.

Recent reviews

25.89 The NT Review recommended[42]

"The legislation should define the obligations of the duty holder to HSRs for:

- *the provision of resources and support to enable them to fulfill their functions,*
- *HSR right to access to information as necessary and*
- *the provision of training at the employer's expense."*

25.90 The SA Review recommended changes to time off provisions for HSRs to attend required training, and giving the employer the right to choose the training provider following consultation with the employee undertaking the training.[43]

Discussion

25.91 Workplace participation and representation requires the active involvement of management to be effective. Without the co-operation and commitment of the person conducting the business or undertaking, mechanisms for the involvement of workers in OHS may not function effectively.

25.92 As such, persons conducting a business or undertaking, in addition to their obligation to consult (see Chapter 24) have a role in facilitating worker representation and participation.

25.93 While existing obligations on employers or persons conducting a business, are provided in both Acts and regulations, there are similarities in the obligations they impose. Options for providing for the obligations of persons conducting a business or undertaking are specifying the obligations in the model Act, or specifying the obligations in model regulation.

25.94 We consider the first option is the most suitable, clearly articulating the obligations that the person conducting the business or undertaking has to facilitate the HSRs exercise of their functions. The obligations on a person, that are able to be enforced, should be contained in the principal Act. This also highlights the importance and necessity of the active involvement and co-operation of persons conducting a business or undertaking in workplace participation and representation mechanisms.

[42] NT Review, p.113, Recommendation 29
[43] SA Review Recommendation 3, pp.31-32

RECOMMENDATION 107

The model Act should provide that a person conducting a business or undertaking most directly involved in the engagement of the HSRs is required to:

a) consult with HSRs on OHS matters;

b) allow HSRs access to information relating to OHS hazards at the workplace, and the health and safety of workers;

c) allow HSRs to accompany a worker during an OHS interview between the worker and an inspector or the person conducting the business or undertaking (with the consent of the worker);

d) allow HSRs to take paid time off normal work as is reasonably necessary to perform their functions and to attend approved training;

e) provide resources, facilities and assistance as are necessary or prescribed by the regulations to enable HSRs to perform their functions;

f) allow a person assisting HSRs to have access to the workplace where that is necessary to enable the assistance to be provided;

g) permit an HSR to accompany an inspector during an inspection of any work area in which a member of the work group works; and

h) provide any other assistance that may be required by regulations under the model Act.

PROVISIONAL IMPROVEMENT NOTICES (PINS)

Current Arrangements

25.95 OHS laws of the Commonwealth, Victoria, SA, WA, Tasmania, the NT and the ACT provide HSRs the power to issue a notice commonly called a provisional improvement notice (PIN).[44] PINs are referred to as 'default notices' in South Australia, 'written directions' in Tasmania, and a 'notice of safety hazard' in the Northern Territory.

25.96 The Queensland Act has recently been amended by the Parliament to provide for PINs, however the provision has yet to be proclaimed.[45]

25.97 The NSW and Tas Acts do not include any provisions for the issuing of PINs.

25.98 A PIN may generally be issued by a HSR if the HSR believes that a person at the workplace is breaching, or has breached and is likely to again breach, the relevant OHS Act or regulations. Failure to comply with a PIN, that has not been the subject of review by an inspector, or has been affirmed by an inspector, is an offence.

25.99 Before issuing a PIN, the HSR must in all cases first consult with the persons involved in the breach and attempt to rectify the problem.

25.100 If the person to whom the PIN is issued does not agree with the notice, the person may request an inspector to attend the workplace to review the circumstances and either affirm (with or without modifications) or cancel the notice.

[44] See s.58 of the ACT Act; s. 60 of the Vic Act; s.40 of the NT Act; s.35 of the SA Act; s.51AC of the WA Act; and s.29 of the Cwth Act.

[45] Section 10 of the *Workplace Health and Safety and Other Legislation Amendment Act* 2008 *(Qld)* provides for the insertion of new subdivisions of Part 7, providing for issuance of PINs by a qualified HSR. This section will commence upon proclamation.

Recent Reviews

25.101 The Maxwell Review considered PINs to be "*an important part of the compliance function performed by an HSR*".[46] The Report noted that criticism had been made of the Victorian system as being "overly legalistic and difficult to complete." [47] The Report recommended:

> *"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."*[48]

25.102 The NSW WorkCover Review recommended that HSRs be given the power to issue PINs, or 'safety recommendation notices', noting that such provisions already exist in a number of other jurisdictions.[49] The review also recommended that HSRs undergo suitable training and that PINs be subject to appeal mechanisms.[50] The Stein Inquiry supported these recommendations.[51]

Stakeholder views

25.103 Whether the model Act should contain an option for HSRs to issue PINS drew broad commented from regulators, industry and unions alike, some supportive others opposed. However, overall, the majority of submissions indicated support for PINs.

25.104 Support for PINs was most evident among those submissions from governments, unions and union organisations.[52] However, there were also a number of supportive submissions from other stakeholder groups, including the submissions of Business SA and AiG and EEASA, who commented: [53]

> *"Members in states like Victoria and Western Australia where Workplace Health and Safety Representatives (HSRs) have the right to issue Provisional Improvement Notices (PINs) in their workplace have found that, despite some instances of abuse, on balance it has had a net positive effect on the management of safety."*

25.105 The Victorian, Tasmanian and South Australian Governments each indicated support for the right for HSRs to issue PINs.[54] In particular the Victorian Government stated:[55]

> *"Provisional improvement notices (PINs) are an important tool to promote safety in the workplace and provision should be made in the model OHS Act for their issue by HSRs. There are operational and budgetary limits to the capacity of the regulator to attend each workplace and Maxwell noted that WorkSafe inspectors stressed that 'HSRs are their 'eyes and ears' at workplaces.' In this context the power of an HSR to issue a PIN should be retained as an important part of the compliance function."*

25.106 Some respondents, such as the CCF, also indicated a preference for PINs to include recommendations for compliance, but that these recommendations should not be binding.[56]

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[46] Maxwell Review, p.211
[47] ibid
[48] ibid
[49] NSW WorkCover Review, pp.55-57
[50] ibid
[51] Stein Inquiry, pp.100-104
[52] For example, see ACTU, *Submission No.214*; CFMEU, *Submission No.224* ; Unions NSW, *Submission No.108*; Tasmanian Government, *Submission No.92* ; WA Government, *Submission No.112*,; Victorian Government, *Submission No.139*
[53] AiG and EEASA, *Submission No.182*, p.8
[54] Tasmanian Government, *Submission No.92* ; WA Government, *Submission No.112*, p.21; Victorian Government, *Submission No.139*, p.77
[55] Victorian Government, *Submission No.139*, p.77
[56] For example, see CCF, *Submission No.99*; Telstra, *Submission No.186*; Optus, *Submission No.196*

Ramsay Health Care suggested that HSRs should be required to undergo appropriate training before being provided with the power to issue PINs.[57]

25.107 Those opposed to PINs mainly include industry representatives, companies and employer organisations such as the CCI WA, MBA, VECCI and Ergon Energy Corporation.[58] Arguments against provision for PINs typically included:

- PINs add another unnecessary level of legislative complexity; and
- PINs may be prone to misuse by HSRs.

25.108 The ACTU in its submission addressed initial concerns regarding the right for an HSR to issue a PIN: [59]

> *"… despite initially vociferous fears in some quarters that HSRs would abuse their powers, especially the right to provisional notices in the over 20 years since the legislation was introduced in states where such powers were granted (such as Victoria) there is no evidence these fears were in anyway justified. There are more than adequate controls on HSR behaviour (through the involvement of an OHS inspector following the issuing of a notice by a HSR and the possibility of removing a HSR from office who was found to have abused their powers)."*

Discussion

25.109 The jurisdiction that first introduced PINs in Australia was Victoria in 1985. Those provisions were considered in the Maxwell Report and remained unchanged, although the report did reflect on the important compliance aspect provided through such a provision.

25.110 One option for the model Act, would be to adopt the Victorian framework for PINs without amendment, recognising that the system has operated in that State unchanged for some 24 years.

25.111 A second option, in light of the Maxwell Report recommendations to simplify the process of issuing PINs, would be to adopt the Queensland framework, which is the most recent framework for PINS in Australia. In our view the Queensland provisions (although yet to be proclaimed,) provide a less complex system and at the same time "focus on the substance of the alleged contravention."[60]

25.112 For example, the details of the Victorian system for service of a PIN on a person by an HSR or include:

- delivering it personally to the person or sending it by post or facsimile to the person's usual or last known place of residence or business; or
- leaving it for the person at the person's usual or last known place of residence or business with a person who is apparently over 16 years and who apparently resides; or
- leaving it for the person at the workplace to which the notice relates with a person who is apparently over 16 years and who is apparently the occupier for the time being of the workplace. [61]

25.113 The provision, as we recommended, should remove unnecessary detail surrounding the service of PINs and instead require the HSR to take 'all reasonable steps' to affect service of the PIN, understanding that such notification is a key aspect of the process of communicating

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[57] Ramsay Health Care, *Submission No.81*
[58] For example, see CCI WA, *Submission No.44*; MBA , *Submission No. 9,* (Part 4); Ergon Energy Corporation, *Submission No.94*; VECCI, *Submission No.148*; RailCorp NSW, *Submission No.150*;
[59] ACTU, *Submission No.214*
[60] Maxwell Review, rec.975
[61] See s64 of the Vic Act

outcomes. The requirement for consultation to occur prior to the issuing of a PIN should assist in ensuring that the PIN is brought to the attention of the person to whom it is issued.

25.114 A third option is to adopt the basic right for an HSR to issue a PIN in the model Act with detail provided in supporting regulations. This option was taken in the development of the ACT *Work Safe Act 2008*. The ACT took the decision to remove the detail of PINs from the Act, (as was provided in the superseded *Occupational Health and Safety Act 1989* (ACT)) into regulation. However, the regulations to support the Act (and prescription for PINs) have not yet been developed.

25.115 We consider the second option should be adopted. In recommending this we have had regard for both the recently introduced Qld provisions and the Vic provisions, the latter in place since 1985. Both of those models set out a clear process commencing with the basis on which an HSR can issue a PIN.

25.116 Current practice enables a PIN to be issued where there is a reasonable belief that a contravention of the Act or regulations is occurring or has occurred and it is likely the contravention will continue. When an HSR becomes aware of a contravention, and prior to issuing a PIN, the HSR must notify the relevant person about the contravention and consult with that person about remedying the contravention. The right of an HSR to issue a PIN is usually limited to addressing contraventions in the HSRs area of representation and/or affecting a member of the HSRs work group (see the earlier discussion in paragraphs 25.80-25.85 regarding the scope of the powers of an HSR and the limited ability of an HSR to exercise powers beyond the work group represented by the HSR).

25.117 To enable action to be taken to remedy a contravention, a PIN must contain details of the provision the HSR believes is being contravened, and the matter or activity the HSR considers is occasioning the contravention. Additionally, the PIN may include recommendations on remedies.

25.118 We are aware of concerns that arise from confusion between the expressions ‘issued’ and ‘given’ in relation to a PIN. A PIN is ‘issued’ to a person who is required to comply with it, but may be given to another person (e.g. a manager or officer of a corporation). Those who are given the PIN need not comply with it, unless they are also the person to whom it was issued. We recommend that this be clarified in the model Act by requiring that the PIN clearly state the person required to comply with the PIN.

25.119 If a worker or manager is given a PIN that is issued to another person, such as the person conducting the business or undertaking, they must bring the PIN to the attention of the person to whom it was issued. The model Act should also require the person to whom the PIN is issued to bring the PIN to the attention of all persons whose work is affected by the notice. Where possible, this is to include displaying a copy of the PIN in a prominent position in the affected work area.

25.120 The person to whom the PIN is issued must either comply with the PIN or request, within seven days, an inspector to enquire into the circumstances relating to the PIN. When the intervention of an inspector is requested, the operation of a PIN is suspended pending the inspector’s decision.

25.121 On conclusion of the enquiry into the circumstances relating to a PIN, an inspector must notify in writing the HSR and the person to whom the PIN was issued, of the outcome of the enquiry. This must include the inspector’s decision to affirm or cancel the notice and the basis for the inspector’s decision, and how a review of the decision may be sought.

25.122 Where a PIN is affirmed by an inspector it should be deemed to be an improvement notice of the inspector and will have effect as such and be subject to the same review procedures of an improvement notice. While this is commonly the case, it is not the case in Victoria[62]. The

[62] Although a decision of an inspector to affirm (with or without modifications) or cancel a PIN is a decision which is able to be reviewed under s128 of the Vic Act.

affirmation of a PIN by an inspector is akin to the inspector adopting the notice as his or her own, having considered that an improvement notice is appropriate in the circumstances. Where the PIN has been affirmed with modifications, it is the inspector, rather than the HSR, who is of the opinion that the modified notice is most appropriate and the inspector best understand what the PIN means and why it is in those terms. It is the inspector who is regulator that is empowered to enforce the PIN and bring a prosecution for a breach of the PIN.

25.123 We are aware of practical issues that arise in the workplace between the HSR and the person to whom it is issued, where the PIN has been modified by an inspector. Those issues relate to a difference in understandings as to the effect and compliance requirements of the PIN.

25.124 For these reasons, we consider it preferable that an affirmed PIN be considered to then be a notice of the inspector.

25.125 We consider that an HSR should be able to at any time before the date for compliance cancel a PIN issued by the HSR.(e.g. they become aware of facts that render the PIN inappropriate or unnecessary). Any defect or abnormality, including incorrectly naming the recipient, will not render a PIN invalid, unless the defect or abnormality is misleading or is likely to cause substantial injustice.

25.126 To remove any doubt, the issuance, affirmation (with or without modification) or cancellation of a PIN does not affect a proceeding for an offence against the model Act or the regulations for a matter in relation to which a notice was given.

25.127 It is critical to emphasise the importance of HSRs receiving training as soon as practicable following their election and subsequent refresher training (training for HSRs is addressed next in this chapter). In this regard the onus is on both the newly elected HSR and the person conducting the business or undertaking to ensure such approved training is undertaken.

RECOMMENDATION 108

The model Act should provide that an HSR have the power to issue a Provisional Improvement Notice (PIN) to a person where the HSR has reasonable grounds to believe the person:

a) is contravening the model Act or regulations; or

b) has contravened in circumstances that make it likely such contravention will continue or be repeated.

RECOMMENDATION 109

The provisions relating to Pins may usefully be modelled on the provisions contained in ss.60-66 of the *Occupational Health and Safety Act 2004* (Vic) or the amendments recently made to the *Workplace Health and Safety Act 1995* (Qld) with the following modifications:

a) the PIN should clearly state the person required to comply with it; and

b) a PIN that has been affirmed by an inspector (with or without modifications) shall be deemed to be an improvement notice of the inspector.

TRAINING FOR HSRS

Current arrangements

25.128 The majority of jurisdictions currently provide for HSRs to receive training. Under the Cwth Act, training for HSRs is mandatory. Table 37 below provides an overview of the HSR training provisions of each jurisdiction.

25.129 Training provisions place the responsibility for the costs of the training on the employer, including allowing HSRs paid time off work to attend training, and paying the course costs. Amendments to the QLD Act[63] introduce the concept of 'qualified workplace health and safety representatives' which provides a limitation to the exercise of certain powers to those who have completed approved training.

TABLE 37: Provision for the training of HSRs

Jurisdiction	Training	Refresher	Employer meet course costs	Paid time off to attend
NSW (these provisions are provided in regulation)	Yes	–	Yes	Yes
Vic (course must be approved or conducted by the Authority)	Yes	Yes	Yes	Yes
QLD (training prescribed in regulation)	Yes	Yes	Yes	Yes
WA (regulations may prescribe entitlements for training)	Yes	–	Yes	Yes
SA (training approved by the Advisory Committee)	Yes	Yes	Yes	Yes
Tas	No	–	–	–
NT (course must be approved or conducted by the Authority)	Yes	Yes	Yes	Yes
ACT	No	–	–	–
Clth (training accredited by the Commission)	Yes (HSR must undertake training)	–	–	Yes

Recent Reviews

25.130 The Maxwell Review reported general acceptance 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*" and recommended such training should be endorsed in OHS legislation[64.]

25.131 The ACT Review reported that training for HSRs is essential to the effective operation Act., presenting the view that all HSRs should receive training to enable them to fulfil their responsibilities[65].

25.132 Associated with the empowerment of HSRs to issue PINs is the need to ensure that such an enforcement and compliance tool is utilised properly and effectively and with appreciation of the range of alternative means of achieving outcomes, such as use of issue resolution

[63] *Workplace Health and Safety and Other Legislation Amendment Act* 2008
[64] Maxwell Review, p.211, para 971
[65] Act Review, p60

procedures. As such, the recommendation of the NSW WorkCover review to provide for issuance of PINs is limited to appropriately training representatives[66].

25.133 The Vic Administrative Review commented that competencies for employee representatives should include a general knowledge of the legislation, and an understanding of the role of inspectors, HSRs, the duties of the employer, the process of issue resolution and an understanding of how the Act and Regulations apply to their workplace[67].

25.134 The recent OHS reviews consistently recommended or agreed that an employer should pay the costs of HSR attendance at training, and allow the HSR the necessary time off work with pay to attend and take part in the courses. Maxwell Review suggested:

> *"The course costs are modest, and the benefits for all workplace parties are enormous."*[68]

25.135 The Maxwell Review reported strong support for mandating that persons who represent an employer in consultation about OHS matters, including issue resolution, also be appropriately trained, noting that the "knowledge imbalance" between an untrained manager and a trained HSR is inimical to effective consultation.[69]

Stakeholder Views

25.136 The ACTU considered that a principled obligation should rest on the employer to provide:

> *"…adequate training and supervision to ensure health, safety and welfare and an obligation to ensure health and safety representatives can attend training at a training provider of their choice…."*[70]
>
> *"…strongly urges that model OHS legislation provides for adequate training of HSRs (in paid employer time and with union involvement)…"*[71]
>
> *"…. Anecdotal evidence from HSRs points to a need for more training to ensure HSRs can exercise their rights and powers with confidence. The ACTU recommends at least 10 days paid HSR training for new HSRs and 3 day refresher courses per year for existing HSRs."* [72]

25.137 The National Mines Safety Framework ('the NMSF')said in the Consultation Framework of training for HSRs:

> *"To ensure adequate consultation can occur, the employer shall … allow HSRs time off work to attend relevant and agreed training without loss of remuneration or other entitlements; "* [73]

25.138 The NMSF included in the Legislative Framework an obligation specific to HSRs and HSC's:

> *"HSRs and OHS committee members shall undertake training, to ensure they have the relevant skills to undertake their responsibilities. Training is to be conducted by a provider*

[66] NSW Workcover Review, p55, Recommendation 21
[67] Vic Administrative Review, p.54
[68] Maxwell Review, p211, para 972
[69] ibid, p.197 para 894
[70] ACTU, *Submission No. 214*, p.26
[71] ACTU , *Submission No. 214*, p.37
[72] ACTU, *Submission No. 214*, p.39
[73] NMSF, *Submission No. 219* p.17

that has been accredited by the relevant regulatory authority, and has been agreed between the employer and employee."[74]

25.139 The WA regulator, in relation to training of HSRs and HSC' members specified:

"… in Western Australia HSRs must complete a mandatory 5 day training course. The specified outcomes for this 5 day course have been mapped to six OHS units of the national BSB30707 Certificate III in Occupational Health and Safety (Cert III in OHS). HSRs are therefore able to attain these six units after completion of their 5 day training course but actual attainment of the competencies is not required for the role of HSR. Thus there is no mandatory requirement for assessment of competencies and the decision as to whether to seek skills recognition into the Cert III in OHS is entirely at the discretion of the HSR.

… In Western Australia there is no specified training for HSCs. However, it is desirable that they are trained to at least the same level as HSRs." [75]

Discussion

25.140 There is widespread support for HSRs to be entitled to such training as is necessary to enable them to properly and effectively perform their functions and exercise their rights and powers. This is also contemporary practice in OHS legislation. It is also generally accepted that the employer should bear the costs of the training and provide the HSR with paid time off work to attend the training.

25.141 We recommend that this approach be continued in the model Act. We consider training of an HSR to be so important to the proper and effective performance of functions and exercise of rights and powers by an HSR, that the training should be an obligation, not merely a right of the HSR.

25.142 We recommend that the model Act adopt the approach in the Cwth Act that an HSR must undertake training.

25.143 While current OHS Acts provide for the training costs to be borne by the employer of the HSR, this may not be applicable under the model Act as we recommend it, with the employment relationship not being the determinant of duties and obligations. Consistent with that, the obligations for payment of the costs of training should rest with a person conducting the business or undertaking who is most directly involved in the engagement or direction of the HSR and members of the work group represented by the HSR. Any dispute as to who should bear the cost may be resolved in accordance with the issue resolution procedures required under the model Act, which may include a decision being made by an inspector.

25.144 This leaves the question of the detail of the training – how much, how often and what should it contain.

25.145 One option would be to include a provision for 'adequate' training for HSRs in the model Act and leave the specification to regulations on:

- the number of days;
- whether refresher training should be included;
- whether any additional training should be specified;
- 'reasonable' paid time to attend;
- course as specified by the HSR;

[74] ibid
[75] Western Australian Government, *Submission No. 112* p.23

- dealing with disputes relating to attending training (whether it be payment for attendance or any other relevant matter);

25.146 A second option would be to specify the obligations of the HSR and the person conducting the business or undertaking in relation to training , and the principles associated with the training and what it is to achieve in the model Act, with the details in regulation. The principles would reflect the importance of training in ensuring the effective operation of HSRs at the undertaking.

25.147 We prefer the second option.

25.148 Such training should be competency based, having regard for the rights and powers able to be exercised by the HSR e.g. issue PINs and direct that unsafe work cease. Importantly the training should provide the knowledge and skills necessary to ensure effective representation.

25.149 The minimum details that should be included in the model Act should be

- an obligation of the HSR to attend initial (5) day competency based training (that has been approved by the regulator) as soon as practicable following election;
- the right of the HSR to specify the approved course, after consultation with the person conducting the relevant business or undertaking and receive paid leave to attend the training;
- the right of the HSR to attend 1 day's refresher training per year and receive paid leave to attend; and
- that a HSR may attend such further training as may be approved from time to time by the regulator or, is considered reasonable having regard for the circumstances of the business or undertaking and after consultation with the person conducting the business or undertaking..

25.150 All other details relating to training are to be specified in regulation.

25.151 Any issues relating to the taking of training may be resolved in accordance with the issue resolution procedure required under the model Act, or referred to an inspector for decision.

RECOMMENDATION 110

The model Act should provide that an HSR, as soon following their election as is reasonable in the circumstances of the business or undertaking in which they are engaged, must attend training which is subject to the following requirements:

a) The training must consist of an initial five (5) day competency based training course, approved by the regulator (an 'approved course');

b) The approved course may be either of the HSRs choice or as directed by an inspector;

c) The HSR is entitled to paid leave to attend training; and

d) The training is to be at a time agreed with the person conducting the business or undertaking, having regard for the duties and functions of the HSR in meeting their obligations under the model Act, or otherwise as directed by an inspector.

RECOMMENDATION 111

The model Act provide that an HSR may attend and receive paid leave for:

a) one (1) day's refresher training per year after the first year, being a course approved by the regulator; and

b) such further attendance (as considered reasonable having regard for the circumstances of

the business) at an approved training course as:

i) may be agreed with the person conducting the business or undertaking in which the HSR is engaged; or

ii) directed by an inspector.

The HSR must first consult with, and attempt to reach agreement with, the person conducting the business or undertaking in which they are engaged, as to the timing and costs of the training. Any issue in relation to the details of the training, or payment, must be resolved in accordance with the issue resolution procedures required by the model Act, or referred to an inspector for decision.

LIABILITY OF HSRS

Current Arrangements

25.152 The Qld, ACT, WA and the Commonwealth Acts expressly provide that an HSR does not incur civil liability from his or her performance of, or his or her failure to perform, any function of a HSR. This protection in the ACT also extends to criminal liability.

Discussion

25.153 An HSR is a volunteer role. The recommended framework in the model Act provides for the rights of HSRs and the role and obligations of the office of HSR.

25.154 Four jurisdictions provide express protection from liability for HSRs in the exercise of, or the failure to exercise, the rights or function of an HSR.

25.155 The role of an HSR is an important one and they should not be deterred from performing it and properly exercising rights and powers provided by the model Act, by the fear of incurring civil liability. We therefore recommend that the model Act provide protection of an HSR from incurring civil liability for any act or omission in the course of the proper performance of the role or exercise of any power or right of an HSR under the model Act.The model Act would not provide for any criminal liability of an HSR in relation to the performance of the functions of an HSR or exercise of any power or right of an HSR under the model Act. Any criminal liability as the HSR may incur may therefore come from some other, presently undetermined, source. The fact that the HSR is performing as such should not provide automatic protection from such unrelated criminal liability. We do not consider there to be any need to extend the protection to criminal liability.

25.156 We note that an HSR will be a worker and will be subject to the duty of care of a worker under the model Act. The two roles of the HSR (as HSR and as worker) are separate.

RECOMMENDATION 112

The model Act include a provision protecting HSRs from incurring civil liability when in good faith performing or omitting to perform, or properly exercising or omitting to exercise a right or power of an HSR.

DISQUALIFICATION OF HSRS

25.157 In this chapter we have dealt with the various functions of HSRs and the associated powers. Those powers are significant and if not used properly may render it inappropriate for the HSR to continue in that role, or to be able to exercise those powers.

25.158 We now consider the circumstances in which a HSR may be disqualified or suspended or prevented from exercising specific powers.

Current Arrangements

25.159 Most current OHS Acts make specific provision for the disqualification of an HSR. There is, however, a wide divergence in the detail of the provisions, ranging from the circumstances which may warrant disqualification or suspension, who may make application for that to occur, who has the power to disqualify or suspend an HSR and the process by which that occurs.

25.160 Table 38 below summarises the provisions in current OHS Acts.

TABLE 38: Current Provision relating to the disqualification of HSR

Jurisdiction	Provision for disqualification of HSR
NSW	No
Vic	Magistrates' Court may disqualify HSR for a specified period or permanently, if the HSR has misused powers, intending to cause harm to the employer or their undertaking etc.
QLD	A provision for the suspension or cancellation of an HSRs power to give a PIN was recently enacted as part of new provisions in the Qld Act relating to PINs[76]. Those provisions have yet to be proclaimed.
WA	The Tribunal may disqualify a HSR, for a specified period or permanently, for having done anything under the Act with the intention only of causing harm to the employer or their undertaking, including the use or disclosure of information or, for failure to adequately perform functions under this Act.
SA	Review committee of the Industrial Court may disqualify a HSR for a specified period for repeatedly neglecting their HSR functions, or for exercising powers or functions for an improper purpose; including the disclosing of information.
Tas	The Director may cancel an appointment and may prohibit a person from being appointed as an HSR for any period up to 5 years, for acting with the intention of causing harm to the employer or the employer's work activities or for acting unreasonably, capriciously or otherwise than for the purpose for which he or she was appointed
NT	The Authority may disqualify a HSR for misusing the powers of a HSR
ACT	No
Clth	The Commissioner may disqualify a HSR, for a specified period not exceeding 5 years for having acted with the intention of causing harm to the employer or their undertaking, or unreasonably, capriciously or otherwise than for the purpose for which the power was conferred, including the disclosure of information

Recent Reviews

Recent reports have made few comments or recommendations about the HSR disqualification provisions in OHS Acts.

[76] *Workplace Health and Safety and Other Legislation Amendment Act 2008* (Qld). The Act took effect on 1 January 2009, apart from the provisions relating to PINs (inserted by s.10 of the amending legislation).

25.161 The Maxwell Review supported greater protection for HSRs against action by employers which discriminated against them because of their OHS work, but, acknowledged that with that protection should come responsibility and an HSR who acted with the intention of damaging the employer's business should be liable to disqualification.[77]

25.162 The WA Review considered the powers that had recently been given to HSRs to issue PINs (these provisions were added to the WA Act in 2004). A question was raised about whether any abuse of such powers should be addressed in the Act, by providing for the disqualification of an HSR, or less extreme action.

25.163 The WA Review reported[78]:

> *"In the Inquiry's view, whilst those alternatives may present as appropriate for a future statutory review, it is premature to undertake such significant tasks as components of the present exercise. The Inquiry is cautious about recommending any significant change to the regime for the issue and operation of PINs given the limited period of its operation. No doubt the regime will be monitored as comprehensively as resources permit."*

Stakeholder Views

25.164 The AiG and EEASA on balance supported the ability of an HSR to issue a PIN or to cause work to cease, provided there were safeguards including:

- 'robust processes through which an HSR can be disqualified for abuse or misuse of their powers',
- the workers represented being able to cause the HSR to step down and strong penalties for misuse of powers[79].

25.165 The ACTU referred briefly to the disqualification provisions in its submission[80]:

> *"There are more than adequate controls on HSR behaviour (through the involvement of an OHS inspector following the issuing of a notice by a HSR and the possibility of removing a HSR from office who was found to have abused their powers)."*

25.166 The MBA referred to specific powers being provided for HSRs in its submission"[81]:

> *"Master Builders opposes health and safety representatives being vested with legal responsibilities which would sit more appropriately with health and safety authorities.*

25.167 The Victorian Government submission also considered the issue of what a representative means for those that elected them. By using the word 'representative', health and safety law clearly intends that a group of employees may choose someone to represent their health and safety interests. How the representative is to discharge his or her responsibility as a representative is a matter for discussion between the representatives and the members of the group. As in any other democratic electoral process, if employees are dissatisfied with how they are being represented, they can call another election[82.] While not disqualification, this is a worker initiated equivalent.

Discussion

25.168 We consider it is important to have appropriate safeguards in place in the model Act, against the misuse of the powers given to an HSR for securing compliance at the workplace. In saying this, we do not wish it to be thought that we believe this to be a widespread concern. In

[77] Maxwell Review, p.11.
[78] WA Review, p.125, para 7.50
[79] AiG and EEASA ,*Submission 182*, pp.44 and 46
[80] ACTU, *Submission No.214*, p.37, para.127
[81] MBA, *Submission No.9*,(Part 4*)*, p.33, para 9.8*,*
[82] Vic Government, *Submission No.139*, p.49-50

our experience the overwhelming majority of HSRs are dedicated, responsible and competent in the performance of their functions and exercise of their powers. Providing for safeguards against abuse of powers may assist the credibility of HSRs and provide comfort to those dealing with them that the powers are exercised in good faith and as is appropriate in the circumstances.

25.169 All submissions accept the need for safeguards as a principle, with the differences being in the nature of those safeguards. Some consider that the procedures relating to the specific powers, such as the review of PINs, are sufficient to provide a check against a misuse of powers. Others consider that a finding of a misuse of power should require the removal of the ability of the HSR to exercise that power, through disqualification, suspension or removal of the specific power.

25.170 We agree with those that propose the disempowerment of an HSR upon a finding of misuse of power. The costs to a business from an HSR directed cessation of work, or compliance or review of a PIN may be great. The inappropriate or excessive exercise of powers, or an inappropriate approach to issue resolution, by an HSR may cause significant damage to the relationship between the person conducting the business or undertaking and the workers engaged by them, in turn having a negative impact on the morale and productivity of the business, and on the OHS culture and co-operation necessary for effective OHS management.

25.171 The model Act could adopt an existing provision allowing the regulator, the person conducting the business or undertaking concerned or a member of the HSRs work group to apply for the HSRs disqualification. Although disqualification provisions currently exist in a number of jurisdictions, we were advised during consultation that few applications had been made to disqualify HSRs. We are not in a position to analyse why that is so, but the infrequency of applications would not, in our view, justify not having such a provision.

25.172 We were told that the grounds for disqualification in some jurisdictions depend on the proof of matters that can never be proven (e.g. that the HSR exercised a power for the sole purpose of causing damage to the employer). This demonstrates the need for the grounds to be meaningful and provable.

25.173 We caution, however, that the grounds for disqualification or suspension should not be so easy to prove as to make HSRs reluctant to exercise their powers for fear of disqualification if found to have unintentionally erred. The task of an HSR is a sometimes difficult and always important one. Their conduct and exercise of powers can provide great benefit to OHS within an organisation. While they may not always ‘get it right’ the consequences of a cautious exercise of powers to prevent harm are well outweighed by the adverse consequences of a failure to take appropriate action, resulting in injury, illness or death. An HSR must therefore not be deterred from the proper exercise of powers.

25.174 We consider that the model Act should provide for applications to disqualify or suspend an HSR on specified grounds. There should be a process that meets the usual standards of procedural fairness, but it should not be too complex or legalistic. The jurisdiction should be conferred on a court or tribunal that is suitably equipped to deal with such applications in a fair and speedy manner.

25.175 A person affected by the exercise of powers by the HSR, or the regulator, should have standing to bring an application for disqualification or suspension. The person making the application should be required to prove, on the balance of probabilities, that the grounds for disqualification or suspension exist.

25.176 The grounds for disqualification or suspension should, in our view, be:

- repeated neglect by the HSR of their functions (as this would mean the workers are not effectively represented, and may cause difficulties in consultation and issue resolution);
- exercising their powers or performing their functions for an improper purpose, including inappropriately disclosing information obtained through the exercise of their powers; or
- acting unreasonably in the performance of their functions or the exercise of their powers.

25.177 We recommend that the model Act provide for the court or tribunal have the power to disqualify or suspend the HSR, or to remove or suspend a specified power of an HSR for a period of time.

RECOMMENDATION 113

A relevant court or tribunal may, on application, disqualify or suspend an HSR or suspend the right of the HSR to exercise a power for a specified period, for:

a) repeatedly neglecting their HSR functions; or

b) exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or

c) acting unreasonably in the performance of their functions and exercise of their powers as a HSR.

Persons able to make such applications include:

a) a person detrimentally affected by the performance or failure to perform the functions or the exercise of powers by the HSR (e.g. a person conducting the business or undertaking); or

b) the regulator; or

c) a member of the HSRs work group.

The onus in such proceedings is on the applicant to prove, on the balance of probabilities that the grounds exist for disqualification or suspension.

CHAPTER 26: HEALTH AND SAFETY COMMITTEES (HSC)

26.1 As noted in Chapter 25 the main mechanisms to facilitate participation of workers in Australian OHS laws are the provisions for HSRs and HSCs. In this chapter we consider and make recommendations on the role of HSCs to promote consultation and co-operation between employers and workers and requirements for their establishment.

Current arrangements

26.2 All Australian OHS Acts provide for the establishment of a workplace health and safety committee (HSC).[1]

26.3 OHS Acts generally have limited provisions relating to the establishment and operation of HSCs. The provisions mainly relate to who must establish an HSC and when. The requirements include the establishment of an HSC:

- by an employer or principal contractor;
- at the request of a majority or prescribed number of employees/workers;
- at the request of an HSR;
- at workplaces with 20 or more employees/workers (50 under the Cwth Act);
- as directed by the regulator; or
- as provided in regulations.

26.4 Some OHS Acts allow for the establishment of more than one HSC, and provide timeframes in which an HSC must be established following any of the above occurrences. These timeframes range from three weeks to three months.

26.5 See Table 39 below for further detail on the provisions.

26.6 Requirements for the composition of an HSC are generally limited to requiring that it includes equal numbers of members representing the employees and those representing the employer. Some jurisdictions[2] require that that HSCs include HSRs in the members representing the employees.

TABLE 39: Establishment of HSCs

State	Section	Provision
NSW	s.17	An HSC is to be established if: • the employer employs 20 or more persons and a majority of those employees request the establishment of the committee or • WorkCover so directs. More than one HSC is to be established if: • a majority of employees request their establishment and the employer agrees or • WorkCover so directs.
Vic	s.72	An employer must establish a health and safety committee: • within 3 months after being requested to do so by a health and safety

[1] See s.17 of the NSW Act; s.72 of the Vic Act; s.86 of the Qld Act; s.38 of the WA Act; s.31 of the SA Act; s.26 of the Tas Act; s.45 of the NT Act; s.54 of the ACT Act; and s.34 of the Cwth Act.

[2] For example, s.72 of the Vic Act provides that HSRs should also hold positions on the HSC. Section 87 of the Qld Act requires HSRs to be appointed members of the HSC

State	Section	Provision
		representative; or • if required by regulations to do so.
Qld	s.86	An employer or principal contractor may establish a workplace HSC for a workplace. An employer or principal contractor must establish an HSC if: • requested by an HSR; • the Chief Executive directs so; or • a workplace health and safety officer is appointed (compulsory for workplaces where 30 or more workers are normally employed). More than one HSC may be established for a workplace.
WA	ss.38 & 39	An employer must establish a workplace HSC within the allowed period after — • the coming into operation of a regulation requiring the employer to do so; • service on the employer of a notice by the Commissioner requiring the employer to do so; or • being requested to do so by an employee, unless the Commissioner has decided that an HSC is not required to be established for the workplace concerned.
SA	s.31	An employer must establish one or more health and safety committees within two months of a request to do so by: • a health and safety representative; • a prescribed number of employees; or • a majority of the employees at any workplace, An employer must also establish one or more health and safety committees if required to do so by or under the regulations.
Tas	s.26	Where more than 20 persons are working at a workplace, the employer must, if requested by a majority of those persons, establish an HSC for that workplace not later than 2 months after being requested to do so.
NT	s.45	An employer with a workforce of at least 20 workers at a particular workplace must, if requested by a majority of the workers or an HSR, establish an HSC for the workplace within 3 weeks of the date of the request.
ACT	s.54	An HSC may be established by agreement between the employer and worker consultation unit or if requested by a majority of employees of a worker consultation unit.
Cwth	s.34	An employer must establish an HSC if the number of the employer's employees is normally not less than 50. An employer must also establish an HSC in a particular workplace if: • the number of the employer's employees in the workplace is normally not less than 50; and either: • an HSR of a designated work group requests the employer to establish an HSC; or • a majority of the employees in the workplace request the employer establish an HSC.

Recent Reviews

26.7 A number of reviews of OHS legislation have considered provisions for establishing consultation arrangements. The Maxwell Review and the SA Review concluded that the existing provisions in Victoria and South Australia respectively were adequate and proposed no changes to the provisions.[3]

26.8 The Laing Review concluded that there was no reason to specify a requirements for the composition of an HSC, preferring that the composition of an HSC be determined by negotiation between the employer, HSRs and employees. The Laing Review supported the provision of broad parameters for the establishment and operation of HSCs, and to provide mechanisms to resolve disputes relating to their establishment[4]. The WA Review reported that the Laing Reviews' recommendations to modify the Act to simplify the process for the establishment and operation of HSCs and to move default/minimum provision into regulation had been implemented.[5]

26.9 The NT Review noted that: [6]

> *"…many contemporary legislative provisions for worker participation in OHS committees are inadequate because they fail take account of contingent and precarious employment and do not effectively engage contractors, sub-contractors, labour-hire workers etc in the consultation process".*

26.10 The NT Review recommended that the proposed OHS legislation require HSCs to be established when requested by an HSR or employees, and extending the requirements for the involvement of sub-contractors to provide for the involvement of other types of 'precarious' workers (such as labour hire personnel) in an HSC.[7]

26.11 The ACT Review recommended that the legislation provide a framework for workplace consultation and participation that was sufficiently flexible to enable workers and employers to negotiate suitable agreements for workplace arrangements for consultation and participation.[8]

Stakeholder Views

26.12 There was a range of stakeholder views as to whether or not HSCs should be provided for under the model Act, and the detail of any provisions.

26.13 The majority of submissions, including those of CCF, HIA and AiG, generally supported the model Act being flexible in providing for the establishment of HSCs, as an option for consultation, but that they should not be a mandated requirement since:[9]

- they are not practical for small businesses, businesses with multiple workplaces and changing workforces, and multi-employer situations; and
- mandating the establishment of an HSC may result in an employer being non-compliant if there is no interest amongst workers to become a member of a committee.

26.14 In particular AiG commented that:[10]

> *"Employers have a duty to consult, at large, and this has tended to be confused with… obligations to form committees or recognise safety representatives. Nothing in the*

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[3] Maxwell Review, p.213, para.981, SA Review, Volume 3, p.23
[4] Laing Review, p.172
[5] WA Review, Appendix A, p.6
[6] NT Review, p118
[7] ibid, recommendations 31 and 32, p.118
[8] Act Review, p.55, Recommendation 18
[9] For example, see CCF, *Submission No.99*; AMIC, *Submission No.143*; MTAA, *Submission No.158*; CC&A Aust, *Submission No.170*; HIA, *Submission No.175*; Aust Bankers Association, *Submission No.197*; and MCA, *Submission No.201*; AiG and EEASA, *Submission No.182*; AICD, *Submission No.187,* p.8
[10] AiG and EEASA, *Submission No.182*, p.47

regulatory regime dealing with consultation mechanisms should effectively restrict an employer consulting in any manner that is demonstrably effective for that workplace."

26.15 There was some support among stakeholders for greater flexibility in current requirements for the establishment of an HSC, relating to the size of an organisation and whether employees request an HSC. The threshold size of an organisation was variously suggested to be between 20 and 50 employees.[11] The Vic Act was sometimes proposed as a suitable model for the requirements to establish an HSC.

26.16 In addition, a number of submissions preferred that the model Act not contain prescriptive provisions for the establishment of HSCs, and that these should instead be in regulations. [12]

26.17 The majority of union and union organisation submissions, including that of the ACTU, [13] supported the model Act containing provisions for the establishment of HSCs, but did not indicate the extent to which the detail for HSCs should be provided in the model Act or regulations. They did however indicate some support for: [14]

- the membership of an HSC to be comprised equally of worker and employer representatives;
- HSRs to be automatically appointed to an HSC; and
- employer representatives to be appointed from senior management with decision making capacity.

Discussion

26.18 There is good evidence that constructive involvement by workers in OHS contributes to better OHS. This is supported by academic studies,[15] previous reviews and the material presented to us about experience in Australia. Legislative support for such arrangements is consistent with the ILO's *Occupational Health and Safety Convention, 1981*.[16]

26.19 HSCs are an important consultative mechanism, provided for in the OHS Acts of all jurisdictions.

26.20 The primary aim of an HSC is to assist in the development of workplace policies and to promote health and safety awareness in the workplace. Those are not intended to deal with immediate, local OHS issues, they being matters for the attention of the workers directly affected (and relevant HSRs) and representatives of the person conducting the relevant business or undertaking.

26.21 Functions of an HSC typically include:

- facilitating consultation and co-operation between employers and workers;
- making recommendations relating to the health and safety of the workers;
- assisting in the development and review of OHS improvement strategies;
- maintenance and monitoring of programs, including training and education; and
- keeping and reviewing information regarding hazards at the workplace.

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[11] For example, see Law Council of Australia, *Submission No.163*; Queensland Government, *Submission No.32*; NSW Minerals Council, *Submission No.183*; MBA, *Submission No.9*;

[12] For example, see TFCA, *Submission No.66;* RCSA, *Submission No.123*, p.38; HIA, *Submission No.175*; BCA , *Submission No. 56*; MTAA, *Submission No.158*; Law Society of NSW, *Submission No.113*;

[13] ACTU, *Submission No.214*, p.41

[14] ACTU, *Submission No.214*, p.41

[15] For a good survey of such studies, see R. Johnstone, M. Quinlan, and D. Walters, *Statutory OHS Workplace Arrangements for the Modern Labour Market*, NRCOHSR, Working Paper 22, 2004.

[16] In particular, see Part IV of the Convention.

26.22 Given the positive evidence in favour of HSCs under OHS Acts,, we consider that that the model Act should provide for the establishment of HSCs, drawing from the experience of such arrangements in Australia..

26.23 We identified two main options.

26.24 The first option is that the model Act express the requirement for HSCs in the model Act in broad terms, with details of the composition, membership, structure, function, frequency of meetings and process to be provided for in regulation. A variant of this option is for some of that detail would be matters for the HSC to determine itself, following its establishment.

26.25 The second option is for the model Act to spell out the details of the structure, membership, function, membership, frequency of meetings and process, similar to provisions already in operation in a number of jurisdictions.

26.26 We prefer the first option as the model Act should only contain broad principles and obligations, with details provided elsewhere. As an HSC is to be a practical means for monitoring and improving OHS at the workplace, how it works should be determined by its members, taking into account the circumstances at the workplace. This is consistent with our views in relation to issue resolution procedures[17].

26.27 Larger organisations may have more complex or diverse systems of work, communication requirements or other factors that make the use of an HSC a valuable tool for organisation wide OHS monitoring and performance improvement. Smaller businesses are more likely to have more direct communication and less requirement for a structure approach.

26.28 We propose that the model Act require the establishment of an HSC where there are 20 or more workers ordinarily working in a business or undertaking at the workplace. Given that such an option in the model Act might preclude many undertakings from setting up an HSC, we also recommend the model Act provide for the establishment of an HSC where:

- requested by an HSR;
- requested by 5 or more workers;
- a person conducting the business or undertaking initiated the establishment; or
- specified by regulation.

26.29 We also believe that it is important that an HSC have a balance of skills, knowledge and views, to optimise the working and outcomes of the HSC. This is particularly so given the diverse experiences of people in different areas or at different levels within an organisation. The HSC should comprise equal representation of workers (including in the worker representation numbers HSRs where they exist, but not normally workers who are managers or supervisors) and managers.

26.30 Important issues to cover by way of regulation should include the:

- structure and functions of the committee; and
- minimum frequency of meetings.

26.31 The regulations may also provide guidance on other aspects of the operation of an HSC, but should not be too prescriptive, instead allowing for flexibility to meet the circumstances at the workplace.

26.32 As already discussed, the primary aim of the HSC at a workplace is to assist in the development of workplace policies and to promote health and safety awareness in the workplace. While no specific qualifications should be considered necessary to be a member of an HSC, persons conducting a business or undertaking should encourage HSC members to develop OHS knowledge and provide the opportunity for HSC members to receive training.

[17] See Chapter 27.

26.33 Crucial to the successful operation of any HSC is the ongoing commitment by a business or undertaking to the standing of the HSC within the organisation. The participation by senior decision makers in the HSC assists in the process, as does the provision of adequate facilities and resources to HSC members.

RECOMMENDATION 114

The Model Act should provide that a workplace HSC:

a) must be established:
   i) where requested by an HSR; or
   ii) where requested by 5 or more workers; or
   iii) if initiated by one or more persons conducting businesses or undertakings; or
   iv) If specified by regulation; or
   v) in workplaces with 20 or more workers; or
b) may be established in any business or undertaking; and
c) must include equal membership of workers (excluding managers or supervisors) and managers.

RECOMMENDATION 115

The details of the structure and functions, minimum frequency of meetings and other operational matters relating to an HSC be provided for in regulations to the model Act.

CHAPTER 27: ISSUE RESOLUTION

27.1 In this chapter we consider what processes are appropriate for the resolution of OHS issues arising between those conducting a business or undertaking and the workers engaged or directed by them. Those issues may relate to whether or not hazards or risks arise from particular work, whether risks are adequately controlled, or whether other risk controls may be required. Other issues may include the means by which workers may be consulted or participate in decisions relating to OHS, including the election of an HSR or the composition of an HSC.

27.2 Issues may arise in relation to the appropriateness of a worker ceasing to undertake work considered by them to be unsafe, direction of the worker to other work and the right to payment during the cessation. They are matters discussed in Chapter 28.

27.3 While HSRs and HSCs may have a role to play in the resolution of issues, their functions and powers are dealt with elsewhere in Chapters 25 and 26.

27.4 We do not in this chapter deal with disputes relating to the entry to a workplace of authorised persons or the exercise of powers by them. Those matters are dealt with in Chapter 45.

27.5 Consultation is an integral part of issue resolution, and conversely, issue resolution processes may be required to deal with issues arising during consultation. The provisions that the model Act should make for consultation are dealt with separately in Chapter 24.

Current arrangements

27.6 While there is some consistency in the general approach to issue resolution, the jurisdictions provide differently in the detail as to how issue resolution is dealt with in legislation and regulations.

27.7 Under the Cwth Act, [1] an employer must develop, in consultation with the employees, written health and safety management arrangements that will provide for a dispute resolution mechanism to deal with disputes arising in the course of consultations between the employer and the employees.

27.8 The NSW Act provides that the functions of HSRs or HSCs include trying to resolve a matter, but if unable to do so, to request an investigation by an inspector[2]. Regulations[3] provide that the OHS consultative arrangements must be used, the matter referred to the employer, the employer to consider it and respond in a timely manner and then, if not resolved after reasonable opportunity, the chairperson of the HSC may request an investigation by an inspector.

27.9 The functions of an HSR under the ACT Act include telling the employer about OHS issues, including potential risks and dangerous occurrences.[4]

27.10 There are no provisions for issue resolution in the Tas Act but the regulations provide that a person may make a complaint to an inspector. Before the inspector may act, the complainant must demonstrate that the issue was raised with the accountable person or HSR or HSC and a satisfactory resolution could not be achieved.[5]

27.11 An object of consultation and worker representation under the NT Act is to provide workers the opportunity to contribute to the resolution of OHS issues.[6] Functions of an HSR include assisting workers deal with management and inspectors, raising OHS issues with management and mediating between workers and management, and assist in issue resolution.[7]

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[1] See s.16(2)(d)(v) of the Cwth Act.
[2] See s.18 of the NSW Act.
[3] See r.29 of the *Occupational Health and Safety Regulation 2001* (NSW)
[4] See s.58 of the ACT Act.
[5] See r.14 of the *Workplace Health and Safety Regulations 1998* (Tas)
[6] See s.29 of the NT Act.
[7] Section 38.

27.12 The SA Act requires an HSR to consult with an employer where there is an immediate threat and referral to inspector if not resolved.[8] An inspector must attempt to resolve any OHS matter that remains unresolved, and in addition to dealing with a 'default notice' or issuing a prohibition or improvement notice, may make such recommendations and take such other action as appear appropriate[9].

27.13 Section 81 of the Qld Act entitles HSRs to help in resolving OHS issues, report OHS issues to the employer or Workplace Health and Safety Officer (WHSO), and seek co-operation to remedy the issue. They may report to an inspector an issue that has not been satisfactorily remedied within a reasonable time.[10] Workers may report an OHS issue to an inspector.[11] An HSC may assist in the resolution of OHS issues.[12]

27.14 Under the WA Act an employer must resolve, in accordance with a 'relevant procedure', an issue with HSR or HSC or employees, whichever is specified in the relevant procedure; a relevant procedure is, under s.24(2), agreed or if not agreed as prescribed in the regulations. Where there is both an HSR and HSC the HSR must refer the matter to the HSC to resolve.[13] An HSR, or if there is not an HSR then an employee, may notify an inspector if attempts to resolve an issue are unsuccessful and there is a risk of imminent and serious harm[14].

27.15 Finally, under the Vic Act an employer and affected employees/HSR must attempt to resolve OHS issues in accordance with an issue resolution procedure that is agreed or, if there is no such procedure, the relevant procedure prescribed by the regulations. An employer's representative must not be an HSR and must have sufficient seniority and competence.[15] If an issue is not resolved within a reasonable time, or is subject to a direction that work cease, any of the parties may ask for an inspector to attend, enquire into the matter and exercise any of his/her powers under the Act that the inspector considers reasonably necessary.[16] The regulations apply where there is not an agreed issue resolution procedure, and deal with who must be involved, reporting of issues and procedure for resolution of issues.[17]

27.16 None of the OHS Acts define what an '*issue'* is.

Recent Reviews

27.17 The NT Review considered the question of issue resolution[18] and recommended[19]

> *"The revised WHA should include a requirement for issue resolution processes that give HSRs the power to issue provisional improvement notices, identifying a perceived breach of OHS requirements and placing the onus on the employer to remedy the breach or seek review by an inspector."*

27.18 While the heading on page 54 of the NSW WorkCover Review refers to 'Resolution of OHS Disputes' this section of the report deals entirely with disputes relating to the exercise of powers by an authorised representative.

27.19 The ACT Review considered Workplace Consultation Arrangements at length[20], but the discussion and recommendations focussed on the formal structures of HSRs and union representation.

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[8] See s.36 of the SA Act.
[9] See s.37(2) of the SA Act.
[10] See s.81 of the Qld Act.
[11] See s.81(4) of the Qld Act..
[12] See s.90 of the Qld Act.
[13] See s.24 of the WA Act.
[14] See s.25 of the WA Act.
[15] See s.73 of the Vic Act.
[16] See s.75 of the Vic Act.
[17] See Part 2.2 of the *Occupational Health and Safety Regulations 2007* (Vic).
[18] NT Review, pp.126-129
[19] NT Review, Recommendation 34, p.127

27.20 The SA Review considered the need for consultation and participation, with particular emphasis on small to medium enterprises. This, however, was concerned with ensuring that information and assistance is provided and did not deal with resolution of issues.

27.21 The most detailed consideration of workplace participation and consultation, and as part of that of issue resolution, was the Maxwell Review. While most of this discussion related to consultation, HSRs and union right of entry, Maxwell did deal with the broader question of issue resolution[21] and recommended:

- issue resolution and cessation of work should be dealt with in separate sections
- the existing provisions in the then Vic Act be continued but anomalies corrected.

27.22 Maxwell noted[22] the comment of the Minister (on 30 May 1985) during the consideration of the Bill which became the Vic 1985 Act , that the power to issue PINs was 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.."*

Stakeholder views

27.23 There is general consensus that OHS issues should be resolved as quickly as possible, at the workplace and preferably without the need for escalation to an inspector or tribunal. This is not only because risks to health and safety should be resolved quickly, but also as the resolution of issues between the parties at the workplace level avoids escalation of disputes that may compromise relationships, consultation and co-operation.

27.24 There was however, a broad range of views on the approach that should be taken to issue resolution, and the level of formality or detail that should be contained in the model Act or regulations. The following are representative samples of the views expressed.

Government views

27.25 The South Australian Government[23] supports the use of existing SA Act provisions and indicates that formal issue resolution procedures should be included in the Act and be activated:

> *"When all attempts to resolve an issue through appropriate consultation processes have failed and the HSR or HSC members believe that the health and safety of an employee/s is at risk…Provisional Improvement Notices (VIC)/ Default notices (SA)/ Cessation of work notices should only occur where all other avenues have been exhausted…"*

27.26 The Victorian Government[24] distinguishes between an 'issue' and an 'immediate threat' and suggests different processes are needed to deal with each of these. It supports the Vic Act provisions for procedures for issue resolution to be developed at the workplace level by the workplace parties and agreed by them, but notes *"…However, in practice, questions have arisen in regard to a number of factors, including what 'agreed' actually means…"* . Another concern is that the employer, or the person representing the employer has enough competence in OHS matters to understand and resolve the issue, and enough seniority to make binding decisions on behalf of the employer.

27.27 The Victorian Government[25] noted that the Vic Act does not define 'issue' to avoid limiting the scope of what could require resolution; an issue could be any matter to do with OHS "while not necessarily indicating the existence of a 'dispute'".

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[20] ACT Review, pp. 51-64
[21] Maxwell Review, pp.204 -206
[22] Maxwell Review, p.205, para.930
[23] South Australian Government, *Submission No.138*, p.40
[24] Victorian Government, *Submission No.139*, pp.53-54
[25] ibid

27.28 This submission expresses the commonly held view of the benefits of resolution of issues at the workplace by agreed procedures:[26]

> *"..There is a greater likelihood of effective resolution and commitment to decisions by all the workplace parties if the issue can be settled there, without conflict and without the need for external intervention by the regulator…"*
>
> *"…The advantage of having local agreed procedures is that they can be negotiated through the consultation process to suit the particular workplace, and provide transparency in how health and safety issues are to be resolved in a timely and efficient way…"*

27.29 The Victorian Government recommends a separate part in the model Act on issue resolution, with a positive duty on workplace parties to attempt to resolve any issue concerning OHS using either locally agreed procedures or the procedure prescribed in the regulations.[27]

27.30 The Western Australian Government[28] considers that the model OHS Act should prescribe some formal requirement for the employer and employees to attempt to resolve the issue in accordance with an agreed procedure, or if there is no such procedure, then a procedure prescribed by the regulations[29]. Issue resolution procedures should be activated only when attempts to resolve the issue do not succeed within a reasonable time and the workplace has exhausted normal processes. It should also be activated where there is a serious and imminent threat, which is the test used by the ILO.

27.31 The Western Australian Government is of the view that:[30]

> *"…the model OHS Act should specify a hierarchy of resolution procedures. In the first instance, workplaces should attempt to resolve the issue at the workplace. If procedures are agreed to at the workplace and followed, then resolution has a better chance of succeeding. However, if there is no workplace procedure agreed, then there should be a mechanism in the model OHS Act to follow. Greater detail and guidance should be provided in codes of practice. …"*

27.32 The Queensland Government[31] supports the inclusion of provisions similar to those in the Vic Act, supported by Codes of Practice on developing agreed procedures and a default resolution procedure.

27.33 The Tasmanian Government [32] commented:

> *"…The important aspect for workplace health and safety is not that there must be health and safety representatives or committees established, but that the employer, responsible officer, etc., involves the relevant persons in the workplace in ensuring that the risks to health and safety are minimised as far as reasonably practicable."*
>
> *"…The provision does not need to prescribe how consultation must be conducted since the provision must be broad and flexible enough to be applicable to all workplaces. There is no advantage in prescribing in detail in regulation the how, who and when, consultation must occur, or how representatives must be elected, what their powers and functions must be, and so on. These are matters that the workpeople themselves must decide and they must be suitable and relevant to them and to their workplace…"*

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[26] ibid
[27] ibid
[28] Western Australian Government, *Submission No.12*, pp.25-26
[29] Suggesting that sections 24 to 28 of the WA Act provide a useful benchmark to build on.
[30] Western Australian Government, *Submission No.12*, pp.25-26
[31] Queensland Government, *Submission No.32*, p.26
[32] Tasmanian Government, *Submission No.92*, p.14

Industry views

27.34 AiG[33] raised the matter of defining what an 'issue' is:

> *"…A major concern in relation to "issue resolution" is actually defining when an issue exists. There is often confusion between talking about safety (consultation) and having an issue that needs to be resolved…The Act needs to clearly delineate between consultation and issue resolution…where default regulations require an employer who identifies an 'issue' to raise it with the HSR and implement issue resolution procedures…contradicts the focus on consultation and co-operative approaches to OHS when all discussions have the potential to be issue resolution processes, which will always carry with them some areas of disagreement…"*

27.35 They consider that there should be a requirement to establish agreed procedures for issue resolution, in line with the organisations general management system. If procedures are not agreed, a default regulation should apply.

27.36 Issue resolution processes should be activated when matters remain unresolved, and in dispute. Issue Resolution should sit completely separately from consultation processes.

27.37 ACCI[34] commented:

> *"…The model Act may appropriately provide for the making of regulations specifying model dispute resolution procedures, which would apply as a default provision where the parties have not developed their own dispute resolution mechanisms…"*

27.38 The Minerals Council of Australia[35] expressed support for the Vic Act and WA Act approaches, noting that issue resolution procedures should be activated "when the parties have reached a stalemate".

27.39 CCI WA[36] said that:

> *"…Workplace co-operation should always be the focus of OHS issue resolution and statutory provisions to address this aim should limit the involvement of parties only to the employer and employees….*
>
> *…Where issues remain unresolved the regulator should become involved rather than creating an adversarial workplace situation with the employer and HSR on opposite sides of a dispute. Workplace OHS issues should be resolved co-operatively and via the consultation mechanisms which have established the HSRs in the workplace…*
>
> *…The model OHS Act should include provisions for structured (HSCs and HSRs) or informal workplace consultative mechanisms for issue resolution. If matters cannot be resolved using this mechanism there should be a process for referring matters to the independent regulator for an objective opinion... "*

27.40 The NSW Business Chamber[37] commented

> *"…How the duty to consult may be best satisfied should remain a matter for agreement between employers and their workforces…complicated, highly structured and closely defined approaches to consultation are not appropriate and may actually act as a disincentive for both parties to consult…*

[33] AiG and EEASA, *Submission No.182*, pp.50-51
[34] ACCI, *Submission No.136*, p.40
[35] Minerals Council of Australia, *Submission No.201*
[36] CCI WA, *Submission No.44*, pp.34-35
[37] NSW Business Chamber, *Submission No.154*, pp.10-11

…the Model Act should provide a framework which encourages the resolution of disputes at the lowest possible level. In the event resolution cannot be reached resolution should rest with the regulator. Given the potential consequences which arise from a breach of OHS laws we do not consider it appropriate that dispute resolution by alternative dispute resolution means is appropriate…"

27.41 The HIA[38] also commented on the need to define what an 'issue' is

"...What is an "issue" should be defined. It should be restricted to matters concerning health and safety. A matter should not be an "issue" until a health and safety concern has been raised by employees and has been considered by the employer but it still remains in dispute. A view that any concern or matter relating to health and safety is an issue even if it has not been discussed with the employer is not supported by HIA. …"

Union and union organisations' views

27.42 The views of the unions were represented by the ACTU[39] and supported by all unions in their submissions and during consultation.

27.43 The ACTU supports the inclusion of procedures for issue resolution in the model Act. The procedures must provide for the employer to respond to issues in a timely and effective manner. The ACTU proposed:

"The employer must nominate a senior manager, who has the power to make decisions and seek resolution in the first instance with an HSR(s) and their union representative (if requested). If there is no HSR then a worker nominated by the affected workers and their union representative (if requested) must be involved in the issue resolution. Workers should raise issues through their HSR.

Should an issue not be resolved it should be referred to a conciliation and arbitration Tribunal (eg as in WA) to assist in the resolution of workplace health and safety issues. The Tribunal is to assist the parties to reach agreement. If the dispute cannot be resolved the Tribunal may determine the issue.

The Tribunal must have the ability to hear grouped/industry wide claims and make industry wide rulings. Unions must have standing before Tribunal and must be able to lodge claims."

27.44 The AMWU[40] provided some detail of the procedure it proposes be mandated, which is consistent with that proposed by the ACTU and closely resembles the requirements of the Vic regulations.

Legal views

27.45 The Law Council of Australia[41] supports the adoption in the model Act of the Victorian provisions, but considers that it would be useful to have a model dispute resolution clause in the regulations following the model in the Workplace Relations Act.

27.46 The Law Society of NSW supports the responsibility resting with the employer and controller of the workplace.[42]

[38] HIA, *Submission No.175*
[39] ACTU, *Submission No.214* , pp.158-165
[40] AMWU, *Submission No.217*, p.28
[41] Law Council of Australia, *Submission No.163*
[42] Law Society of NSW, *Submission No.113*

Other views

27.47 The NSCA[43] proposed

> *"…Normal escalation of issues utilising the workplace 'chain of command' and then an option to contact the regulator or an external agency for matters that remain unresolved..."*

27.48 Deborah Vallance[44] noted in relation to agreed procedures

> *"...Vic OHSA 2004 includes reference to "agreed procedures" . This continues to create difficulties of interpretation for the regulator and at the workplace eg can the health and safety committee override the wishes or workers etc. These words need to be deleted and the Model Law to include the procedures in the Vic OHS Regulations 2007..."*

27.49 Andrew See[45] suggested that unresolved issues may be referred to the Australian Industrial Relations Commission.

27.50 A number of companies provided submissions. A consistent theme in each of these[46] is that the model Act should set out the requirements for issue resolution and the regulations set out the detailed process.

Discussion

27.51 There has been a good deal of research undertaken and academic papers published[47] on formal workplace participation and representation and much written in texts about the formal structures and procedures. The question of how best to approach the more immediate and less formal resolution of issues in the workplace has not been subject to the same attention. This may reflect a view that this is an area in which common sense will prevail, or that it is more important to focus on formal structures and processes to be activated when informal attempts at resolution fail.

27.52 We have, however, had the benefit of the submissions and comments during consultation, which have also reflected our experience of the issues.

27.53 We consider the matters that need to be addressed in a discussion of the appropriate approach to OHS issue resolution are:

1. what is an issue and should it be defined in the model Act;
2. who should be involved in issue resolution;
3. what are the most appropriate processes for resolution of issues and should these be left to the parties or prescribed; and
4. should this be a matter for the model Act or regulations or guidance.

What is an 'issue' and should the term be defined?

27.54 A number of the submissions commented on what should be considered to be an issue, and whether the term should be defined.

27.55 While the Victorian Government stated that 'issue' should not be defined as doing so may limit the scope of what could require resolution, the AiG and the HIA both strongly asserted that it should be defined. The Victorian Government consider that an 'issue' is any matter to do with OHS, and need not indicate a dispute. The AiG on the other hand noted that there is a difference

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[43] NSCA, *Submission No.180*, p.14
[44] Deborah Vallance, *Submission No.144*, p.13
[45] Andrew See, *Submission No.7*, p.16
[46] See for example, Mirvac *Submission No.*168; Ergon Energy *Submission* No.94; John Holland *Submission No.107*;
[47] See for example "*Working Arrangements for OHS in the 21st Century*" Walters D, Working Paper 10, NRCOHSR; 2003 and "Statutory OHS Workplace Arrangements for the Modern Labour Market", Johnstone R, Quinlan M and Walters D, Working Paper 22, NRCOHSR which may be found at http://ohs.anu.edu.au/publications/index.php .

between talking about safety (consultation) and having an issue that needs to be resolved, and an issue should only be considered to arise where there is a matter to be resolved. The HIA was more direct, saying that a matter should not be an "issue" until a health and safety concern has been raised by employees and has been considered by the employer but it still remains in dispute.

27.56 We understand these differing views to be widely held. This is not an ideal situation, and we consider that the question of what is an 'issue' for the purposes of issue resolution, should be resolved by definition in the model Act.
Support for the view of AiG and HIA can be found in the comment of Creighton and Rozen[48]

> *"…This suggests that "things" that must be dealt with in accordance with s73(1) are any matters where there is some difference of opinion between the employer and one or more employees relating to health and safety at the workplace. It does not require that there be a "dispute" in the conventional industrial sense…"*

27.57 The Concise Oxford Dictionary defines 'issue' to relevantly mean

> *"…a point in question; an important subject of debate or litigation.. under discussion.. in dispute… at variance…"*

27.58 The ordinary meaning of 'issue' is therefore that which is preferred by AiG and HIA.

27.59 This is not a case of mere semantics. Identifying a matter as an 'issue' will trigger procedures and obligations for the parties. Those procedures, if they are consistent with those in current OHS Acts, will require the involvement in the matter of persons other than the worker directly affected and their supervisor or manager. This may result in:

- delay in dealing with the matter, while that process occurs; and
- the relationship between the worker and supervisor or manager being compromised.

27.60 That should, in our view, not occur until the parties directly involved in the relevant work have consulted on the matter, and the concern of the worker has not been addressed to the satisfaction of the worker.

27.61 The website[49] of Safework SA includes a useful diagram of the process for "*Resolution of an OHS Problem*". The entry point for the process is "*Problem reported to leader, supervisor or manager or by an employee*", with an arrow across to "*Problem Resolved*" and an arrow down to "*Issue not resolved*" and then further down to "*Employee reports problem to HSR who attempts to consult with employer & Committee*". This would appear to indicate the view of Safework SA that escalation of issue resolution to formal processes, such as the involvement of an HSR or HSC should only occur when the matter remains unresolved between the employee and manager or supervisor.

27.62 We therefore recommend that the model Act provisions relating to issue resolution define an issue as being a dispute or concern about OHS that remains unresolved after consultation between the affected worker(s) and the representative of the person conducting the relevant business or undertaking most directly involved in the engagement or direction of the affected worker(s).

27.63 We note this should not prevent:

- timely escalation or early involvement of representatives; or
- a worker exercising a right to stop work they consider to be unsafe.

[48] At paragraph 1194 on page 255
[49] At http://www.safework.sa.gov.au/contentPages/docs/hsrResolutionChartwithHSR.pdf

RECOMMENDATION 116

The model Act should define an "issue" for the purposes of issue resolution at a workplace, as being a dispute or concern about OHS that remains unresolved after consultation between the affected worker(s) and the representative of the person conducting the relevant business or undertaking most directly involved in the engagement or direction of the affected worker(s).

Who should be involved in issue resolution

27.64 The objectives of issue resolution should always be to ensure:

- that the health and safety of workers and others are not put at risk;
- the model Act and regulations are being complied with; and
- the resolution of an issue preserves or builds a positive relationship between the workplace participants that is conducive to ongoing trust, consultation and co-operation on matters relating to OHS.

27.65 These objectives are best met where the process involves:

- those directly involved in the relevant work;
- those who make, or are able to make, decisions affecting the work and the way in which it is undertaken;
- those who have relevant information; and
- assistance and representation necessary to enable the parties to understand all relevant matters and contribute effectively to the discussions.

27.66 A worker may not have the expertise or the confidence to effectively deal with a manager or other person in seeking to resolve an issue. The worker should accordingly be entitled to the assistance of an appropriate person.

27.67 An aim of providing for representation of workers by an HSR is to ensure that workers are able to be assisted by a person with knowledge of and training in OHS, who understands the work being undertaken by the workers, and associated hazards and risks. The HSR for the affected workers should be involved in the issue of a resolution, once the matter has become an issue. To effectively represent the worker(s) the HSR will necessarily involve the workers in the resolution process.

27.68 The issue resolution process is currently limited to the employers and their employees[50]. As we have recommended that employment no longer be the sole determinant of duties and obligations under the model Act, it is appropriate that the obligations for issue resolution are similarly broadened. We therefore recommend that a person conducting a business or undertaking most directly involved in the engagement or direction of the relevant workers be involved in issue resolution. This has the effect of applying issue resolution obligations to the parties in 'employment like' arrangements.

27.69 While duties of care may extend to consequences beyond a 'workplace' an OHS concern or issue will ordinarily be restricted to those involved at a workplace and issue resolution provisions should usually be so restricted. Where there is more than one business or undertaking at the workplace that is involved in the work that is the subject of the issue, then the persons conducting each such business or undertaking should be involved in the resolution of the issue.

[50] Other than under the Vic Act which allows for multi-employer work groups under section 47 and consultation is to be undertaken with contractors under s.35(2).

27.70 This should not, however, prevent the resolution of an issue that exists across different workplaces at which the relevant business or undertaking is being conducted, and where the affected workers are able to be conveniently represented (by the same HSR or relevant HSRs working together).

27.71 A third party (that is, not being a party to the issue) authorised to represent or assist a party to an issue, should be entitled to access a workplace at which the issue has arisen, for the purpose of providing such representation or assistance.

RECOMMENDATION 117

The following persons should be entitled to be involved in the resolution of an OHS issue at a workplace:

a) any HSR elected to represent the affected worker(s), in consultation with the affected worker(s);

b) where there is no relevant HSR, the affected worker(s);

c) a representative of the person conducting a business or undertaking at the workplace that is involved in the engagement or direction of the affected worker(s) and if more than one relevant business or undertaking, a representative or representatives appointed by them for the purpose.

Any party should be entitled to obtain assistance from or be represented by a person nominated or authorised on their behalf, who should thereby be entitled to enter the workplace for that purpose.

What are the appropriate processes for issue resolution?

27.72 OHS issues may relate to specific hazards and risks or broader systems or administrative arrangements that may give rise to hazards or risks. Workers and others may become exposed or continue to be exposed to hazards and risks while OHS issues remain unresolved. The process of issue resolution, involving disagreement and debate, may undermine the trust, credibility and co-operation of the parties and thereby potentially undermine ongoing communication that is essential to ongoing OHS risk management.

27.73 Issues should accordingly be resolved as soon as can reasonably be achieved (but not so soon that any party feels disenfranchised or unsatisfied with the fairness or integrity of the process).

27.74 Issues should be resolved so far as possible as to avoid further dispute, need for ongoing debate, or a recurrence of the issue or a similar issue; that is, an issue should be resolved ‘once and for all’ to the extent that is possible in the circumstances.

27.75 The model Act should therefore require all who may be involved in the resolution of OHS issues, including:

- affected workers and their representatives;
- those conducting relevant businesses or undertakings and their representatives;
- inspectors; and
- courts or tribunals;

to take all reasonable steps to achieve timely, final and effective resolution of issues.

27.76 This could be provided in the issue resolution part of the model Act and/or in the objects.

RECOMMENDATION 118

The model Act should require all parties to, or authorised to be involved in consideration of, an OHS issue (including inspectors, courts and tribunals) to make all reasonable endeavours to achieve a timely, final and effective resolution of the issue.

27.77 We have noted above why early resolution of an OHS issue is important. Resolution may be delayed if it is not clear to the parties, or they disagree, how they are to attempt to resolve the issue. The resolution of the issue and ensuring optimal (which includes timely) outcomes will not be assisted by the parties first having to resolve the process by which the issue is to be resolved.

27.78 The model Act should therefore require that there be an issue resolution procedure that is available to the parties as soon as the issue arises. That may be a procedure agreed between the person conducting the business or undertaking and the workers engaged by them. The model Act should provide for the parties to be subject to a default procedure, if an agreed procedure does not exist when an issue arises. That default procedure, being a matter of process rather than principle, should be provided in regulations rather than in the model Act.

27.79 We agree with the views expressed in the submissions and recent reviews that it is preferable that issue resolution procedures be agreed between the parties. Agreed procedures will be more likely than a generic default procedure to accommodate the subtleties of the relationship between the parties, the workplace organisation and the types of hazards and risks that are likely to be the subject of issues. The parties are also likely to undertake the process of issue resolution with greater comfort and confidence if they are familiar with and readily accept the process.

27.80 The model Act, and the regulators, should therefore encourage those conducting a business or undertaking to agree issue resolution procedures with worker(s) regularly engaged or directed by them.

27.81 An industrial relations dispute resolution procedure may not be an agreed procedure for OHS issue resolution.[51] This is consistent with the subject matter of OHS being different to industrial issues, with a greater need to maintain co-operation and consultation between the parties. Another differentiating factor between OHS and industrial relations is that in OHS the interests of the parties are aligned – both want to ensure health and safety and the issue is usually only as to whether that has been achieved or the means for doing so.

27.82 An issue resolution procedure should accordingly be agreed specifically for OHS purposes, unless it is clear, and the parties specifically agree, that an issue resolution process agreed for other purposes is appropriate for OHS.

27.83 For an OHS issue resolution procedure to be effective, there must be a minimum of formality and technical requirements. The method for resolution is best determined by those involved in, and making decisions related to, the relevant work. There is general consensus between all stakeholders on these points. The aim is resolution of an issue, rather than a process of alleging a breach or enforcing outcomes. A failure of issue resolution between the workplace participants may result in the intervention of an inspector, or the issuing of a PIN, but the parties should not assume those outcomes and pursue a formal process anticipating those outcomes. To do so may make those outcomes more likely.

27.84 The issue resolution process may not result in a resolution and third party intervention or the exercise of powers under the model Act may be necessary. The parties should not be able to agree a process that purports to prevent that intervention or exercise of powers.

[51] See *Gilbertson-Greenham Pty Ltd v AMIEU* (1990) 5 VIR 189 at p.201 and also comments of Creighton and Rozen, "Occupational Health & Safety Law in Victoria", 3rd Ed, 2007, para.1191, pp.253-254

27.85 We recommend that the model Act require that the default procedure and agreed procedures provide for the following:

1. While escalation to formal procedures and the involvement of representatives or third parties may be required, attempts should first be made for the concern to be resolved between those most directly involved in the relevant work.
2. In order to
   a) avoid ongoing dispute in relation to a matter not really in dispute, but rather resulting from misunderstanding as to the subject matter or circumstances or a lack of information by one party; or
   b) narrow the matters that are the subject of dispute and thereby both expedite the resolution and make the resolution more likely

   the first step in the formal process of resolving an issue should be to determine the nature and scope of the issue.
3. The parties should be required to meet to attempt to resolve the issue in a timely manner, in accordance with the procedure, and be entitled to such representation and assistance as will enable them to do so.
4. The procedure should set out specific matters to be considered by the parties in attempting to resolve the issue, including but not limited to:
   a) the degree and immediacy of risk to workers or other persons;
   b) risk control measures in place and those available to eliminate or minimise the risk, including interim risk controls;
   c) the ability of the parties to eliminate or minimise the risk, or their ability to influence others who may be able to do so;
   d) any relevant accepted industry practice; and
   e) whether any other persons may be reasonably required to be involved in the process to assist an early resolution.

RECOMMENDATION 119

The model Act should encourage workers and those conducting businesses or undertakings at a workplace to agree procedures by which OHS issues are to be resolved, should they arise, where they are able to do so.

The model Act should provide for default issue resolution procedures, as specified in regulations, to be adopted where the parties have not agreed issue resolution procedures.

The model Act, or regulations, should provide for the matters that must, as a minimum, be provided for in an agreed issue resolution procedure (referred to in paragraph 27.85).

27.86 The model Act should provide for a party to refer the issue to an independent third party, who should assist the parties to reach a resolution and if that is not achievable (at all or in an appropriate time period) to impose an outcome on the parties.

27.87 The third party may be an inspector, who will have OHS expert knowledge and the power to impose requirements on the parties by notices or directions. The third party may be a court or tribunal experienced in issue resolution who may be able to implement understood and accepted procedures of conciliation and arbitration.

27.88 The relevant court or tribunal will be a matter for each jurisdiction to determine, but it should be a court or tribunal with powers of conciliation and arbitration and power to deal with the substance of a matter. The procedure by which the court or tribunal deals with OHS issue resolution may either be provided by regulations made under the model Act, or by the rules of the court or tribunal.

27.89 The choice of third party 'intervener' should be at the option of the party making the referral. The choice may be determined by issues such as trust in the inspector, the need for a timely outcome, or the involvement of industrial relations or other matters together with an OHS issue.

27.90 The issue resolution process, including the referral for third party intervention, should not prevent the exercise of rights to cease unsafe work or to issue a PIN.

27.91 The model Act should ensure that procedures for the review of a PIN, and those for resolution of an issue by an inspector or court or tribunal, do not result in inconsistent findings or outcomes. As the PIN process is a formal process with legal implications associated with non-compliance and having associated formal review procedures, the PIN review process should take precedence over the issue resolution process.

27.92 The PIN review process should however not prevent the parties, or a court or tribunal, from attempting to resolve the issues and should not prevent the parties or a court or tribunal from dealing with issues beyond the scope of the PIN. That is, while a court or tribunal should not be able to hear and determine a matter to which a PIN relates, while the PIN remains subject to review or the time for review remains open, it should be able to assist the parties to attempt to resolve the issue (which may be assumed, as is current practice, to result in a consistent outcome in the PIN review process). The model Act should, however, permit the parties to consent to proceed before a court or tribunal, so long as they agree that the outcome of such proceedings shall also determine any dispute in relation to the PIN.

27.93 While issues relating to the grouping of workers for representation, or the formation or operation of a committee or other administrative matters, are dealt with elsewhere, it is our view that these matters may also be appropriately dealt with following the issue resolution process recommended in this chapter - workplace discussion, followed by referral to an inspector or court or tribunal.

RECOMMENDATION 120

The following process should apply to the resolution of issues at a workplace:

1. The parties should meet to determine the nature and scope of the issue.
2. The parties should seek to resolve the issue as soon as possible in accordance with:
   a) an agreed procedure; or
   b) where there is more than one relevant business or undertaking at the workplace, a procedure agreed between all parties; or
   c) where a procedure has not been agreed or cannot be agreed, a default procedure prescribed by the regulations.
3. If the issue remains undetermined or unresolved after reasonable attempts have been made, any party can:
   a) seek the attendance at the workplace of an inspector, as soon as possible, to assist in resolution of the issue; or
   b) bring proceedings in a court or tribunal with powers to hear and determine such matters and exercising powers of conciliation and arbitration, such proceedings to be brought and determined in accordance with a process to be determined by

regulations.

4. The referral of an issue to an inspector or court or tribunal should not prevent the exercise of the right of a worker to cease unsafe work, or prevent the exercise of power by a HSR to direct a work cessation or issue a provisional improvement notice (PIN).
5. A court or tribunal may not hear a matter relating to an OHS issue with respect to which a PIN has been issued:
   a) where processes have been commenced under the model Act for the review of the PIN; or
   b) until the time has elapsed for taking steps under the model Act for the review of the PIN

   other than to the extent that the issue is broader than the matters dealt with by the PIN, or by the consent of the parties.

Formal processes under the model Act for the review of a PIN should not prevent a court or tribunal, or the parties, from taking steps to resolve the issue by conciliation.

CHAPTER 28: RIGHTS TO CEASE UNSAFE WORK

28.1 In this chapter we consider and make recommendations in relation to the appropriateness of a worker ceasing to undertake work considered by them to be unsafe, whether there is a role for HSRs in any direction to cease unsafe work, the direction of the worker to other work and the right to payment during the cessation. The processes for the resolution of OHS issues arising between those conducting a business or undertaking and the workers engaged or directed by them are discussed in Chapter 27.

Current Arrangements

28.2 The right of an individual worker to cease unsafe work was a provision first recognised at common law. Since then, this right has been codified in statute in various forms.

28.3 Unsafe work is typically defined in jurisdictional OHS legislation as work that presents a serious or immediate/imminent risk to the health and safety of a person (see Table 40).

28.4 Provisions exist under the WA, Tas, NT and ACT Acts to allow workers to cease work if they consider it to be unsafe. The WA Act is the only Act is the only Act that specifically provides that workers must be paid for the time during which they ceased work on this basis.

28.5 The Tas, ACT and NT Acts each provide for the employer to assign a worker, who ceases work they consider to be unsafe, to suitable alternative work if available.

28.6 Although the Vic, SA and Cwth Acts do not entitle workers to cease work they consider to be unsafe, those Acts provide that a HSR may direct workers to cease unsafe work. Under the SA Act, workers must continue to be paid for the period of such work cessation, while alternative work provisions operate in the Victorian and Commonwealth jurisdictions (see Table 41).

28.7 The NSW and Qld Acts are the only Acts that do not include any provisions for cessation of unsafe work either at the choosing of a worker or at the direction of an HSR.

TABLE 40: Descriptors of unsafe work

State	Section	Descriptors of unsafe work	HSR/Worker
NSW	NA		
Vic	s.74	an immediate threat to the health or safety of any person.	HSR
Qld	NA		
WA	s.26	a risk of imminent and serious injury or imminent and serious harm to his or her health.	Worker
SA	s.36	an immediate threat to the health or safety of an employee	HSR
Tas	s.17	a risk of imminent and serious injury to, or imminent and serious harm to the health of, any person.	Worker
NT	s.77	a serious and immediate risk to a worker's health or safety.	Worker
	s.38	a serious and immediate risk to the health or safety of the worker.	HSR
	s.41	serious and immediate risk to the worker's health or safety.	HSR
ACT*	s.42	a significant risk to work safety.	Worker
Cwth	s.37	an immediate threat to the health or safety of one or more of the employees.	HSR

* Under s58 in the ACT Act, an HSR may, in accordance with the regulation, exercise emergency powers

TABLE 41: Statutory OHS rights to cease or direct the cessation of unsafe work

State	Worker right to cease unsafe work	Payment for period chose to stop work	HSR right to direct unsafe work cease	Payment for period directed to stop work
NSW	No	NA	No	NA
Vic	No	NA	Yes – s74	No, but A
Qld	No	NA	No	NA
WA	Yes – s26	Yes – s28	No	NA
SA	No	NA	Yes – s36	Yes – s37(3)
Tas	Yes – s17	No, but A	No	NA
NT	Yes – s77	No [A]	Yes – s38 Yes – s41	No
ACT	Yes – s42	No, but A	No	Na
Cwth	No	NA	Yes – s37	No, but A

A: Employer may assign other work.

Recent Reviews

28.8 The SA Review reported that "*HSRs capacity to stop dangerous work is highly advantageous and* appropriate *to achieving safer and healthier workplaces*"[1] observing that the identification of hazards (other than through incident investigation) is reliant on those at the workplace (including HSRs and workers) to identify and stop dangerous work.

28.9 The NT Review observed that a worker's right to cease work where there is an immediate risk of severe injury is consistent with the approach in the majority of other jurisdictions and represents contemporary Australian practice. Following a recommendation[2] of the NT Review, the NT provisions where extended from an individual right to a collective right for HSRs to direct that dangerous work cease, as part part of an issue resolution process. That provision has been implemented and is consistent with provisions in the Cwth, Vic and SA OHS Acts[3].

28.10 The Maxwell Review[4] touched on the issue of work cessation. While dealing with the history and location in the legislation of the provision entitling an HSR to direct a work stoppage, Maxwell endorsed the retention of this provision.

Stakeholder Views

28.11 In general, stakeholders were supportive of a providing a worker's right to cease unsafe work in the model OHS Act.[5]

28.12 However, this support was accompanied with suggestions of safeguards and limitations that should be included in a model Act to accompany the use of such a right. These included clear provisions in the model Act regarding the determination of 'unsafe work', the right of employers to reassign workers, the right of workers to continue to be paid for the period of

[1] SA Review, Part 3, p59
[2] NT Review, Recommendation 34, p125
[3] ibid, p126
[4] Maxwell Review at paragraphs 930 to 939 at pages 204 to 206.
[5] For example, see ACCI *Submission No.136*, p40; Business Council of Australia, *Submission No,056*, p.3; ACTU, *Submission No.214*, p.45; Queensland Government, *Submission No.032*, p.26

cessation and penalties for miss-use of such rights. For example, the Law Council of Australia commented that:[6]

> *"In the first instance, the right should arise only if there is an immediate risk and no steps can be taken immediately by the employees or the employer to remedy the situation".*

28.13 While the AiG proposed:[7]

> *"There are common law rights to withdraw labour. If they are to be included in the Act, they need to be described as a right to request reassignment to safe work and reflect the ILO words about imminent and serious danger, not a right to stop work altogether if there is a concern about work being unhealthy or unsafe. However, these provisions can only apply if the issue resolution process has been activated and failed."*

28.14 To assist in the interpretation and application of 'cease work' provisions, WorkSafe Victoria provided guidance for employee representatives in that State on the interpretation of immediate threat[8], the entitlement the employer to provide alternative work, and the entitlement of the employee to receive normal/expected earnings for the period of the 'cease work'.

28.15 Views on provisions for the payment of wages were divided. [9] There was general support that entitlements to pay and other benefits should not be negatively affected due to genuine health and safety concerns. There was, however, concern that providing for such entitlements in a model OHS Act would create an unnecessary overlap with industrial relations issues. The stated preference was that disputes over entitlements to wages etc be addressed in the industrial relations arena.[10]

28.16 Some stakeholders were concerned about the possibility of such rights being misused. They proposed that penalties for misuse accompany any right to cease work. For example, the Minerals Council of Australia stated:[11]

> *"The OHS Act must be very clear that right to cease work must not be misused for industrial purposes. … There should be penalties for misuse of the right to cease work."*

28.17 Some stakeholders did not support the inclusion of a worker's right to cease unsafe work in a model OHS Act as such rights are already provided for under industrial relations legislation and is a common law right. For example, ACCI argued:[12]

> *"The model OHS Act does not need to provide for this as it is already a right at common law.*
>
> *Provisions of the Workplace Relations Act 1996*[13] *also allow employees to cease work where there is a health and safety risk, without this cessation of work being subject to the penalties for unlawful industrial action contained in that statute."*

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[6] Law Council of Australia, *Submission No.163*, p.27

[7] AiG and EEASA, *Submission No.182*, p.51

[8] WorkSafe interprets 'immediate threat' in this context to mean 'immediate in time and direct'. Although it is not possible to be specific about what might be an immediate threat, as this will vary between workplaces, if the issue concerns work that is likely to lead immediately to injury or harmful exposure, then a direction to cease work is an appropriate response. (*Employee Representation - A Comprehensive Guide To Part 7 Of The Occupational Health And Safety Act 2004*, p52, http://www.worksafe.vic.gov.au/wps/wcm/resources/file/ebade9446da1bd1/employ%20represent.pdf)

[9] For example, see ACTU, *Submission No.214*, p.46; VECCI, *Submission No.148*, p.21; N. Prince, *Submission No.072*, p.11; NSW Law Society, *Submission No.113*, p.17; ACCI *Submission No.136*, p40-41

[10] For example, see VECCI, *Submission No.148*, p.21; N. Prince, *Submission No.072*, p.11; ACCI *Submission No.136*, p40-41

[11] Minerals Council of Australia, *Submission No.201*, p.30

[12] ACCI *Submission No.136*, p40

[13] *(s 420(1)(g)(i))* Not captured in definition of unlawful industrial action: (g) action by an employee if: (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

28.18 Support for empowering HSRs to direct work to cease was divided. Those supporting such a provision were of the view that the right should be accompanied with an obligation to first consult with the person conducting the business or undertaking.[14]

28.19 Johnstone et al in supporting the inclusion of a provision for HSRs to direct unsafe work cease said:[15]

> "*We submit that the Model OHS Act should give HSRs the right to direct that work to cease if it causes an immediate risk to the health and safety of any person. Once again we favour the Victorian model, which like most of the other provisions in the other Australian statutes vesting such a right, includes the right in a general process of resolving OHS issues.*
>
> *We further submit that the Model OHS Act should codify the individual common law right to refuse to do dangerous work. As we argued in section 1.1, the model Act should, as far as is possible, be self-contained, so that such an important right should be included in the Act. Further, the common law right is vague, and a clear statement of the right of an individual to refuse dangerous work should be included in the Act. Workers would exercise the individual right in circumstances where the HSR was not present, or while the HSR goes through the procedures leading up to the exercise of the HSRs right to stop dangerous work.*
>
> *The person conducting a business or undertaking should, of course, be able to summon an inspector to help resolve the issues leading to the provisional improvement notice or the work cessation order, or to have the notice or order reviewed."*

28.20 Conversely, stakeholders who are not supportive of the right for HSRs to direct the cessation of work submitted that such powers should only be available to inspectors.[16]

28.21 Governments generally supported providing a right to HSRs to direct work to cease. Such a right is supported by the South Australian[17], Victorian[18] and Queensland Governments. The Queensland Government said:[19]

> *"The principal right to direct that work cease if it is an immediate and significant risk to health and safety, should be a collective right vested in the relevant health and safety representative. This collective right should supersede any individual right to refuse dangerous work exercised by an individual worker leading up to the health and safety representative's work cessation direction."*

28.22 The Western Australian Government did not support such a right for HSRs:[20]

> *"The WA OSH Act provides that a HSR may issue a Provisional Improvement Notice (PIN) in certain circumstances. In Western Australia a PIN cannot require a site or operation to be shut down. … In Western Australia the provisions in the OSH Act allow employees the right to refuse to work when there is a risk of causing imminent and serious injury or immediate and serious harm to a person's health. Those provisions are independent of the provisions that relate to PINs and include sanctions for refusal to work when an employee leaves a workplace without authorisation or refuses to do reasonable or alternative work: see section 28A"*

28.23 Concern was expressed by some, in submissions and during consultation, that because of the focus on 'immediate threat', a right to cease work provision may fail to capture situations that

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[14] For example, see Optus, *Submission No.196*, p10; SDAEA (VIC), *Submission No.018*, p.3
[15] Johnstone, R., Bluff, E., Quinlan, M., *Submission No.55,* p 31-32
[16] For example, see NSW Law Society, *Submission No.113*, p.17; Asciano, Submission No.179, p.2; Australian Mines & Metals Association *Submission No.118*, p.17
[17] SA Government, Submission No.138, p.41,
[18] Victorian Government, Submission No.139, p.56,
[19] Queensland Government, *Submission No.032*, p.26
[20] WA Government *Submission No.112*

could be unsafe, where the manifestation of the adverse outcome may be delayed, such as exposures leading to diseases of long latency (e.g. asbestos) or psycho-social risks such as violence and bullying. One submission suggested a way to take account of these situations may be:

> *"Wording such as "… given the nature of the threat and the degree of risk, work should immediately cease …" or "… where to continue work would expose the worker or others to a risk of serious injury or harm" would be a more reasonable test to have to meet."*[21]

Discussion

28.24 The provision for ceasing unsafe work and options to be considered for the model Act will be dealt with in two parts.

28.25 First we will consider whether the model Act should:

a) include only the right of an individual worker to cease unsafe work; or

b) include both the right of an individual worker to cease unsafe work and the right of a HSR to direct that workers they represent cease unsafe work.

28.26 Secondly, we discuss whether a model Act should include a test for determining when work is considered to be unsafe and ceased.

Who should have the right to action or direct a cessation of unsafe work?

28.27 There are three options available in relation to the entitlement to action or direct a cessation of unsafe work.

28.28 *Option One:* Not include cease work provisions in a model Act, leaving this to the operation of the common law.

28.29 *Option Two:* Include a provision in the model Act for an individual worker to cease unsafe work, which may include provisions:

- requiring the worker(s), as soon as possible after ceasing the unsafe work, to report the risk to the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s);

- requiring the worker(s) and, any relevant HSR, to attempt to resolve the issue of concern with that person in accordance with the issue resolution procedures required by a model Act; and

- entitling the person conducting the business or undertaking to direct the worker(s) to undertake suitable alternative work, if available; and

- entitle the worker(s) to the payments and/or benefits they would have received had they continued to carry out their normal work.

28.30 *Option Three:* Include in a model Act the right of a worker to cease unsafe work (as specified in Option Two), and in addition the power of an HSR to direct that unsafe work cease. This would include provisions:

- requiring the HSR to first consult with the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s), unless the risk is so serious and imminent that it is not reasonable to do so, in which case that consultation should occur as soon as possible after the HSR directs the workers to cease work;

[21] Confidential submission.

- requiring the HSR to attempt to resolve the issue of concern with that person in accordance with the issue resolution procedures required by a model Act; and

- entitling the person conducting the business or undertaking to direct the worker(s) to undertake suitable alternative work, if available; and

- entitle the worker(s) to the payments and/or benefits they would have received had they continued to carry out their normal work.

28.31 The majority of stakeholders supported the inclusion in the model Act of the right of the individual worker to cease unsafe work, although there was some suggestion that, given the common law obligation on a worker to cease unsafe work, the provision was perhaps unnecessary.

28.32 Four of the nine jurisdictions currently contain provisions for an HSR to direct that unsafe work cease, namely South Australia, the Northern Territory, Victoria and the Commonwealth. Governments (with the exception of WA) supported such a provision being included in the model Act.

28.33 A matter commented on by a number of stakeholders was the prospect of issues arising at the workplace relating to the operation of a specified provision for HSRs to direct that unsafe work cease. Such issues might relate to circumstances where:

- a person conducting a business or undertaking most directly involved in the engagement of the affected workers withdraws payment and/or entitlements for the period of the cease work; or

- the affected workers fail to make themselves available for alternative work as required by the legislation; or

- the HSR fails to consult with the person conducting a business or undertaking who is most directly involved in the engagement of the affected workers, before directing that the work cease.

28.34 We have noted the means by which those issues may be resolved, by Option Two and Option Three.

28.35 We consider it important for the smooth operation of cease work provisions that there is a clear link to the issue resolution processes provided for under a model Act[22]. This would provide for the resolution of the issues through:

- the internal issue resolution processes, or

- calling in an inspector to make a decision on the matter in dispute (which would be reviewable); or

- an application to an appropriate court or tribunal.

28.36 Option three draws on the knowledge and training of the HSR in OHS matters and circumstances where workers may be placed in high risk situations. The HSR, given their training and operation on a day to day basis in the workplace, may be better placed than an individual worker to be able to progress discussions with the person conducting the business or undertaking and have more experience in use of the issue resolution process.

28.37 Concerns raised in submissions and consultation about the potential for misuse by an HSR of the power to direct a cessation of work, can be met by the provisions that we recommend[23] for the disqualification of an HSR.

[22] See Chapter 27.
[23] See Recommendation 113.

28.38 We consider Option Three should be adopted.

Should a test apply?

28.39 A range of tests currently apply in cease work provisions, to determine whether a worker is entitled to cease work or an HSR direct that work cease. Although there appears to be some similarity between some of the jurisdictions, there are differences in the language used. For example, those tests include:

- a serious and immediate risk to a worker's health or safety (NT);
- an immediate threat to the health or safety of an employee (SA, Commonwealth, Vic);
- a risk of imminent and serious injury or imminent and serious harm to his or her health (WA); and
- a significant risk to work safety (ACT).

28.40 Submissions were made by stakeholders, in particular unions, expressing concern that requiring an immediate or imminent risk to the health or safety of a person may not permit a worker to cease work where exposure to a substance occurs that may not cause immediate harm but may cause serious long-term harm. They assert that there is a need to incorporate a test for the cease work provision which recognises exposure to substances causing a serious risk of diseases of long latency.

28.41 The most stringent test, provided for in WA - 'a risk of imminent and serious injury or imminent and serious harm' - was considered by the Full Bench of the WAIRC[24]. It was said by his Hon., the President, when considering an individual's right to cease unsafe work:

> *"It seems to me that s72(1) directs attention to both the subjective beliefs of an individual employee and an objective analysis of those beliefs. This is because the section seems to require the employee to have a belief. Furthermore, that belief must be based on "reasonable grounds". In other words, there needs to be a belief actually held by the employee and one which is based on reasonable grounds.*[25]"

28.42 An alternative to adopting one of the tests in current OHS legislation is to adopt a new test that refers to '*a* serious *risk emanating from immediate or imminent exposure to a hazard*'. This would have the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard, and circumstances of psychological threat or other similar conditions. The risk (the seriousness of the harm and the likelihood of it occurring) would have to be considered 'serious', and be associated with an immediate or imminent exposure to a hazard.

28.43 We recommend this new test should be adopted for a model Act to apply to:

- the right of the individual worker to cease unsafe work; and
- the right of the HSR to direct that unsafe work cease.

RECOMMENDATION 121

The model Act should provide that:

a) a worker(s) may cease work where they have reasonable grounds to believe that to continue to work would expose them or any other person to a serious risk to their health or safety or that of another person, emanating from immediate or imminent exposure to a hazard;

b) a worker(s) who exercises their right to cease unsafe work in accordance with (a) is required as soon as possible to inform the person conducting a business or undertaking

[24] Thiess Pty Ltd v AMWU(WA Branch) and Others, 86 WAIG 2495.
[25] ibid

most directly involved in the engagement of the affected worker(s);

c) the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s) may require suitable alternative work to be undertaken by the worker(s) until they resume their usual work;

d) a worker who refuses to work as mentioned in section (a) is entitled to the same pay and other benefits, if any, to which they would have been entitled if they had continued to do their usual work;

e) the procedures for the determination of any disputes relating to the provision of payment and/or entitlements may be referred to a relevant court or tribunal for consideration; and

f) any issue arising under this section of the model Act may be referred to the issue resolution process for the business or undertaking, required by the model Act.

RECOMMENDATION 122

The model Act should provide that:

a) where an HSR has reasonable grounds to believe there exists a serious risk to the health or safety of a worker(s) represented by the HSR, emanating from immediate or imminent exposure to a hazard worker, the HSR may direct the worker(s) to cease work, subject to the following:

   i) the HSR must first consult with the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s), unless the risk is so serious and imminent that it is not reasonable to do so, in which case that consultation should occur as soon as possible after the direction of the HSR for the work to cease;

   ii) the HSR must attempt to resolve the issue of concern with the person conducting the business or undertaking, in accordance with the issue resolution procedures required by the model Act; and

   iii) the person conducting the business or undertaking will be entitled to direct the worker(s) to undertake suitable alternative work, if available; and

   iv) the worker(s) would be entitled to the payments and/or benefits they would have received had they continued to carry out their normal work.

b) the HSR or the person conducting the business or undertaking most directly involved in the engagement of the worker(s) may request an inspector attend the workplace to resolve any issue arising in relation to the cessation of work.

CHAPTER 29: DISCRIMINATION, VICTIMISATION AND COERCION

29.1 In this chapter we consider and make recommendations in relation to inappropriate conduct that has, or may have, the effect of deterring people from being involved in activities or exercising rights that are important to OHS. That conduct may take various forms, commonly known as discrimination, victimisation or coercion.

29.2 While there is a general consensus that persons should be accountable for such conduct[1]:

- current laws are often seen as not achieving that outcome in a way that fairly and effectively balances protections and rights; and
- there is considerable debate about whether that accountability should be provided by criminal or civil liability or both.

Current Arrangements

OHS legislation

29.3 All OHS Acts in Australia deal with discrimination by a person against another by reason of that other person being involved in specified OHS activities or roles. Details of the provisions are described in Table 42 in Appendix C.

29.4 Most OHS Acts deal only with discrimination, where an employee or prospective employee has suffered a specified detriment or has been threatened with a detriment (sometimes referred to as discrimination or victimisation).[2] The SA Act also prohibits coercion, where a person is threatened or intimidated to take or not take action related to OHS.[3] The WA Act extends the prohibition to protect a person engaged under a contract for services.[4]

29.5 The OHS Acts are generally consistent in describing the detriment that forms the basis for the offence. The OHS Acts are inconsistent in various other elements of the offence, including:

- the conduct or role of the 'victim' for which the detriment has been imposed;
- whether a breach of the provision gives rise to any civil remedies such as entitlement to reinstatement of employment or compensation; and
- whether a 'victim' may seek civil remedies separately from, and in the absence of, a prosecution;
- whether a 'victim' may be represented by another person (such as a union) in such proceedings or application for a civil remedy;
- whether the offending reason (e.g. that the person had provided information to an inspector) is required to be the sole reason, the dominant reason, the predominant reason or a substantial reason for the detriment.

29.6 All of the principal OHS Acts require the defendant to prove that the proscribed reason was not the sole, dominant, predominant or substantial (as variously expressed) reason for imposing the detriment.

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[1] Australia's obligations under the ILO's *Occupational Health and Safety Convention, 1981* (C155) require the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with Australian OHS laws.

[2] Cwth Act s76; Qld Act s174; NSW Act s23; Vic Act s76; SA Act s56; WA Act s56 and s35A and s35B; Tas Act s18; NT Act s93

[3] SA Act s56.

[4] WA Act s35B; although, curiously, this only applies in relation to activities or the status of the contractor as a health and safety representative.

Federal and State discrimination laws

29.7 In considering whether or not to recommend a provision in the model Act relating to discrimination, victimisation and coercion associated with OHS, we have considered whether there are other means by which such conduct is regulated or compensated.

29.8 Various laws around Australia provide for the civil liability of a person who has discriminated against another on the basis of specified attributes or characteristics or activities. Those laws apply in relation to, among other things, employment, prospective employment, partnerships, sport, certain clubs, contracting and the provision of accommodation, goods and services.

29.9 Laws relating to discrimination, other than those found in OHS Acts may, in limited cases, apply in relation to discrimination or victimisation because the 'victim' has an OHS role or has exercised an OHS power or right, or engaged in OHS activity. This is because the discrimination must relate to a specified characteristic, which might overlap in some cases with OHS roles or activities.[5]

29.10 Various elements of the discrimination laws may, however, be appropriately and usefully included in OHS discrimination provisions, particularly in relation to civil proceedings and remedies. Later in this chapter, we refer, where appropriate, to specific provisions of discrimination laws.

29.11 We have identified a number of Bills, presently before various Parliaments, that are relevant to this discussion.

Fair Work Bill 2007 (Cwth)

29.12 The Fair Work Bill will, if enacted, regulate industrial relations and employment throughout Australia, subject to constitutional limitations.[6] The legislation will apply to most but not all businesses or undertakings - a matter of significance when considering the adequacy of remedies it may provide for OHS discrimination.

29.13 Clause 26 of the Bill excludes the concurrent operation of State laws, described as '*State or Territory industrial laws*', which (amongst other things) provide rights and remedies connected with conduct that adversely affects an employee in employment[7], or connected with the termination of employment[8]. Clause 27 provides however, for various 'non-excluded' matters, and specifically refers to OHS laws.[9]

29.14 The model Act would therefore apply in all respects, alongside this legislation, except to the extent that the model Act is enacted as a State law and there is a direct inconsistency with the Federal law that is not saved by clause 27.[10]

29.15 The Fair Work Bill proposes rights of a person, and the exposure of an offender to a civil penalty, for conduct that may include discrimination, victimisation or coercion in relation to OHS.

29.16 Clause 340 provides that a person must not take adverse action against another person because the person has exercised or proposes to exercise a workplace right, or because a third person has done so for the person's benefit. Clause 341 defines a workplace right to include a benefit of or a role or responsibility under a *workplace law.* That term is defined in clause 12 to

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[5] For example in the *Equal Opportunity Act 1995* (Vic), the attribute of 'industrial activity' - see s.6(c) - may be relevant to OHS.

[6] The Fair Work Bill, when passed, will be limited in its application to constitutional corporations, the Federal and Territory governments, the Territories and external Territories referred to in the Bill and such of the States as refer their industrial relations power to the Commonwealth or adopt the Fair Work Bill. For example, a partnership operating in a State that is has not referred power or adopted the Bill would not be subject to it. The 'adverse action' provisions of the Bill also extend to various types of conduct which involve or affect constitutionally covered entities – cl.338.

[7] See Clause 26(2)(b)(vi) of the *Fair Work Bill 2007* (Cwth)

[8] ibid, Clause 26(2)(b)(v)

[9] ibid, Clause 27(2)(c) of the *Fair Work Bill 2007* (Cwth)

[10] See s.109 of the Constitution.

include a law that regulates relationships between employers and employees. It specifically includes laws that regulate relationships *by dealing with OHS matters.* It includes a person being *able* to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek compliance with that law (e.g., an OHS inspector). Clause 342 defines adverse action to include a range of prejudicial and injurious action prior to, during and at termination of employment, as well as the termination of the contract of an independent contractor, or the failure to engage a contractor, or the terms of engagement. A prospective employee is specifically covered by clause 341.

29.17 Clause 343 provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intent to coerce the other person, or a third person, to exercise or not a workplace right at all or in a particular way.

29.18 In short, the Fair Work Bill will, if enacted, provide a remedy to a person subjected to OHS discrimination or coercion.[11] This may be an alternative to any remedy available under OHS or discrimination laws, or may be available where such laws do not provide for a remedy.[12]

Bill to amend the Vic Act

29.19 A Bill[13] was introduced in early December 2008 to amend the Vic Act in relation to discrimination.

29.20 The proposed amendments, if enacted, will introduce a civil right of action for discrimination based on OHS roles and activities, in addition to a criminal offence.

29.21 The right of action for a civil remedy will be available where the proscribed reason was a *substantial* reason for the discrimination. The *dominant* reason test will be retained for proceedings in relation to a criminal offence. The reverse onus of proof of reason will apply to both criminal and civil proceedings.

29.22 In addition to reinstatement of employment and compensation, the amendments will allow an injunction to be obtained. The provisions will allow a person to be represented by a person authorised to represent them.

Bills to amend Federal Discrimination laws

29.23 Under the *Racial Discrimination Act 1975* (Cwth), the *Sex Discrimination Act 1984* (Cwth) and the *Disability Discrimination Act 1992* (Cwth), if an act is done for two or more reasons, including a discriminatory one, it is considered to be discriminatory, whether or not the discriminatory reason is the substantial or dominant reason. By contrast, the *Age Discrimination Act 2004* (Cwth) imposes a 'dominant reason' test[14], though we note that this is the subject of pending amending legislation[15] to bring it into line with the other federal discrimination laws.

29.24 All the federal discrimination laws also contain provisions proscribing victimisation against those who seek the protection of the laws or co-operate with the legislative processes in various ways.[16] These provisions are not qualified by the 'multiple reasons' provisions mentioned above in relation to discrimination, but contain various formulations of the degree to which the

[11] Under cl.360, where there are multiple reasons for the alleged adverse action, 'a person takes action for a particular reason if the reasons for the action include that reason'.

[12] For example, while reverse onus as to the reason for conduct that is found in OHS laws will also apply to the Fair Work proceedings (cl361) a person may take action under the Fair Work provisions if the reasons for the conduct include *a* reason that is proscribed (cl.360). OHS laws currently require the proscribed reason to be dominant, predominant or substantial. Thus an action under the Fair Work provisions may be easier to prove than under current OHS laws.

[13] The *Occupational Health and Safety Amendment (Employee Protection) Bill 2008*

[14] Section 16.

[15] *Disability Discrimination and other Human Rights Legislation Amendment Bill 2008.* The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for Inquiry and its report is due in late February 2009

[16] Age Discrimination Act, s.51; Racial Discrimination Act, s.27(2); Sex Discrimination Act,, s. 94; Disability Discrimination Act, s. 42

victimisation is required to constitute the reason. Under federal discrimination laws, victimisation may give rise to civil or criminal liability.[17]

Recent Reviews

29.25 The Maxwell Review found that there was a perception that protections for HSRs against retaliation or retribution for raising OHS matters were inadequate.[18] In response, Maxwell recommended extending the provisions to provide that discriminatory action is unlawful if one of the reasons for the action was safety related, as opposed to the sole reason.[19] Maxwell also recommended extending the provisions to prohibit harassment and victimisation in addition to discrimination.[20]

29.26 The NT Review noted that it can be extremely difficult to prove that OHS activity has lead to discriminatory action if this requires establishing that OHS is the sole or only reason for the discrimination. The NT Review recommended that provisions for protection against discrimination should only require proof that OHS activities are the dominant or substantial reason for the discrimination, not the only reason, and the onus of proving that OHS activities were not a dominant or substantial reason should be placed on the defendant.[21]

29.27 The WA Review did not support a reverse onus of proof for quasi-criminal offences, instead recommending referring powers to a tribunal to provide for conciliation and to grant remedies[22].

29.28 The ACT Review noted that consensus could not be reached on where the onus of proof should lie[23].

29.29 To provide protection to all workers and to ensure that employment/potential employment in a contractual chain is covered, the Vic Administrative Review suggested that breaches outside of the employer/employee relationship could be addressed by the inclusion of a coercion clause. Such a clause would provide, for example, if a 'principal contractor' coerces a 'sub contractor' to breach a discrimination and victimisation clause of the Act, it is taken that the 'principal contractor' also breached the clause[24].

Stakeholder Views

29.30 Generally, those who made submissions on this issue supported protecting persons from discrimination and victimisation over OHS matters. Opinions were, however, divided with respect to whether such matters should be dealt with in the model OHS Act, and, if this was to occur, how.

29.31 The submissions from governments, unions and academics tended to support the inclusion of protection from discrimination and victimisation in the model OHS Act.

29.32 The Queensland Government considered that "provisions enabling workers to participate in OHS decision-making will be ineffective unless all workers are robustly protected against any form of discrimination or victimisation on the basis that they participated in OHS processes or raised OHS issues."[25]

29.33 Opponents generally considered that it is not necessary to include such provisions in the model OHS Act because there are protections in other legislation which should not be duplicated.

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[17] See http://www.aph.gov.au/Senate/committee/legcon_ctte/disability_discrimination/index.htm.
[18] Maxwell Review, p.213; para 982
[19] ibid, p.214; para 987
[20] ibid, p.214; para 990
[21] NT Review, p130
[22] WA Review, p.127-128, para.7.57-7.58
[23] ACT Review, p64; Recommendation 26
[24] Vic Administrative Review, p62
[25] Queensland Government, *Submission No.32*, p.26

For example, VECCI[26] and the ACCI[27] considered that "existing provisions that are present in workplace relations and anti-discrimination should have scope to, in most circumstances, provide protections against discriminatory treatment and victimisation." They also commented that the existing provisions in OHS legislation should be examined "to ensure they are genuinely necessary and do not conflict or replicate provisions in other areas of law." The ACCI did, however, indicate it would support provisions based on section 76 of the Vic Act.

29.34 Submissions from employers, employer groups and industry generally support the prosecutor or regulator bearing the burden of proof for offences related to discrimination and victimisation. Unions and governments, however, generally support the model OHS Act placing the burden of proof for such offences on the defendant. Governments generally support the standard of proof being the criminal standard for those elements where the offence is a criminal matter and the civil standard for civil actions by workers.

29.35 The Western Australian Department favoured the burden of proof resting with the prosecutor although considered there was some merit in having a reverse onus of proof in relation to the "reason" as provided in the Vic Act (where the defendant bears the onus of proving that the reason alleged in the charge was not the dominant reason why the defendant engaged in the conduct). [28] On this point, the submission from Johnstone et al, considered that "the onus should be on the alleged discriminator to show on the balance of probabilities that another reason (other than involvement in OHS activities) was the *dominant* reason for the discrimination."[29] This approach is also supported by the Queensland Government.[30]

Discussion

The need for provisions in the model Act

29.36 Federal and State discrimination laws and the Fair Work Bill provide remedies for discrimination, victimisation or coercion related to various activities, some of which may relate to OHS.

29.37 We consider, however, that the model Act should include provisions dealing with discrimination, victimisation and coercion related to OHS, because:

- to do so will directly support involvement in OHS activities and roles, by making clear in the model Act, rather than having to look elsewhere, that the proscribed conduct is unlawful and clearly subject to penalties and remedies;
- there are significant gaps in the availability of remedies under the discrimination laws[31] and the Fair Work Bill;
- other legislation does not provide for the proscribed conduct to be an offence;
- the model Act can provide clarity and detail that is not present in the other legislation, particularly as to the types of conduct that are prohibited and the roles and activities to which the proscribed conduct relates; and
- the model Act can provide an alternative means of obtaining redress.

[26] VECCI, *Submission No.148*, p.21
[27] ACCI, *Submission No. 136*, p.41
[28] Western Australian Government, *Submission No. 112*, p.29
[29] Johnstone, Bluff and Quinlan, *Submission No. 55*, p.33
[30] Queensland Government, *Submission No.32*, p.26
[31] These will apply to OHS activities only occasionally.

RECOMMENDATION 123

The model Act should protect the exercise or intended exercise of rights, functions or powers, and the taking of action, under the model Act by prohibiting discrimination, victimisation and coercion relating to those activities.

Who should be protected by the provisions

29.38 As noted above, the intention of discrimination provisions in OHS laws is to encourage engagement in OHS activities and the proper exercise of roles and powers under the legislation. This is done by providing protection for those engaged in such roles and activities from being subject to discrimination, victimisation or coercion because they are so engaged.

29.39 The model Act should therefore clearly provide protection for those engaged in OHS by:

- exercising a right, role or power, or performing a function under the model Act;
- taking action to seek compliance with any duty or obligation under the model Act;
- being involved in raising or resolving, or both, an OHS concern or issue; and
- communicating with or assisting any person exercising a power or performing a function under the model Act.

29.40 Those most likely to fall within one or more of these categories are:

- workers;
- health and safety representatives;
- inspectors;
- members of a health and safety committee;
- witnesses;
- a person authorised under the model Act to enter a workplace;
- a duty holder (person conducting a business or undertaking including a contractor, an officer, a worker).

RECOMMENDATION 124

Provisions relating to discrimination, victimisation and coercion should provide protection of and remedies for all persons who have been, are, or intend to be, involved in any of the following activities ("*relevant activities*"):

a) exercising a right, role or power, or performing a function under the model Act;

b) taking action to seek compliance with any duty or obligation under the model Act;

c) being involved in raising or resolving, or both, an OHS concern or issue; and

d) communicating with or assisting any person exercising a power or performing a function under the model Act

and specifically including:

a) workers and witnesses;

b) health and safety representatives and members of health and safety committees;

c) inspectors; and

d) authorised persons.

What conduct should be proscribed

29.41 The OHS Acts are consistent in stipulating the types of conduct that represents discrimination or victimisation of an employee, prospective employee or health and safety representative (who is, by definition, an employee).

29.42 The changing nature of work relationships means that restricting protection to employees no longer provides adequate protection for those who are carrying out work. We do not see that there is a valid distinction between refusing to employ a person and refusing to engage a contractor, or between terminating employment and terminating a contract. The WA Act[32] extends protection to a contractor or prospective contractor, from termination of their engagement or other detriment (e.g. the terms on which they are engaged). It does not, however, provide protection from a refusal to engage a prospective contractor, an omission that we consider should be addressed.

29.43 The various forms of 'employment like' arrangements[33], on which we have made comment elsewhere, mean that using expressions such as 'principal', 'contract' and 'contracting' may be too restrictive. The 'commercial arrangements' may better cover all such arrangements. It may also cover other conduct, such as refusal to purchase materials or goods by reason of OHS activity of the supplier. Such a broader application of the provisions is consistent with their intention.

29.44 We recommend that conduct which should be proscribed as discrimination or victimisation should be that which:

> *directly or indirectly puts a person, or intentionally causes another person to put a person, to their detriment in employment, prospective employment or commercial arrangements, or threatening to do so for the proscribed reason.*

29.45 With the exception of the SA Act[34], coercion is not directly prohibited under the principal OHS Acts. Coercion may be considered to be action taken to intimidate or force or cause a person to act or to fail to act. Where that is related to OHS roles or activities, it is inappropriate and in our view should be prohibited. Some types of coercion may fall within the description of discrimination. There may, however, be circumstances where the coercion does not result in detriment to the person in their employment or commercial arrangements (such as the threat of violence) and therefore is not discrimination.

29.46 We therefore recommend that the model Act specifically prohibit coercion, which we propose be described as:

> *Without reasonable excuse, requiring, authorising, intentionally causing or inducing a person to:*
>
> - *engage in discriminatory action; or*
> - *take action detrimental to the health or safety of any person; or*
> - *refrain from exercising a right, or power or performing a function under the model Act at all or in a particular way; or*

[32] See s.35B of the WA Act

[33] Such as bartering, share farming, share fishing, purchase of materials and sale back to that vendor by the same person of finished materials.

[34] See s.56 of the SA Act

- *refrain from seeking or continuing to undertake a role under the model Act (e.g. not to seek election as a HSR).*

29.47 The reference to 'reasonable excuse' is intended, however finally drafted, to provide for circumstances where the conduct may have been reasonable, such as where:

- a person is persuaded, on reasonable grounds, not to exercise a power in a particular way – for example, not to issue a notice because remedial work will be voluntarily undertaken, or to provide a particular direction in a notice that is more appropriate in the circumstances; or
- emergency services personnel require or direct a person to act in a particular way during an emergency.

29.48 As we recommend in Recommendation 128 the person engaging in the offending conduct would have the onus of proving a reasonable excuse.

29.49 We are aware that some drafting conventions do not permit the use of the expression 'reasonable excuse', instead requiring the detail of what would be a reasonable excuse to be included in the provision. Those drafting conventions will need to be followed in drafting the relevant clause. We have sought to indicate our intention here.

29.50 Consistent with other criminal legislation, and to avoid arguments as to whether a person engaged in discrimination or coercion or it was undertaken by others, aiding and abetting discriminatory or coercive conduct should also fall within the conduct that is proscribed.

What the proscribed reason should be

29.51 The fact that a person is subjected to a detriment should not by itself render the conduct unlawful. What makes the conduct unlawful is that the person is subjected to a detriment for an improper reason or purpose.

29.52 Consistent with the discussion above, the proscribed reason for the purposes of discrimination or victimisation should be that one or more of the following applies to the person subjected to the detriment:

- the person has been involved in the performance or exercise, past performance or exercise or intends to perform or exercise any right, power or function under the model Act or be involved in any investigation or resolution of OHS matters;
- is or takes action as or has acted as a health and safety representative or a member of a health and safety committee constituted under the model Act;
- is or takes action as or has acted as a person authorised under the model Act to enter a workplace;
- assists or informs any of the above or an inspector in the exercise of a role or power or the performance of a function under the model Act; or
- raises or has raised or intends to raise an issue or concern about OHS to any of the above persons or to the person conducting the business or undertaking.

29.53 We will consider below, in the parts of this chapter relating to criminal and civil proceedings respectively, whether the proscribed reason for engaging in discrimination, victimisation or coercion should be the dominant reason, a substantial reason or some other standard for the provision to apply. We do not, however, accept that it should be the sole reason. Such a requirement would negate the protection intended to be given by the model Act.

Who would be prohibited from discriminating, victimising or coercing?

29.54 The model Act should not limit those who may engage in conduct that unlawfully discriminates, victimises or coerces. The provision should apply to everyone. That being said, those ordinarily in relationships with those who may be subject to the proscribed conduct will be:

- anyone who conducts a business or undertaking (including the Crown in any capacity) and thereby engages or directs workers and enters into commercial arrangements;
- an officer (including any person representing the Crown);
- a worker, including managers and supervisors; and
- person authorised under the model Act to enter a workplace.

29.55 The provisions should not apply to an inspector, who is subject to various review processes and in the event of conduct representing coercion may be guilty of assault or misfeasance in public office.

RECOMMENDATION 125

The following conduct by any person ("***proscribed conduct***") should be prohibited by the model Act:

a) **Discrimination and victimisation**

Directly or indirectly putting a person, or intentionally causing another person to put a person, to their detriment in employment, prospective employment or commercial arrangements, or threatening to do so, because the person has been, is, or proposes to be, involved in any of the relevant activities

Note: *We discuss later whether the reason should be the dominant or a substantial reason or whether another requirement should apply.*

b) **Coercion**

Without reasonable excuse, coercing, requiring, authorising, intentionally causing or inducing a person to

i) take action detrimental to the health or safety of any person;

ii) refrain from exercising a right or power or performing a function under the model Act or not exercise or perform it in a particular way;

iii) refrain from seeking , or continuing to, undertake a role under the model Act;

iv) engage in any unlawful discriminatory conduct, as defined.

c) **Aiding and abetting discrimination, victimisation or coercion.**

Note*: Drafting conventions relating to the use of 'reasonable excuse' will need to be observed, while meeting the intention of this recommendation.*

Civil or criminal or a combination?

29.56 All current OHS Acts provide for criminal offences for OHS discrimination. Most allow a court upon a finding of guilt to make orders for civil remedies of compensation and reinstatement of employment.

29.57 The WA Act[35] and NSW Act[36] allow a person to bring a civil action upon termination, whether or not a prosecution is brought. The Bill to amend the Vic Act would, if passed, provide a civil right of action in that State.

[35] See s.35C and 35D of the WA Act
[36] See s.23A of the NSW Act

29.58 A number of submissions proposed that the model Act only provide for civil and not criminal liability for discrimination. This raises the question whether the model Act should provide for:

- criminal liability only;
- civil liability only;
- some discriminatory conduct to attract criminal and some only civil liability; or
- criminal and civil liability for all discriminatory conduct.

29.59 Having considered the issues and matters raised in submissions, we have formed the view that the model Act should provide for criminal and civil liability for all acts of unlawful discrimination, victimisation and coercion (proscribed conduct). Our reasons for this are:

- all of the matters described as proscribed conduct may be so egregious as to warrant criminal punishment;
- the potential for criminal punishment may provide a significant deterrent against such conduct;
- there may be cases in which the regulator chooses not to take criminal proceedings for breach (due to problems in meeting the criminal standard of beyond a reasonable doubt, or for reasons associated with their enforcement policy) but a person has suffered detriment and should be provided with an opportunity to seek civil remedies;
- investigations and criminal proceedings typically take at least a year or two, while civil proceedings may allow the 'victim' to obtain a remedy much sooner; significant hardship may result from delayed reinstatement or compensation; and
- many cases of discrimination arise from the employment relationship and may be quickly resolved through conciliation; such actions may arise from a misunderstanding and the opportunity to resolve matters early may assist in maintaining and healing relationships.

RECOMMENDATION 126

The model Act should provide for criminal offences and liability to civil interventions and remedies, for engaging in, authorising, aiding or abetting proscribed conduct.

Criminal proceedings

29.60 We consider that offences of discrimination, victimisation or coercion under the model Act should be clearly understood to be serious criminal offences.

29.61 The procedures of the criminal law and as the processes and requirements that we recommend in our report for the investigation and prosecution of breaches should apply to offences of this nature.

29.62 The criminal burden of proof, with an exception noted below, should be carried by the prosecution, to the criminal standard of beyond a reasonable doubt.

29.63 The intention of the person who engages in discriminatory conduct, will be known to that person. As there may be many reasons why conduct that subjects another person to detriment may occur (e.g. termination for redundancy) it will be excessively difficult, if not impossible, for a prosecutor to prove the reason for the conduct.

29.64 This is why discrimination laws around Australia, under OHS Acts and under discrimination legislation, typically impose on the person allegedly engaging in the conduct the burden of proving that it was not for a proscribed reason.

29.65 If the person engaging in the conduct did so for a proper reason, the person should be able to demonstrate it. There is accordingly not considered to be any unfairness in requiring them to do so.

29.66 Similarly, the nature of coercive conduct is such that it may more often than not be engaged in for improper purposes. If the person had a reasonable excuse for engaging in the conduct, then that may be peculiarly known to them, and not the prosecution (if the prosecution was aware of a reasonable excuse, then presumably a prosecution would not be brought).

29.67 We recommend that the model Act provide that the burden of proving that conduct was not engaged in for a proscribed reason, or that the defendant had a reasonable excuse for coercive conduct, be borne by the defendant. Consistent with criminal law principles, a defendant being required to prove a matter in the nature of a defence, should only be required to do so on the balance of probabilities.

A dominant or substantial reason?

29.68 Most OHS Acts provide that the proscribed reason must have been a dominant reason, or predominant reason, for the conduct to be an offence. Some require that the proscribed reason is a 'dominant or substantial' reason.[37] At the other extreme, the Tas Act[38], the SA Act[39] and the NSW Act[40] each require that the proscribed reason is *the* reason, or the conduct is because of the proscribed reason - that is, it must be the only reason for the conduct.

29.69 We are not aware of any cases under OHS Acts where the terms 'dominant' or 'substantial' have been considered. Cases relating to legal professional privilege provide that 'dominant' for such purposes means *"the ruling, prevailing or most influential purpose*"[41], or to have been 'paramount rather than merely a primary or substantial purpose'[42]. While 'substantial' has been applied in discrimination cases as meaning more than fanciful, or having some substance, even though the reason may be very minor compared to other reasons, we note the following recent comment of Buchanan J in the Federal Court case of *Penhall-Jones v State of New South Wales*[43]:

> *"…Accordingly the authorities are unified in their approach that the ground or reason relied upon to establish breach of the relevant legal obligation need not be the sole factor but must be a substantial and operative factor…It must afford a rational explanation, at least in part, 'why' an action was taken. The connection cannot be a mere temporal conjunction of events, by an incidental but non-causal relationship or by speculation…"*

29.70 We have formed the view that the test for finding a criminal offence under the model Act for discrimination, victimisation or coercion, should be that a proscribed reason was a dominant reason for the offending conduct. We have done so for the following reasons:

- with the availability of a civil right of action, we anticipate that only the most serious cases will be the subject of criminal prosecution and they should not be taken except in the clearest cases';
- these should be considered to be serious offences with significant penalties available to be imposed; they should not be found lightly and the proscribed reason should be clearly the reason for the conduct;

[37] WA Act s35A, s35B and s56; Qld Act s174. This effectively means a substantial reason, as any dominant reason will be substantial.
[38] See s.18 of the Tas Act
[39] See s.56 of the SA Act
[40] See s.23 of the NSW Act
[41] *Federal Commissioner of Taxation v Spotless Services Limited* (1996) 186 ALR at 416
[42] *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380.
[43] [2007] FCA 925, at paragraph 85.

- there should in our view be a clear distinction between criminal offences and civil liability; a danger in having the same test for both may be that a less rigorous approach may be taken in civil proceedings (particularly given the civil burden of proof), which may over time influence the approach to criminal matters; and
- the preponderance of OHS Acts currently has this or an easier (for the defendant) standard, with the Bill to amend the Vic Act retaining the 'dominant reason' test in that State; this may suggest current attitudes on this issue.

Recommended penalties

29.71 There is considerable inconsistency in penalties provided in current OHS Acts, with maximum penalties ranging from as low as around $4,000 to a maximum in the Vic Act of just under $300,000 for a corporation and up to penalties are up to around $60,000 and a term of imprisonment of not more than 6 months for an offence by a natural person.[44]

29.72 While an offence of this nature may be serious, it will rarely put a person to a risk of death or serious injury, such as to justify the application of a penalty for a Category 1 or Category 2 offence.[45] In the event that a person is put to such a risk, it is likely that a duty of care offence would be committed, a prosecution taken for a breach of the duty of care and the appropriate penalty imposed. Even so, we consider that discrimination, victimisation and coercion offences should not be subject to low maximum penalties.

29.73 We recommend that these offences be classified as Category 3 offences, with the penalties for that category of offences to be available. This will be approximately equivalent to the highest current maximum penalty, taking into account indexation increases prior to the commencement of the model Act.

29.74 Consistent with these views, and our comments in our first report at paragraphs 12.23 to 12.26, we do not recommend a custodial sentence be available for an offence of this nature.

RECOMMENDATION 127

The model Act should provide that an offence related to proscribed discriminatory conduct is committed where involvement or intended involvement in the relevant activity is the dominant reason for the proscribed discriminatory conduct.

RECOMMENDATION 128

A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in a criminal prosecution of proving on the balance of probabilities that the reason alleged was not the dominant reason for which that person engaged in that conduct.

A person alleged to have engaged in coercion should bear the onus of proving on the balance of probabilities that the person had a reasonable excuse for doing so.

The prosecution should bear the onus of proof in relation to all other elements of an offence of engaging in proscribed conduct, beyond a reasonable doubt.

RECOMMENDATION 129

An offence of engaging in proscribed conduct should be a Category 3 offence (see Recommendation 55 in our first report).

[44] We note that the Bill to amend the Vic Act would remove imprisonment from the penalties provided in s76(4) of that Act.

[45] See recommendation 55 in our first report regarding the categories of offence and Tables 11, 12 and 13 under paragraph 12.21 regarding the proposed levels of fines.

Civil proceedings and remedies

The procedures and rules that should apply

29.75 Procedures for dealing with civil litigation are matters appropriately left to the jurisdictions. However we make the following comments to indicate what we consider to be appropriate procedural elements.

29.76 Civil proceedings for discrimination, victimisation or coercion under the model Act are likely to relate to claims that are similar in nature and substance to those under discrimination laws and unfair dismissal laws. The processes developed to provide for the timely and effective resolution of such claims appear to us to be appropriate to deal with claims of this nature under the model Act.

29.77 As we have noted above, a reason for providing for civil proceedings in this area, is to provide timely resolution of issues and relief. We therefore consider that the opportunity should be provided for early resolution of a matter between the parties, by means of mediation, conciliation and arbitration. This may involve the use of equal opportunity or administrative tribunals, or a specialist tribunal, such as the WA Occupational Safety and Health Tribunal.[46]

Interim interventions, such as injunctions restraining ongoing conduct or requiring reinstatement of employment pending the outcome of proceedings, may be appropriate (subject to the usual rules and requirements for obtaining that relief).

Action through a representative

29.78 During consultation, some concerns were raised with us as to the effectiveness of anti-discrimination provisions in OHS laws. A particular matter raised was the unwillingness of a person who has been coerced or subject to discrimination or victimisation to raise the issue formally.

29.79 While a person whose engagement has been terminated may be likely to pursue a claim against the employer or principal, a person who remains engaged may be reluctant to do so. An ongoing course of improper conduct may continue in the absence of a claim being made. That conduct may be directed at or affect a number of persons. The ability to bring an action through an intermediary acting on their behalf may provide a means by which this reluctance may be overcome.

29.80 We recommend that a person be entitled to bring a claim under the model Act relating to OHS discrimination, victimisation or coercion either directly or through a representative authorised by the person. An example of this is the referral of a matter to the WA OSH Tribunal by an agent[47]. It is common in industrial matters for representative actions to be brought by a union or association on behalf of individuals.

The civil burden of proof and standard of proof should apply

29.81 Consistent with our comments above, we consider that the person bringing a claim under the model Act for discrimination, victimisation or coercion should bear the onus of proving all elements of the claim, other than the reason for the proscribed conduct or the existence of a reasonable excuse.

29.82 The civil standard of proof – on the balance of probabilities – should apply to such claims.

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[46] Section 35C of the WA Act provides for the referral of matters to the Tribunal that relate to discrimination; see Part VIB of the WA Act that provides for the practice and procedure of the Tribunal.

[47] See s.35C(3) of the WA Act

The defendant should bear the burden on the question of reason for the conduct or reasonable excuse

29.83 For the reasons set out in paragraphs 29.63 to 29.67 in relation to criminal proceedings, we recommend that the defendant in a civil claim under the model Act have the burden of proving that any discriminatory conduct was not engaged in for a proscribed reason, or that the defendant had a reasonable excuse for coercive conduct.

A dominant or substantial reason or other test?

29.84 We considered in paragraphs 29.68 to 29.70 the test that should be applied in criminal proceedings to determine when a reason should result in discriminatory conduct being an offence under the model Act. We refer to that discussion. We recommended[48] that the reason must be the dominant reason for the conduct, for it to represent an offence. The same issue arises in relation to a civil claim – that is, when should a reason for engaging in discriminatory conduct give rise to a cause of action?

29.85 We note the following relevant to this issue:

- some current discrimination laws contain the 'substantial' reason test;[49]
- while most current OHS laws adopt a test of 'the reason' or 'dominant' or 'predominant' reason in relation to these types of matters, those laws relate (with some exceptions) only to criminal proceedings;[50]
- the 'dominant reason' test will be more difficult to satisfy than a 'substantial reason' test; while this is appropriate for criminal proceedings (for the reasons set out at paragraph 29.70) the higher test may result in persons being left without relief under the model Act for discriminatory conduct which is similar to conduct for which relief is available under discrimination laws;
- we consider there to be a benefit in providing a clear differentiation between criminal and civil proceedings and applying a different standard to each would assist in doing so;
- amendments are currently before the Federal Parliament to amend Federal discrimination laws to provide liability where a person engages in discriminatory conduct for *reasons that include* a proscribed reason; that is the requirement that the reason be substantial would not be included in the relevant provision;
- under the *Workplace Relations Act 1996* it is sufficient for an applicant to show that the conduct of an employer of which complaint is made under the Act's freedom of association provisions was undertaken *'for reasons that include a prohibited reason"*[51]. The Federal Court of Australia has held the employer's reasons will include a prohibited reason within the meaning of the Act 'if the prohibited reason is one of the operative reasons for the conduct whether or not it was the substantial reason for the conduct';[52]
- as noted in the decision of Buchanan J referred to in paragraph 29.69, for something to be a 'reason' for conduct, it must necessarily be *"... at least in part, 'why' an action was taken. The connection cannot be a mere temporal conjunction of events, by an incidental but non-causal relationship or by speculation…"*[53]*.* This means that any 'reason' must be operative or causal.

[48] See Recommendation 127

[49] For example, see the *Equal Opportunity Act 1995* (Vic) and *Anti-Discrimination Act 1977* (NSW), but most Federal discrimination laws do not so provide.

[50] See the discussion at paragraph 29.4 and footnote 2.

[51] See s.298K(1) of the *Workplace Relations Act 1996*

[52] *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513.

[53] Buchanan J in the Federal Court case of *Penhall-Jones v State of New South Wales* [2007] FCA 925, at paragraph 85.

29.86 In reaching our conclusions on this point, we have been conscious of the possibility that the Fair Work Bill, when enacted, may provide for effectively the same remedies for the same conduct ('adverse action' in the language of the Bill) as would be proscribed by the model Act.

29.87 For these purposes, however, the Fair Work Bill adopts in proposed s.360 a similar test to that in other federal anti-discrimination laws. This to the effect that if there are two or more reasons for the offending conduct and one of the reasons is a proscribed reason, the contravention is made out, unless the respondent shows (proposed s.361) that the reasons for the conduct did not include the proscribed reason.

29.88 This could have the effect that a person who comes within the scope of the Fair Work Act (which would be the great majority of workers) would be able to elect whether to seek a civil remedy under that Act or under the OHS laws. Accordingly, to avoid a potentially confusing difference in standards, we consider that, subject to the Parliament's decisions about the content of the Fair Work Bill, the test under the OHS laws should be the same as under the Fair Work Act.

29.89 This would involve using either the words of that Act (proposed s.360) or, if greater clarity were considered to be useful, adopting the language of the Federal Court (see above) and referring to the proscribed reason as one of the operative reasons for the conduct.

Remedies

29.90 The full range of remedies available under current OHS laws and under discrimination laws should be available, as appropriate to the circumstances, to a successful claimant in civil proceedings under the model Act. Those remedies should include:

- reinstatement of employment or engagement to the same or an equivalent position;
- compensation for loss resulting from the discriminatory conduct;
- injunction, or interim injunction, restraining further discriminatory conduct; and
- other relief as considered necessary by the court or tribunal.

29.91 Whether or not the model Act should provide for a maximum level of compensation is a matter of policy upon which we do not consider we are in a position to comment. We do, however, consider that the model Act should, to the extent possible, align the civil remedies and entitlements to legislation that operates in the areas of unlawful termination of employment and discrimination. We see no reason why a person who has been subject to discrimination related to OHS should be compensated any less or more than someone who has been discriminated against for other reasons.

No double-dipping or multiple actions

29.92 The adoption of our recommendation that a person may be entitled to bring a civil claim for discrimination:

- under the model Act;
- under industrial laws; and
- under discrimination laws.

29.93 This may mean that several actions may be taken by a person in respect of the same subject matter. This is not conducive to the effective operation of the justice system, and may result in undue hardship on the parties and over-compensation of the victim.

29.94 We therefore recommend the model Act provide that:

- a person may not commence or proceed with a civil claim under the model Act if the person has commenced proceedings for the same subject matter under another law and those proceedings have not been determined or withdrawn; and

- a person may not recover any compensation under the model Act if the person has received compensation for the same subject matter under another law; and
- a person may not commence or proceed with a civil claim under the model Act if the person has previously commenced and failed in a claim relating to the same subject matter under another law.

RECOMMENDATION 130

The model Act should provide for civil action against a person who has engaged in, authorised, aided or abetted proscribed conduct.

RECOMMENDATION 131

A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in civil proceedings of proving, on the balance of probabilities, that the reason alleged was not one of the operative reasons for the conduct.

A person alleged to have engaged in coercion should bear the onus of proving the person had a reasonable excuse for doing so.

The person bringing a civil claim should bear the onus of proof in relation to all other elements of the action, on the balance of probabilities.

RECOMMENDATION 132

The model Act should permit a person authorised by a claimant to have standing before a court or tribunal to represent that person and to bring a civil claim on the person's behalf in relation to proscribed conduct.

RECOMMENDATION 133

A relevant court or tribunal should be able to make the following orders in relation to a person who has suffered loss or damage as a result of proscribed conduct:

a) an injunction to restrain the continuation of the proscribed conduct; and/or

b) compensation; and/or

c) reinstatement of employment or, in relation to a prospective employee, employment in a similar position; and/or

d) other relief as considered necessary

save that a person should not be able to recover compensation or other relief under the model Act and under any other applicable Commonwealth, State or Territory legislation.

RECOMMENDATION 134

The model Act should provide that a person may not:

a) commence or proceed with a civil claim under the model Act if they have commenced proceedings for the same subject matter under another law and those proceedings have not been determined or withdrawn; or

b) recover any compensation under the model Act if they have received compensation for the same subject matter under another law; or

c) commence or proceed with a civil claim under the model Act if they have previously commenced and failed in a claim relating to the same subject matter under another law.

Should the model Act include a defence

29.95 The approach that we recommend provides for responses by the defendant to a prosecution or civil proceeding that are in effect defences, being:

- that a proscribed reason was not the dominant reason (for criminal liability) or substantial reason (for civil liability) for putting a person to their detriment; and
- that the person had a reasonable excuse for engaging in coercive conduct.

29.96 Whether these matters should be provided in the model Act as defences, or as elements of the substantive provision but subject to direction on the burden of proof, is a matter for the drafters of the model Act to determine.

29.97 We do, however, consider that the model Act should provide a defence for a person alleged to have committed an offence of discrimination, victimisation or coercion, where that offence arises from the conduct of another person.

29.98 As is common to all OHS Acts, the conduct of an employee, officer or agent of a body corporate within the scope of the employment or authority of that person, should be imputed to the body corporate. In this way, a body corporate may be found to have committed the relevant conduct. The onus of proof as to the reason for that conduct, or the availability of a reasonable excuse, being on the defendant may however have unfair consequences in such circumstances. How is the body corporate to prove the reason, particularly if the person engaging in the conduct is not available or is relying on a privilege against self-incrimination to refuse to give evidence (that person may not themselves be prosecuted in relation to that matter)?

29.99 A natural person may have alleged against them an offence of discrimination or coercion, on the basis that they caused another person to engage in the offending conduct.

29.100 A person conducting a business or undertaking in which workers are engaged, officers are appointed and agents are used, should take reasonable steps to ensure that those persons do not commit offences. They are required to comply with the primary duty of care so far as is reasonably practicable. An officer is required to exercise due diligence to ensure compliance by the organisation and a worker is required to take reasonable care. Consistent with this, we consider that a person should take reasonable measures to prevent discrimination, victimisation or coercion. The law should encourage them to do so.

29.101 We therefore recommend that the model Act include a defence for any person in relation to criminal or civil proceedings for discrimination, victimisation or coercion, that the person took reasonable precautions to prevent the occurrence of the offence by another person.

29.102 An example of a defence of this nature in OHS legislation, is found in s59A(2) of the SA Act, which provides:

> *"It will be a defence in any criminal proceedings under the Act against a body corporate, an administrative unit of the Public Service of the State or a natural person where the conduct or a state of mind is imputed to the body, administrative unit or person…it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature…"*

29.103 A defence of this nature is found in discrimination laws in answer to vicarious liability of an employer or principal for the acts of employees or agents.[54]

29.104 A defence of this nature would not be easy to prove. It would not be available where the alleged offender was aware of, but took no steps to prevent, the offending conduct by another.

[54] For example, see the *Equal Opportunity Act 1995* (Vic), s103; Age Discrimination Act (Cwth), s.57(2); Racial Discrimination Act (Cwth), s.18A; Sex Discrimination Act (Cwth) s.106(2); Disability Discrimination Act (Cwth), s.123(2).

29.105 Apart from providing some relief against the potentially harsh affects of the reverse onus of proof on the reason issue, this defence may provide a strong incentive to organisations to implement, communicate and enforce policies against discrimination and coercion.

RECOMMENDATION 135

The model Act should provide that it would be a defence to a prosecution or civil action against a person (body corporate, partnership or individual) relating to proscribed conduct engaged in by another person, to prove on the balance of probabilities that they had taken reasonable precautions to prevent that other person from engaging in the proscribed conduct.

PART 8

OTHER HEALTH AND SAFETY OBLIGATIONS

- Risk Management
- Monitoring
- Obtaining Advice
- Incident Notification
- Permits and Licensing

CHAPTER 30: RISK MANAGEMENT

30.1 Risk management is generally accepted as a systematic process involving the identification of hazards, assessment of risks and the implementation of control measures to eliminate or minimise risks. In our first report we considered risk management in the context of the primary duty of care, and in relation to the test for the 'reasonably practicable' qualification. In this chapter, we consider whether processes for risk management should be in the model Act or in regulations, including application of risk management processes to specific classes of duties.

Current Arrangements

30.2 Effectively, the general duties in all OHS Acts require duty holders to engage in systematic OHS management. This has been achieved using a variety of ways. The NT Act has included the requirement for duty holders to manage risk as part of the primary duty of care.[1] The ACT and QLD Acts require duty holders to apply the risk management process where no regulations (or other instruments) have been issued setting out a way to control a risk.[2]

30.3 For example, s.27A of the Qld Act provides that, the in absence of regulations (or other instrument, 'to manage exposure to risks' in the workplace, a duty holder must: 'identify hazards; assess risks that may result because of the hazards'; work through a hierarchy of controls to choose and implement appropriate control measures; and monitor and review the control measures. This is reinforced by the Qld *Risk Management Code of Practice 2007*.

30.4 All jurisdictions institutionalise risk management processes in their regulations.[3] For example, the regulations in WA provide obligations for designers, manufacturers, and suppliers of plant to identify, assess and control risks arising from their work activities.[4] Other jurisdictions have included similar obligations in regulations for certain activities such as manual handling, working at height or in confined spaces, or working with asbestos. Some jurisdictions also provide further information on the risk management process in a code of practice.[5]

30.5 The Vic Act requires elimination or minimisation of risk without specifically mandating that the duty holder undertake formal hazard identification and risk assessment.[6] This is, in part, achieved via the calculus for reasonably practicable, and case law. The Vic regulations do not require that risk assessment be undertaken, but focus on risk controls for specific activities.

30.6 In NSW, the risk management approach to OHS risks in the workplace is stated as an objective of OHS legislation.[7] This is in addition to including the process in regulation.

30.7 Some jurisdictions have also enacted provisions which set out a hierarchy of controls. The hierarchy itemises the measures in order of most to least preferred, commencing with elimination of the risk.[8]

Stakeholder views

30.8 Most submissions acknowledge the importance of a requirement for risk management principles in the model Act. However, there are divergent views on whether the risk management processes should be mandated in the Act, or in the regulations, or provided for in practical guidance in Codes of Practice.

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[1] See s.55(3) of the NT Act.
[2] See ss.27 & 27A of the Qld Act, and ss.14 & 15 of the ACT Act.
[3] See E. Bluff and R. Johnstone, *The relationship between "reasonably practicable" and risk management regulation*, Australian Journal of Labour Law*,* 18 (2005), pp.220-237.
[4] See r.3.1 of the *OHS Regulations* 1996 (WA)
[5] For example, *Occupational Health and Safety Code of Practice 2008* (Cwth)
[6] See s.20 of the Vic Act.
[7] See s.3(e) of the NSW Act.
[8] See s.27A(b) of the Qld Act, or r1.3.3 of the SA Regs.

30.9 The submission from the ACTU gives strong support for a mandated risk management process, such as s.27A of the Qld Act:[9]

> *"It should make it clear that the object is to eliminate the hazard, and if that is not possible, control it and require the duty holder to be proactive utilising a systematic process as distinct from an ad hoc reactive response."*

30.10 The ACTU submission also provides detailed proposals for what the model Act should contain, including lists specifying how duty holders should be required to implement risk management principles, the need for consultation with relevant workers and for a life cycle approach to risk management.[10] In addition, the submission also recommends further guidance to assist duty holders carry out effective systematic OHS management set out in a code of practice and other guidance material.[11]

30.11 Similarly, Johnstone, Bluff and Quinlan submit that:[12]

> *"The Model OHS Act should explicitly require duty holders to undertake systematic OHS management in order to comply with their general duty obligations, and the Act should outline the approach to be taken in a way that integrates the concept of 'reasonably practicable' into the process, and also shows how duty holders should use the provisions in regulations and codes of relevance to the issue being addressed in order to comply with the general duty."*

30.12 The Australasian Railway Association's view is that the relationship between risk management, risk assessment and reasonably practicable should be the subject of greater clarity in the OHS legislation.[13]

30.13 Those who did not support mandated procedures felt that such measures do not provide duty holders with flexibility in their approach to managing risk and hazards in the workplace. HIA regards mandated requirements as:[14]

> *"…problematic, unnecessarily prescriptive and inconsistent with COAG's recommendation that legislation should focus on clearly identifiable outcomes, rather than inputs or the means of achieving that outcome."*

30.14 ACCI does not support a mandated legislative requirement:[15]

> *"Principles of risk management may assist the workplace parties in many instances by providing a framework which contributes towards meeting general safety obligations; this does not need however to be reflected as a legislative principle."*

Discussion

30.15 As we noted in our first report, risk management is essential to achieving a safe and healthy work environment. We found that risk management is implicit in the definition of reasonably practicable, and as such, need not be expressly required to be applied as part of the qualifier or the duties of care. To highlight the importance of risk management, we did, however, recommend that it be included in the fundamental principles applicable to the model Act.[16] We propose objects and principles that could be applied to the model OHS Act in Chapter 22.

30.16 The remaining issue, therefore, is how the process for risk management should be addressed within the suite of model legislative instruments.

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[9] ACTU *Submission No.214,* p.30
[10] ibid*,* pp.31-32
[11] ibid, pp.32-33.
[12] R. Johnstone, L. Bluff, M. Quinlan; *Submission No.55,* p.21
[13] Australasian Railway Association, *Submission No.188*, p.19
[14] HIA, *Submission No.175*, p.21
[15] ACCI, *Submission No.136*, p.34
[16] See Recommendation 9 of our first report.

30.17 The risk management process generally consists of the following steps:

- identification of hazards;
- assessment of the risks associated with each hazard;
- identification of measures to eliminate or minimise the risks;
- application of the most appropriate control measure in accordance with a hierarchy of controls; and
- monitoring and review of control measures to ensure effectiveness.

30.18 This process has also been set out comprehensively in the Australian Risk Management Standard (AS/NZS 4360:2004). In their submission, Johnson et al proposed that a modified risk management process be included in the model Act immediately after the primary duty of care.[17] They assert that this arrangement, along with other modifications, would be:[18]

> *"…more transparent and accessible than is the case with the general duties as currently formulated, and more congruent with the underlying policy objective of OHS regulation. It will also ensure that the Model OHS Act is self-contained, in the sense that all the relevant principles required for compliance are set out in the Act."*

30.19 We note that the NT Review recommended this approach to codify recent case law and align the Act with contemporary practice.[19] Other submissions also suggested inclusion of the risk management process in the Act for similar reasons.

30.20 Although the risk management process is a method by which duty holders can meet their duty of care, we would question whether the process is applicable in every case; if adherence to the process in and of itself satisfies the duty of care; and, further, if failure to adhere to the risk management process should constitute a breach of duty of care.

Should the risk management process be mandated?

30.21 The Maxwell Review found that risk could be successfully managed without mandating hazard identification and risk assessment in all cases, particularly where the hazards are well known and have universally accepted controls. Maxwell recommended the Vic Act support a systematic approach to risk management without mandating it in every case.[20]

30.22 Incorporating an obligation into the model Act that mandates application of the risk management process may lead duty holders to believe they have met the duty by simply applying that process. Instead, the focus of the model Act must remain on achieving the outcome of safe and healthy work environments. This should be done by eliminating or minimising risk as far as is reasonably practicable. Implementing the risk management process is one method, albeit a very important one, to achieve this outcome. On the basis that applying the process will not, by itself, satisfy the duty of care, we would also contend that failure to apply the process should not constitute a breach of the primary duty of care.

30.23 Thus, we agree with the Law Council of Australia's submission supporting the inclusion of the specific provisions in the regulations:[21]

> *"'Risk management' … is a systematic step-by-step process that details the specific way in which a duty holder can satisfy their general duty to prevent risks to health and safety. Therefore, the proper place for risk management provisions is within regulations rather than the principal Act, which is meant to focus upon general rather than specific duties."*

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[17] R. Johnstone, L. Bluff, M. Quinlan, *Submission No.55*, p.21
[18] ibid, p.23
[19] NT Review, p.64
[20] Maxwell, p.157-158
[21] Law Council of Australia, *Submission No.163,* p.21

Where should the risk management process enacted?

30.24 As a process, requirements for risk management should be placed in the model regulations rather than the model Act. Duty holders may not need to carry out the risk assessment step of the process where suitable control measures are immediately identifiable. This approach is also taken in the UK where requirements for risk assessment are set out in Regulations, accompanied by an approved Code of Practice which provides guidance on their application. In addition, the HSE provides guidance material detailing methods of risk assessment and principles for risk management.[22]

30.25 It is vitally important that the nexus between the duties of care, the reasonably practicable qualifier, and systematic management of risk is clear. As we noted in our first report, elements of risk management are implicit in the calculus for the 'reasonably practicable' qualifier in that they require consideration of likelihood of consequences occurring, the degree of harm that would result and application of suitable controls.

30.26 We recommend that the model Act not specify how to undertake risk management as part of the duty of care, but that the regulation-making power allow for the process to be established via regulation, with further guidance provided in code of practice.

Definitions

30.27 Related to the risk management process is the issue of whether the terms 'hazard' and 'risk' should be defined in the model Act. Only the WA and ACT OHS Acts define both terms, whereas, the Qld Act defines 'risk'[23] and the NT Act defines 'hazard'.[24]

30.28 We are of the view that these terms do not need to be defined in the model Act because they are now well understood in relation to OHS to mean:

> *Hazard* - means any thing or situation with the potential to cause harm to people.
>
> *Risk* - means the likelihood of a hazard causing harm, and the seriousness of the potential harm.

30.29 Should it be seen as necessary to define these terms in regulation to support the risk management provisions, we recommend that the above definitions be applied.

RECOMMENDATION 136

The model Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.

[22] *The Management of Health and Safety at Work Regulations 1999, Management of Health and Safety at Work Regulations 1999 Approved Code of Practice and guidance* and http://www.hse.gov.uk/risk/index.htm

[23] 'Risk' means 'risk of death, injury or illness'.

[24] 'Hazard' means 'a source of risk'.

CHAPTER 31: MONITORING HEALTH AND SAFETY

31.1 Monitoring health and safety is part of the pro-active risk management process, and can assist with early identification of emerging conditions, allowing a duty holder to take preventative action. In this chapter, we consider and make recommendations on a duty for persons conducting a business or undertaking to monitor the health of workers under their control: and whether there should be a duty to monitor conditions at the workplace for the purposes of preventing fatalities, illness or injury.

Current Arrangements

31.2 In its 1995 report into work, health and safety, the Industry Commission recommended that the principal OHS legislation in each jurisdiction require all employers, as far as reasonably practicable:[1]

> *"to undertake ongoing identification, assessment and management of the risks to health and safety at their workplace, including keeping appropriate records and monitoring the health and safety of their employees"*

31.3 Most OHS Acts include a requirement for employers to monitor the health[2] of workers and conditions at a workplace under the employer's management and control (see Table 43 below).[3]

31.4 Often, these provisions are included as part of the primary duty of care; however, the NT and Vic OHS Acts have expressed these as separate duties. The Maxwell Review noted that the separate provisions would not apply to deemed employees in Victoria, so in effect, host employers are not required to monitor the health of independent contractors or labour hire personnel.[4] The NT Act applies the obligation to the employer's workers, broadly defined. However, NT employers are only required to monitor worker's health or conditions at a workplace if instructed by regulations.

31.5 The duty to monitor the health of employees in the Tas Act is limited to circumstances where the regulator has identified a hazard and issued a written instruction to the employer to undertake the monitoring. This limitation does not, however, apply to monitoring of conditions at a workplace.

31.6 The Qld, NSW and WA Acts do not have a general requirement to monitor workplaces or employee health; instead they have detailed provisions for 'health surveillance' in regulations governing hazardous substances and lead. This is as required by the *National Standard for Hazardous Substances* issued by NOHSC, as well as other standards, and as such is a feature of OHS regulations in most jurisdictions.

TABLE 43: Duty to monitor health and safety

State	Duty requirement
NSW	Health Surveillance in regulations
VIC	s.22(1) An employer must, so far as is reasonably practicable— (a) monitor the health of employees of the employer; and (b) monitor conditions at any workplace under the employer's management and control.

[1] IC Report, p.60, Recommendation 3

[2] In South Australia, employers must monitor health and welfare of employees. In the Cwth, employers must monitor the health and safety of employees. In the ACT, employers must monitor health, safety and welfare of employee. All others with a provision only require that health of employees is monitored.

[3] NSW does not appear to have a requirement for monitoring of employees or the workplace in either their principal Act or regulations.

[4] Maxwell Review, pp.135-136, para 585

State	Duty requirement
Qld	Health Surveillance in regulations
WA	Health Surveillance in regulations
SA	s.19(3) Without derogating from the operation of [the primary duty of care], an employer must so far as is reasonably practicable— (a) monitor the health and welfare of the employer's employees in their employment with the employer, insofar as that monitoring is relevant to the prevention of work-related injuries; (h) monitor working conditions at any workplace that is under the management and control of the employer
Tas	s.9(2) Without limiting [the primary duty of care], an employer must so far as is reasonably practicable – (a) if hazards exist and have been identified to the employer, in writing, by the Director, monitor the health of employees in their employment with the employer to ensure the prevention of work-related injuries and illnesses; and (h) monitor working conditions at any workplace that is under the control or management of the employer
NT	s.60(1) An employer must, if so required by the regulations: (a) monitor the health of the employer's workers or a particular class of workers; and (b) monitor conditions relevant to the health and safety of workers at a workplace under the employer's control
ACT	s.21(3) Without limiting [the primary duty of care], the person's duty includes— (f) monitoring the work safety of people at the business or undertaking, and the conditions of the workplace, to ensure that work-related illness and injury are prevented
Cwth	s.16(5) Without limiting the generality of [the primary duty of care] insofar as that section applies in relation to an employer's employees, the employer breaches that subsection if the employer fails to take all reasonably practicable steps: (a) to take appropriate action to monitor the employees' health and safety at work, and the conditions of the workplaces under the employer's control

31.7 Monitoring the health and safety of workers and the workplace, both as a general duty in the Act and a more prescriptive process in the regulations, is also a feature of OHS laws drafted for application to the mining industry.

31.8 The regulation-making powers of WA allow for the monitoring of employee health subject to their consent. However, most Acts require that employers consult workers on arrangements for health monitoring.

Stakeholder Views

31.9 No submissions opposed the inclusion of a requirement to monitor conditions at a workplace under the employer's control under the employer's primary duty of care. The ACTU have recommended that employers be required to "monitor health and safety" presumably instead of conditions or employees.[5] Business SA suggested that the model Act enable employers to implement drug and alcohol testing programs free of industrial disputation, citing the prevalence of drugs and alcohol in workplace fatalities and injuries.[6]

[5] ACTU, *Submission No. 214*, p.26
[6] Business SA, *Submission No. 22*, p.38

Discussion

31.10 The obligation for monitoring both the health of workers, and conditions at a workplace is a necessary process if the duty holder is to meet their primary duty of care. Monitoring is part of the pro-active risk management process, and can assist with early identification of emerging conditions, particularly ones that develop over time, allowing a duty holder to take preventative action.

31.11 Monitoring the health of workers is to be limited to what is reasonably practicable. The degree of monitoring and methods used should be proportionate to the risk and directly related to meeting the primary duty of care. This can be achieved through visual observation and enquiry of the worker, through to obtaining medical reports or testing where the risk to workers warrants such measures.

31.12 Monitoring would generally be systematic and on-going for it to have the most effectiveness. It is the person conducting the business or undertaking who is best placed to ensure that systems are in place to monitor the health of workers engaged by them or under their direction. However, we consider that the person who has management or control of the workplace will have the most influence over the systematic monitoring of conditions at their workplace. In most circumstances the person conducting the business or undertaking and the person in control of the workplace will be the same. Where they are not, it is more appropriate for the obligation holder who can affect positive change at the workplace to be the one required to monitor conditions to prevent fatalities, illnesses or injury.

31.13 More specific 'health surveillance' requirements for various hazardous substances should continue being the subject of regulations.

Privacy Considerations

31.14 Though submissions to our review did not raise major objections to the obligation to monitor, we are aware that there have been legal cases associated with monitoring health, for example testing employees for the effects of alcohol and drugs. [7]

31.15 For example, random urine testing was supported in the case of *BHP Iron Ore Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia* (Full Bench, WAIRC, 19 June 1998), particularly noting the importance of health and safety in that industry.

31.16 The Federal Court of Australia in the case of *Blackadder v Ramsey Butchering Services Pty Ltd* (2000) noted that to comply with its duties under OHS legislation an employer must be able to require an employee to provide medical evidence about their fitness to undertake their duties. This case related to attendance for medical examination, but would support a similar proposition in relation to less intrusive testing.

31.17 *Australian Railways Union of Workers and Others v Western Australian Government Railways Commission* (WAIRC, 1998) found that:

> *"There is certainly authority, including the BHP case, which recognises that, to be an effective deterrent, random testing for drugs or alcohol should be carried out alongside a range of other activities that educate, persuade, assist and provide a second chance and which recognise the social realities of peoples' lives…".*

31.18 The Commission noted in that case that it was 'regrettable' that the Railways Commission had not consulted widely before introducing the policy.

31.19 Generally, privacy legislation in most jurisdictions applies only to the public sector. In 2000, the *Privacy Act 1988* (Cwlth) was amended to cover organisations with an annual turnover of more than $3 million. Private sector organisations are required to comply with ten National

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Privacy Principles (NPPs) in the Act.[8] However, employment records held by employers covering current and past workers, including records relating to the health, are exempt from coverage under the Privacy Act, where the act or practice relating to the record is directly related to the employment relationship.[9] Instead, the privacy of employment records is to be governed by workplace relations legislation, however, none of this legislation covers OHS records.

31.20 The Privacy Act is currently subject to review by the Australian Law Reform Commission, who has recommended the employment record exemption be removed.[10] This recommendation has been supported by the Office of the Federal Privacy Commissioner in their submission to the review.[11] In the interim, organisations are encouraged to apply the NPPs to employment records as 'good privacy practice'. For example, obligation holders undertaking monitoring should ensure that:

- information is not collected unless it is necessary for the one or more of the organisations activities;[12]
- individuals are aware that monitoring is to occur, including the purpose of the monitoring;[13]
- information is collected by lawful and fair means, and not in an unreasonably intrusive way;[14]
- information collected is protected from misuse, loss or unauthorised access, modification or disclosure.[15]

31.21 Decisions of the court have upheld the essential elements of the NPPs in this area.[16]

31.22 In Part 7, we have recommended that duty holders are required to consult with workers on monitoring arrangements.

RECOMMENDATION 137

The model Act should include an obligation for persons conducting a business or undertaking to ensure, as far as is reasonably practicable, the health of workers engaged by them or under their direction, is monitored for the purpose of preventing fatalities, illnesses or injury arising from the conduct of the business or undertaking.

RECOMMENDATION 138

The model Act should include an obligation for persons with management and control of a workplace to ensure, as far as is reasonably practicable, that conditions at that workplace are monitored for the purposes of preventing fatalities, illness or injury.

[8] *Privacy Act 1988* (Cwlth), Schedule 3.
[9] See ss.6, 7(1)(ee) & 7B(3) of the Privacy Act 1988 (Cwlth). This operates to include records used or created during monitoring of employee health and safety.
[10] ALRC, *For Your Information: Australian Privacy Law and Practice*, May 2008, para 40.121.
[11] www.privacy.gov.au/publications/submissions/alrc_72/PartE.html#ach6
[12] NPP 1.1
[13] NPP 1.3 and 1.5
[14] NPP 1.2
[15] NPP 4.1
[16] For example, see *Australian Railways Union of Workers and Others v Western Australian Government Railways Commission* (WAIRC, 1998); *BHP Iron Ore Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia* (Full Bench, WAIRC, 19 June 1998); *Blackadder v Ramsey Butchering Services Pty Ltd* (2000) and *Pioneer Construction Materials Pty Ltd v TWU and IUW* (17 November 2003).

CHAPTER 32: OBTAINING ADVICE

32.1 In this chapter we deal with the question of whether the model Act should require duty holders to make arrangements so that they have competent advice readily available to them to facilitate their meeting their duties.

32.2 In so doing, our attention is on the possible requirements under the model Act. We note, however, that any such requirements must be seen in the practical context of the availability and competence of OHS advice and the very wide range of work situations, environments, arrangements and types of duty holders that are potentially subject to such requirements.

Current Arrangements

Obligation to obtain advice

32.3 As we discussed in our first report, OHS Acts impose duties of care on duty holders because they influence one or more of the elements that go to the performance of work, and in doing so may affect the health or safety of themselves or others. Duties of care require duty holders to ensure that, in their role and by their conduct, they do not adversely affect health or safety.

32.4 Under existing OHS laws, duty holders have a wide range of obligations to ensure that they have the resources, or access to them, to be able to meet their responsibilities. These include obtaining competent advice. The obligations are variously found in the OHS Acts and in regulations (see below). There are also some relevant codes of practice. The requirements have been described as 'rather basic and piecemeal', particularly in comparison with more well developed requirements under the laws of some other countries.[1]

32.5 Such obligations range from some particular requirements relating to securing competent first aid or health services through to more general obligations designed to ensure that a duty holder has, or has access to, information and advice that will assist in satisfying applicable duties of care and other OHS obligations. It is the latter with which we are concerned.[2]

32.6 NSW places such an obligation on an employer by regulation. Under reg.16 of the consolidated NSW regulations ('the NSW Regulation'), an employer must obtain such information as is necessary to enable the employer to fulfil the employer's responsibilities under the NSW Regulation with respect to hazard and risk management and providing information. The information that has to be obtained must be 'reasonably available information from an authoritative source'.[3]

32.7 The Vic Act requires an employer, so far as is reasonably practicable, to employ or engage a person with suitable qualifications in relation to OHS to provide advice to the employer concerning the health and safety of employees.[4]

32.8 Under Part 8 of the Qld Act, an employer (but not other persons conducting a business or undertaking) must appoint a qualified person[5] as a workplace health and safety officer (WHSO) if the employer has, or is likely to have, thirty or more workers at the workplace for a total of any forty days during the year. A similar requirement is placed on principal contractors, but the threshold for appointment is different from that of employers. A principal contractor must appoint a WHSO where the principal contractor has, or is likely to have, thirty or more persons working at a workplace in any twenty-four hour period.[6] A WHSO may be appointed (with the regulator's

[1] Bluff,L, *The missing link – regulating occupational health and safety support services*, 2005, NCOHSR, Working Paper 35, p.2..
[2] The other types of more specific obligations tend to be dealt with in regulations.
[3] *Occupational Health and Safety Regulation 2001* (NSW), r.16.
[4] See s.22(2)(b) of the Vic Act.
[5] Under s.92 0f the Qld Act, a qualified person is one who holds a certificate prescribed by the regulations.
[6] There are certain other circumstances in which a principal contractor must appoint a WHSO – Qld Act, s.94.

approval) in respect of more than one workplace. The regulations specify the industries in which WHSOs must be appointed.[7]

32.9 WHSOs are management appointees. Their functions include informing employers about the state of OHS at the workplace, conducting inspections to identify hazards and unsafe practices and report on them, establishing educational programs; investigating OHS incidents; and assisting OHS inspectors.[8] The WHSO must also undertake periodic overall health and safety assessments and provide the employer or principal contractor and any HSC with a report.

32.10 Employers and principal contractors with fewer than 30 workers may also appoint a WHSO. An employer or principal contractor who is suitably qualified may appoint himself or herself as the WHSO.

32.11 A person is qualified for appointment as a WHSO if the person has satisfactorily completed an approved WHSO course conducted by a registered training organisation; or has other qualifications or experience that would enable the person to perform the functions of a WHSO satisfactorily.[9] Certificates of appointment are issued for a maximum of five years.[10]

32.12 The appointment of a WHSO does not diminish the OHS responsibilities of the employer or principal contractor.[11]

32.13 Unlike responsible officers in South Australia and Tasmania (see below), WHSOs do not take on the obligations of the employer. Instead, WHSOs are viewed as an advisory role akin to that of a Health and Safety Representative.

32.14 WHSO training, which is in two stages, is broad and would usually not be sufficient for implementing all facets of a health and safety management system at the workplace.[12] Employers are reminded by the regulator that most workplaces, especially those which are considered more hazardous, will need to seek the advice of professionally qualified health and safety personnel or other specialists.

32.15 Employers and principal contractors have specified obligations to help WHSOs to perform their functions.[13]

Responsible Officers

32.16 The Tas Act requires all employers to appoint a 'responsible officer' for each workplace at which the employer carries on business. The appointed officer is responsible for performing the duties of the employer under the Tas Act and regulations at the workplace. The responsible officer can be prosecuted for breaching the obligations, irrespective of whether proceedings are brought against the employer. Further, the appointment of a responsible officer does not relieve an employer of the duty of care under the Act. In essence, the duty of care is equally owed by the employer and the responsible office for a workplace.[14]

32.17 The SA Act requires each company carrying on business in the State to appoint one or more responsible officers.[15] If a company fails to appoint a responsible officer, then all officers of the company are deemed to be the responsible officers. The responsible officers in South Australia must take reasonable steps to ensure the company complies with its duty of care. The provisions, however, do not derogate from any other rule of law relating to the duties of officers of bodies corporate.

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[7] WHS regulations (Qld), r.30.
[8] Qld Act, s.96.
[9] *Workplace Health and safety Regulation 2008*, rr.57, 58..
[10] Ibid, r.57.
[11] Qld Act, s.98.
[12] http://www.deir.qld.gov.au/workplace/training/training/whso/whso/employers/index.htm
[13] Qld Act, s.97.
[14] See ss.10-12 of the Tas Act
[15] SA Act, s.61.

32.18 Other OHS Acts have less prescriptive requirements. For example, the Qld Act provides that company executive officers must ensure that their corporation complies with the Act.[16] The Vic Act allows an employer to nominate a representative with an appropriate level of seniority and competence to resolve OHS issues.[17] However, the Victorian government advised that this position does not require the person to fulfil the employer's duty of care, and does not attract penalties.[18]

Stakeholder Views

32.19 Some submissions identified a need for greater access to competent advice, and there were proposals for terms such as *competent*, *suitably qualified* and *suitably qualified OHS advice* to be defined.[19]

32.20 The Victorian government advocated the adoption of the obligation under s.22 of the Vic Act to seek advice. It should be accompanied by the capacity conferred on employers under the Vic Act to nominate a representative with an appropriate level of seniority and competence to attempt to resolve OHS issues.[20] This combined arrangement was seen to balance an obligation to seek advice with flexibility in deciding how to do so. This was said to be less prescriptive than some alternatives (e.g. WHSOs) and avoided creating another tier of duty holders.[21]

32.21 On the other hand, the Queensland government supported the inclusion of WHSO provisions in the model Act, pointing to the strong support for WHSOs from Queensland stakeholders and research that demonstrated the effectiveness of the arrangements.

32.22 Employers had benefited from there being an appointed officer with OHS training, expertise and authority. Unions had also found it highly beneficial to have a designated officer responsible for OHS at the workplace as it clarified lines of communication and ensured that unions could quickly locate and liaise with OHS specialists at the workplace. WHSOs also improved communication and co-operation between organisations and the inspectorate.

32.23 Research indicated that WHSOs had been effective as a means of improving knowledge and understanding about OHS issues within workplaces, more effective risk management, improved manual handling procedures, greater awareness and control of hazardous substances, more OHS induction training and more effective employee consultation and involvement.[22]

32.24 For employers with fewer than thirty employees, the Queensland government proposed alternative extension programs. This might include supporting employers' associations to provide roving WHSOs to target particular industries, regions or small businesses. Other measures could include specialist services through the regulator's dedicated advisory function as well as the development of codes of practice to support small and medium businesses.[23]

32.25 The Queensland government stressed the accountability of the appointed person to senior management. There should be no liabilities on a WHSO, whose role was to facilitate and assist the employer to comply with legislation. Experience showed that employers had not viewed WHSOs as an opportunity to displace their OHS obligations. Under the Qld Act, the appointment of a WHSO in no way reduced duty holders' obligations.

32.26 Other submissions opposed the inclusion of provisions requiring employers to appoint persons to positions with specific OHS responsibilities.[24] There was concern that this would

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[16] Qld Act, s.167
[17] Vic Act, s.73(2)(b)
[18] Victorian government, *Submission No. 139*, p.34.
[19] For example, L. Ruschana (RMIT), *Submission No.166*, p.5, and W. Macdonald (La Trobe), *Submission No.119*, p.3, SIA, Submission No.128, p.3.
[20] Vic Act, s.73.
[21] Victorian government, *Submission No. 139*, pp.33-34
[22] Queensland government, , *Submission No.32,* p.16.
[23] Ibid.
[24] For example, ACCI, *Submission No. 136*, p.28; Business SA, *Submission No. 22*, p.39; and BCA, *Submission No. 56*, p.3

restrict business freedom and innovation by focusing on workplace and business arrangements rather than on improving OHS outcomes. Another criticism was that mandating such appointments would increase red tape and costs for little benefit, provide for blame shifting and management delegation of responsibility, as well as reducing consultation and shared responsibility for OHS.

32.27 On the other hand, there was support for both the approach in the Vic Act and the Qld requirement for WHSOs. The MBA indicated that, while most of its members preferred the Vic Act provision, its Queensland branch members strongly favoured the appointment of WHSOs. This was said to be based on strong, positive experience.[25]

32.28 The AIG and EEASA advised us that its members had expressed support for both the Queensland WHSO provisions and the SA responsible officer provisions.[26]

32.29 Submissions were divided on the issue of liability for appointed persons. Some thought the duty for appointed persons, if they were to be required by the model Act, should be qualified by a test of recklessness or level of control, influence and skill, or both.[27] One submission recommended that persons appointed to OHS roles should not have any liability beyond that normally borne by an employee. [28] Some supported offences for misuse of powers for application to appointed persons.

Discussion

32.30 Duty holders will not always have the knowledge or experience to adequately address hazards and risks. This is particularly the case for small businesses. Although there are very useful programs initiated by regulators to advise duty holders on compliance, they are necessarily ad hoc and depend on the availability and interest of participants.

32.31 Accordingly, we see particular value in legislatively establishing an obligation on primary duty holders to ensure that they have access to advice to help them fully meet their obligations. There appear to be two broad models in the OHS Acts. The first is an express obligation to employ, engage or appoint a qualified person to advise and assist the duty holder in meeting the duty holder's responsibilities (as provided in differing ways in the Vic Act, the Qld Act, and the NSW Regulation).

32.32 The second, somewhat different model is that provided under the SA responsible officer provisions, which by requiring the most senior officer of a corporation to be appointed to that position and to undergo mandatory training, ensures that the corporation has a senior decision maker with OHS training and the responsibility of ensuring the corporation's compliance.

32.33 The Tasmanian responsible officer provisions, describe above, provide a variation of the responsible officer model. The Victorian government observed that the Tasmanian approach seemed to conflict with a fundamental principle of OHS legislation that the duties are non-delegable, and, to some extent, duplicated officer liability provisions in Australian statutes which place positive duties on officers.

32.34 We consider that the Victorian provisions provide a model that is suitable for all duty holders. In the model Act, we propose that the provision be expressed as applying to persons conducting a business or undertaking. This will provide flexibility and universal coverage. At the same time, we were impressed by the strong support for and evidence about the effectiveness of the Queensland WHSO provisions. They are well established and successful. They do not have an excessive reach as they are triggered by the presence of a minimum number of workers. We note that a minority of businesses in Australia employ thirty workers or more. As we noted in our first report, the great majority of private sector businesses (95.8 per cent) have fewer than twenty employees.

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[25] MBA, *Submission No.9*, part 4, p.20. paragraphs 7.2-7.27
[26] AiG and EEASA, *Submission No.182*, p.31.
[27] For example, Johnstone et al, *Submission No. 55*, p.19 and ACTU, *Submission No. 214*, p. 27, paragraph 102.
[28] AIG and EEASA, *Submission No.182*, p.31.

32.35 We therefore consider that an obligation should be placed on businesses or undertakings that have thirty employees or more on a regular basis to appoint a WHSO (however finally described in the model Act). We consider that using employees as the actuating requirement provides a suitable reference point for this type of obligation.

32.36 We note that the Queensland provisions have successfully operated in relation to principal contractors. That has provided another way to ensure not only that a WHSO is available in another defined context where there will usually be complex OHS circumstances but there will also be non-employees who are at the workplace and exposed to those hazards and risk. This may provide a model for providing for the appointment of WHSOs in areas where there are stable but non-traditional work relationships involving large numbers of workers.

32.37 The Victorian government expressed its concern about bringing principal contractors (or appointed officers or responsible officers) into the legislative scheme as 'another tier of duty holders'. While we appreciate the objective of avoiding unnecessary complexity, we note that the specific identification of principal contractors in this context is as a means of identifying a class of duty holders who should be required to engage a WHSO. It does not vary the duties of care that are held by principal contractors. Instead it means that they have greater expertise and advice available to them at workplaces.

32.38 We see a strong case for responsible officers as provided in South Australia, particularly where the head offices of corporations may be out of the State. It ensures a high level of engagement by officers at the local level. On the other hand, we consider that it is not necessarily appropriate for the national system, particularly as we are proposing proactive duties of care for all officers of corporations.

RECOMMENDATION 139

The model Act should provide that persons conducting a business or undertaking must, where reasonably practicable, employ or engage a suitably qualified person to provide advice on health and safety matters.

The qualifications of persons providing such advice should be addressed in the regulations.

Provision should be made along the lines of the Queensland Act for the appointment by persons conducting a business or undertaking of WHSOs and further consideration should be given to how that requirement can be extended to non-traditional work arrangements that normally involve thirty or more workers.

CHAPTER 33: INCIDENT NOTIFICATION

INCIDENT NOTIFICATION

33.1 All Australian OHS laws currently require that certain workplace incidents, deaths, illnesses and injuries are reported to a relevant authority. Most have a broad obligation in their OHS Act, supplemented by further detail in regulations. Victoria, however, has all incident reporting obligations in their Act, whereas QLD and SA have all their incident reporting obligations in regulations.

Current Arrangements

33.2 Two approaches have been taken in the OHS laws to defining the types of injuries or illnesses that must be notified. Some have specified the particular injury or illness that must be reported, for example, injuries such as amputation, head injury, and electrocution. Others have sought to define injury and illness by setting a threshold level of medical intervention or incapacitation before notification is required. Definitions of illness and injury range from provision of first aid through to hospitalisation, or can include non-attendance at work for a period (between 4 and 10 days) because of the illness or injury. In some cases a combination of each of these approaches is used.

33.3 Most OHS laws also require a designated person to notify the regulator of events that could have caused significant illness or injury, but did not.[1] As with injury and illness, a multiplicity of terms and definitions are used to specify what incidents need to be notified. Terms used include: 'incident'[2]; 'serious incident'[3]; 'dangerous event'[4]; 'dangerous incident'[5]; 'reportable incident'[6]; 'serious event'[7] and 'dangerous occurrence'[8]. Most provisions focus on the event at the workplace, listing events such as the collapse of a structure, uncontrolled explosion or fire, damage to a crane, hoist, escalator, etc. However, the Commonwealth requires that any incident which could have caused death, serious injury or illness, is notified to the regulator.

33.4 Some jurisdictions require reporting of injury or illness of any person, whereas others limit the requirement to report employee injury or illness.

33.5 Timeframes for notification also vary across jurisdictions. For fatalities, serious injuries and incidents, most require immediate notification[9] (usually by phone), which is then to be followed up by a written record detailing the incident. The deadline for written records varies from 24 hours to seven days. Work related illnesses and some less serious incidents are subject to different timeframes. Table 44 in Appendix C compares incident notification requirements across the jurisdictions.

Stakeholder Views

33.6 Some submissions expressed particular concern about the complexity and confusion created by the multiplicity of terms and definitions for events, injuries or illnesses governing what must be reported. Submissions generally expressed the desire for one national reporting system,

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[1] Only WA does not include a requirement for 'near-miss' incidents to be notified to the regulator. Instead they only require notification of specified illnesses and injuries.
[2] NSW Regs s.341; Vic Act, s.37.
[3] NSW Act s.87(1), and NSW Regs s.344.
[4] QLD Act, Schedule 3.
[5] Tas Act, s.3.
[6] NT Act, s.64.
[7] ACT Act, s.36.
[8] SA Regs, s.6.6.1(3); ACT Act, s.37; CWLTH Act, s.5(1); CWLTH Regs, s.3.
[9] This is also variously required to be performed 'promptly', 'as soon as practicable', 'as soon as possible', 'within 2 hours', or 'within 4 hours'.

with increased clarity and simplicity around the requirements for what should be reported, when and to whom.[10]

33.7 A number of submissions advocated the use of incident notification provisions in Vic, WA and the Commonwealth.[11] The NT Review recommended consideration be given to adopting part 5 of the Vic Act for incident reporting.[12] Conflicting opinions were presented on provisions in NSW, with some submissions indicating support for the arrangements and others stating that they found the NSW reporting arrangements to be confusing and too complex.[13]

Discussion

33.8 Incident notification is a key information source for regulators. A primary purpose of the requirement is to allow regulators to investigate incidents and potential OHS breaches in a timely manner. Regulators can also use notified incidents as an opportunity to provide obligation holders with advice to assist with compliance and steps to prevent re-occurrence. Most regulators publish "hazard alerts" following the investigation of some incidents to raise awareness of particular hazards.

Use of incident notification data

33.9 Incident data is used at the local level to provide regulators with an indication of emerging trends in incidents, injury and illnesses across industry. This data may be used by regulators to target education and compliance activities. At the national level, the ASCC collects data based on workers' compensation claims to report on Australia's OHS performance. The ASCC also currently produces reports on notified fatalities. The data for these reports is drawn from multiple sources, including deaths notified to regulators and coronial data.

33.10 Submissions to this review expressed concern about the use of incident notification data for statistical purposes. Some submissions felt that information gathered through incident notification should be collated and made available to the public in real time; whereas others, including the ACTU, felt that incident reporting was not a sufficient base from which to draw information, suggesting that Medicare, coronial and ABS data also be used.

33.11 The prevailing diversity in reporting requirements, as discussed earlier, makes comparing data across jurisdictions difficult. Although incident notification is mandatory under OHS laws, it is estimated that there is a significant amount of under reporting of dangerous occurrences and serious incidents that did not result in a fatality. For the 2002 review of its OHS Act, WA WorkSafe advised the number of notifications has been declining.[14] While no detailed analysis was undertaken, it is estimated that less than twenty per cent of notifiable injuries are being reported.[15] Low compliance rates also adversely affect the reliability of data.

33.12 Implementation of a consistent and simplified incident notification regime under the model Act would go some way to addressing these concerns. This should remove some obstacles to compliance and generate data that are more complete and reliably comparable. However, the main purpose of incident notification provisions in the model Act should be to allow regulators to conduct investigations in a timely manner. Any attempts to collect the type of data needed for statistical purposes through incident notification provisions will result in greater compliance cost and red tape for business.

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[10] For example, see CSR, *Submission No.54*, p.28; AiGroup, *Submission No.182*, p.81; and ATO, *Submission No. 194*, p.10.

[11] For example, Queensland Government, *Submission No. 32*, p. 39; Chamber of Commerce and Industry WA, *Submission No. 44* ,p. 65; or John Holland, *Submission No. 107*, p.9.

[12] NT Review, p.96, Recommendation 25.

[13] For example, NSW Minerals Council, *Submission No. 183*, p. 36;or OneSteel, *Submission No. 115*, p.26.

[14] From 2,333 notifications in 1998/99 to 1,590 in 2000/01.

[15] Liang, R. *Final Report: Review of the Occupational Health and Safety Act 1984*, 14 November 2002, p.109

A simplified notification process

33.13 Reviewing current provisions in each jurisdiction, it is easy to see how businesses, particularly those operating in multiple jurisdictions, would find incident notification requirements to be confusing and complex.

33.14 This was highlighted in the 2005 review of OHS legislation in the ACT, which noted:[16]

> *"The disparity between reports received under the statutory reporting requirements in the OHS Act and what is known through workers' compensation claims data also suggests there is some confusion among employers about what must be reported and when—particularly in relation to the obligation to report injuries resulting in seven days incapacity. The result is a high level of non-compliance with the regulatory requirements and obscured understanding about the need to report serious incidents immediately."*

33.15 A harmonised reporting regime under the model Act should assist in addressing such confusion. The provisions should clearly define the types of incidents that should be notified, capturing only those events which are of a nature and significance that they may demonstrate a breach of the model Act or that there is an ongoing serious risk to the health or safety of workers or others. That is, the regulator should be provided with an opportunity to investigate.

Who has the obligation?

33.16 Reflecting our recommendations for the primary duty of care, it is reasonable for persons conducting a business or undertaking to have the obligation to notify the regulator of fatalities, illnesses and injuries to persons involved in their business or undertaking.

33.17 In practice the actual notification could be provided by any person at the workplace at the time of the incident, however, it remains the responsibility of the person conducting the business or undertaking to ensure that the regulator is notified of the incident.

What must be notified?

33.18 Given that the primary purpose of incident notification provisions in the model Act should be to allow regulators to conduct investigations in a timely manner, only the most serious incidents causing, or which could have caused, fatality and serious injury or illness should be notified. The limitation of requirements to notify only serious incidents should reduce the compliance burden imposed on obligation holders.

33.19 The definitions of 'serious illness', 'serious injury' and 'dangerous occurrence' should reflect the principal that only the most serious events are to be captured. An option would be to list a range of specific incidents or events, however, it may not be sufficiently comprehensive. A reference to a type of illness can also be problematic. For example, it may not be immediately apparent whether the particular type of injury has been sustained; expressions such as 'loss of bodily function' are ambiguous, as that could mean numbing of an affected area for a short period of time; and other expressions such as 'serious laceration' may be subjective or require interpretation.

33.20 Similarly, designating a period of hospitalisation or absence from work would not assist obligation holders to immediately notify the regulator of an incident. Defining a serious injury or illness according to the type of medical treatment also has problems – a person with an obligation to notify may not be aware of what type of treatment the injured person has had.

33.21 Instead, definitions of serious illness or injury could consist of a combination of specified injuries (e.g. amputation) and the threshold level of medical intervention (e.g. treatment at hospital requiring admission). A definition of 'dangerous incident' should capture those events that could have caused fatality, serious illness or injury, or suggest the existence of a serious risk to the health or safety of workers and others. The notification of such events should not require

[16] ACT Review 2005, p.71

subjective assessment by the obligation holder (e.g. events listed in s.37(2) of the Vic Act are of this type).

33.22 We note that most OHS laws limit the requirement to notify the events occurring at a workplace.[17] Instead, we consider it more appropriate for the obligation holder to notify the regulator of a fatality, illness or injury of a person has a causal link to a work activity performed in the conduct of the business or undertaking. This is consistent with our preference for linking the duties of care and obligations in the model Act to the performance of work, rather than a specific site or place. Dangerous incidents, however, should be limited to those occurring at a workplace.

33.23 Most OHS laws apply the notification obligation to fatalities, injuries and illnesses affecting employees, and, in some circumstances, other persons at a workplace. Since the person conducting a business or undertaking has a primary duty to workers and others, the notification should be required when 'any person' is affected.

When must notification occur?

33.24 It is imperative that obligation holders notify the regulator that an incident has occurred immediately and by the quickest means possible, to enable a timely response by the regulator. This notification should be followed up by a written record of the incident, to provide the regulator with more specific detail than may be gained during the initial contact and to provide the person conducting the business or undertaking with evidence that they have met their obligation to notify.

RECOMMENDATION 140

The model Act should place an obligation on the person conducting the business or undertaking to ensure that the regulator is notified immediately and by the quickest means, of a:

a) fatality of any person,

b) 'serious injury' to any person,

c) 'serious illness' of any person; or

d) a 'dangerous incident'

arising out of the conduct of the business or undertaking.

RECOMMENDATION 141

A written record of the incident must be provided to the regulator within 48 hours of the obligation holder reporting the incident.

RECOMMENDATION 142

Definitions of 'Serious Illness', 'Serious Injury' and 'Dangerous Incident' for incident notification should reflect the principle that only the most serious events are to be captured as outlined in paragraph 33.21.

Placement in OHS Laws

33.25 There was no consensus in submissions as to whether laws governing incident notification should be in the model Act or regulations. Some thought the provisions should go in

[17] The QLD WHS Act also includes specified domestic premises. The new ACT Act includes incidents at or near a workplace.

the model Act for prominence and ease of reference. Others preferred all provisions in the regulations due to the administrative and detailed nature of those provisions.[18] It was also suggested that the Act contain the obligation to notify while the regulations contain details of what to report and to whom.[19] One submission thought that incident reporting should not be in the model Act or regulations as it was a matter for the regulator to determine.[20]

33.26 Due to the importance of notification obligations, our preference is for all notification obligations to be placed in the model Act, with associated definitions contained in a Schedule to the Act. We also note that Maxwell advocated co-location of incident notification provisions in the Act, specifically by recommending that site preservation provisions were moved from the regulations to the Act.[21]

33.27 Provisions governing how long records should be retained, and who an obligation holder should be obliged to allow to access the record should be set out in the model regulations.

RECOMMENDATION 143

The model Act should contain all provisions governing incident notification, including associated provisions such as site preservation. Related definitions should be placed in a schedule to the model Act.

OBLIGATION TO PRESERVE AN INCIDENT SITE

Current Arrangements

33.28 Most OHS Acts place a duty on the employer, person in control or occupier to preserve an incident site, though some have limited this duty to preservation of plant or other items. Two jurisdictions, QLD and SA, have placed these provisions in their regulations. Three jurisdictions[22] rely on provisions which empower inspectors to direct that an incident site is left undisturbed instead of placing a duty on the person with control of the site. However, some jurisdictions have both a duty on persons at a workplace and inspector powers to quarantine an incident site (see Table 45 below for further detail).

33.29 All Acts with a duty to preserve sites provide for certain exceptions under which a site may be disturbed. These can include actions:

- to assist an injured person; (NSW; Vic, Tas[23], NT, ACT)
- considered essential to avoid of further injury or damage; (NSW, Vic, Tas, NT, ACT)
- to remove a body; (NSW)
- in connection with a police investigation; (NSW) or
- undertaken with the permission of an inspector. (NSW)

33.30 The majority of jurisdictions seek to place a timeframe on the requirement to preserve a site. Timeframes vary from 36 hours to any period specified by an inspector.

[18] For example, Business SA, *Submission No. 22*, p.72 and MBA, *Submission No. 9*, Part 4, p 49.
[19] SA Wine Industry Association, *Submission No. 127*, p. 11.
[20] Law Society of NSW, *Submission No. 113*, p. 33.
[21] Maxwell, p.315-316, para.1504.
[22] WA, NT and the Cwlth. See entries in Table 45.
[23] In Tasmania, this provision is expressed as actions taken to save a life or relieve suffering.

TABLE 45: Duty to preserve an incident site in principal Acts

Duty Holder…	Timeframe…	The duty includes…
New South Wales		
s.87 • Occupier	• 36 hours after notification.	• Must take measures to ensure that **plant** at that place is not used, moved or interfered with after it has been involved in a serious incident, and the area at that place that is **within 4 metres** of the location of a serious incident, is not disturbed. • Exceptions include actions: to assist an injured person, to remove a body, to avoid of further injury or damage, in connection with a police investigation or with the permission of an inspector. • Further provisions in regulations. • Non-disturbance requirements may also apply by virtue of an investigation notice.
Victoria		
s.39 • Employer • Self-employed person	• Until an inspector arrives at the site; or • Such time as an inspector directs.	• Must ensure that **the site** where the incident occurred is not disturbed. • Exceptions include: protecting the health or safety of a person; aiding an injured person; taking essential action to make the site safe or to prevent a further occurrence of an incident.
Queensland		
• All incident site preservation provisions are contained in regulations.		
Western Australia		
• No apparent duty for employers to preserve an incident site in Act or regulations. However, an inspector has the power to require that **a workplace, or any part of it**, be left undisturbed for as long as is specified (s.43(1)(j)).		
South Australia		
• All incident site preservation provisions are contained in regulations.		
Tasmania		
s.48 • A person	• Not stated.	• Must not move or otherwise interfere with any **plant or other thing** involved in the death, injury, illness or occurrence without the prior permission of an inspector. • Exceptions include actions to: save life; relieve suffering; prevent further injury or damage.
Northern Territory		
• No apparent duty for employers to preserve an incident site in Act or regulations. However the Authority may direct the employer to ensure that **the site** of the incident is not disturbed until a workplace safety officer has inspected the incident. Such a direction cannot prevent actions to: aid injured persons; and avert further threats to health and safety. (s.66)		

Duty Holder…	Timeframe…	The duty includes…
Australian Capital Territory		
s.41 • A person in control of a business or undertaking	• 72 hours; or • Until an inspector directs otherwise	• Must ensure that **the site** where the serious event happened is not entered or disturbed. • Exceptions include: protecting work safety; helping an injured person; and taking essential actions to make the site safe or prevent a further dangerous event.
Commonwealth		
• No apparent duty for employers to preserve an incident site in Act or regulations. However, an inspector has the power to require that **a workplace, or any part of it, or any plant, substance or thing**, be left undisturbed for as long as is necessary, in the inspectors opinion, to remove the threat or to allow the inspection, examination, measuring or testing to take place. (s.45(1)).		

Discussion

33.31 While an obligation to quarantine an incident site until it can be inspected by the regulator may impose compliance costs on a business or undertaking, it is an appropriate requirement to ensure that evidence required for a proper investigation is not compromised. The person with management and control of the workplace will be best placed to ensure that the incident site, including any plant, substance or other item associated with the incident, is quarantined for the purposes of allowing inspection by the regulator.

33.32 All OHS laws have set out certain essential activities that may be undertaken while a requirement to preserve an incident site is in operation. These exceptions, though expressed differently, are generally consistent across all OHS laws and should continue.

33.33 We do not support activation of the obligation to preserve a site upon a request from the regulator (as is the case in NT). The intervening time between the incident occurring, and the regulator becoming aware of the incident and issuing a non-disturbance request will be varied. In that time, a site may be significantly changed. Allowing for the specified exceptions to the obligation, the onus should be on the obligation holder to ensure incident site is quarantined as soon as the incident occurs. This should in no way prevent an inspector from issuing a non-disturbance notice whenever they deem necessary.

Duration of requirement to preserve the incident site

33.34 Some OHS laws set a time limit on the obligation for site preservation. For example, NSW requires that an incident site be preserved for 36 hours after notification. Other jurisdictions have stated that the incident site should remain undisturbed at the inspector's discretion. Both arrangements appear to achieve the same end; that the inspector should be afforded adequate time to conduct the investigation.

33.35 Given that we have recommended inspectors have the ability to issue non-disturbance notices, the obligation to preserve a site from the time of the incident should be limited. Specifying a number of hours or days for non-disturbance of incident sites may be too restrictive for the regulator and unnecessarily costly for the person conducting the business or undertaking.

33.36 Providing for site perseveration until an inspector attends the site is, in our view, the preferred option for the model OHS Act. The regulator may release the obligation holder from the requirement to preserve the site if inspection is not required. This will allow for sites to be preserved where an inspector is to attend an incident site, after which they issue a non-disturbance notice for a further specified period, if needed.

RECOMMENDATION 144

Persons with management and control of the workplace should have an obligation to ensure an incident site, including any plant, substance or other item associated with the incident, is not disturbed until an inspector attends the incident site, or the regulator directs otherwise, which ever occurs first.

RECOMMENDATION 145

The obligation to preserve an incident site does not preclude any activity:

a) To assist an injured person;

b) To remove a deceased person;

c) Considered essential to make the site safe or to prevent a further incident;

d) Associated with a police investigation; or

e) For which an inspector has given permission.

WORKER OBLIGATION TO REPORT

Current Arrangements

33.37 Three OHS Acts also place a duty on workers to report any injury, illness, accident, risk or hazard connected with work, of which they are aware, to their employer. These provisions are found in the current OHS Acts of WA and NT, and also in the new ACT Act.

33.38 In WA and the ACT, the duty is expressed as part of the worker's broader duty of care.[24] WA also requires an employee or self-employed person to report hazards to the person in control of the workplace as part of the broader incident notification provisions.[25] In NT, only reporting of accidents is part of the worker's duty of care.[26] The requirement to bring any risk or hazards to the employer's attention is expressed as part of the worker's reciprocal duty to participate in workplace consultation.[27] None of the provisions derogate from the worker's right to report an OHS issue to the regulator at any time.

Discussion

33.39 It is appropriate for workers to be required to advise the person conducting the business or undertaking and (where this may be a different person) the person with management or control of a workplace of any illness, injury, accident, risk or hazard connected with the work, as soon as they become aware of it. By placing this requirement in statute, we are enacting provisions that are consistent with philosophy that all persons at a workplace should share responsibility for OHS.

33.40 While the failure of a worker to report such matters becomes an offence, the penalty should be of a lesser degree than applied for breaches of the worker's duty of care. For this reason, the obligation should be expressed as a separate provision immediately following the worker's duty of care.

[24] WA Act, s.20(2)(d) and ACT Act, s.27(2)(d).
[25] WA Act, s. 23L.
[26] NT Act s.59.
[27] NT Act s.32 & 59.

RECOMMENDATION 146

The model Act should place an obligation on workers to report any illness, injury, accident, risk or hazard arising from the conduct of the work, of which they are aware, to the person conducting the business or undertaking or (where this is a different person) the person with management or control of the workplace. The obligation should also make clear that it in no way impinges on a worker's ability to report an OHS issue to the regulator at any time.

CHAPTER 34: PERMITS AND LICENSING

34.1 Our terms of reference ask us to make recommendations regarding permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances. In this chapter we refer to permits and licences as 'authorisations' and discuss what is needed in the model Act for the effective operation of permits and licences, particularly in relation to mutual recognition.

Current arrangements

34.2 All OHS Acts enable the OHS regulator to issue various licences, permits and registrations authorising the conduct of prescribed activities or the use of a specific type of plant, substance or workplace.

34.3 The regulation making powers of all OHS Acts provide for the issue, variation, renewal, cancellation or suspension of permits, licences or registrations (although not explicitly listed under the general regulation making powers in the NT and ACT). These requirements are therefore found in the regulations.

34.4 The Victorian and Commonwealth OHS Acts create offences for persons who do not hold a licence, permit or registration where required to do so under the regulations.[1] The Queensland Act establishes a licensing review committee which has the power to take disciplinary action against licence holders and to review relevant licensing decisions.[2]

Types of authorisation systems (licences, permits, registration)

34.5 Although the types of authorisations vary across jurisdictions, most OHS laws require a person to be authorised by the regulatory authority (generally through a licensing system) to perform the following types of work:

- high risk work (e.g. scaffolding and rigging, operating cranes and forklifts, using pressure equipment);
- removing specific types and amounts of asbestos;
- demolition;
- using scheduled carcinogens; and
- operating a major hazard facility.

34.6 In addition, certain designs and items of plant need to be registered before being used in the workplace.

34.7 There are types of work for which a licence is required in some jurisdictions but not in others. For example, Queensland is the only jurisdiction that currently requires licences for the operation of a scraper, road roller and grader. Licences for formwork and the use of explosive powered tools are only required in NSW.[3] Licences for operating front-end loaders and excavators are only required in Queensland, NSW, SA and ACT.

National Standards

34.8 In Australia the operation of specific high risk work is governed by a system of certification or licensing designed to minimise the risk of adverse consequences associated with a lack of competency. In April 2006, the ASCC declared the *National Standard for Licensing Persons Performing High Risk Work* which aims to facilitate the operation of a nationally uniform,

[1] Part 6 of the Vic OHS Act, s.23A of the Commonwealth Act only relates to the unlicensed operation of a major hazard facility.
[2] Part 6, Divisions 8, 9 and 10 of the Queensland Act.
[3] These requirements are under review, see *Review of Part 9.2 of the Occupational Health and Safety Regulation 2001 Disussion Paper*, WorkCover NSW, available at www.workcover.nsw.gov.au

competency based licensing system for persons performing certain types of high risk work. It replaces the *National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment* [NOHSC:1006(2001)] originally declared in 1992. Jurisdictions are in various stages of adopting the new National Standard into OHS regulations and converting 'certificates of competency' previously issued to renewable licences with photographic identification.

34.9 The ASCC has been working to support the national licensing system by developing units of competency within the AQTF and mandated national assessment instruments. This facilitates the mutual recognition of licences by ensuring training and assessment standards are equivalent across jurisdictions.

34.10 The *National Standard for Plant* introduced requirements for the registration of certain designs and items of plant. While this National Standard has generally been adopted into regulation in most jurisdictions, the registration processes derived from the standard are inconsistent, which has resulted in some designs being recognised for registration in some jurisdictions but not in others. As a result plant manufactured according to these designs cannot be used across Australia. This is compounded by the differing levels of audit or scrutiny applied to designs in each jurisdiction.

Mutual recognition

34.11 Mutual recognition schemes were designed in the early 1990s to remove barriers to the inter-jurisdictional flow of goods and workers in registered occupations. In May 1992, the Commonwealth, State and Territory Governments signed the *Intergovernmental Agreement Relating to Mutual Recognition Agreement*. This was followed by a similar scheme to remove trade barriers with New Zealand in the signing of the *Intergovernmental Arrangement Relating to Trans-Tasman Mutual Recognition in 1996*.

34.12 Under mutual recognition laws (e.g. *Commonwealth Mutual Recognition Act 1992*), anyone in a registered occupation (which covers a broad range of employment authorisations4) wishing to work in a different jurisdiction needs to notify the relevant registration authority in that jurisdiction and, with that notification, is deemed to be registered. When working in the second jurisdiction, the person has to comply with all regulations in that jurisdiction relating to how the occupation is conducted.

34.13 Through the implementation of National OHS Standards, the jurisdictions have been able to automatically recognise some OHS authorisations issued in other jurisdictions, if the jurisdiction accepts that the authorisation was issued under equivalent conditions to their own. Some jurisdictions have clauses in regulations that allow for this recognition.[5]

34.14 The automatic recognition (where notification or registration in the second jurisdiction is not required) has been beneficial for persons requiring authorisations moving between jurisdictions, but it has meant that regulators have not been able to take any action (e.g. suspension, cancellation) under mutual recognition laws in relation to a licence that they have not issued.

34.15 The PC is currently reviewing Australia's mutual recognition schemes. In its Draft Research Report, the PC acknowledges the advantages of national licensing (referring to persons performing high risk work as an example) over mutual recognition in terms of labour mobility: [6]

> *"By removing differences in standards and scope of activities, a single national licence avoids many sources of friction under mutual recognition."*

[4] See s.4.1 of *Mutual Recognition Act 1992* (Cwlth)
[5] See NSW *OHS Regulation 2001*, cl.112; Vic *OHS Regulation 2007*, cl.3.6.4
[6] Productivity Commission 2008, *Review of Mutual Recognition Schemes*, Draft Research Report, Canberra, p.xxxiii

COAG National Licensing System

34.16 In July 2008 COAG agreed, as part of its commitment to a seamless economy, to develop a National Licensing System with the following characteristics.[7]

- co-operative national legislation;
- national governance arrangements to handle standard setting and policy issues and to ensure consistent administration and compliance practices;
- all current holders of state and territory licences being deemed across to the new licence system at its commencement;
- the establishment of a publicly available national register of licensees; and
- the Commonwealth having no legislative role in the establishment of the new system.

34.17 The National Licensing System will initially be applied to seven economically important trades. Additional occupational areas may be included over time. Some of the occupations proposed to be covered by the National Licensing System are the subject of separate activity to provide more unified or harmonised regulation, such as the work of the ASCC in relation to licensing persons performing high risk work, and the Australian Transport Council on a national approach to maritime safety in relation to commercial vessels. In all cases, further development of national licensing for these occupational areas will take place in co-operation with those undertaking this related work to ensure that there is no duplication and that there is an appropriate integration of desired outcomes. This may involve transferring responsibility for some elements of the work to other initiatives.[8]

34.18 In November 2008, the ASCC agreed to continue to liaise with the COAG Skills Recognition Steering Committee to investigate having asbestos removal, demolition and shot-firing considered as licence classes under the National Licensing Standard for Persons Performing High Risk Work, rather than the COAG National Licensing System.[9]

Stakeholder views

34.19 Submissions from business, governments and unions support that licences, permits and registrations be subject to mutual recognition provisions in the model Act. A number of submissions, including Business SA and the Victorian Government, stated that the permissioning systems are more appropriately covered in model subordinate law, rather than in the model Act.

34.20 Business SA proposed that the current national initiatives with respect to licensing of high risk OHS activities be maintained and provide a model for how mutual recognition can be addressed.[10]

34.21 Some submissions also noted the need for mutual recognition of penalties associated with licensing, for example, the Law Council of Australia comments: [11]

> *"In addition, penalties and other restrictions should be communicated amongst regulators and imposed across jurisdictions, as currently occurs in respect of motor vehicle licences, registrations and penalties".*

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[7] COAG Meeting Outcomes, 3 July 2008, available at www.coag.gov.au
[8] *National Licensing System for Specified Occupations: Consultation Regulation Impact Statement*, October 2008, p.9, available at www.licencerecognition.gov.au
[9] ASCC Communique, 20 November 2008, available at www.ascc.gov.au
[10] Business SA, *Submission No.22*
[11] Law Council of Australia, Submission No 163, p.46

Discussion

34.22 Authorisations such as licences, permits and registrations are a regulatory tool to control activities that are of such high risk to require demonstrated competency or a specific standard of safety.

34.23 Authorisation systems place costs on duty holders as well as on regulators and therefore the level of authorisation should be proportionate to the risk, with a defined and achievable safety benefit.

34.24 Given that authorisations are issued to control activities of high risk, the model Act should create an offence to undertake the activity without the relevant permission from the OHS regulator.
It should also be an offence for a person conducting a business or undertaking to direct or allow a worker to undertake the activity, unless the worker has the appropriate authorisation. While such provisions are currently in most OHS regulations[12], we are of the view that these offences should be in the model Act.

34.25 Authorisation systems commonly consist of the following processes, however the details can vary depending on the type of authorisation:

- Application
- Assessment
- Issue/not issue, with or without conditions
- Variation, renewal
- Suspension/cancellation
- Review of decisions
- Fees

34.26 Since these are administrative processes, it is appropriate that they be prescribed in regulation, as is the case currently. However, it is important that the making of regulations include the criteria for all aspects of the authorisation system to ensure consistency and transparency in the administration of the system. For example, there should be criteria for when a licence is suspended rather than cancelled.

34.27 Decisions taken by the regulator in relation to authorisations must be reviewable, allowing for a process of internal review.

How can mutual recognition be facilitated?

34.28 We note that additional provisions to general mutual recognition law currently exist in regulations under some OHS Acts that allow automatic recognition of interstate authorisations. Such provisions complement mutual recognition because they allow persons holding authorisations to work in more than one jurisdiction without the need to notify the local authority or obtain a new licence.

34.29 The regulation-making power in the model Act should ensure that similar provisions are made to automatically recognise equivalent licences, permits and registrations issued under the corresponding OHS law in other States or Territories, and include safeguards to ensure jurisdictions can make case by case exceptions where there are concerns about fraud.

34.30 Mutual recognition of authorisations will reduce compliance costs and reduce duplication of administrative processes. However, mutual recognition can only be applied if authorisations have the same status across jurisdictions, and this requires the following:

[12] See for example *Qld Workplace Health and Safety Regulation 2008*, cl18(1); Vic *OHS Regulation 2007*, cl.3.6.2; NSW *OHS Regulation 2001*, cl.270(2)

- equivalent competency and safety standards across Australia;
- sharing of information between regulators regarding authorisations; and
- consistent authorisation processes

34.31 In an environment of mutual recognition and cross-border activity, the sharing of information between regulators becomes essential. The principle of information sharing is recognised in the *Mutual Recognition Act 1992*. Under this legislation, a local registration authority of a State must furnish without delay any information reasonably required by a local registration authority of another State about a person substantively registered under a law of the first mentioned state. The furnishing of information can only be made if the registering authority requiring the information notifies that it is required in connection with a notice lodged by a person seeking registration, a person's deemed registration, or an actual or possible disciplinary action against the person. The provision of the information may be made, despite any law relating to secrecy or confidentiality.[13]

34.32 Since mutual recognition under OHS laws occurs without any further process in the receiving jurisdiction, the ability to utilise the provisions of the Mutual Recognition Act for information sharing is not available. Therefore, the appropriate structures will need to be built into the model OHS Act to enable this to happen.

34.33 Where an authorisation has been issued interstate, the regulator should be able to provide information regarding a breach to the issuing authority. The issuing authority should be able to accept this information as prima facie evidence of the breach, so that the issuing authority can take the appropriate action such as revoking or cancelling the authorisation. Information on sanctions imposed on licence holders should be shared between jurisdictions, to prevent a licence holder who has had their licence cancelled in one jurisdiction from re-applying in another jurisdiction.

34.34 We have identified the importance of information sharing and cross-jurisdictional co-operation in relation to inspectors in Chapter 37. Similarly, we recommend that the regulation-making power enable the sharing of information with other government agencies in relation to the issue, renewal, revocation, variation, suspension and cancellation of authorisations.

34.35 A national database would also make the administration of the national licensing system easier and more robust. While there has been discussion of such a database in the development of the National Standard for licensing, there has been no agreement on how it would be established or maintained.

34.36 While the harmonisation of OHS laws will assist in achieving equivalent safety standards and consistent processes relating to authorisations, it is essential that decisions to authorise particular activities, or the use of a specific type of plant, substance or workplace, be made at the national level. Authorisations should be justified only where the risks cannot be safeguarded via alternative means and where the benefits to the community outweigh the costs associated with maintaining the system.

34.37 We note the work in progress nationally through the ASCC and COAG to establish the processes and infrastructure necessary to support a national licensing system and recommend that this work continue under Safe Work Australia.

RECOMMENDATION 147

The model Act should include provisions that make it an offence:

a) to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation;

[13] *Mutual Recognition Act 1992* (Cwth) , s.37

b) to contravene any conditions placed on an authorisation; or

c) for a person conducting a business or undertaking to direct or allow a worker to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation.

RECOMMENDATION 148

The regulation-making power in the model Act should allow for:

a) the automatic recognition of equivalent licences, permits and registrations issued under a corresponding OHS law, and include safeguards to ensure jurisdictions can make case by case exceptions where there are concerns about fraud.

b) the sharing of information with other government agencies in relation to the issue, renewal, variation, revocation, suspension and cancellation of authorisations.

RECOMMENDATION 149

The regulation making powers in the model Act should allow for the processes of application, issue, renewal, variation, suspension, cancellation, review of decisions and placing conditions on such authorisations to be established via regulation.

RECOMMENDATION 150

Decisions for the types of activities that may need authorisations should be justified at the national level based on the level of risk and a cost-benefit analysis.

PART 9

ROLE OF THE REGULATOR IN SECURING COMPLIANCE

- **Regulator role in providing education and advice**
- **Enforceable Undertakings**
- **Cross-jurisdictional Co-operation**

CHAPTER 35: THE ROLE OF THE REGULATOR IN PROVIDING EDUCATION, ADVICE AND ASSISTANCE

35.1 Our terms of reference require us to examine the role of the OHS regulatory agencies in providing education, advice and assistance to duty holders. We consider this from the perspective of what the model Act should provide in supporting that role.

35.2 In this respect, we note that Article 3 of the ILO *Labour Inspection Convention 1947* (C81)[1] provides that the functions of the system of labour inspection are to include supplying technical information and advice to employers and workers regarding the most effective means of achieving compliance with the relevant legislation.

Current arrangements

35.3 The most recent WRMC Comparative Monitoring Report2 summarises the role of the OHS regulators. Each OHS regulator has a role to:

a) work in partnership with community to achieve safe workplaces

b) set safety standards

c) provide interpretations of laws and standards

d) provide information and guidance materials in regard to OHS matters

e) promote fair, safe and decent work through policy development and community information, managing programs and improving compliance

f) promote and encourage safe, fair and productive working lives by working with employers, employees, unions and industry representatives.

35.4 The dual role of the regulator in each Australian jurisdiction as enforcer and educator is similar, however different jurisdictions place different levels of importance on those roles. In each jurisdiction, except New South Wales and Tasmania, the OHS Acts mandate the education role of the regulator.

35.5 Elsewhere in this report, we discuss the objects of the model Act. In so doing, we identified the types of existing objects. We reported that most Acts include specific objects relating to the promotion of education and awareness on matters relating to OHS. The objects are variously expressed and their scope differs. Even so, a common aim exists of developing community awareness. The objects do not, however, reflect a similar underpinning aim of providing education, advice and assistance to duty holders. The Cwth Act includes an object '... ensure that expert advice is available on (OHS) matters affecting employers, employees and contractors'.[3]

35.6 In all Acts, the regulator is given a wide range of functions and powers. Only the Victorian Act specifically provides the regulator with the power to make guidelines on the application of legislative provisions (from the Act or regulations) [4]

35.7 While the OHS legislation does not require a regulator to publish enforcement or prosecution policies, it is commonly done. In addition, the Heads of Workplace Safety Authorities published a National Occupational Health and Safety Compliance and Enforcement Policy in December 2008.[5]

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[1] Ratified by Australia on 24 June 1975.
[2] *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*5th Ed, 2008, Commonwealth of Australia.
[3] Cwth Act, s.3(c).
[4] S.12
[5] Refer HWSA website - www.hwsa.org.au

Previous Reviews

35.8 There has been consistent support for the role of government (through the OHS regulator) in providing OHS education, advice and assistance.

35.9 The Robens report recommended that the functions of an authority for safety and health at work include:

- management of the statutory inspection and advisory services, including their supporting scientific and technical research facilities and institutions; and
- the acquisition and provision of information, and the promotion and co-ordination of research, education and training for safety and health at work.[6]

35.10 In 1995, the Industry Commission found that Information, training and education were essential to successful management of health and safety at work. Without them, those at the workplace were unlikely to identify and assess hazards adequately or implement effective risk management. Accordingly, government facilitation of information, training and education was an important component of any effective occupational health and safety strategy. Such actions could complement other government programs by:

- identifying and encouraging best practice in the management of risk;
- mitigating ignorance, thereby reducing the need for prescriptive regulation;
- informing employers about their gains from prevention; and
- empowering workers and their representatives to participate in the management of risk at the workplace.[7]

35.11 The Maxwell Review[8] recommended that greater prominence be given to the Authority's educative role in its functions.

35.12 The NSW WorkCover Review considered views by stakeholders that the regulator's effectiveness could be improved and recommended that the Act clearly articulate WorkCover's OHS prevention, advisory assistance and educational functions.[9]

35.13 The NSW Workcover Review[10] and the Stein Inquiry also recommended that Workcover should be able to issue guidelines on interpretation of the OHS Act and regulations.[11]

Stakeholder views

35.14 A number of Governments supported the use of interpretative documents to assist employers and workers (NSW, Vic, Qld, WA, Tas and the Commonwealth), although not necessarily as a model Act provision (WA, Commonwealth).

35.15 The Commonwealth noted that "The development of agreed interpretative documents would assist regulators in adopting consistent approaches and having consistent understandings on the implementation of aspects of the model OHS Act. This would also provide a degree of certainty and guidance to employers and workers."[12] The Vic Government noted that they would "transparently state how the regulator will exercise its discretions under the Act and regulations."[13] On the other hand, SA did not support them, noting that there were sufficient information sources already.

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[6] Robens Report, p.39
[7] IC Report, p.283
[8] Maxwell review, pp.282-283
[9] NSW Workcover Review, p.50
[10] ibid
[11] Stein inquiry, pp.80-81
[12] P.5
[13] P.63

35.16 Interpretive documents were seen as important tools to assist all involved understand the duties. Other specific comments included that published policies and interpretative documents are of "considerable value to the persons designing and using safety management systems."[14]

35.17 There was also broad agreement that all enforcement policies should be published. VECCI and ACCI noted that they were important for transparency and consistency and ACCI considered them to be "best practice regulation".[15]

35.18 The ACTU supported the publication of enforcement policies as one of the means by which the regulator can show independence and accountability. "It is crucial that the OHS regulator be fully accountable for its functions and activities. The Model OHS Act should require inspectorates to make all of their activities as transparent as possible. This includes making public their inspection, and enforcement procedures, policies and guidelines (which will have the welcome by-product of improving general deterrence).[16] It also means requiring inspectorates to publish detailed annual reports on all of their inspection and enforcement activities, for example the number of inspections, whether they are reactive or proactive, the types of inspection programs implemented, the number of notices (and the industries and hazards that they addressed), to enable public scrutiny of all accepted enforceable undertakings; and providing summaries of all prosecutions'.[17]

Discussion

35.19 It is important that duty holders under the model Act have a clear understanding as to how they can comply with the legislation. While there will be provisions in the model Act focused on compliance and enforcement measures, the model Act should support an approach that seeks to gain voluntary compliance from duty holders.

35.20 Voluntary compliance can only be attained if all the parties understand what they need to do to comply with the Act. The regulator is clearly in the best position to assist in this regard as it has the detailed knowledge of the legislation, has mechanisms to reach stakeholders and knows some of the pitfalls that employers and others can fall into in dealing with OHS.

35.21 The 2006 Regulation Taskforce review[18] into regulatory burden on business noted the strong views by business that regulators should be required to provide advice and support to employers and other parties. Mention was made of ACCI's views in regard to regulatory bodies having a role as both information providers and enforcers and the complexity of OHS regulations. In response, the review recommended that the regulators capacity to respond to direct requests from business for advice be examined.

35.22 Responses by stakeholders support a role for the regulator in providing advice and clarifying legislative provisions. How the regulator carries out this function alongside its compliance and enforcement activities is not something the model Act needs to address. As government and other stakeholders acknowledge, in reality these functions are inevitably intertwined. As part of providing education and advice, the regulator can outline to all duty holders its approach to compliance and enforcement. In addition, the development by the HWSA of a national compliance and enforcement policy is a positive development.

[14] Submission 79, Delta Electricity, p.5
[15] Submission 136, ACCI, P.45
[16] See for example WorkSafe Victora, (2007), *Victorian Occupational Health and Safety Compliance Framework Handbook*.
[17] Para 182
[18] G. Banks et al, *Rethinking Regulation: Report of the Taskforce on reducing regulatory Burdens on Business*, report to the Prime Minister and the Treasurer, January 2006

RECOMMENDATION 151

The model Act should:

a) subject to the final decisions about its objects and principles, make clear in the objects or principles that education, training and information for duty holders, workers and the community are important elements of facilitating good occupational health and safety;

b) include in the enumerated powers and functions of the regulator sufficient authority for the regulator to promote and support education, training and information for duty holders, workers and the community;

c) as recommended in our discussion of the role of inspectors, make clear that an inspector may provide advice about compliance with the model Act;

d) authorise the regulator to make guidelines on the way in which:

   i) a provision of the model Act or regulations would, in the regulator's opinion, apply to a class of persons or to a set of circumstances; or

   ii) a discretion of the regulator under the model Act or regulations would be exercised.

CHAPTER 36: ENFORCEABLE UNDERTAKINGS

36.1 The introduction of enforceable undertakings is a recent trend in some Australian OHS Acts and are used by some Australian OHS regulators more than others. In this chapter we consider the appropriateness and effectiveness of including enforceable undertakings as part of OHS regulation's enforcement strategy.

Current arrangements

36.2 Provisions allowing for enforceable undertakings are a relatively recent innovation in several principal Australian OHS Acts.[1] In this context, an enforceable undertaking is an agreement entered into by a person who is alleged to have breached an obligation under such an Act. The person agrees to take certain specified steps to rectify the alleged breach or improve the OHS performance in the person's business or undertaking or otherwise to take action that will be beneficial to OHS. Typically, the agreement is entered into with the relevant OHS regulator, but might also be given as an undertaking to a sentencing following court proceedings for a breach. Failure to comply with the agreement will lead to enforcement action. Table 46 at Appendix C outlines the relevant provisions.

Enforceable undertakings in non-OHS contexts

36.3 Enforceable undertakings have become more common in various other regulatory contexts. They are most familiar in the fields of competition law and corporations law. The *Trade Practices Act 1974* (the TPA) has made provision for such undertakings since 1993 (section 87B). The Australian Securities and Investments Commission has been able to accept such undertakings since 1998.[2] Enforceable undertakings are available to (and used by) various other regulators, including the Australian Prudential Regulation Authority[3], the Civil Aviation Safety Authority[4], the Therapeutic Goods Administration[5], and some State regulators, including the Queensland Office of Fair Trading[6] and Consumer Affairs Victoria.[7]

Enforceable undertakings in OHS contexts

36.4 Experience in Queensland helps in understanding how their system operates. The Queensland government advised us that in that State (where the system of enforceable OHS undertakings is the most developed and used) in the five year period to mid-2008, there were 105 applications for such undertakings. Fifty-one per cent were accepted, twenty-nine per cent were rejected and twenty-one per cent were withdrawn.[8] The average monetary value of an accepted undertaking was $178,000, which was five times greater than the average value of a court penalty ($34,000). The highest monetary value of an undertaking was $1.5 million. In some cases, the value of the undertaking was over thirty times the highest available fine.[9]

36.5 OHS regulators in the other States have accepted far fewer written undertakings.[10]

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[1] See the ACT Act, the Cwth Act, the Qld Act, the Tas Act and the Vic Act.
[2] They are now provided for in ss.93AA and 93A of the *Australian Securities and Investments Commission Act 2001*.
[3] *Superannuation Industry (Supervision) Act 1993* (Cwth), s.262A; *Insurance Act 1973,* s.126
[4] *Civil Aviation Act 1988* (Cwth), s.30DK.
[5] *Therapeutic Goods Act 1989* (Cwth), s.42YL.
[6] For details, see: http://www.fairtrading.qld.gov.au/OFT/oftweb.nsf/Web+Pages/D9CA7BEDCCE1804F4A256E29001A8B4E?OpenDocument.
[7] *Fair Trading Act 1999* (Vic), s.146
[8] Queensland Government, *Submission 32*, p.33
[9] ibid, p.33
[10] For more information, see R. Johnstone and M. King, '*A responsive sanction to promote systematic compliance? Enforceable undertakings in OHS regulation*', National Research Centre for OHS Regulation, October 2008, Working Paper 58

Recent Reviews

36.6 Recent reviews and studies support the judicious use of enforceable undertakings.

36.7 After considering their use in other contexts and States, Maxwell concluded that:

a) the Victorian Authority should be empowered to accept enforceable undertakings as an alternative to prosecution; and

b) the power to accept undertakings should be expressed broadly and should not be unnecessarily fettered by legislation.[11]

36.8 Brown and Hyam commented in their 2007 interim report that the power to enter into enforceable undertakings with employers acknowledged the value of alternatives to prosecution in certain circumstances.[12]

36.9 Similarly, in supporting the introduction of enforceable undertakings in NSW, the 2006 WorkCover Report observed that they provided a timely 'restorative justice' approach that engages organisations to achieve systematic solutions that correct or prevent breaches and their underlying causes. In this way, such undertakings were seen as a departure from the traditional punitive approach of prosecuting for one-off or unlikely-to-be-repeated events, providing a responsive and timely sanction that could be part of an effective enforcement strategy.[13]

36.10 Stanley recommended the option of non-pecuniary orders made by the Court, be included in the South Australian OHS penalty regime. In reaching that conclusion, the Stanley report commented that the option of enforceable agreements was 'hugely valuable'. It could take account of the differences in impact on big companies and small businesses and could also embrace what would actually result in tangible and desirable improvements at the workplace. However, in Stanley's view, of more value than all of this was that the 'penalty' could assist workers at the workplace in question. There was a perceivable link between the prosecution and a desirable outcome for the workers.[14]

36.11 A similar point was made by Macrory in his review of sanctions in Britain. Macrory observed that an 'Enforceable Undertaking Agreement', which he recommended be introduced, would allow proportionality with the breach and the defendant's resources. In Macrory's view, small duty holders might also be encouraged by the principle of agreeing to a strategy under such an undertaking that was clear, objective and measured.[15]

36.12 In a review of the ACCC's use of enforceable undertakings under the Trade Practices Act, Parker found that, despite some criticism of the ACCC's approach, 'mostly … the flexibility, timeliness and co-operative nature of enforceable undertakings means that they are generally popular with both regulators and industry.'[16]

36.13 Johnstone and King have recently examined enforceable undertakings in OHS regulation.[17] Although noting that there has been limited empirical work carried out on such undertakings, Johnstone and King found that enforceable undertakings '… can have a significant impact upon the organisational culture of firms, on their compliance with OHS law, on their acquisition and implementation of skills in relation to systematic OHS management, and in the delivery of tangible benefits to workers, industry and the community'.[18]

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[11] Op. cit, p.352, paragraph 1692.
[12] Op. cit, p.261, paragraph 752
[13] Op. cit., section 8.2, p.52
[14] Op. cit., vol. 3, pp.119, 120
[15] Op. cit, p.68, paragraph 4.24 and following discussion
[16] Parker C, Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings, Modern Law Review, Vol. 67, No. 2, pp. 209-246, March 2004
[17] Johnstone, R and King, M, op cit
[18] ibid, pp.34, 35

Stakeholder views

36.14 The ACCI proposed that the model Act specifically facilitate the use of voluntary enforceable undertakings in appropriate circumstances, acknowledging them as a legitimate tool in compliance activities. In the ACCI's view, the obligations should be developed in conjunction with a business and should be clear and achievable. The regulator should not be given undue discretion. No preconditions that assume guilt should exist and no admission of fault or liability should be required.[19] The AIG expressed similar views.[20]

36.15 According to the CCF, enforceable undertakings should be available for all but the most serious offences.[21] Business SA commented that enforceable undertakings would be part of an effective penalty regime, avoiding protracted and costly court cases. An undertaking should not, however, involve an admission of guilt,[22] a view shared by the CCI WA, which similarly expressed support for such undertakings.[23]

36.16 On the other hand, the ACTU does not support enforceable undertakings being used as an alternative to prosecutions. The ACTU stated that such an undertaking must only be considered where the defendant admits guilt and consultations have been held with the workforce and relevant unions.[24]

36.17 The position of governments was generally supportive but differed in detail.

36.18 The Commonwealth Government recommended enforceable undertakings as part of an array of enforcement measures.[25]

36.19 Drawing on its experience with enforceable undertakings, the Queensland Government strongly supported this option. The Queensland Government observed that such undertakings are not only less adversarial than prosecutions, but they also enable regulators to tailor their responses to particular circumstances and management capacities of the regulated enterprise, e.g. by requiring systematic OHS management with third party audit.[26] The Queensland Government's views about safeguards are discussed later.

36.20 The South Australian Government believes that enforceable undertakings should be available after a decision against prosecution has been taken. There should be transparency and accountability in relation to decisions. A party giving an undertaking should admit fault or liability.[27]

36.21 In the Victorian Government's view, while enforceable undertakings should be available, they should not be used for offences that cause death, serious injury or show high culpability or involve recidivists.[28] The Victorian Government also specified a number of safeguards (see discussion later).

36.22 The WA Government considered enforceable undertakings to be a useful addition to the regulatory tools for improving OHS outcomes.[29] They should be an alternative to prosecution. The Qld and Tas Acts were mentioned as models.[30]

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[19] ACCI, *Submission No.136*, p.54, paragraphs 226-231
[20] Australian Nursing Federation, *Submission No.82*, pp. 64, 65
[21] CCF, *Submission No.99*, p.10
[22] Business SA, *Submission No.22*, p.61
[23] CCI WA, *Submission No.44*, p.47
[24] ACTU, *Submission No.214*, p.51, paragraph 193
[25] DEEWR, *Submission No.57*, p.6
[26] Queensland Government, *Submission No.32*, p.33
[27] South Australian Government, *Submission No.138*, pp.51, 52
[28] Victorian Government, *Submission No.139*, p.81
[29] Although an undertaking may be given in WA, it is only after conviction and as an alternative to paying a fine – submission 112, p.39. See WA Act, ss.55H-55R.
[30] ibid

36.23 The Law Council of Australia stated that regulatory bodies should be able to enter into enforceable undertakings as an alternative to prosecution, with no inference of fault, but with the capacity to punish a breach of an undertaking.[31]

36.24 The Law Society of NSW proposed that there be provision for enforceable undertakings, but saw a need for flexibility and the circumstances in which they may be considered should be spelled out in prosecution guidelines or a code. As there would not be any legal proceedings in which evidence would be tested, there should not be any admission of liability.[32]

36.25 Submissions from academic experts were also in favour of enforceable undertakings.[33]

Discussion

36.26 Enforceable undertakings have been more frequently used by some Australian OHS regulators than by others. Even so, experience supports including enforceable undertakings in the model OHS law. There is no evidence that they have frustrated the objectives of OHS regulation. The available evidence suggests their use has also been successful in other regulatory fields.

Safeguards

36.27 The effectiveness of enforceable undertakings depends critically on their being used appropriately and fairly. They must be recognised as part of a suite of enforcement tools. They might be the only response to a breach or may complement other action (including legal proceedings). We emphasise that they are voluntary. A regulator may not compel anyone to give an undertaking. To do so would defeat its purpose. By the same token, a regulator is not obliged to agree to an undertaking where a person seeks one. Nonetheless, individual applications should be treated consistently.

36.28 Whether an enforceable undertaking is the best regulatory response requires careful consideration of the circumstances of an alleged offence and whether another action or sanction would be more appropriate. This raises questions of how:

a) to decide that an enforceable undertaking is the right regulatory response;

b) to determine the appropriate content for an undertaking;

c) to protect against unfair or inadequate requirements in such undertakings:

d) to measure the effectiveness of such undertakings.

36.29 Before discussing these issues, we emphasise that providing for safeguards in the formulation and use of enforceable undertakings should not have the perverse result of restricting their utility. The safeguards should be part of a broad framework in which a regulator, an alleged offender and, in appropriate cases, workers or others who will be affected by the undertaking, are involved in considering and where appropriate, developing the terms of the undertaking.

Deciding whether an enforceable undertaking is the right regulatory response

36.30 The objective of an enforceable undertaking should be more than to provide an immediate solution for a particular instance of non-compliance. An undertaking should secure a lasting commitment to an understanding of what is required for ongoing compliance with the obligations under the Act. If an undertaking is not going to have such results, the circumstances may not warrant its use.

36.31 In those jurisdictions where undertakings are provided for, they are not considered suitable for serious contraventions.[34]

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[31] Law Council of Australia, *Submission No.163*, pp.31, 33
[32] Law Society if NSW, *Submission No.113*, p.24
[33] McCallum et al, *Submission No.42*, p.12; Johnstone et al, *Submission No.55*, pp.38-41

Determining the appropriate content for an undertaking

36.32 A critical element in framing an undertaking is the extent to which interested parties are involved in that process. The undertaking should not be negotiated only between the alleged offender and the regulator. Persons who have been affected by the incident (typically, workers) should be consulted. Where there are worker representatives, their views should be considered. The model Act should require the decision maker to provide such persons with an opportunity to comment on any proposed undertaking.

36.33 We were impressed by the administrative practice of the Queensland regulator in having proposed undertakings examined by a group of experts as an advisory panel. Each application for an undertaking is reviewed by a three-member panel. For workplace health and safety applications, the panel is made up of two industry representatives and the Executive Director of Workplace Health and Safety Queensland. These groups consider all facts before making a recommendation to the Director-General, who can accept or reject the application. We consider that this approach should be built into the model Act. The appointments should be made by the Minister for a specified period.

36.34 Given the purpose of an undertaking, they should not be available where the alleged offender merely proposes to rectify the default or take minimal action in relation to the circumstances that gave rise to the default. A key aim should be a lasting change to safety performance. On the other hand, neither the regulator nor the applicant should be limited to any particular type of action for the purposes of developing an undertaking. This is more appropriate for a policy or guidelines.

Protection against unfair or inappropriate requirements in such undertakings

36.35 Although there was a division of opinion in the submissions about whether an admission of fault or liability should be required, we have concluded that it is inappropriate. In reaching this view, we note the views of the Law Council of Australia. We consider that it is sufficient that there be an acknowledgement of the incident and an expression of regret that it occurred. This has operated successfully in Queensland. In any event, we do not see this as a matter that needs to be spelled out in the model Act.

36.36 We note that Maxwell drew attention to some potential shortcomings in the process for enforceable undertakings.[35] One of these related to the relatively weak position of small businesses when negotiating the terms of an undertaking compared with the resources of a regulator. We consider that this would be addressed by ensuring a proper process whereby the regulator was obliged to explain in writing the implications of entering into an undertaking and to give the applicant a reasonable opportunity to consider the matter before it is finalised. The availability of expert scrutiny of and advice about a proposed undertaking (through a tripartite panel – see above) would also reduce the risk of an unfair outcome.

36.37 Some concern has been expressed about the legal basis of undertakings that might be seen to offend the general rule that the exercise of public power must be reasonably proportionate to the prescribed purpose of the power.[36] Maxwell also drew attention to this issue[37] and to views expressed by the ALRC in relation to how legislation should be framed.[38] This is a matter that should be kept in mind both in the drafting of the model Act (and any formal policy relating to undertakings) and in the application of the relevant provisions.

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[34] Victoria considers them inappropriate in a range of serious cases – *Submission No.139*, p.81. Queensland regards them as not appropriate where there are strong reasons for preferring a deterrent or retributive response – submission 32, p.33

[35] Maxwell, p.351, para.1685

[36] K. Yeung, *The public enforcement of Australian competition law*, ACCC, 2001, p.116 and following, discussing undertakings under s.87B of the *Trade Practices Act 1974* (Cwth).

[37] Maxwell, p.352, paras. 1690 and 1691

[38] ALRC, *Principled Regulation: Federal, Civil and Administrative Penalties in Australia,* 2002, para 16.79, "... *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.*'

36.38 Regulators must be accountable for their decisions about accepting or refusing undertakings. To ensure both consistency and fairness in decision making, a policy and guidelines should be publicly available. They should be mandated by the model Act and the regulator's decisions must be taken by reference to them. In the interests of harmonisation, such a policy and guidelines should be formulated on a national basis, for example, by the successor body to the ASCC and endorsed by the WRMC. The application guide promulgated by the Queensland Department for this purpose would provide a good starting point.[39]

36.39 With this in mind, the model Act should provide for any regulatory decisions in relation to applications to give an enforceable undertaking to be considered by reference to any current nationally determined policy and guidelines endorsed by the WRMC or other responsible Ministerial Council.

36.40 A regulator should be required under the model Act to give written reasons for decisions about undertakings. The decisions should be readily publicly available along with the terms of any accepted undertakings. This could be achieved by providing for an electronic register of undertakings, decisions and developments. In the interests of harmonisation, this should be in the same form in all jurisdictions. It may be desirable to provide links to the other registers in the other jurisdictions.

36.41 Decisions on applications should be made within a reasonable time. This is in the interests of all parties, but particularly an applicant and any victims of an incident for which an undertaking is under consideration. We do not consider that it is necessary to spell out a time frame in the Act (this could be addressed in the policy).

36.42 Decisions to accept or refuse undertakings should be reviewable judicially. This is both consistent with existing practice[40] and in line with our approach that, unless there are compelling contrary reasons, any exercise of a power or performance of a function under the model Act should be reviewable. We understand that there are such arrangements in each jurisdiction and, on that basis, no provision would need to be made in the model Act. We do not, however, propose that a person who has voluntarily given an undertaking should later be able to challenge its content, for example, if enforcement action becomes necessary.[41]

36.43 There should be a capacity under the model Act to seek a variation to an undertaking where circumstances change or a better way of meeting the agreed obligations become available. Similarly, it should be possible for a person to apply to withdraw from an undertaking. Such an application for variation or withdrawal should be treated in the same way as an application for the original undertaking and could only take effect with the agreement of the regulator.[42]

Consequences of non-compliance

36.44 Where there is a breach of an undertaking, the regulator should be able to bring civil proceedings in relation to the breach. The regulator should be able to seek a penalty for the breach and orders from a court requiring compliance with the undertaking, the costs of

[39] *Enforceable undertakings under the Workplace Health and Safety Act 1995 and the Electrical Safety Act 2002*, available at http://www.deir.qld.gov.au/pdf/whs/eu_application_guide.pdf. See also WorkSafe Victoria's *Supplementary Enforcement and Prosecution Policy 2006* available at: http://www.worksafe.vic.gov.au/wps/wcm/resources/file/eb26aa4fd757672/enforceable_undertakings.pdf.

[40] For example, in Queensland, the Director-General's decisions about enforceable undertakings are reviewable by the Supreme Court under the *Judicial Review Act 1991*(Qld) and, in the Commonwealth sphere, such decisions would be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cwth).

[41] For a discussion of the review of decisions to accept or reject an enforceable undertaking, see ALRC Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* 2002, Chapter 23, paras, 23.45 to 23.55.

[42] See Qld Act, s.42H, Vic Act, s.16(2).

supervising future compliance and in bringing the proceedings and any other orders that the Court considers appropriate.[43]

36.45 If the regulator considers that the particular non-compliance is so fundamental that there is no purpose in seeking an order seeking adherence to the undertaking, the regulator should:

a) be able to seek a penalty for the breach; and

b) be at liberty to institute proceedings for the original offence, even if the limitation period has expired.

The role of the courts

36.46 We are proposing that enforceable undertakings be normally available as an alternative to prosecution. Accordingly, the main role of a court would, as discussed above, be in relation to dealing with non-compliance of an undertaking or, in appropriate cases, exercising a judicial review jurisdiction in relation to undertakings.

36.47 Even so, we note that the Vic Act provides (s.137) an option for a court to release an offender who gives a health and safety undertaking. This occurs after conviction. We see this as a useful adjunct to enforceable undertakings. If it were not already within the scope of the powers of a court under the model Act, such a provision may be appropriately included.

Measuring the effectiveness of such undertakings

36.48 There are two matters that we consider should be considered here. The first concerns monitoring compliance with a particular undertaking and reporting on whether it has been discharged. The second concerns monitoring and reviewing the overall effectiveness of enforceable undertakings, particularly in the context of harmonised laws.

36.49 As to the first matter, self-evidently, there is little point in a regulator's accepting an undertaking if the regulator does not have the resources to follow it up effectively. This does not necessarily involve the regulator incurring significant financial or opportunity costs. The terms of the undertaking may require independent third party auditing, for example, at the expense of the alleged offender and with the results being made available to the regulator. Even so, it is essential that the regulator be in a position to assess progress under an undertaking[44] and, in appropriate cases, advise and assist the person who is attempting to comply or take enforcement action. Equally important, the regulator must ensure those who were affected by the events that gave rise to the undertaking are properly and regularly informed about the outcome. These are not matters that need to be provided for in the model Act, but we see them as important for fostering confidence in the system of undertakings.

36.50 The second matter relates to monitoring the overall system of undertakings. Although this is an administrative matter, it is essential for the successful operation of the statutory scheme. Ultimately, success should be judged by the improvements in OHS that result from the system. We strongly encourage a program for assessing the success of enforceable undertakings and for identifying improvements that could be considered at a minimum when the model Act is periodically improved. This might be a matter than could be addressed under the National OHS Strategy 2002-2012.

Other matters

36.51 We have not reached a conclusion on whether or how an enforceable undertaking given in one jurisdiction could have application in another. Nonetheless, we can see some benefits in so providing. For example, a business that operates in more than one jurisdiction (e.g. the A.C.T.

[43] See ss.42G and 42I of the Qld Act; s.17 of the Vic Act for examples of relevant enforcement provisions. Section 87B of the *Trade Practices Act 1974* (Cwth) sets out the enforcement provisions relating to enforceable undertakings under that Act.

[44] See discussion in Johnstone and King, op. cit. at p.34.

and NSW) should not be able to evade its obligations by transferring some or all of its operations to the jurisdiction in which an undertaking has not been given.

36.52 This might be addressed by requiring the alleged offender to undertake to perform the agreed improved practices and processes in every jurisdiction in which it conducts the business or the relevant part of the business. We have elsewhere made recommendations for facilitating the cross appointment of inspectors. That would provide a basis for monitoring the adherence to the undertaking in jurisdictions outside that in which it was originally given. We do not consider that other amendments are necessary.

Conclusions

36.53 In our view, key points supporting the availability of enforceable undertakings under the harmonised laws include:

a) enforceable undertakings are consistent with the graduated approach to enforcement that we discuss and recommend in this report;

b) they provide a speedier and more predictable response to non-compliance than court proceedings (and may be less costly for all concerned, with a further benefit in freeing up prosecution and court time);

c) by involving the alleged offender in developing the conditions of the enforceable undertaking, ongoing commitment to lasting improvements is more likely and by allowing affected persons to express views, the principles of restorative justice will (to that extent) be applied;

d) properly applied and monitored, the system should improve overall confidence in the regulation of OHS.

36.54 Accordingly, we propose that the model Act should provide for:

a) the regulator to be able to consider an application from an alleged offender to enter into an enforceable undertaking in relation to an alleged contravention of the model Act, other than a category 1 breach of a duty of care;

b) the establishment of an expert tripartite advisory panel, appointed by the Minister, to advise the regulator about the suitability of applications;

c) the regulator to be required to take into account the advice of the panel;

d) applications to be made and undertakings to be agreed without an admission of fault or liability by the alleged offender;

e) the regulator to give written reasons, which should be publicly available (in an electronic register), for accepting an undertaking;

f) unless review is otherwise available, a regulator's decision in relation to an application to be judicially reviewable;

g) the variation of an undertaking or withdrawal from an undertaking by further agreement with the regulator (the same process as applied to the original undertaking should apply to the application for variation or withdrawal);

h) in the case of non-compliance with an undertaking, the regulator to be able to take civil proceedings for a penalty for the breach and to seek orders from a court requiring compliance with the undertaking, an award of the reasonable costs of supervising future compliance and in bringing the proceedings, and any other orders that the Court considers appropriate

i) if the regulator considers that the particular non-compliance is so fundamental that there is no purpose in seeking an order seeking adherence to the undertaking, the regulator:

   i). to be able to seek a penalty for the breach; and

ii). to be at liberty to institute proceedings for the original offence, even if the limitation period has expired.

36.55 As a further method of securing the benefits of an undertaking, if it is not already within the scope of the powers of the court, a court should be empowered, after the conviction of a person for an offence under the model Act other than a Category 1 offence, to release an offender who gives a health and safety undertaking to the court. The Act should provide guidance to the court on the conditions for and content of an undertaking.[45]

RECOMMENDATION 152

The model Act should authorise a regulator to be able to accept, at the regulator's discretion, a written enforceable undertaking as an alternative to prosecution, other than in relation to a Category 1 breach of a duty of care.

The provisions relating to enforceable undertakings should provide for the safeguards relating to process, transparency of decision making, reviewability of decisions and enforcement that are outlined in paragraph 36.54

If the power to do so does not already exist, a court should be given the discretion under the model Act to release an offender, after conviction, who gives a health and safety undertaking to the court.

This judicial discretion should not be available in respect of a Category 1 offence.

[45] Section 137 of the Vic Act provides a model.

CHAPTER 37: CROSS-JURISDICTIONAL CO-OPERATION

37.1 Our terms of reference at clause 13(e) ask us to make recommendations relating to mechanisms for improving cross-jurisdictional co-operation.

37.2 Even though it was known to be outside our remit, a number of submissions to this review called for Australia's OHS regime to be a single national system, with one regulator administering one set of OHS laws with national application. This showed the dissatisfaction with the current arrangements and illustrates why much improved cross-jurisdictional co-operation will be welcomed.

37.3 The 2004 PC Report examined possible models for establishing national frameworks for workers' compensation and OHS arrangements. The PC Report stated:[1]

> *"In the Commission's view, the co-operation and participation of the States and Territories is essential in the process of developing effective national frameworks. The imposition of overriding national OHS legislation to replace the current state and territory arrangements, in the face of opposition from those jurisdictions, and from some significant stakeholders, would be an undesirable option to pursue."*

37.4 In our view, genuine cross-jurisdictional co-operation at all levels of government is the key factor which will determine the success of efforts to harmonise OHS. The current collective will of governments to work co-operatively to develop and maintain harmonised OHS laws has been formalised in the inter-governmental agreement. The ASCC (or its replacement body) will be an important forum for fostering cross-jurisdictional co-operation. Through a partnership of governments, unions and industry associations, the ASCC leads and coordinates national efforts to improve national consistency in the OHS regulatory framework. The ongoing commitment to the National Occupational Health and Safety Strategy 2002-2012 is another strong foundation for stronger cross-jurisdictional co-operation.

37.5 At the regulator level, the administrative infrastructure to facilitate effective cross-jurisdictional co-operation already exists through the Heads of Workplace Safety Authorities (HWSA), which consists of the General Managers (or their representatives) of the each OHS regulator in Australia and New Zealand. HWSA has clearly stated its commitment to cross-jurisdictional harmonisation and contributing towards the achievement of the targets of the National OHS Strategy.[2]

37.6 In our report, we have identified a number of areas where cross-jurisdictional co-operation is needed and have suggested legislative mechanisms for facilitating this.

37.7 In Chapter 34, we note that information sharing between regulators is necessary to allow the mutual recognition of authorisations issued by each regulator such as licences, permits and registrations. We have recommended that the regulation-making power should enable the sharing of information with other government agencies in relation to the issue, renewal, revocation, variation, suspension and cancellation of authorisations.

37.8 In Chapter 38, we have made recommendations to enhance the cross- jurisdictional co-operation in relation to inspectors. We note that circumstances may arise where the resources of a regulator within a jurisdiction are not sufficient (either as to the number of inspectors, or expertise) for informing or advising duty holders, or for the effective and timely investigation of an incident, or for specific OHS initiatives. Enabling the Commonwealth, States and Territories to share resources would allow for flexibility to meet particular circumstances or requirements. We have recommended that, subject to formal agreement between Ministers or regulators, inspectors should be appointed in more than one jurisdiction and that the exercise of powers or the performance of functions of an inspector in one jurisdiction be valid for the proper purposes of other jurisdictions.

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[1] PC Report, p.76

[2] See the HWSA Charter at www.hwsa.org.au

37.9 In addition, we consider that public confidence in harmonisation would be enhanced by the regulators in each jurisdiction agreeing to the administrative arrangements for the effective sharing of expertise, resources and information and making details of progress publicly available.

37.10 These measures are designed to reinforce and enhance cross-jurisdictional co-operation, which is essential to the success of a harmonised OHS regime.

RECOMMENDATION 153

We recommend that Ministers note the range of measures designed to reinforce and enhance cross-jurisdictional co-operation which we have identified in this report.

PART 10

ROLE OF INSPECTORS IN SECURING COMPLIANCE

- Appointment
- Role and Functions
- Qualifications and Training
- Powers
- Questioning and Related Privileges and Rights
- Protection and Offences
- Accountability

CHAPTER 38: APPOINTMENT OF INSPECTORS

38.1 We agree with the observations made in 2006 by the ILO's Committee of Experts:[1]

> *"… an effective system of labour inspection at the national level, carried out by professionally trained and adequately resourced inspectors, who are suitably qualified and independent of improper external influence, benefits both employers and workers. A strong and effective labour inspectorate provides not only better protection, but also better prevention and productivity at work, to the benefit of everyone."*

ONGOING AND TEMPORARY APPOINTMENTS

Current arrangements

38.2 All Australian OHS Acts allow for the appointment of inspectors[2]. The numbers of inspectors differ between jurisdictions, as noted in the following Table 47. As we discuss later, the variation underscores why OHS outcomes would benefit from improved national arrangements that allowed the regulators to co-operate in the exercise of powers and the performance of functions and to share their resources for those purposes. In particular, some jurisdictions have shortfalls in the number of inspectors and the skill base on which the regulators can draw.

TABLE 47: Numbers of inspectors by jurisdiction[3]

State	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Cwth
Number of inspectors (2006-07)	313	225	228	103	89	30	12	6	45

38.3 Inspectors may typically be appointed either by the responsible Minister or a specified senior official of the regulator, such as the chief executive.

38.4 Most OHS Acts specify that only public servants may be appointed as inspectors (see Table 48 below). The Qld Act allows the appointment of persons considered to possess the necessary expertise, experience or training, while the NT Act indicates only that "the Authority may appoint workplace safety officers".

38.5 The Tas Act also allows a 'person' to be authorised to perform specific functions and exercise certain powers of an inspector. We understand that the section has been used to authorise inspectors experts from the mining industry (e.g. for the Beaconsfield mine investigations), forestry inspectors and the police bomb squad. It has also been used to authorise union officials to enter workplaces as part of a trial of union right of entry in that State.

38.6 The appointment of inspectors is normally on an ongoing basis and terminates either upon resignation of the inspector or revocation by the regulator. However, some OHS Acts also allow appointments to be subject to certain conditions and limitations. For example, the term of appointment may be limited or the inspector may be restricted to performing specific tasks, exercising specific powers or operating in certain places.

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[1] ILO Committee of Experts on the Application of Conventions and Recommendations, General Survey , *Labour Inspection*, International Labour Conference, 95th Session, 2006, Report III, Part IB, para 374

[2] Inspectors are called 'Investigators' under the Commonwealth Act and 'Workplace Safety Officers' in the NT Act.

[3] WRMC, *Comparative Performance Monitoring Report: Comparison of occupational health and safety and workers' compensation schemes in Australia and New Zealand* (10th Ed), Commonwealth Government, Canberra, August 2008.

TABLE 48: Appointment of inspectors

State	Who may be appointed	Term of appointment
NSW	s.47 (workplaces other than in mining or coal) – A statutory officer, public servant, person employed by a public or local authority, or a person as prescribed by regulations.	None specified.
	s.47A (mining only) – A person appointed as a government official under the *Mine Health and Safety Act 2004* (NSW).	None specified.
	s.47B (coal only) – A person appointed as a government official under the *Coal Mine Health and Safety Act 2002* (NSW).	None specified.
Vic	s.95(1) – An officer or employee of the Authority or Department of Primary Industries.	None specified.
Qld	s.99 – A person considered by the chief executive to hold the necessary expertise, experience, or has satisfactorily finished training approved by the chief executive.	s.101 – May be specified in the instrument of appointment.
WA	s.42 – Only officers of the Department.	Not specified.
	s.42A – The Commissioner may appoint any WA public servant as a 'restricted inspector'.	s.42A(1) & (2) – For restricted inspectors, either upon expiry of the term of appointment (not specified) or until revoked.
SA	Definition of Inspector – Public servants authorised by the Minister. s.53 – The Minister, Director or Advisory Committee may delegate a power or function under the Act s.38(1) – Persons appointed by the Director.	None specified. s.53(2) b – May be revoked.
Tas	s.34(1) – Must be employees or officers of a Department or Agency of the State.	None specified.
	s.34(3) – The Secretary may authorise other persons to exercise powers of inspectors.	None specified.
NT	s.15 – May be appointed by the Authority.	The instrument of appointment may specify terms and conditions of appointment.
ACT	s.180 – Public servants.	None specified. Legislation Act 2001 (ACT) allows the appointment to be revoked by the Authority or upon resignation.
Cwth	s.40(2) – An employee of Comcare or a person having knowledge and experience in OHS. s.40(8) – appointment may also be regulated under regulations.	s.40(3) – Until revoked by Comcare or the resignation of the inspector.
	s.51 – Officers of the public service of a State or territory.	None specified.

Stakeholder views

38.7 The appointment of inspectors was not widely discussed in submissions but there was general support among those who commented, for the model Act to provide for the appointment of inspectors.[4] However, there was little detail provided as to who should be appointed, the appointment process or whether there should be provision in the model Act for temporary or restricted appointments.

38.8 The Victorian Government recommended that:[5]

- inspectors should be employees/officers of the regulator and exercise their powers on behalf of that regulator; and
- there should be an express power for OHS regulators to revoke an inspector's appointment.

38.9 The Tasmania Government suggested that the model Act should provide some flexibility in the appointment of inspectors from outside the ranks of employees of the regulator, while the Victorian Automobile Chamber of Commerce (VACC) was opposed to the temporary appointment of inspectors.[6]

38.10 Some responses that opposed the appointment of inspectors being addressed in the model Act did so on the grounds that it is:

- an issue which should be addressed individually by each jurisdiction; [7]
- better dealt with through existing employment processes;[8] and
- better addressed in regulations or another instrument.[9]

Discussion

38.11 We consider that inspectors must be and be seen to be independent and free from influence in exercising their powers. Accordingly, care must be taken in relation to the temporary appointment of inspectors, and the appointment of persons without the security of tenure of a public servant.

38.12 Also, the considerable time and expense associated with appropriate training may not be invested if an inspector is only appointed on a temporary basis.

38.13 There may however be occasions where there is a need for short term, temporary appointments. This may arise:

- from a need to fill vacant positions during the recruitment and training of ongoing inspectors; and
- where a specific initiative requires additional resources or specialised skills.

38.14 We consider that the model Act provide for:

a) the ongoing appointment as inspectors of persons with suitable qualifications and experience, who, upon appointment, be or become public servants;

b) temporary appointments, subject to conditions setting the circumstances and limitations on which they may be made.

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[4] See Victorian Government, *Submission No.139*, pp.66-67; South Australian Government, *Submission No.138*, p.45; Commonwealth Government, *Submission No.57*, p.6; ACCI, *Submission No.136*, p.47; Delta Electricity, *Submission No.79*, p.5; Optus, *Submission No.196*, p.11

[5] Victorian Government, *Submission No.139*, pp.66-67

[6] VACC, *Submission No.152*, p.29

[7] Western Australian Government, *Submission No.112*, p.32

[8] TFCA, *Submission No.66*

[9] AiG and EEASA, *Submission No.182*;

RECOMMENDATION 154

The model Act should make specific provision for the process of appointment of inspectors.

RECOMMENDATION 155

Inspectors should ordinarily be public servants appointed on an ongoing basis.

RECOMMENDATION 156

The model Act should provide for the temporary appointment of inspectors, subject to strict conditions.

CROSS-JURISDICTIONAL CO-OPERATION

Current arrangements

38.15 References in this part of the report to 'jurisdictions' are, according to the context, references to:

a) legal jurisdictions (Commonwealth, State or Territory);

b) geographic areas (State or Territory); or

c) industry or hazard areas (e.g. electrical safety or rail safety regulation)

38.16 No formal national system exists that allows inspectors from one geographic jurisdiction to exercise powers or perform functions in another jurisdiction.[10]

38.17 At present only the Cwth Act explicitly provides for assistance to be obtained from inspectors of another jurisdiction. This is achieved by providing for public servants from other jurisdictions to be able to perform the duties of a Commonwealth investigator.[11]

38.18 While persons may in practice be authorised as inspectors under different legislation within a geographic jurisdiction[12], the legislation does not provide for powers exercised under one Act to be taken to also be exercised or authorised under or valid for the purposes of another Act[13], and dual appointment is required to enable that to occur.

38.19 Without explicit legislative provision, cross-jurisdictional co-operation is necessarily limited and has to be arranged administratively. The effectiveness of such arrangements is hampered by restrictions on the divulgence and use of 'confidential information' and on the authority of an inspector in one jurisdiction to obtain evidence that may be used in another.[14]

Recent reviews

38.20 The issue of cross-jurisdictional co-operation was discussed in the NSW WorkCover Review and later in the Stein Inquiry. In seeking feedback on the issue, the NSW WorkCover

[10] WorkCover Review, p.58

[11] See s51 of the Cwth Act and s71 of the *Public Service Act 1999* (Cwth).

[12] e.g. some inspectors are appointed and authorised to exercise powers under both the Victorian *Occupational Health and Safety Act 2004* and *Dangerous Goods Act 1985*

[13] For example, allowing evidence obtained through the exercise of power under one Act to be used in proceedings under another Act.

[14] For example, we have been made aware of difficulties in achieving cancellation or revocation of a licence or permit in one State, where the evidence supporting the decision to do so was collected by an inspector in another State, exercising powers under the legislation of that other State.

Review released a discussion paper titled '*Recognition between Safety Inspectorates*'.[15] The paper raised the prospect that greater cross-jurisdictional co-operation could be achieved either through the exchange of information or by allowing the temporary appointment of inspectors from other jurisdictions to assist in investigations.[16]

38.21 The NSW WorkCover Review recommended that amendments be made to the NSW Act to allow the exchange of information with other agencies, including OHS regulatory agencies from other Australian jurisdictions.[17] The Stein Inquiry agreed.[18]

Stakeholder views

38.22 The issue of cross jurisdictional co-operation, as it relates to the appointment of inspectors, was only addressed in a very small number of submissions.

38.23 The Victorian Government submitted that:[19]

> *"…the model OHS Act [should] make provision for state inspectors to be granted authority to exercise the authority and powers of other state regulators, with a view to maximising the ability of Australian OHS regulators to consistently apply OHS laws in Australian workplaces. In this context, the model Act should include provisions establishing the mechanisms that would allow agencies to not only share inspectors but to also provide strategic data, compliance information, and general intelligence and expertise that assists in enforcement."*

38.24 The Law Society of NSW suggested that even if the OHS harmonisation process is successful, without the presence of a single national regulator it is still likely that, where an employer is working on a Commonwealth site or with Commonwealth employees, there is the capacity for both the Commonwealth and State regulatory regimes to apply. Thus creating:[20]

> *"…a situation where 2 separate regulatory bodies and 2 separate prosecutors could be investigating potential breaches of their respective occupational health and safety acts with potentially different outcomes."*

38.25 The Law Society of NSW proposed that this may best be addressed in the model Act by providing for inspectors to hold a dual state and Commonwealth appointment.[21] The AiG and EEASA indicated similar views for cross jurisdictional enforcement, but also made an alternative suggestion that joint inspections (i.e. between the Commonwealth and States) could be undertaken in such circumstances instead.[22] VECCI suggested memoranda of understanding between jurisdictions may be a suitable solution.[23]

Discussion

38.26 Businesses or undertakings are often conducted in more than one State or Territory. A chain of events constituting a breach of the Act may commence in one jurisdiction and conclude in another (particularly in the supply of goods). The conduct of a person in one jurisdiction may clearly demonstrate that the person is not fit and proper to be licensed or permitted to engage in conduct of a specified nature in any jurisdiction.

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[15] NSW WorkCover, *Recognition between Safety Inspectorates: Occupational Health and Safety Act 2000 Review*, Issue paper 2, December 2005.

[16] ibid, pp.5-6; In our view, arrangements for the exchange of information between jurisdictions may be required in addition to, rather than as an alternative to, temporary appointments, where the information may be required for use in more than one jurisdiction.

[17] WorkCover Review, pp.58-59

[18] Stein Inquiry, pp.123-125

[19] Victorian Government, *Submission No.139*, pp.67, 118

[20] Law Society of NSW, *Submission No.113*, p.5

[21] ibid, p.6

[22] AiG and EEASA, *Submission No.182*, p.83

[23] VECCI, *Submission No.148*, p.26

38.27 The adoption of a model Act in each jurisdiction should provide consistency in the relevant law, including the powers and qualifications of inspectors and procedures by which information is collected. This should give confidence that information that was appropriate and admissible in evidence in the jurisdiction in which it was collected, would be equally as appropriate as evidence in another jurisdiction. This should overcome any reservations about evidence collected in another jurisdiction. There would still need to be provisions in the model Act for the exchange and use of information, to enable it to be admissible in evidence.

38.28 Circumstances may arise where the resources of a regulator within a jurisdiction are not sufficient (either as to the number of inspectors, or expertise) for informing or advising duty holders, or for the effective and timely investigation of an incident, or for specific OHS initiatives. Enabling the Commonwealth, States and Territories to share resources would allow for flexibility to meet particular circumstances or requirements. This may also allow for focusing expertise in relation to particular matters (e.g. mining or major hazard facilities) in one or more jurisdictions. This would assist in maintaining a high level of expertise available to the regulators and duty holders.

38.29 Another benefit from sharing resources may be cost savings, optimising inspector numbers and expertise across the country, and limiting the duplication of the costly and time consuming training necessary to ensure and maintain the requisite levels of competence and expertise.

38.30 Similar considerations and conclusions apply to the sharing of resources and authorising the exercise of powers across industry and activity based jurisdictions within a State or Territory.

38.31 We accordingly consider that the model Act should expressly provide for:

a) subject to formal agreement between Ministers or regulators, inspectors to be appointed in more than one jurisdiction (without any adverse effect on the inspectors' original appointments);

b) the exercise of powers or the performance of functions of an inspector in one jurisdiction to be valid for the proper purposes of other jurisdictions; and

c) information collected during the proper exercise of powers of an inspector in one jurisdiction to be validly usable in proceedings in another, as if that information had been collected in that second jurisdiction during the exercise of powers or the performance of functions under the legislation of the second jurisdiction.

38.32 In addition, we consider that the regulators in each jurisdiction should agree on publicly available administrative arrangements for the effective sharing of expertise and information.

RECOMMENDATION 157

The model Act should, subject to written agreement between ministers or regulators, specifically permit:

a) inspectors to be appointed in more than one geographical or industry/activity-based jurisdiction; or

b) inspectors appointed in one jurisdiction to be authorised to perform functions and exercise powers in, or for the purposes of, another jurisdiction.

RECOMMENDATION 158

The model Act should clearly set out the scope and limits (if any) of the cross-jurisdictional appointment or authorisation.

RECOMMENDATION 159

The model Act should provide for the valid use and admissibility of evidence gathered by an inspector exercising cross-jurisdictional authority.

IDENTITY CARDS

Current arrangements

38.33 In line with accepted practice, all Australian OHS Acts require inspectors to be provided with an identity (ID) card. The extent of the information required on the cards differs. See Table 49 below for further detail.

TABLE 49: Inspectors identification

State	ID Card and contents	Offences relating to ID Cards
NSW	s48 • name • expiry date (if any) • premises to which entry can be gained (i.e. mining, coal, other workplace) • limitations or restrictions on functions • signature of the authorising delegate	None specified
Vic	s96 • photograph of the inspector • signature of the inspector	None specified
Qld	s102 • photograph of the inspector • signature of the inspector	It is an offence to, without reasonable excuse, not return the ID Card within 21 days of ceasing to be an inspector.
WA	s42C • signature of the authorising delegate	None specified
SA	s52 • must be in a form approved by the Minister	None specified

State	ID Card and contents	Offences relating to ID Cards
Tas	s34(2) • Contents not specified	None specified
NT	s16 • name and photograph of the inspector	None specified
ACT	s181 • photograph • date of issue • expiry date • anything else prescribed by regulations	It is an offence to, without reasonable excuse, not return the ID Card within 7 days of ceasing to be an inspector.
Cwth	s40(6) • Contents not specified	None specified

Stakeholder views

38.34 The topic of inspector's identification was only addressed in a very small number of submissions.

38.35 Unions NSW indicated support for the current inspector identification provisions of the NSW Act,[24] while Telstra submitted that inspector's ID cards should indicate the particular industries in respect of which they have the requisite skills, training and experience to deal with.[25]

Discussion

38.36 We consider that the model Act should ensure that, by requiring the use of an ID card, the authority of an inspector can be readily demonstrated at all times at which the inspector exercises powers or performs functions. The nature of the card and the information on it should enable duty holders and others to understand and accept the inspector's authority, while making the impersonation of an inspector difficult.

38.37 We recommend that the ID card provide at least the information currently required under the NSW Act (see Table 49, Appendix C), and identify the legislation under which the inspector is authorised to exercise functions and powers.

38.38 The model Act should prohibit the forgery of an inspector's ID card, or altering or defacing it without authorisation.

38.39 We note that where an inspector had been cross-appointed to another jurisdiction, the inspector would be subject to these requirements for that jurisdiction and would be issued with an appropriate ID card for use while operating under the cross-appointment.

[24] Unions NSW, *Submission No.108*, p.46
[25] Telstra, *Submission No.186*, p.27

RECOMMENDATION 160

The model Act should make specific provision for ID cards for inspectors, containing at least the information specified at s.48 of the NSW Act.

RECOMMENDATION 161

The model Act should provide that it is an offence to forge an inspector ID card, or to alter or deface it without authorisation.

CHAPTER 39: ROLE AND FUNCTIONS OF INSPECTORS

39.1 Inspectors are central to the successful operation of OHS regulation, and their skills, knowledge, expertise and judgement are critical factors in securing compliance under the legislation. In this chapter we discuss discusses the appropriate roles and functions of an inspector.

INSPECTORS ROLE AND FUNCTIONS GENERALLY

Current arrangements

39.2 OHS inspectors have a number of overlapping roles and functions under the OHS Acts. These may be undertaken directly or as a representative of the regulator. They include:

- providing advice to duty holders to facilitate and secure compliance with the legislation;
- resolving OHS issues referred to the regulator (e.g. concerning specific risks and associated PINs and work stoppages related to OHS);
- enforcing the legislation (e.g. issuing improvement and prohibition notices); and
- investigating and prosecuting breaches of the legislation.

39.3 More detailed discussion on each of these roles is provided later in this Part.

39.4 These roles and functions of inspectors are rarely specified in OHS Acts. Rather, they are either:

- generally implied and enabled through the inspectors' powers[1];
- set out in OHS Acts as the functions of the regulator or objects and purposes of the Act, with the inspectors' role being to exercise the functions of the Authority or fulfil the objects and purposes of the Act; or
- clarified through the regulator's compliance and enforcement policy.[2]

39.5 However, another approach is taken in the NT Act, which specifically identifies the functions of inspectors.[3]

39.6 Article 3 of the ILO *Labour Inspection Convention 1947* (C81) provides that the functions of the system of labour inspection are to include:[4]

- securing the enforcement of legal provisions relating to, among other things, the health, safety and welfare of workers;
- supplying technical information and advice to employers and workers regarding the most effective means of achieving compliance with the relevant legislation; and
- bringing to the attention of the 'competent authority' (i.e., OHS regulator in the Australian context) defects or abuses not specifically covered by the legislation.

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[1] For example, the general powers section of the WA Act (see s.43) provides that an inspector may provide information to any person for the purposes of facilitating compliance with the Act. Section 103A of the Qld Act also specifies that inspectors have a general role of providing OHS advice to persons with OHS obligations. Similarly, s.18 of the Vic Act allows an inspector to exercise powers on behalf of the Authority to provide advice to duty holders on how to meet their obligations under the Act.

[2] For example, while the NSW Act does not specifically identify the role and functions of an inspector, these are identified in the NSW WorkCover publication '*When an Inspector Calls: A Guide to WorkCover's Compliance Strategy*' and '*Role of the WorkCover Inspector*' information sheet.

[3] See s.17 of the NT Act relating to *workplace safety officers*.

[4] Ratified by Australia on 24 June 1975.

Recent Reviews

39.7 The Maxwell Review criticised the then Victorian OHS Act for not defining the role and functions of inspectors, stating:[5]

> *"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."*

39.8 Maxwell also indicated that such provisions would give:[6]

> *"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…"*

39.9 In conclusion, Maxwell recommended that the then Victorian Act be amended, with a provision detailing the role and functions of inspectors, including:[7]

a) "to monitor and promote compliance with this Act and the regulations

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."

39.10 This recommendation was not implemented. Rather the roles and functions of inspectors are scattered throughout the Act, as well as being implied in some places rather than explicit.

Stakeholder views

39.11 There was general support in the submissions for identifying the role and functions of inspectors in the model Act, but the roles and functions were rarely specified. The submissions that did discuss the role and functions in any detail recommended they include, in no particular order:[8]

- entering workplaces for the purposes of inspection;
- inquiring into workplace issues;
- investigating workplace incidents;
- enforcement and issuing notices; and
- providing advice on achieving compliance.

39.12 The provision of advice by inspectors was an issue of significance in many submissions, and is discussed later in this chapter.

39.13 The Victorian Government submitted that inspectors' role and functions do not need to be more detailed than general statements in the model Act, since such detail already exists in

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[5] Maxwell Review, p.293
[6] ibid
[7] Ibid, p.295-296
[8] Queensland Government, *Submission No.32*, pp.27-28; Business SA, *Submission No.22*, p.56; ACCI, *Submission No.136*, p.47; Minerals Council of Australia, *Submission No.201*,p.35 ; Victorian Employers Chamber of Commerce and Industry (VECCI), *Submission No. 148*, p.25

guidance material.[9] The Victorian Government also noted that steps towards harmonising such guidance material were being made through a proposed national compliance and enforcement policy.[10] The Victorian Government position was echoed by several companies and employer organisations, some of which indicated that inspectors' functions should be governed by a national Code of Conduct or other such instrument.[11]

39.14 Similar comments during consultation supported the view that the role and functions of inspectors should be stated only generally in the model Act as detail may increase the tendency to challenge an inspector's exercise of power and may restrict the regulator's capacity to conduct comprehensive investigations.

39.15 The Western Australian Government did not support inspectors' roles and functions being addressed in the model Act, as it viewed this as an issue for individual jurisdictions. [12]

Discussion

39.16 An inspector's role in securing compliance with OHS legislation is well known and relatively consistent in all OHS Acts. Assisting workplace parties in resolving OHS issues has also long been a generally accepted part of that role, although views differ on the extent to which an inspector should be involved and the formality of that involvement. Providing information and assistance to duty holders at a workplace has also been recognised in the legislation, but we received many comments that in practice it was insufficiently undertaken.

39.17 In our view the proactive elimination or minimisation of risk so far as reasonably practicable should be the primary focus, both of the model Act and of those persons who have powers, functions and rights under it. The exercise of coercive powers to enforce the model Act and regulations is an essential means of securing compliance. Nonetheless, it should not be the only or immediate focus of a regulator or the inspectors who represent and act for the regulator at workplaces.

39.18 Inspectors are experienced, trained and qualified to enable them to perform their role in the enforcement of the legislation. They possess extensive knowledge not only as to the law, but also risk management generally and for specific industries, activities and hazards. Their knowledge is not merely theoretical, but is supported by experience in numerous workplaces. They are well placed to provide information and advice to duty holders on the elimination and minimising of hazards and risks, assisting in achieving complementary outcomes of health and safety protection and legal compliance.

39.19 Inspectors are well qualified to assist in resolving OHS issues at the workplace as they:

- are independent of the workplace participants and should be seen as being objective when expressing views on the issues;
- have knowledge and experience that may add much value to the consideration of the issues and in identifying solutions; and
- can compel appropriate action, should the parties not resolve the issue.

39.20 The role and experience of inspectors with enforcement notices, equip them to review provisional improvement notices (PINs) and to determine issues related to the appropriateness of a work stoppage on safety grounds.

39.21 Against that background, we consider that the model Act should explicitly recognise (preferably in one place) at least the following roles and functions of an inspector:

- providing information and advice to duty holders;

[9] Victorian Government, *Submission No. 139*, p.67
[10] ibid
[11] For example, see Chamber of Commerce and Industry (CCI) WA, *Submission No.44*; NSW Minerals Council, *Submission No. 183*; Property Council of Australia, *Submission No.183*
[12] Western Australian Government, *Submission No.112*, p.32

- undertaking specific industry, occupational or hazard and risk based interventions (e.g. advice, risk management and enforcement in relation to the industry, occupation or hazard and risk concerned);
- assisting in the resolution of issues at workplaces;
- reviewing PINs and the appropriateness of work stoppage on safety grounds;
- securing compliance with the model Act and regulations through the exercise of various powers, including the issuing of notices and giving directions; and
- investigating suspected breaches and assisting in the prosecution of offences.

39.22 Each role requires different knowledge, skills and approaches. Some inspectors may be better suited to some of the roles than to others. Our earlier recommendations about cross-appointments and the sharing of resources should assist regulators in assigning the best qualified inspectors to particular tasks.

39.23 The allocation of resources is generally a matter for administrative decision and need not be addressed in the model Act. Even so, the model Act should allow for an inspector to be authorised only to perform certain roles (this may be of particular significance in relation to temporary or cross-appointments).

39.24 We discuss many of these roles in greater detail below.

RECOMMENDATION 162

The model Act should:

a) specify the roles and functions of an inspector, including:

i) providing information and advice to duty holders;

ii) undertaking specific industry, occupational or hazard and risk based interventions (e.g. advice, risk management and enforcement in relation to the industry, occupation or hazard and risk concerned);

iii) assisting in the resolution of issues at workplaces;

iv) reviewing PINs and the appropriateness of work stoppage on safety grounds;

v) securing compliance with the model Act and regulations through the exercise of various powers, including the issuing of notices and giving directions; and

vi) investigating suspected breaches and assisting in the prosecution of offences; and

b) allow the appointment of an inspector for all, or only specified roles and functions.

ADVICE

Current arrangements

39.25 The degree to which OHS Acts provide inspectors with the power to offer advice and assistance to duty holders in complying with their duties and obligations varies. See Table 50 below.

39.26 Some OHS Acts, such as the Vic Act and the NT Act, specifically provide inspectors with a general power to provide advice and assistance on OHS matters. The Qld Act empowers an inspector to advise a person with obligations under the Act about compliance.[13]

[13] Qld Act, s.103A.

TABLE 50: Inspectors powers to provide advice

Jurisdiction	Advice
NSW	Not specified
Vic	s.18 – An inspector may exercise the power of the Authority to provide advice to duty holders on how to meet their obligations. s.113 – Notices may include directions and advice.
Qld	s103A – May provide advice on OHS matters to persons with OHS obligations. s117 – Improvement notices must include directions.
WA	s.43(1)ea – May provide information to facilitate compliance with the Act. s.45(3) – Must notify the relevant person action required to be taken following an inspection.
SA	s.39(3) – Inspectors may provide directions in improvement notices to facilitate compliance with the Act. s.38(10)a(ii) – Must notify the relevant person action required to be taken following an inspection.
Tas	s.38(1) & (2) – Inspectors may give formal directions orally or in writing.
NT	s.17(1)b – Workplace Health and Safety Officers have a broad function under the Act to provide advice to employers and workers about how to comply with their obligations under the Act. s.75(3)b – Must include directions for compliance in a improvement notice.
ACT	s.125(d) – Inspector may state in a compliance notice measures to be taken to ensure compliance with the Act. s.132(3) – An inspector may provide 'any other information' considered appropriate in an improvement notice.
Cwth	s.46(8) – Prohibition notices may include directions. s.47(4) – Improvement notice may specify action to be taken.

39.27 The NSW Act does not specify that inspectors may provide advice.[14] However NSW WorkCover clearly indicates in its compliance policy that this is a function that inspectors are expected to fulfil.[15] The recently introduced Confirmation of Advice Records (CARs), which are administered administratively, support this function by providing a formal written record of advice provided by inspectors during workplaces visits. CARs are discussed in more detail in Chapter 41.

39.28 By comparison, other OHS Acts, allow inspectors to provide direction and advice when issuing notices for non-compliance. However, in such instances these directions become mandatory, with non-compliance being a contravention of the relevant Act.

Recent Reviews

39.29 Recent OHS reviews have recommended giving inspectors explicit powers to provide advice to duty holders. The Maxwell Review, while noting a number of considerations for not providing advice, concluded that it was important that inspectors be able to provide advice to duty

[14] This point was highlighted in the Stein Inquiry, p.76, para 10.13.
[15] See NSW WorkCover publication '*When an Inspector Calls: A Guide to WorkCover's Compliance Strategy*'.

holders to secure compliance without the need to issue enforceable notices (i.e., improvement or prohibition notice).[16]

39.30 The Maxwell review also recommended that any advice provided by inspectors should not have any legal force (i.e., following or not following the advice has no legal consequences), nor should it result in any personal liability on the part of the inspector. The position of Maxwell was supported by the Stein Inquiry.

39.31 The Tas Review was critical of the fact that the Tas Act does not empower inspectors to provide advice and pointed out that if inspectors were to provide advice it would attract potential liability, as inspectors only have immunity in discharging their legislated powers and functions.[17]

39.32 The Tas Review concluded that:[18]

> *"…inspectors, at the "front line" of the agency, should be able to exercise their discretion in providing advice and be involved in education or other awareness raising activities, without fear of liability. If this type of activity will facilitate the achievement of the legislation's objectives to prevent injury, illness or death, then we believe that the Act should expressly give inspectors those powers and functions."*

39.33 Inspector immunity is discussed in more detail in Chapter 43.

Stakeholder views

39.34 The ability of inspectors to provide advice was consistently raised as a major concern by many companies, employer organisations, industry representatives, professional associations, and union organisations in their submissions, with the majority supporting inspectors having specific roles, functions and supporting powers to provide advice.[19] The predominant reasons provided in the submissions were that:

- based on enforcement data, reliance on enforcement measures alone is not proving to be effective in reducing the injury and fatality rate;
- the provision of advice facilitates greater compliance in improving OHS outcomes and is vital in ensuring long term systematic improvements; and
- there has been a conflict in some jurisdictions between inspectors enforcement role and advice provided by regulators and advisers.

39.35 Many of those submissions that supported inspectors having an advisory role under the model Act also indicated that where an inspector does provide advice, that advice should not result in any personal liability on the part of the inspector.[20] Inspector immunity and liability is addressed in Chapter 43.

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[16] ibid, Chapter 25, pp.258-267

[17] Tas Review, p.257

[18] ibid, p.263

[19] For example see Delta Electricity, *Submission No.79*; John Holland, *Submission No.107*; Optus, *Submission No.196*; Telstra, *Submission No.186*; Business SA, *Submission No.22*; Tasmanian Chamber of Commerce and Industry, *Submission No.45*; Commerce Qld, *Submission No.93*; ACCI, *Submission No.136*; VECCI, *Submission No.148*; AiG and EEASA, *Submission No.182*; MBA, *Submission No.9*; Independent Contractors of Australia, *Submission No.67*; TFCA, *Submission No.66*; Civil Contractors Federation, *Submission No.99*; HIA, *Submission No.175*; NSW Minerals Council, *Submission No.183*; Minerals Council of Australia, *Submission No.201*; APESMA, *Submission No.33*, Law Society of NSW, *Submission No.113*; Safety institute of Australia, *Submission No.128*; National Safety Professionals, *Submission No.129*; ACTU, *Submission No.214*

[20] Telstra, *Submission No.186*, p.28; Commerce Qld, *Submission No.93*, p.7; NSW Minerals Council, *Submission No.183*, p.23; HIA, *Submission No.175*, p.28; MBA, *Submission No.9*, p.40; National Safety Professionals, *Submission No.129*, p.40; Independent Contractors of Australia, *Submission No.67*, p.3; OneSteel, *Submission No.114*, p.16; Ramsay Health Care, *Submission No.81*, p.8

39.36 There was also some suggestion that advice provided by an inspector should be able to be used as a defence against prosecution. [21] However, this view did not appear to be a widely held, and the Law Society of NSW specifically argued against it.[22]

39.37 Submissions from governments were more divided on the issue of inspectors providing advice. Both the Queensland and Australian Government submissions supported inspectors being able to provide advice to facilitate compliance.[23]

39.38 The Tasmanian and Victorian Governments gave some support for inspectors having such a role, but that it should not place them in the position of being considered a consultancy service and noted that:[24]

- a conflict of interest may occur when an inspector visits a site and reveals breaches of legislation or non-compliance; and
- it was more appropriate to separate the advisory and enforcement functions of the regulator into separate units to overcome this problem.

39.39 The position of the Tasmanian and Victorian Governments was supported by several companies, industry representatives, professional associations and unions,[25] albeit sometimes for different reasons including:

- separating the advisory and enforcement functions will avoid situations where an inspector does not act on an issue because they were part of the development of the solution;
- businesses should be able to seek advice without threat of punishment; and
- inspectors' duties must focus on enforcement of the Act and Regulations rather than encouraging compliance

Discussion

39.40 Earlier in this chapter, we referred to the importance of inspectors being able to provide information and advice to duty holders. We agree with the comments made in recent reviews about supporting this role of an inspector by legislation. We consider that the model Act should make it clear that an inspector can provide advice, including (but not limited to) when exercising a power of entry to a workplace.

39.41 While it is not necessary to provide powers specifically to enable the provision of advice, many of the powers ordinarily available to be exercised by an inspector may be useful for that purpose – e.g. powers to ask questions, inspect the workplace and require the provision of documents. It may be useful for the model Act to recognise that such powers may be exercised for the provision of advice.

RECOMMENDATION 163

The model Act should make clear that an inspector may provide advice about compliance with the model Act and that an inspector's power of entry and the powers that an inspector can exercise upon entry are available for the provision of advice.

[21] MBA, *Submission No.9*, p.40; NSW Minerals Council, *Submission No.183, p.23*
[22] Law Society of NSW, *Submission No.113*; pp.20-21
[23] Queensland Government, *Submission No.32*, p.28; Commonwealth Government, *Submission No.57*, p.6
[24] Tasmanian Government, *Submission No. 92*, pp.17-18; Victorian Government, *Submission No.139*, p.66
[25] Babcock and Brown Power, *Submission No.97*, p.35; Ergon Energy Corporation, *Submission No.94*, p.24; Property Council of Australia, *Submission No.185*, pp.26-27; National Safety Council of Australia, *Submission No.180*, p.16

ISSUE RESOLUTION / PIN REVIEW

Current arrangements

39.42 All OHS Acts provide for inspectors to attend at a workplace to address various OHS matters, issues or disputes, relating to such matters as:

- directing the cessation of unsafe work (i.e., where an immediate threat to health and safety has been identified);
- the issuing of a provisional improvement notice (PIN)[26];
- the election and establishment of HSRs and HSCs;
- the exercise of powers by an authorised representative; and
- other matters which affect health and safety at work.

39.43 Inspector attendance at a workplace for this purpose may generally be requested by HSRs, HSCs, authorised representatives (employer and employee) or employers. Where such a request is made, an inspector is generally required to attend the workplace as soon as possible or practicable, or, in some cases, within a specified timeframe.

39.44 Currently the specified timeframes for attendance by an inspector range from immediately to within seven business days, depending on the nature and seriousness of the matter in question.

39.45 For example, in Western Australia an inspector must attend a workplace 'forthwith' where there is an unresolved issue that involves an imminent risk of serious harm or injury.[27] In South Australia, if the matter to be resolved is a direction to cease unsafe work, the inspector must attend within one to two business days (depending on whether the workplace is located within a metropolitan area or not). All other cases must be addressed within seven business days.[28]

39.46 In Victoria, if an inspector is asked to attend a workplace to review a PIN, the inspector must attend the workplace as soon as possible after the request is made and before the day specified in the PIN for compliance.[29]

39.47 Under some OHS Acts[30], if the inspector cannot resolve the matter, it may be referred to a relevant tribunal for further mediation

Stakeholder views

39.48 The role of inspectors in issue resolution and PIN review was only addressed in a small number of submissions, which did not address the issue in great detail.

39.49 Submissions from some industry representatives, employer organisations and companies, opposed HSRs being able to issue PINs (see discussion on HSRs in Chapter 25). However, where it was assumed that PINs would be a part of the model Act, it was often proposed that they should also be reviewable,[31] although there were differences of opinion as to what the review process should entail.

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[26] A 'Default Notice' (see SA Act) and a 'Notice of Safety Hazard' (see NT Act) operates in much the same manner as a PIN does in other jurisdictions.

[27] See s.25 of the WA Act.

[28] See s.37 of the SA Act.

[29] See s.63 of the Vic Act.

[30] For example, under s.55A of the SA Act if an inspector is unable to resolve a matter relating to bullying or abuse of an employee, the inspector may refer the matter to the SA Industrial Commission.

[31] For example, see CFMEU, *Submission No.218*; SIA, *Submission No.128*; Law Council of Australia, *Submission No.163*; AICD, *Submission No.187*; Minerals Council of Australia, Submission No.201; Cement Concrete & Aggregates Australia (CCAA), *Submission No.170*; Ramsay Health Care Australia, *Submission No.81*;

39.50 For example the Law Council of Australia considered that a PIN was best reviewed in the first instance by the HSC.[32] Telstra and Ramsay Health Care Australia indicated that PINs should be reviewed by an inspector in the first instance.[33] NSW Minerals Council recommended PINs be reviewable by a third party administrative appeals tribunal.[34] Other submissions simply recommended that internal and external review processes should be available, but did not provide any further clarification.[35]

39.51 The Tasmanian, Victorian, Western Australian and South Australian Governments all supported a review process for PINs, with the remaining government submissions being silent on the issue. [36] However, the Western Australian and South Australian Governments were the only ones to clarify that PINs should, in the first instance, be reviewed by an inspector with the option for the affected persons to obtain further review if dissatisfied with the outcome.

39.52 Transfield Services indicated that it was not necessary to provide HSRs with the ability to issue PINs if there were satisfactory issue resolution processes in place. It noted that where an issue could not be resolved, it was preferable that the regulator mediate the dispute.[37] On a similar point, the CCI WA recommended that inspectors should be trained to mediate between workplace parties to determine matters and issue appropriate notices.[38]

39.53 The ACTU suggested that inspectors should be required to issue immediate written reasons for overriding a HSR on a matter.[39]

Discussion

39.54 As we have noted in paragraph 39.42, inspectors are able to assist the resolution of OHS issues at a workplace. The various provisions of the current OHS Acts enabling inspectors to carry out that role are appropriate. We consider that the model Act should specifically provide for such a role of an inspector and confer the necessary powers to enable them to fulfil that role effectively.

39.55 Similarly, given the role of an inspector in issuing prohibition and improvement notices, an inspector is well placed to be the first point of formal review of a PIN, and to assist the parties to resolve any associated issues.

39.56 While the provisions of the various OHS Acts relating to the review of PINs are appropriate, there is one point on which we consider comment should be made. While a PIN affirmed by an inspector, with or without modification, is ordinarily then taken to be a notice of the inspector, that is not universally so.[40]

39.57 The aim of a PIN is to enable enforcement of OHS obligations at the workplace, without the need for the intervention of an inspector. The PIN will be issued because of a dispute as to the matter for which the PIN was issued. If the person to whom the PIN is issued agreed with the opinion of the HSR, the relevant action would be taken and the PIN would not be necessary. Where an inspector has become involved in considering the PIN and exercises independent judgement in affirming the PIN, the notice should be taken to be that of the inspector and to reflect the views of the inspector. In practice, having the PIN remain the notice of the HSR may

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[32] Law Council of Australia, *Submission No.163*, p.32

[33] Telstra, *Submission No.186*, p.13 Appendix 2; Ramsay Health Care Australia, *Submission No.81*; p.9

[34] NSW Minerals Council, *Submission No.183*, p.25

[35] Australian Meat Industry Council, *Submission No.143*, p.10; Cement Concrete & Aggregates Australia (CCAA), *Submission No.170*, p.23; AICD, *Submission No.187*, p.12

[36] Western Australian Government, *Submission No.112*, p.36; Tasmanian Government, *Submission No.92*, p.21; South Australian Government, *Submission No.138*, p.50; Victorian Government, *Submission No.139*, p.78

[37] Transfield Services, *Submission No.174*, p.5

[38] CCI WA, *Submission No.44*, p.44

[39] ACTU, *Submission No. 214*, p.48

[40] Under s63 of the Vic Act, the PIN at least implicitly remains a notice of the HSR who issued it. This flows from the language of the section and the absence of a provision found in the earlier 1985 Vic Act specifically providing that the PIN then becomes a notice issued by the inspector who affirmed it.

undermine its acceptance, or produce difficulties in confirming compliance with it (the inspector and HSR may differ in their views as to what constitutes compliance and the effect of any modifications).

39.58 We therefore consider that the model Act should state that, upon affirmation by an inspector, with or without modification, a PIN will be taken to be a notice issued by the inspector.

RECOMMENDATION 164

The model Act should provide powers necessary to enable an inspector to effectively carry out the roles and functions of issue resolution and review of provisional improvement notices.

RECOMMENDATION 165

A provisional improvement notice should be taken to be a notice issued by an inspector, upon affirmation of the notice, with or without modification.

CHAPTER 40: QUALIFICATIONS AND TRAINING

40.1 In this chapter we consider and make recommendations on the training, skills, qualifications and experience necessary for inspectors to effectively carry out those roles and functions and ensure public confidence in the capacity of the inspectorate.

Current arrangements

40.2 The detail of necessary qualifications and experience required of inspectors is not specified in any OHS Act. Rather, we understand such requirements are typically specified as part of the regulator's recruitment processes and include consideration of:

- experience in similar roles (e.g. safety consultant, Health and Safety Representative, safety manager, law enforcement etc.) or industries;
- skills such as the ability to communicate clearly, negotiate and resolve conflicts, solve problems and research and analyse information; and
- tertiary qualifications such as a certificate, diploma or degree in OHS, although this is generally not a mandatory requirement.

40.3 Following the initial recruitment and appointment process, the regulators in each jurisdiction[1], to varying degrees, provide their inspectors with structured on-the-job training including:

- induction;
- OHS study courses such as:
  - regulatory frameworks (e.g. relevant legislation and regulations);
  - technical skills and knowledge (e.g. plant, heights, hazardous substances, dangerous goods etc);
  - personal development; and
  - operational policies and processes; and
- mentoring and coaching by other more experienced and senior inspectors.

40.4 Efforts are also being made through the Heads of Workplace Safety Authorities (HWSA) to coordinate the establishment of agreed national inspector competency standards and to identify technical skills, knowledge and emerging issues that are aligned to the National OHS Strategy.[2]

40.5 Through this initiative all jurisdictions are now providing training to enable inspectors to achieve nationally recognised qualifications with a focus on the Diploma of Government (Workplace Inspection) and Diploma of Government (Investigation).[3]

40.6 Other training and qualifications offered to inspectors include:

- Advanced Diploma of Government (Workplace Inspection);
- Certificate IV in Government (Statutory Compliance); and
- Certificate IV in Government (Investigation).

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[1] NSW has established the New Inspector Training Program (NITP), which runs for 18 months and upon completion provides the inspector with a Diploma of Government (Workplace Inspection). WA has an inspector induction program which runs for 6 months and upon completion provides the inspector with a Certificate IV in Government (Statutory Compliance).

[2] Heads of Workplace Safety Authorities (HWSA). Seez; http://www.hwsa.org.au/working_groups/project.aspx?id=101

[3] ibid

40.7 Article 7 of ILO *Labour Inspection Convention 1947* (C81) requires that inspectors are to be recruited having regard to their qualifications, which are to be determined by the Authority, and adequately trained for the performance of their duties.[4]

Recent Reviews

40.8 The Maxwell Review recommended that eligibility for appointment as an inspector should be limited to 'qualified persons' and that the required qualifications should be specified in the Act.[5] However, Maxwell also noted that in specifying inspector qualifications, some flexibility should be built into the Act to allow the acceptance of equivalent qualifications, and for treating particular types of experience as equivalent to qualifications.[6]

Stakeholder views

40.9 Inspector qualifications and training was consistently raised as an important issue in submissions. There was universal support for inspectors to be appropriately experienced and trained, with the majority of submissions indicating that training and experience in respect of specific industries (e.g. construction and mining), hazards (e.g. chemicals) and fields (e.g. ergonomics, medicine) was particularly important. This was a view expressed by the ACTU, Unions NSW, the Association of Professional Engineers, Scientists and Managers Australia (APESMA) and WA Farmers Federation among others.[7]

40.10 Some submissions, such as the Law Society of NSW, the ACTU, Australian Motor Trades Industrial Council (AMTIC), State Public Service Federation Group and the Community & Public Sector Union (SPSF Group & CPSU), also indicated that inspectors should hold tertiary or other OHS qualifications of a Certificate IV level or higher, and that the regulator should encourage inspectors to achieve these qualifications if they are not already held by the inspector. [8]

40.11 However, while there was general support for inspectors to be appropriately experienced, trained and qualified, the issue of whether or not such detail should be specified in the Act was only considered in a small number of the submissions. Some of the submissions, such as Master Builders Australia (MBA), supported the Act containing detailed provisions outlining the specific experience, training and qualifications required of inspectors.[9] Other submissions, such as those of the South Australian and Queensland Governments, suggested such detail belongs in subordinate regulations or alternatively in a code of practice or other such instrument.[10]

40.12 The Law Society of NSW and Western Australian Government did not support inspectors' training and qualifications being addressed in the model Act. This was viewed as a jurisdictional issue. [11]

40.13 The Law Council of Australia and NSW Minerals Council both recommended the establishment of a national certification register for inspectors.[12] The Law Council of Australia suggested that this would allow mutual recognition of inspectors and indicated that International Association of Labour Inspection (IALI) may provide a suitable standard.

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[4] Ratified by Australia on 24 June 1975.

[5] Maxwell Review, p.295

[6] ibid

[7] ACTU, *Submission No. 214*; AMWU, *Submission No.217*; Unions NSW, *Submission No.108*; APESMA, *Submission No.33* ; Rio Tinto, *Submission No.142*; Telstra, *Submission No.186*; Optus, *Submission No.196*; WA Farmers Federation, *Submission No.106*

[8] ACTU, *Submission No. 214*, p.47; AMTIC, *Submission No.158*, p.13; SA WIA, *Submission No.127*, p.10; CPSU/SPSF Group, *Submission No.230*, p.62; NSW Minerals Council, *Submission No.183*, p.23; Minerals Council of Australia, *Submission No.201*, p.35

[9] MBA, *Submission No.9*, p.40

[10] South Australian Government, *Submission No.138*, p.45; Victorian Government, *Submission No.139*, p.67; TFCA, *Submission No. 66*, p.6; AiG and EEASA, *Submission No.182*, p.58

[11] Western Australian Government, *Submission No.112*,p.32 ; Law Society of NSW, *Submission No.113*, p.20

[12] Law Council of Australia, *Submission No.163*, p.30; NSW Minerals Council, *Submission No.183*, p.23

40.14 The need for inspectors to be appropriately trained and qualified was sometimes directly linked to an inspector's ability to provide relevant and accurate advice.[13] More discussion on inspectors' ability to give advice is provided in Chapter 39.

Discussion

40.15 As we noted earlier, each role of an inspector requires specific skills and knowledge. The coercive powers that may be exercised by inspectors, and the degree to which duty holders may rely on and act in response to an inspector's advice or directions, mean that they may be highly influential in determining what happens at a workplace. Inspectors may also influence relationships between workplace parties by the way the inspectors deal with OHS issues and communicate with the parties.

40.16 Accordingly, inspectors must be able to perform to a high standard, exhibiting and exercising high levels of technical and inter-personal skills. These may be provided by training and by the attainment of qualifications.

40.17 The credibility of the inspectors (and through them, the regulator) is critical to their effectiveness in each of their roles. Inconsistency in the performance of different inspectors can undermine the credibility of the inspectorate and the regulator.

40.18 The Victorian Parliament Law Reform Committee, in its report '*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*' recommended that agencies have clear and appropriate qualification requirements and educational and training standards for their inspectors.[14]

40.19 For these reasons, we consider that there must be a consistent, minimum standard of qualifications and initial and ongoing role-specific training for inspectors. The detail of the required qualifications and training should be a matter for the regulators. This may be an appropriate matter for the HWSA to determine. We consider, however, that the need for a high level of consistent performance is sufficiently important that it should be dealt with in the model Act, which should refer to the requirement for such qualifications and the source of and process for gaining them.

40.20 Examples of minimum qualifications are noted above at paragraphs 40.5-40.6. Further training or qualifications could relate to specific roles or activities and might, for example, include areas of law, psychology and inter-personal communication skills.

RECOMMENDATION 166

The model Act should provide for inspectors to have such nationally consistent qualifications and training (including ongoing training) as mandated by or under the legislation.

[13] Johnstone, Bluff and Quinlan, *Submission No.55*, pp.34-35; Optus, *Submission No.196*, pp.10-11

[14] Victorian Parliament Law Reform Committee, '*Inquiry into the Powers of Entry, Search, Seizure and Questioning by Authorised Persons*', Parliament of Victoria, May 2002. See recommendation 17 at page xxiii. See also the discussion at page 3 and from page 101. See also pages 30-31.

CHAPTER 41: POWERS REQUIRED TO PERFORM INSPECTOR'S ROLES

41.1 In this chapter, we discuss the key powers that we consider are necessary for inspectors and make recommendations about them. This does not, of course, preclude other powers being conferred on inspectors. While some of the powers that we discuss may only need to be exercised in some roles (e.g. making affidavits will not be required for issuing an improvement notice), the model Act need not specify in which role an inspector may exercise a particular power.

41.2 We deal with a specific aspect of inspectors' powers – seeking information by questioning and access to documents and rights and privileges of those from whom the information is sought – in the next chapter. We do so as this is not only an area where there are some inconsistencies but because it involves complex and sensitive issues.

POWERS OF ENTRY

Current arrangements

General power of entry

41.3 Inspectors are consistently provided with the power to enter workplaces, although the definition of 'workplace' varies between OHS Acts (see Table 51 below).

41.4 While the powers to enter workplaces are generally consistent, the timing of such entry varies. Where there is no provision about this matter (for example, the SA Act) it appears that powers of entry may be exercised at any time. Other Acts, such as the Vic and ACT Acts, specify that entry to a workplace may only be made during ordinary hours of business, or at any time where serious or urgent circumstances warrant such access.

41.5 The NSW, NT and ACT Acts empower inspectors to use force to enter workplaces. In NSW and the Northern Territory the use of force is restricted to that considered 'reasonable' to gain entry to a workplace. In the ACT, the use of force is restricted to that considered 'necessary'.

41.6 Article 12 of the *ILO Labour Inspection Convention 1947* (C81) requires that inspectors (with the proper credentials) to have the power to enter freely, without prior notice, at any hour (night or day) to any workplace liable to inspection.

TABLE 51: Inspectors powers of entry – General power of entry, timing and use of force

State	General power of entry	Timing of entry to workplaces	Use of force
NSW	s.50	s.53 – At any reasonable time during the day or any hour when work is usually carried out at the premises.	ss.54 & 55
Vic	s.98	s.98(1) – During working hours. s.98(2) – Any time if there is an immediate risk of serious injury or death.	NA
Qld	s.104(1)	Not specified	NA
WA	s.43(1)a	s.43(1)a – Any reasonable time, day or night, or as required to perform functions under the Act.	NA
SA	s.38(1)a	s.38(1)a – Entry may be made at any time. s.38(1a)(a) – Cannot enter a workplace where a self-employed person works alone unless there is a risk to the health and safety of the self-	NA

State	General power of entry	Timing of entry to workplaces	Use of force
		employed person.	
Tas	s.38(1)	s.36(1) – Entry may be made at any time.	NA
NT	s.67(1)	s.67(2) – Entry may only be made with 'reasonable' notice. s.67(4) – Entry may be made with authorisation from the Authority in urgent situations.	s.71
ACT	s.74(1)a	s.74(e) – At any reasonable time or in serious or urgent situations, at any time. s.74(6) – 'Reasonable time' means during normal business hours, when the premises are being used as a workplace, or when the public has access to a premises.	s.74(5)
Cwth	s.42	s.42(1) – At any reasonable time during the day or night.	NA

Entry to non-workplaces

41.7 Residential premises, which are 'suspected' of being used as a workplace, are generally excluded from an inspector's power of entry unless the occupiers consent or a search warrant is obtained (see Table 52 below). The Maxwell Review supported this[1]. Search warrants are discussed later in this chapter.

41.8 Entry to premises, whether a workplace or domestic premises, may generally be gained at any specified time if a search warrant is obtained (see Table 52 below).

TABLE 52: Inspectors powers of entry – Entry to non-workplaces

State	Entry to non-workplaces
NSW	s.57 – Entry may not be made to residential premises without occupier permission or a search warrant.
Vic	s.107 – Entry may not be made to residential premises without occupier permission or a search warrant.
Qld	s.104(4) & s105 – Entry may not be made to residential premises without occupier permission or a search warrant. Entry may be made to public places without requiring consent.
WA	s.43(1a) – may enter residential premises that an employer has a duty to maintain.
SA	s.38(1)a – May enter certain other places where specific items of plant are located s38(1a)(b) – entry made under s.38(1)a places only at a reasonable time.
Tas	s.36(1A) – Entry may not be made to residential premises without occupier permission or a search warrant.
NT	s.67(3) – Entry may not be made to residential premises without occupier permission or a search warrant.
ACT	s.74(1)b & e – Public premises (including vehicles), and premises in serious and urgent situations. s.74(2) – Entry may not be made to residential premises without occupier permission or a search warrant.

[1] Maxwell Review, p.301

State	Entry to non-workplaces
Cwth	May only enter workplaces. Definition of workplace specifically excludes private dwellings.

Notice of entry

41.9 Under some OHS Acts, inspectors must provide notice of entry to a workplace, but there is some variation in the requirement. For example, NSW, Victoria and Western Australia require inspectors to notify the occupier of the premises or the employer of the entry after the fact, while the NT Act requires inspectors to provide employers 'reasonable' notice of intention to enter the workplace (see Table 53 below).

TABLE 53: Inspectors powers of entry – Notice of entry

State	Notice of entry to workplaces
NSW	s.51 – Entry may be made without notice, but must be announced to the occupier as soon as reasonably practicable unless to do so would defeat the purpose of, or create unreasonable delay to the entry, or the person is already aware of the entry.
Vic	s.102 – Reasonable steps must be taken to announce entry to the occupier or HSR, unless to do so would defeat the purpose of, or create unreasonable delay to the entry, or the person is already aware of the entry.
Qld	Not specified
WA	s.45(2) – Reasonable steps must be taken to announce entry to the employer.
SA	Not specified
Tas	Not specified
NT	s.67(2) – Entry may only be made with reasonable notice.
ACT	Not specified
Cwth	Not specified

41.10 The Maxwell Review raised concerns with the notice of entry provisions of the then Vic Act and indicated that the requirement to provide notice to the employer only upon entry was unsatisfactory since:[2]

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."

41.11 Consequently, Maxwell recommended that inspectors be required to give notice of their entry to the person in charge, or apparently in charge, of the premises and to any HSR. However, Maxwell also recommended that inspectors should not need to give notice where the giving of notice would defeat the purpose for which entry was made or would cause unreasonable delays to entry, or where the persons required to be notified are already aware of the inspector's entry or were notified in advance of when the inspector would enter the premises.[3]

[2] Maxwell Review, p.302
[3] ibid

41.12 The NT Review recommended that inspectors should be able to enter workplaces without notice,[4] although this recommendation was not adopted.

41.13 Article 12 of the *ILO Labour Inspection Convention 1947* (C81) requires inspectors to have the power to enter, without previous notice, at any hour of the day or night any workplace liable to inspection, but that inspectors should also be required to notify employers of their presence when conducting an inspection, unless to do so would prejudice the performance of their duties.

Production of authority/ID

41.14 Inspectors are normally required to display their ID card or, if requested, to produce it in order to exercise their powers validly, including that of entry. However, failure by an inspector to produce their ID card is dealt with differently in OHS Acts (see Table 54 below).

TABLE 54: Inspectors powers of entry – Production of authority

Jurisdiction	Produce ID (authority) to use powers
NSW	s.52 – Must produce ID card on request to exercise powers. s.63(4)a – Inspector must produce ID to demand personal details under s.63.
Vic	s.96 – Must produce ID card on request to exercise powers. s.100(3) – Must produce ID when requiring production of documents or answering of questions.
Qld	s.103 – Must produce / display ID card to exercise powers or at first opportunity if otherwise not practicable.
WA	s.42C(2) – Must produce / display ID card on request to exercise powers.
SA	s.52 – Must produce / display ID card on request to exercise powers.
Tas	s.34(2A) – Must produce ID card to exercise functions. s.34(2B) – Failure to show ID does not invalidate actions.
NT	s.16(2) – Must produce ID card if requested to exercise powers. s.74(a) – It is a defence against a failure to comply with a request by an inspector if the inspector did not identify themselves as an inspector.
ACT	s.76 – Must produce ID if requested to exercise powers or when requesting entry under s.74(1)c. An inspector must leave premises if unable to produce ID on request.
Cwth	s.40(7) – Inspectors must carry ID at all times while exercising powers or functions. s.42(2) – Must produce ID Card on request to exercise powers. An inspector must leave premises if unable to produce ID on request.

41.15 The Maxwell Review recommended that inspectors be required to produce their ID cards when requesting the production of documents or requiring questions to be answered.

Search warrants

41.16 As discussed earlier in this chapter, inspectors are consistently empowered to enter workplaces. This power is commonly restricted to the hours of normal operation of the business. Residential premises are generally excluded from inspectors' powers of entry unless they are 'suspected' of being used as a workplace, in which case entry may only be made with the occupiers' consent or under a search warrant.

[4] NT Review, p.146

41.17 All OHS Acts, except the WA Act, SA Act and the Cwth Act, typically allow inspectors to apply to a court or magistrate for a search warrant to enable access to a workplace outside normal business hours or to other premises, such as residential premises, where relevant information or evidence may be kept.[5]

41.18 The application process for search warrants is relatively consistent across those OHS Acts that provide for them and generally requires the inspector to suspect on 'reasonable' grounds that there exists at the premises evidence of a breach of the relevant OHS Act. However, none of these OHS Acts explicitly identifies the evidence upon which the warrant may be sought.

41.19 The issue of inspectors' powers of entry and search warrants was considered in the Maxwell Review, which concluded that inspectors should be able to access workplaces without warrant for a number of reasons, including:[6]

- it would be difficult for an inspector to find out whether 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;
- health and safety issues may frequently arise in circumstances of emergency or (real or perceived) immediate risk to health and safety and requiring inspectors to obtain warrants in these circumstances could cause critical delay; and
- workplaces are typically commercial premises and entry to them does not raise the same civil liberties issues that arise in relation to residential premises.

41.20 Maxwell considered, however, that residential premises should be accessible for investigating possible contraventions, but only with the authority of a search warrant.[7]

41.21 The NT Review supported inspectors in the NT being able to obtain and execute search warrants, but was silent on the circumstances in which search warrants should be required or available.[8]

Stakeholder views

41.22 The majority of submissions agreed that inspectors should have access to a range of powers to support their compliance and enforcement roles.

41.23 Several employer organisations, including ACCI, Business SA, VECCI and VACC supported inspectors' powers including general powers of entry, but did not indicate what the general powers of entry should include.[9] The ACTU and AMWU made similar comments in their submissions.[10] APESMA indicated its support for the ACTU position on the topic of inspectors' powers.[11]

41.24 Some submissions indicated a preference for inspector powers of entry to be modelled on the provisions of the Victorian, NSW or Queensland Acts, with the Victorian Act being the most preferred.[12]

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[5] See s.58 of the NSW Act, s.104 of the Vic Act, s.106 of the Qld Act, s.36(1C) of the Tas Act, s.69 of the NT Act, and ss.90-99 of the ACT Act.
[6] Maxwell Review, pp.300-301
[7] ibid
[8] NT Review, pp.145-146
[9] Business SA, *Submission No.22*, p.56; ACCI, *Submission No.136*, p.47; VECCI, *Submission No.148*, p.25; VACC, *Submission No.152*, pp.27-28
[10] ACTU, *Submission No.214*, pp.47-49; AMWU, *Submission No.217*, pp.31-32
[11] APESMA, *Submission No.33*, p.3
[12] Johnstone, Bluff and Quinlan, *Submission No.55*, pp.34-35; MBA, *Submission No.9*, p.40; ACTU, *Submission No.214*, pp.47-49; AMWU, *Submission No.217*, pp.31-32; National Safety Council of Australia, *Submission No.180*, p.15; Ergon Energy Corporation, *Submission No.94*, p.24

41.25 Submissions from the ACTU, VACC and VECCI indicated that when an inspector has entered a workplace they should be required under the model Act to notify certain persons at the workplace, such as the duty holder, occupier and the relevant HSR.[13]

41.26 VACC, VECCI, Business SA and MBA also supported inspectors having the power to seek search warrants.[14] The MBA suggested that search warrants should only be available in extraordinary circumstances and should be authorised by a senior official. VACC, VECCI and Business SA suggested that inspectors be required to provide a report of any inspections to the occupier of the workplace or premises inspected.

41.27 The Victorian and South Australian Governments each indicated that the provisions of their respective Acts were a suitable basis for providing for inspectors powers of entry, while the Western Australian Government did not support inspectors' powers being addressed in the model Act at all as these were viewed as a jurisdictional issue.[15]

41.28 The Victorian Government also indicated:[16]

- that, in the interests of good governance, inspectors powers should also be referred to the Authority for use in appropriate circumstances where it may not be appropriate or feasible for an inspector to individually exercise a statutory power; and
- support for the principle that when somebody is subject to inspection powers they should be able to know that the person exercising those powers does so with authority. To that end, the model Act should require that inspectors identify themselves before exercising inspection powers.

Discussion

41.29 We consider that entry by an inspector to a workplace should ordinarily be limited to such times at which the person with management or control of the workplace, or in respect of whom the inspector proposes to exercise powers, may be expected to be present (when the business is operating or able to be accessed by members of the public[17]). This is both to enable such persons are available to assist in protecting the health and safety of the inspector (e.g. pointing out latent hazards) and to provide transparency in the exercise by the inspector of his or her powers.

41.30 Activities, and the exercise of powers, that can be effectively undertaken in normal business hours should await entry during normal business hours. However, in some circumstances an inspector may need to enter a workplace outside normal business hours or residential premises. For example:

- to seize evidence which may otherwise perish or be removed;
- to require the elimination or minimisation of immediate risk of serious injury or death to any person; or
- where the inspector reasonably suspects a residential premise is being used as a workplace.

41.31 To account for these circumstances, the model Act should permit inspectors to obtain a search warrant for entry at such times as the circumstances render necessary.

41.32 We do not consider that an inspector should be required to give prior notice of intended entry to a workplace. To do so may defeat the purpose of the entry. That an inspector may enter

[13] ACTU, *Submission No.214*, pp.47-49; VECCI, *Submission No.148*, p.25; VACC, *Submission No.152*, pp.27-28
[14] VECCI, *Submission No.148*, p.25; VACC, *Submission No.152*, pp.27-28; Business SA, *Submission No.22*, p.56; MBA, *Submission No.9*, p.40
[15] Victorian Government, *Submission No.139*, p.67; South Australian Government, *Submission No.138*, p.45; Western Australian Government, *Submission No.112*, p.32
[16] Victorian Government, *Submission No.139*, p.67
[17] Section 90(8) of the ACT 1989 Act provides a useful example of how this may be expressed.

a workplace at any time during normal business hours without notice, may provide some incentive to a duty holder to ensure compliance at all times (rather than leave remedial actions until or unless an inspector gives notice of intended entry). The model Act should require notice to be given as soon as practicable after entry, for the reasons given above for ordinarily restricting entry to business hours.

41.33 The notice of entry should be given to the person with apparent management or control of the workplace and any person conducting a business or undertaking at the workplace in respect of whom the inspector proposes to exercise functions or powers. This is consistent with our recognition elsewhere (e.g. duties of care, consultation) of the change in work relationships and the diminished relevance of the employment relationship. Notice of entry should also be given, where practicable, to any relevant HSR at the workplace, as is commonly required, to provide an opportunity for the HSR to assist the inspector and be informed of matters relevant to OHS at the workplace.

41.34 The model Act should also include the usual provisions relating to the display of an ID card, and providing for a written notice of entry and steps taken during the visit to be provided for by the inspector upon, or as soon as practicable after, leaving the workplace[18].

RECOMMENDATION 167

The model Act should provide for the right of an inspector to enter a workplace during such times as the business conducted thereat is operating or the workplace is accessible to members of the public, and at other times if the inspector reasonably believes that an immediate risk to the health or safety of any person exists from activities or circumstances at the workplace.

RECOMMENDATION 168

The model Act should provide inspectors with the authority to obtain and execute search warrants.

RECOMMENDATION 169

The model Act provide requirements on an inspector to:

a) at all times during entry to a workplace, display or have available for examination, such identification and authorisation card or documentation as required by the model Act;

b) notify as soon as practicable after entry:
   i) the person with apparent management or control of the workplace; and
   ii) any person conducting a business or undertaking at the workplace in respect of whom the inspector proposes to exercise functions or powers; and
   iii) a health and safety representative (if any) representing workers undertaking work as part of the relevant business or undertaking at the workplace of the entry and the purpose of the entry.

c) provide a written notice to each of those mentioned in (b), upon or as soon as practicable after leaving the workplace, specifying:
   i) the purpose of the entry;
   ii) relevant observations;
   iii) any action taken by the inspector; and
   iv) the procedure for seeking a review of any decision made by the inspector during the entry.

[18] An example of this is s103 of the Vic Act.

POWERS PROVIDED ON ENTRY

Current arrangements

41.35 All OHS Acts provide inspectors with broad powers to make searches, examinations and inspections, to access documents, ask questions, obtain information, gather evidence and seize items.

41.36 Some OHS Acts provide all of these powers under the same provision, while other Acts provide separate provisions for specific functions such as accessing documents and seizing items. For simplicity, our discussion on inspectors' powers is broken down into the following categories:

- inspecting, examining and recording;
- accessing documents;
- actions relating to plant, substances and materials; and
- questioning, affidavits and statutory declarations.

Inspecting, examining and recording

41.37 All Australian OHS Acts provide broadly consistent powers to inspectors to make searches and inspections upon entering a workplace.

41.38 The majority of OHS Acts also provide inspectors with general powers to:

- take samples of substances and things (including biological samples);
- take measurements and conduct tests (e.g. noise, temperature, atmospheric pollution and radiation);
- take photographs and make audio and video recordings; and
- require owners, employers and others at a workplace to provide any assistance (including the provision of facilities) reasonably necessary to allow the inspector to exercise their powers and functions.

41.39 Table 55 below provides further detail on these powers.

41.40 Some Acts, such as the Vic and WA Acts require an inspector to notify the 'employer' and any relevant HSR where the power to take photographs or make sketches has been exercised, and to make those photos and sketches available to the employer for inspection.[19]

41.41 The Qld, Vic, WA and ACT Acts also allow inspectors to take on to premises materials and equipment necessary to exercise their powers.

41.42 NT and ACT inspectors have additional powers to operate plant and equipment or to request other qualified/trained persons to do so.

41.43 The NSW Act is the only Act which specifically allows inspectors to conduct biological testing.

41.44 The ACT Act also provides additional specific powers for inspectors to stop and detain vehicles which are suspected on reasonable grounds of being a workplace or containing documents relevant to workplace duties imposed by the legislation. However, the inspector must not detain the vehicle for longer than is reasonably necessary to exercise the inspector's general powers.

41.45 The Maxwell Review supported maintaining inspectors' general powers to conduct inspections, examinations and tests and take samples, photographs, measurements and

[19] See s.103(3) of the Vic Act, and s.45(4) of the WA Act.

recordings.[20] However, Maxwell also found that the Act should clearly differentiate between powers which are exercisable on entry to premises and powers which may be exercised more generally.[21]

41.46 The NT Review similarly agreed with giving inspectors a broad range of powers upon entry to a workplace consistent with those powers discussed here and provided in other OHS Acts.[22]

41.47 Article 12 of *ILO Labour Inspection Convention 1947* (C81) provides, among other things, that inspectors, after entry, must be empowered to carry out any examinations and tests that they consider necessary to satisfy themselves about compliance with the relevant legislation. The powers are to include the taking or removal of samples of materials or substances for analysis, subject to notification to the 'employer' or the employer's representative.

TABLE 55: Inspectors powers – Inspect, examine and record

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
Make inspections	s.59	s.99(b)	s.108(3) a & b	s.43(1)a , d & e	s.38(1)b	s.36(1)a	s.17(1)a	s.78	s.41
Take materials and equipment onto premises	–	s.99(c)	108(3)g	43(c)	–	–	–	s.78(h)	–
Take photos	s.59(a)	s.99(f)	s.108(3) c	s43(1)h	s38(1)e & f	s36(1)d	NS	s78(c)	s42(1)c
Make audio recordings	s.59(a)	s.99(f)	s.108(3) c	s43(1)h	s38(1)e & f	s36(1)d	s70(1)b	s78(c)	–
Make video recordings	s.59(a)	s.99(f)	s.108(3) c	s43(1)h	s38(1)e & f	s36(1)d	s70(1)b	s78(c)	–
Make sketches	NS	s.99(f)	NS	s43(1)h	NS	NS	NS	s78(c)	s42(1)c
Take samples of substances or things	s.59(b)	s.101	s.108(3) c	s43(1)f	NS	s36(1)a	s70(1)e	s78(e)	s44(1)
Measure and test	s.59(a)	s.99(f)	s.108(3) c & e	s43(1)h	s38(1)e & f	s36(1)a & d	s70(1)f	s78(c)	s42(1)b
Conduct biological testing	s.59(d)	–	–	–	–	–	–	–	–
Open or operate plant or systems	–	–	–	–	–	–	s.70(1)c	s.78(d)	–
Require assistance	s.59(f)	s.121	s.108(3) h	s.43(1)n	s.38(7)	s.36(6)	s.70(1)h	s.78(j)	–

[20] Maxwell Review, p.311
[21] ibid, p.304
[22] NT Review, pp.144-146

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
from owner, employer etc									

NS Not specified

Accessing documents

41.48 All OHS Acts provide inspectors with the power to request persons to produce documents for examination (See Table 56 below). In some OHS Acts, a request to produce records or documents may be refused if the information may incriminate the person to whom the request was made[23] or the information is subject to legal professional privilege.[24] We discuss self incrimination and legal professional privilege later.

41.49 The NSW, Vic, NT and ACT Acts each explicitly provides that an inspector may seize documents and records for further examination and as evidence of a contravention of the Act. The Qld, WA, SA and Tas Acts also appear to provide similar powers of seizure of documents but are less explicit and instead generally extend the power to the seizure of 'things'.

TABLE 56: Inspectors powers – Access to documents

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
Request production of and copy or take extracts from documents	ss.59(e) & 62	ss.100(1) &124	ss.108(3)d & 122	s.43(1)i	ss.38(1) c & d	ss.36(1) b, c & f	s.70(1)(h)(iii)	ss.78(b) &s.78(i)	s.43(1)
Seize documents	s.62(4)	s.99(d)	NS s.109	NS s.43(1)g	NS s.38(4)	NS s.36(2)	s.70(1)g	s.85	–

NS Not specified

41.50 Under Article 12 of the *ILO Labour Inspection Convention 1947* (C81), inspectors must be empowered to make any enquiries that they consider necessary to be satisfied about compliance with the relevant legislation, to require the production of documents that have to be kept by law and to be able to copy them or make extracts.

41.51 Maxwell suggested that the power of an inspector to request documentation should:[25]

- not be restricted to workplaces, but rather extended to any premises lawfully entered by the inspector;
- be limited to documents physically located in or about the premises being inspected;
- specify that requests for documentation must only be directed to persons in charge of the documentation sought;
- be able to be exercised orally or in writing but that, if made orally, it must be confirmed in writing within 48 hours;

[23] In particular see the Vic and Qld Acts.
[24] In particular see the Vic, SA and Tas Acts.
[25] ibid, pp.304-307

- require a warning to be issued by the inspector that a failure or refusal to provide the documentation is an offence, and provide a defence of 'reasonable excuse' for such a failure or refusal.

41.52 The Maxwell Review also suggested that it should be an offence to provide false or misleading documentation in response to an inspectors request and that if they have not already done so, inspectors should be required to show their ID Card where making such a request. [26]

41.53 The SA Review recommended that inspectors should have power to require a person who the inspector reasonably suspects has committed, is committing, or is about to commit, a breach of the Act in relation to the operation of plant, to produce evidence of that person's qualification to undertake the function or operate the plant.[27]

41.54 The NT Review supported inspectors being provided powers to require the production of documents.[28]

Actions relating to plant, substances and materials

41.55 All Australian OHS Acts empower inspectors to seize items such as plant, substances and materials for a range of purposes (See Table 57 below), including:

- as evidence of a contravention of the legislation;
- to undertake further testing and analysis; or
- if the item is likely to cause injury or illness, or create dangerous or hazardous situations.

TABLE 57: Inspectors powers – Actions relating to plant, substances and materials

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
Seize and remove plant, substances and materials	s.60	s.99(d)	ss.109-115	s.43(1)g	s.38(4)	s.36(2)	s.70(1)g	s.85	s.44
Dismantle plant etc	s.60	–	s.111(1)c	–	–	–	–	–	–

41.56 Where plant or materials have been seized, or samples have been taken, inspectors are generally required to issue a receipt for the items taken or provide a notice of the intention to take the plant or substances.

41.57 In the ACT, if the inspector has seized an unsafe thing, the inspector may destroy or dispose of the thing and charge any cost incurred to the offender (see discussion at paragraphs41.197-41.203, 'Remedial Interventions').

41.58 The Maxwell Review recommended specific statutory provisions for inspectors' powers of seizure, clearly stating the purposes for which the power may be exercised and separate from their general powers.[29] Maxwell also considered that items should not be able to be seized for the sole purpose of conducting further examination and testing. Specifically, Maxwell noted that where inspectors generally have powers to examine and conduct tests and measurements on plant, substances and other things, their seizure should only occur where the inspector believes

[26] ibid
[27] SA Review, Vol. 3, pp.99-100
[28] NT Review, pp.144-146
[29] Maxwell Review, pp.296, 304

on reasonable grounds that the item constitutes evidence of an offence against the Act.[30] Forfeiture of seized items was also supported by Maxwell.[31]

41.59 The NSW and Qld Acts illustrate how inspectors may be given powers to dismantle plant and equipment for examination[32]. In NSW, this power may be exercised if the inspector believes on reasonable grounds that the plant or equipment has been used in the commission of an offence against the Act. Under the Qld Act, this power may only be exercised if the item has first been seized by the inspector. Seizure may only occur if the item is deemed to be likely to cause injury or illness or create dangerous or hazardous situations. Inspectors in Queensland may also take action to have seized plant dismantled by other persons.

Affidavits and Statutory Declarations

41.60 The power to take statutory declarations or affidavits is only available to inspectors in a minority of OHS Acts (see Table 58 below).

41.61 The Vic Act provides inspectors with the power to take affidavits for any purpose relating to or incidental to the performance of their functions or the exercise of their powers.

41.62 Under the WA and NT Acts, an inspector can require a person to verify by statutory declaration answers to the inspector's questions.

41.63 In the NT this power is shared by the Authority and is also restricted to verification of written answers or other information.

41.64 Although the Qld Act does not provide inspectors with powers to require statutory declarations or take affidavits, such avenues are open to the Authority to pursue in certain circumstances, such as during an inquiry.[33]

TABLE 58: Inspectors powers – Questioning, Affidavits and Statutory Declarations

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
Ask questions and make enquiries	s.59(e)	s.99(a) & 100(1)c	s.108(3)e	s.43(1)d & k	s.38(1)g	s.36(1)e	s.70(1)h	s.78(i)	s.43(1)
Request name and address	s.63	s.119	s.120	s.43(1)m	–	–	s.70(1)h	s.88	–
Take affidavit or statutory declaration	s.60	–	s.111(1)c	–	–	–	–	–	–

41.65 The Maxwell Review supported inspectors being provided the power to both take affidavits and require statutory declarations but believed that this power should be regulated under the *Evidence Act 1958* (Vic) rather than OHS legislation.[34]

[30] ibid, pp.308-309
[31] ibid, pp.309-310
[32] See s.60 of the NSW Act and s.111(1)c of the Qld Act.
[33] See s.140 of the Qld Act.
[34] Maxwell Review, pp.318-319

Assistants

41.66 Apart from the Cwth Act, all Australian OHS Acts allow inspectors to be accompanied and assisted by other persons, such as relevant experts and interpreters, when entering a workplace (see Table 59 below). It is usually an offence to refuse entry to an inspector's assistant.

TABLE 59: Inspectors powers of entry – Assistants

State	Power to bring assistants
NSW	s.68 – May bring others to the workplace to assist with exercising powers.
Vic	s.122(2) – May bring others to the workplace to assist with exercising powers. s.122(3) – Interpreters.
Qld	s.108(3)g – May bring others to the workplace to assist with exercising powers.
WA	s.43(2) – May bring others to the workplace to assist with exercising powers. s.44 – Interpreters.
SA	s.38(6) – May be assisted by persons authorised by the Director. s.38(1)g – Interpreters.
Tas	s.36(4) – Inspectors may be assisted by persons so authorised by the Director or Secretary. s.36(5) – Interpreters.
NT	s.68 – Inspectors may be accompanied by assistants.
ACT	s.74(5) – Inspectors may enter premises with any necessary assistance or force. s.78(h) – May take any person onto premises. s.97 – May request specialist IT assistance.
Cwth	Not specified

41.67 The Vic, WA, SA and Tas Acts also specifically provide that any questions asked or direction made by an interpreter on behalf of an inspector is taken to have been made by the inspector.

41.68 The Maxwell Review recommended that the amendment of the then Vic Act, which permitted assistants to accompany an inspector onto a workplace, to allow persons assisting inspectors to enter any place, not just a workplace, that the inspector had a legal right to enter.[35]

Stakeholder views

41.69 The majority of submissions agreed that inspectors should have access to a range of powers to support their compliance and enforcement roles, but the powers were rarely specified.[36]

41.70 Submissions that specifically discussed what powers inspectors should have available to them upon entry to a workplace, including the submissions of ACCI, Business SA, VECCI and VACC, generally recommended inspectors have the power to:[37]

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[35] Maxwell Review, p.303

[36] For example, see Johnstone, Bluff and Quinlan, *Submission No.55*; Optus, *Submission No.96*; John Holland, *Submission No.107*; ACCI, *Submission No.136*; VECCI, *Submission No.148*; VACC, *Submission No.152*; Business SA, *Submission No.22*; Ergon Energy Corporation, *Submission No.94*; MBA, *Submission No.9*; APESMA, *Submission No.33*; ACTU, *Submission No.214*; AMWU, *Submission No.217*; National Safety Council of Australia, *Submission No.180*

[37] ACCI, Submission No.136, p.47; VECCI, Submission No.148, p.25; VACC, Submission No.152, p.28; Business SA, Submission No.22, p.56;

- make inspections;
- require the production of documents; and
- take samples.

41.71 Each of these submissions also suggested that a comprehensive list of inspector powers would ensure accountability and transparency on the part of the regulator.

41.72 Business SA indicated in its submission that inspectors should be required to request drug and alcohol testing of workers involved in serious incidents.[38]

41.73 Some submissions indicated a preference for inspector powers upon entry to be modelled on the provisions of the Victorian, NSW or Queensland Acts, with the NSW Act being the most preferred.[39]

41.74 The Victorian and South Australian Governments each indicated that the provisions of their respective Acts were a suitable basis for providing for inspectors powers of entry, while the Western Australian Government did not support inspectors' powers being addressed in the model Act at all as these were viewed as a jurisdictional issue. [40]

Discussion

41.75 To carry out the various roles referred to above effectively, an inspector must be able to:

- identify, have access to, obtain and consider all relevant information;
- where necessary, have the benefit of testing and analysis of plant or substances;
- take with them to the workplace a person to assist and advise them on technical matters;
- require owners, employers and others at a workplace to provide any assistance (including the provision of facilities) reasonably necessary to allow the inspector to exercise their powers and functions; and
- record information in a manner that will allow its future use, including in legal proceedings.

41.76 Each of the jurisdictions currently provide for this in different ways and to varying degrees. Subject to the comments below in relation to specific powers, we consider that inspectors should be provided with all of the powers currently available under all of the OHS Acts. That is, we recommend that the model Act consolidate all of the powers currently available to inspectors across Australia, with the following modifications or limitations.

Access to documents

41.77 The power to access documents should be subject to the availability of legal professional privilege, which we discuss in the next chapter. We agree with and adopt each of the recommendations of Maxwell noted at paragraphs 41.51-41.52 above.

41.78 Non-compliance with an inspector's lawful request or requirement under the model Act will be a contravention of the Act with significant penalties. Accordingly, the request or requirement must be clear and the person who is required to respond to it must be able to determine whether and how to respond. Where a request relates to the production of documents, the person to whom it is made should be able to understand the exact scope and detail of the request, to avoid unintentionally failing to provide documents that are the subject of the request.

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[38] Business SA, *Submission No.22*, p.38

[39] Johnstone, Bluff and Quinlan, *Submission No.55*, pp.34-35; MBA, *Submission No.9*, p.40; ACTU, *Submission No.214*, pp.47-49; AMWU, *Submission No.217*, pp.31-32; National Safety Council of Australia, *Submission No.180*, p.15; Ergon Energy Corporation, *Submission No.94*, p.24

[40] Victorian Government, *Submission No.139*, p.67; South Australian Government, *Submission No.138*, p.45; Western Australian Government, *Submission No.112*, p.32

41.79 As Maxwell noted, the person to whom the request is made may not be the owner of the documents, or authorised to have or provide the information. Legal professional privilege may apply, but only able to be claimed by the document's owner (e.g. a company) and not the individual to whom the request is made.

41.80 We therefore consider that the model Act should provide that a request for documents:

a) be made in writing, unless the circumstances require immediate access by the inspector to the information (e.g. where the inspector believes that there is an immediate and serious risk to the health or safety of a person or believe that the documents may be removed or destroyed if not taken immediately); and

b) be directed to the person with the ownership or authority to provide the document and claim any relevant privilege; and

c) provide a reasonable time for considering and responding to the request, except in the exceptional circumstances described in (a) .

The operation of plant or systems of work

41.81 We acknowledge that it is important for an inspector to have a good understanding of how plant or a system of work operates. We are, however, concerned that a power to require the operation of plant or a system of work may often cause considerable difficulty and cost for the person conducting the relevant business or undertaking, and is probably unnecessary.

41.82 In most cases, an inspector will have an opportunity:

- to be informed by witnesses of how plant or a system of work operates;
- to obtain technical advice on the operation of plant; and
- to witness the operation of the plant or system during the course of the conduct of the business or undertaking[41].

41.83 Compelling the operation of plant or a system of work may result in an inspector unnecessarily disrupting the business operation. Considerable expense and time may be required of the person to whom the request is made (e.g. in setting or 'tooling' the plant, using materials that may otherwise not be used, interrupting normal production schedules).

41.84 We recommend that the powers of an inspector to examine and observe plant and systems of work, and to test and analyse plant, not allow the inspector to require the operation of plant or systems of work.[42]

RECOMMENDATION 170

The model Act should provide for (a consolidation of) all of the powers currently provided in OHS Acts in Australia, that may be exercised by an inspector upon entry to a workplace, in relation to the following:

a) inspection, examination and recording, including

i) taking samples of substances and things (including biological samples);

ii) taking measurements and conduct tests (e.g. noise, temperature, atmospheric pollution and radiation);

iii) taking photographs and make audio and video recordings;

iv) requesting assistance from owners, employers and others at a workplace in exercising

[41] The provision of assistance to an inspector would clearly include informing the inspector of a time at which the plant or system of work will be in operation and provide the inspector with access to observe that operation.

[42] This is currently provided in s70(1)(c) of the NT Act and s78(d) of the ACT Act.

their powers and functions; and

b) access to documents; (subject to each of the matters recommended by Maxwell, the request being in writing unless circumstances of urgency otherwise require, and allowing reasonable time for the person to consider and respond to the request);

c) testing, analysis, seizure and forfeiture of plant (but not operation of it) and substances;

d) the taking of affidavits; and

e) the taking of persons who are providing assistance to an inspector in the proper exercise of a power or function, to a workplace for the purpose of providing such assistance (e.g. interpreters and technical experts).

Note: *The exercise of some of these powers may be subject to the availability of legal professional privilege or the privilege against self-incrimination*

Note: *Powers to ask questions, and associated rights and privileges, are the subject of Recommendations 179 to 199*

NOTICES AND DIRECTIONS

Current arrangements

Safety directions, warnings and cautions

41.85 A number of OHS Acts[43] specifically empower inspectors to issue oral directions to stop work, and (in most Acts) to rectify unsafe situations. Oral directions can typically only be issued where there is a serious and immediate risk to a person's health and safety and it is not practical to issue a written notice. The Tas and NT Acts both require oral directions provided by inspectors to be followed up in writing at the earliest convenience.

41.86 The Tas Review raised a concern about the right to appeal against an oral direction[44], namely, the ambiguity surrounding whether an oral direction that caused the cessation or substantial cessation of a business was subject to appeal under the Tas Act. This concern stemmed from the apparent condition that an appeal may only be made in regard to 'notices' issued.[45]

41.87 Article 13 of the *ILO Labour Inspection Convention 1947* (C81) requires inspectors to be empowered to take steps to remedy defects in plant, layout or work methods that they have reasonable cause to believe constitute a threat to the health or safety of workers. This is to be achieved by the power to order rectification within a specified time limit or immediately in cases of imminent danger to workers' health or safety.

Compliance Agreements

41.88 The concept of compliance agreements is found in the ACT Act.[46] Inspectors and employers can enter into voluntary 'compliance agreements' to rectify unsafe situations and practices in a co-operative fashion without resorting to formal enforcement and prosecution.

41.89 Compliance agreements do not result in any admission of fault or liability on the part of the recipient. Compliance agreements are also not admissible in civil or criminal proceedings in

[43] See s.120 of the Vic Act; s.45A of the Cwth Act; s.78 of the NT Act; s.38 of the Tas Act.
[44] Tas Review, pp.255-256 and see s.38 of the Tas Act.
[45] A similar issue may occur in relation to directions issued under s.120 of the Victorian Act, since such directions are not reviewable under s.127 of the Vic Act.
[46] See ss.124-129 of the ACT Act.

relation to the Act, and cannot be considered in relation to any other action taken under the Act (i.e., in the decision to issue an improvement or prohibition notice).

41.90 Under a compliance agreement, the employer or responsible person agrees to take specific measures to ensure compliance with the OHS Act. These measures and timeframe are specified by the inspector in the agreement. The relevant responsible person must tell each person whose work is affected by the agreement about it, give a copy to each person in control of a workplace where those persons work, and display the agreement in a prominent location at each premises affected by the contravention giving rise to the agreement, distributed to each person .

41.91 Failure to abide by a compliance agreement is not an offence under the ACT Act. However, failure to inform affected persons, or to display or distribute the agreement as required, or its unauthorised removal or alteration is an offence under the Act.

41.92 Where a compliance agreement is not given effect, it is still open to the inspector to use another enforcement tool, such as an improvement or prohibition notice.

41.93 The issuing of a compliance agreement provides a record of the advice given by the inspector, which provides certainty for the employer and is not open to recall bias that oral directions can lead to.

41.94 As noted earlier in Chapter 39, NSW has recently introduced CARs, which are similar to compliance agreements and seek to achieve similar goals; however they are implemented administratively rather than through legislation.

41.95 CARs support and promote the advisory focus of the regulator by allowing inspectors to provide a written record to the employer and employee representative of advice given during workplace visits and are intended for use during all workplace visits, not just intervention activities traditionally associated with advisory activities.[47]

41.96 CARs are not formal notices, are not enforceable, and do not replace enforceable notices or orders. However, they can be used in conjunction with notices or orders, such as an improvement notice. The purpose of the CAR is to:[48]

- provide written practical guidance to employers and workers;
- encourage employers to examine ways of improving safety management;
- assist inspectors and employers to interact through discussion rather than direction;
- direct users to additional resources and assistance;
- improve reporting on advisory activities; and
- assist in identifying advisory trends and designing future interventions.

Improvement Notices

41.97 The ability of inspectors to issue improvement notices exists under all Australian OHS Acts. An improvement notice is a written direction by an inspector requiring a person to remedy a breach of OHS legislation. Improvement notices are generally only issued for minor breaches of the OHS Acts but are not limited in this regard by any provisions of the Acts. Failure to comply with an improvement notice is an offence under all OHS Acts.

41.98 Improvement notices typically refer to a specific regulation or duty of care provision in the relevant OHS Act, set a time limit within which the duty holder must carry out the improvement, and in some cases may identify remedial action. However there are some differences in how each of these aspects is dealt with in detail.

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[47] NSW WorkCover, *Small Business Safety Program*, viewed on 14/01/2009 at http://www.workcover.nsw.gov.au/Documents/safebusiness/pdf/small_business_safety_program_factsheet_5169.pdf

[48] ibid

41.99 Not all OHS Acts require improvement notices to include directions to achieve compliance. The Qld, NT and Tas Acts specify that an improvement notice must include directions to achieve compliance. In all other OHS Acts the provision of directions and advice to achieve compliance is an optional inclusion in improvement notices at the discretion of the inspector.

41.100 All OHS Acts require a timeframe for compliance to be specified in the improvement notice, but the statutory minimum timeframe for compliance is inconsistent. Only the NSW Act provides a specific minimum timeframe for compliance; which is seven days from the date of issue of the notice[49]. Under the Vic, NT and Cwth Acts, the minimum time for compliance is limited to that considered 'reasonable' by the inspector, having regard to the nature of the breach.[50]

41.101 Under the SA Act, a person issued with an improvement notice must notify the Authority (via a 'statement of compliance') when the matters to which the notice relates have been remedied. The notification must be made within five business days of the remedy occurring. However, it is unclear whether the Authority would be aware if the matter had been remedied prior to the expiration of the timeframe specified in the notice or if the statement of compliance had been provided within the required five-day timeframe. A failure to provide the statement of compliance to the Authority within the required timeframe is punishable via an infringement notice.

41.102 All OHS Acts provide an appeals process against the issuing of an improvement notice. However, the statutory timeframes in which an appeal may be lodged are again inconsistent. Most OHS Acts[51] allow a 14 day appeal period, the NSW Act allows seven days and the ACT Act allows 28 days. The Commonwealth Act does not specify any timeframe for appeals. Only the WA Act directly links the timeframes for compliance with an improvement notice and the appeals process. This is achieved by specifying that an appeal against an improvement notice may be lodged at any time *prior* to the expiry of the timeframe for compliance.

41.103 Where such an appeal has been lodged, all OHS Acts, except the ACT and NT Acts, provide that the notice is suspended pending the outcome of the appeal. However, in Victoria and Queensland the suspension is not automatic but depends on either a decision of the Authority or a specific request from the appellant.

41.104 There are also differences in relation to action that may be taken regarding non-compliance with improvement notices. For example, the SA[52] Act allows the issuing of an on-the-spot fine ('expiation fee' or 'infringement notice') for failure to comply with an improvement notice, while the Vic Act only allows prosecution.

41.105 Additional detail on improvement notices is provided at Table 60 below.

41.106 The SA Review recommended that an improvement notices should be called a 'notice of agreed compliance' and require the employer to sign the notice, agree to a date by which the identified problem is to be rectified and notify the inspectorate when the problem has been addressed.[53]

41.107 Article 13 of the *ILO Labour Inspection Convention 1947* (C81), which is described above, is again relevant to inspectors' powers in this area.

[49] This was also the minimum time provided by s43(1) of the Vic 1985 Act.
[50] See s.111(2) of the Vic Act, s75(3) of the NT Act and s.47(3) of the Cwth Act.
[51] Vic, Qld, SA, Tas and NT.
[52] See s.39(4) of the SA Act.
[53] SA Review, Vol. 3, pp.89-91

TABLE 60: Contents of improvement notices

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT	Cwth
Details of the breach	s.91(4)	s.111(2)	s.117(3)	s.48(2)	s.39(2)	NS	s.75(3)	s.132(2)	s.47(3)
Reasons for opinion	s.91(4)	s.111(2)	s.117(3)	s.48(2)	s.39(2)	s.38(6)	s.75(3)	NS	s.47(3)
Period for compliance	s.91(2) S 7 days	s.111(2) R	s.117(3) NS	s.48(2) NS	s.39(3) NM	NS	s.75(3) R	s.132(2) NS	s.47(3) R
Require a response indicating compliance	NS	NS	NS	NS	s.39(2)	NS	NS	NS	NS
Timeframe for response	NS	NS	NS	NS	s.39(5) 5 days	NS	NS	NS	NS
Action required to comply	s.95 NM	s.111(3) NM	s.117(3) M	s.50(1) NM	s.39(3) NM	s.38(1) M	s.75(3) M	s.132(3) NS	s.47(4) NM
Compliance period may be extended	NS	NS	NS	NS	NS	NS	NS	s.134	s.47(5)
Notice to be displayed	s.102	s.115(2)	NS	s.48(3)	s.41	NS	NS	s.135(3)	s.47(8)
Appeals allowed	s.96	s.127	s.148	s.51	s.42	s.41	s.87	Unclear Part 7	s.48
Timeframe for appeals	s.96(2) 7 days	s.128(1) 14 days	s.149(3) 14 days	s.51(2) equal to period to comply	s.42(2) 14 days	s.41(1) 14 days	s.88(1) 14 days	Unclear s.177 28 days	NS
Notice suspended on appeal	s.96(5)	s.128(6) only if applied for	s.151 only if applied for	s.51(7)	s.42(3)	s.41(3)	NS	Unclear s.177(3)	s.48(4)

R 'Reasonable' period for compliance
S Specified period
NM Not mandatory
M Mandatory
NS Not specified

Prohibition Notices

41.108 Prohibition notices are one of the most consistently applied enforcement tools and are provided for in all jurisdictions. They are typically issued when an inspector is of the opinion that there is a contravention of the Act, involving an immediate[54] or serious[55] threat to health and

[54] In NSW Act, Vic Act, WA Act (serious and imminent risk), SA Act, NT (serious and imminent risk) and Cwth Act.
[55] In Qld Act, WA Act (serious and imminent risk), NT (serious and imminent risk), and ACT Act.

safety, and operate to prevent a specific activity from occurring. The Vic and Cwth Acts also allow prohibition notices to be issued to prevent the performance of an activity in a specified manner.

41.109 The specified activity generally cannot commence again until the matter has been reviewed and an inspector certifies that the risk has been removed. In some cases giving a prohibition notice can, in some cases, effectively shut down a workplace or a business while rectification is undertaken.

41.110 Most OHS Acts, apart from the Qld, ACT and NT Acts, allow inspectors to provide directions in the prohibition notice to assist with compliance. The provision of directions in prohibition notices is mandatory under the Tas Act.

41.111 Another common requirement in the majority of OHS Acts[56] is for prohibition notices to be displayed in a prominent position at the workplace and brought to the attention of, or copies provided to, each person affected by the notice (e.g. workers, HSRs etc). Where a prohibition notice is issued to an employee, the employee is typically required to provide a copy to the employer.

41.112 All OHS Acts provide for appeals against the issuing of a prohibition notice. However, the timeframes in which appeals may be lodged are inconsistent. The majority of OHS Acts[57] allow a fourteen day appeal period, while NSW and WA Acts allow seven days and the ACT Act allows twenty-eight days. The rules of the AIRC stipulate fourteen days for appeals against a decision to issue an improvement notice under the Cwth Act .[58] Prohibition notices generally remain in force throughout the period of an appeal.

41.113 Additional detail on prohibition notices is provided at Table 61 below.

41.114 The Maxwell Review recommended that prohibition notices should be able to be issued to prevent the performance of an activity in a specified manner, not just to prevent an activity from occurring.

41.115 In arriving at this conclusion, Maxwell noted that "…in many cases, the risk created by an activity arises not from the nature of the activity itself but from the manner in which it is being conducted"[59] and provided the following example:[60]

> *"Assume… 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.*
>
> *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."*

41.116 Maxwell also considered the use of the term 'immediate risk', which is generally used to prescribe the situations in which a prohibition notice can be issued. Maxwell believed that the term was misleading and suggested that unless the relevant risk is present before the inspector's eyes, the power is not exercisable. Maxwell instead recommended that the issuing of prohibition notices should be dependent on the 'severity of the risk', not the immediacy.[61]

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[56] NSW, Vic, SA, WA, ACT and Cwth.
[57] Vic, Qld, SA, Tas and NT.
[58] Australian Industrial Relations Commission Rules 2007, rule 81(2).
[59] Maxwell, p.333
[60] ibid
[61] Ibid, p.334

41.117 The use of the term 'immediate risk' was also raised in the SA Review, which recommended the term 'immediate' not be used as it creates confusion on when a prohibition notice may be issued.

41.118 Article 13 of the *ILO Labour Inspection Convention 1947* (C81), which is described above, is again relevant to inspectors' powers in this area.

TABLE 61: Contents of prohibition notices

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT*	Cwth
Must contain details of the relevant provision of the Act	s.93(2)	s.112(2)	s.118(6)	s.49(3)	NS	NS	NS	NS	NS
Reasons for opinion that a breach has or will occur	s.93(2)	s.112(2)	NS	s.49(3)	s.40(2)	s.38(6)	s.76(3)	s.141(2) a	s.46(3)
Specify prohibited activity	s.93(2)	s.112(2)	s.118(6)	s.49(3)	s.40(2)	s.38(4)	s.76(3)	s.141(2) a	s.46(3)
Remedy must be certified by an inspector	NS	s.112(1)	NS	s.49(1)	s.40(1)	NS	s76(2)	ss.146-149	s.46(6)
Period for compliance	NS	s.112(1) until certified	NS	s.49(1) until certified	s.40(1) until certified	NS	s.76(2) until certified	s.146 until certified	s.46(3) R
Include action required for compliance	s.95 NM	s.112(3) NM	NS	s.50(1) NM	s.40(3) NM	s.38(1) M	NS	NS	s.46(8) NM
Notice to be displayed	s.102	s.115(2)	NS	s.49(4)	s.41	NS	NS	s.144	s.46(9)
Appeals allowed	s.96	s.127	s.148	s.51	s.42	s.41	s.87	Unclear Part 7	s.48
Timeframe for appeals	s.96(2) 7 days	s.128(1) 14 days	s.149(3) 14 days	s.51(2) 7 days	s.42(2) 14 days	s.41(1) 14 days	s.88(1) 14 days	s.177 28 days	NS
Notice not suspended pending outcome of appeal	s.96(5)	s.128(6)	s.151	s.51(7)	s.42(3)	s.41(4)	NS	s.177(3)	s.48(3)

* In the ACT a prohibition notice may also be issued to allow inspection and testing, or the investigation of an accident. A compliance period must be set for such notices and is also extendable.
R 'Reasonable' period for compliance.
S Specified period.
NM Not mandatory.
M Mandatory.
NS Not specified.

Infringement notices

41.119 Infringement notices, also known as on-the-spot fines, can be issued by inspectors under all OHS Acts except the WA and Cwth Acts. Infringement notices can apply for specific, often low-to-medium level offences under OHS legislation. Infringement notices are intended to be a penalty for a particular episode of non-compliance and highlight that the breach is serious enough to warrant a fine while avoiding court action.

41.120 Infringement notices do not necessarily require any action to be taken to rectify the matters that gave rise to the offence. Acceptance of an infringement notice generally does not result in any admission of fault or liability on the part of the recipient and in principle, once an infringement notice has been paid a person's liability for the offence is taken to be discharged and further proceedings cannot be taken for the offence.

41.121 The NSW and Tas Acts include specific provisions allowing inspectors to issue infringement notices for offences, with the detail of the offences for which infringement notices may be issued provided in the corresponding regulations.

41.122 The Vic Act provides for the development of regulations to address the issuing of infringement notices. However, at the time of writing this report no such regulations have made.

41.123 In the ACT, NT and QLD, infringement notices are not provided for or administered under the relevant OHS Acts. Instead, they are administered under separate Acts and regulations.[62]

41.124 There are significant differences between the various OHS Acts as to when infringement notices may be used, for what offences they can be issued and to whom they can be given.

41.125 In some OHS Acts, infringement notices may be issued for offences against the general duties, such as a failure to ensure the health and safety of employees. In other cases, the offences relate to more specific obligations such as a failure to display an improvement or prohibition notice. Under the SA Act,[63] infringement notices (expiation notice) can only be issued for a failure to comply with an improvement notice or to notify the Authority that the matter for which an improvement notice was issued has been remedied.

41.126 While most OHS Acts allow infringement notices to be issued to employers, others also allow them to be issued to employees[64], HSRs[65], registered organisations[66] and inspectors.[67]

41.127 There are also significant differences between the OHS Acts as to the size of the monetary penalties that may be imposed under infringement notices. For example, the penalty that may be applied under an infringement notice for contravening an improvement notice is $315 in SA, $400 in ACT (individual) and $1500 in NSW.[68]

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[62] In the NT infringement notices can be issued under, and only apply to offences against, the Work Health (OHS) Regulations 2006 (NT).
In Qld infringement notices can be issued by inspectors under the *State Penalties Enforcement Act 1999* (Qld). Infringement notice offences are specified in Schedule 5 of the State Penalties Enforcement Regulation 2000 (Qld). Inspectors may only issue infringement notices for offences against the Workplace Health and Safety Regulation 1997 (Qld).
In the ACT infringement notices can be issued by inspectors under the *Magistrates Court Act 1930* (ACT). Schedule 1 of the Magistrates Court (OHS Infringement Notices) Regulation 2004 (ACT) specifies offences that infringement notices can be issued for. Inspectors may only issue infringement notices for offences against the *Occupational Health and Safety Act 1989* (ACT)62 and Occupational Health and Safety Regulation 2007 (ACT).

[63] See ss.39(4) and 39(5) of the SA Act.

[64] In NSW, for failing to comply with the duties to take reasonable care and co-operate on OHS.

[65] In the ACT, for failing to distribute or notify a PIN to relevant persons.

[66] In the ACT, for failing to correctly authorise a representative or provide notification of authorisation or cancellation to the Authority.

[67] In the ACT, for failing to return an identity card after ceasing to be an inspector.

[68] It is unclear in NSW and SA whether these penalty amounts are for individuals or corporations.

41.128 The issue of infringement notices has been addressed in a number of recent OHS Reviews. The Reviews have consistently recommended their use, but in some cases with some caution.

41.129 The SA Review recommended the adoption of infringement notices as they would present "viable punitive penalties where current circumstances are not conducive to prosecution" (e.g. too costly or inefficient, or not in the public interest to proceed to full prosecution).[69] However, the SA Review also recommended infringement notices only be issued for a very limited number of offences and noted some potential negative consequences of their use, including:[70]

- employers 'building' fines into their running costs;
- possible inconsistency in application; and
- perceptions of infringement notices as a revenue raising scheme.

41.130 The NT Review shared some of these concerns. In cautioning on the use of infringement notices, the Review suggested that they should not be the major part of the enforcement mix. Rather, there should be ample provision for inspectors to select from a range of options, depending on the nature of the offence and the organisation concerned.

41.131 The ACT Review noted a number of successful prosecutions where the penalties imposed by the ACT Magistrates Court were less than or equivalent to the potential fine from an infringement notice. However, the ACT Review also observed that recording a conviction against the offender, in addition to the penalty, provided a powerful message to industry and an effective enforcement tool for the Authority.[71]

41.132 The NSW WorkCover Review expressed similar concerns to those of the ACT Review and recommended an enhanced penalty notice system be developed. The issues identified by the review included the level of penalties needed to act as an effective deterrent and the types of offences for which penalty notices could be issued. Importantly, the review drew attention to the need for checks and balances to ensure the consistent and transparent use of such notices.[72] The Stein Inquiry supported these recommendations.[73]

41.133 The Maxwell Review noted that in Victoria, even though the then legislation enabled the making of regulations for infringement notices, this had never occurred. Maxwell recommended that the making of provisions for issuing infringement notices should occur 'without delay' and that:[74]

> *"…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."*

41.134 Maxwell also agreed with the recommendation by the Australian Law Reform Commission[75] that the level of penalty for infringement notices should not exceed 20 per cent of the maximum penalty that could be imposed by a court for the offence.

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[69] SA Review, pp.92-96
[70] ibid
[71] ACT Review , p.77
[72] NSW WorkCover Review, pp.60-61
[73] Stein Inquiry, pp.105-107
[74] Maxwell Review, pp.347-349
[75] Australian Law Reform Commission, Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, Discussion Paper 65, 2002(b) p.418.

Non-disturbance notices

41.135 A number of OHS Acts [76] empower inspectors to issue 'non-disturbance' notices.[77] These notices prevent the movement, interference with, or disturbance of specified plant, items, substances, work areas or premises and are often used in the investigation of serious workplace incidents.

41.136 The ACT Act allows for this through the issuing of a prohibition notice.[78]

41.137 In NSW[79] these notices are supported by provisions which prevent the disturbance of 'serious incident' (e.g. death or serious injury) scenes for a period of 36 hours. An inspector may attend a scene and issue an 'investigation notice' to extend the period of non-disturbance. The investigation notice may operate for a period not exceeding seven days, as specified in the notice, but may be renewed more than once by issuing another investigation notice.

41.138 The NT Act includes similar provisions which allow the Authority to direct that the scene of a reportable incident not be disturbed until an inspector has attended and investigated the incident. However, the period of non-disturbance is not restricted, nor are inspectors able to issue 'investigation' or 'non-disturbance' notices.

41.139 The Maxwell Review supported including provisions in the Vic Act similar to those in the NSW Act, and empowering inspectors to issue non-disturbance notices to prevent the disturbance of incident scenes, particularly in cases of death or serious injury.[80]

Revocation and alteration, defects and errors

41.140 All OHS Acts provide that a notice issued by an inspector may be revoked, varied or altered by the Authority or other review body on appeal. The issue of appeals and decisions that may be reviewed is dealt with later in this Report. Some OHS Acts also allow inspectors to revoke, vary or alter a notice.

41.141 Under the Tas Act , a notice issued by an inspector may be revoked by another inspector or the Director of the Authority.[81]

41.142 The Cwth Act allows inspectors to vary or revoke an improvement or prohibition notice previously issued.[82]

41.143 The ACT and Cwth Acts[83] also permit an inspector to vary or extend the period for compliance under an improvement notice, provided the original timeframe for compliance has not already expired.

41.144 The NSW and Vic Acts make provision about errors or defects in notices issued by inspectors. Under the NSW Act[84] a notice may be withdrawn by an inspector or the Authority if the notice was issued in error or is incorrect. On the other hand, the Vic Act[85] provides that formal irregularities or defects in notices do not invalidate the notice, subject to certain criteria.

41.145 The Maxwell Review[86] considered the issue of errors and defects in notices and recommended that the then Act be amended to protect notices against challenge on grounds of technical (as opposed to substantive) non-compliance. Maxwell indicated that this could best be

[76] See s.89 of the NSW Act; s.110 of the Vic Act; s.43(1)j of the WA Act; s.66 NT and Cwth.
[77] In NSW these are referred to as 'investigation notices'.
[78] See s.139 of the ACT Act.
[79] See ss.86, 87 and 89 of the NSW Act.
[80] Maxwell Review, p.315
[81] See s.38(7) of the Tas Act.
[82] See ss.46(11) and 47(10) of the Cwth Act.
[83] See s.134 of the ACT Act and s.47(5) of the Cwth Act.
[84] See s.99 of the NSW Act.
[85] See s.116 of the Vic Act.
[86] Maxwell Review, pp.342-344.

achieved by simplifying the content requirements of notices issued by inspectors to only those necessary to inform the recipients of notices about:

- what they must do or refrain from doing, and by when;
- the consequences of non-compliance; and
- the availability of internal and external review of the notice.

41.146 Maxwell also considered that:[87]

> *"…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."*

41.147 Consequently, Maxwell proposed that the Act be amended to address this concern.

Stakeholder views

41.148 The ability of inspectors to issue notices, and the associated requirements and limitations, was a topic on which we received a large number of comments.

41.149 There was almost universal support from stakeholder submissions for provision in the model Act for a wide range of enforcement tools, such oral directions, improvement and prohibition notices, and processes for their review.[88]

41.150 NatRoad supported the introduction of non-mandatory advisory notices, which would operate in a similar fashion to compliance notices.[89] That is to say that they could be issued by inspectors as a first option to ensure compliance, with escalation to improvement and prohibition notices if the issue is not appropriately addressed.

41.151 Consistent with stakeholder preferences for inspectors to be able to provide compliance advice, (see Chapter 39) the majority of submissions, including Unions NSW, ACCI and Telstra, also supported notices including directions and advice on achieving compliance.[90] A number of these submissions also indicated that any such advice and assistance should not be binding.[91]

41.152 A more diverse range of opinions was presented on the availability of infringement notices as an enforcement tool, timeframes for compliance with notices, the staying of notices during appeal and inspectors ability to modify, amend or cancel notices.

41.153 Opinion on infringement notices was evenly divided with opposition to their inclusion in the model Act predominantly arising from industry representatives such as the Minerals Council of Australia, WA Farmers Federation and Master Grocers Australia among others.[92]
Those who supported the use of infringement notices argue that they:[93]

- provide an effective deterrent for minor offences such as not wearing personal protective equipment; and

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[87] ibid

[88] For example, see Johnstone, Bluff & Quinlan, *Submission No.55*; Business SA, *Submission No.22*; ACCI, *Submission No.136*; AiG & EEASA, *Submission No.182*; Unions NSW, *Submission No.108*; ACTU, *Submission No.214*; Law Council of Australia, *Submission No.163*; Energy Networks Association, *Submission No.165*; HIA, *Submission No.175*; Australian Bankers Association, *Submission No.197*, p.14

[89] NatRoad, *Submission No.58*, p.3

[90] Unions NSW, *Submission No. 108*, p.48; ACCI, *Submission No.136*, p.52; Telstra, *Submission, No.186*, p.13, Appendix 2; National Safety Council of Australia, Submission No.180, p.16; CCI WA, Submission No.44, p.45

[91] Telstra, *Submission, No.186*, p.13, Appendix 2; Cement Concrete & Aggregates Australia, *Submission No.170*, p.23; Australian Bankers Association, *Submission No.197*, p.14

[92] Master Grocers Australia, *Submission No.109*, p.9; WA Farmers Federation, *Submission No.106*, p.3; Minerals Council of Australia, *Submission No.201*, p.40

[93] For example, see Unions NSW, *Submission No. 108*, p.48; Johnstone, Bluff & Quinlan, *Submission No.55*, pp.37-38; Commerce Qld, *Submission No.93*, p.9

- provide an alternative punishment where it may be costly, inefficient or not in the public interest to proceed to full prosecution.

41.154 Support for infringement notices was almost always tempered by a preference that they be reserved for non-complex, minor offences where the breach is clearly defined in law, the facts are easily verified and the evidence is non-controversial, and that such offences are clearly dictated in the model Act.[94] However, in some cases it was suggested that infringement notices should be used in conjunction with improvement and prohibition notices or where such notices have failed.[95]

41.155 Those who did not support infringement notices did so on the basis that:[96]

- the issuing of infringement notices may become a KPI for inspectors and potentially a revenue raising activity;
- infringement notices do not operate to improve OHS outcomes but rather serve to distract from managing more important OHS risks (i.e. people will tend to focus more on preventing infringement notice offences in the first instance rather than more serious offences such as breaches of the primary duty of care);
- they do not promote co-operative relationships with regulators; and
- the issuing of infringement notices applies a *guilty until proven innocent* approach, which can result in costly appeals processes.

41.156 All Australian governments supported allowing inspectors to issue infringement notices but stipulated that infringement notices should only be issued for minor, strict liability offences where a determination of 'reasonably practicable' is not required. [97] Most governments also believe that provision for infringement notices should be made under the model Act, The Victorian Government prefers that infringement notices are provided for in regulations rather than the model Act.[98] While the Queensland Government added that infringement notices generally should not be issued on their own but rather in conjunction with improvement and prohibition notices and prosecution.[99]

41.157 There was no clear consensus on whether a minimum timeframe for compliance with notices should be specified in the Act. The minimum timeframe for compliance with notices was variously recommended to be from 24-hours[100] to 14 days[101], or alternatively a period equivalent to the appeal period[102] or a 'reasonable' timeframe to be determined by the inspector taking into account the individual circumstances, including the nature and seriousness of the risk.[103]

41.158 Opinion on the stay of notices during appeal was divided. A number of submissions, including those of the Queensland and Tasmanian Governments, Unions NSW and the

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[94] For example, see Johnstone, Bluff & Quinlan, *Submission No.55*, pp.37-38; AICD, Submission No.187, p.13; HIA, *Submission No.175*, pp.29-30

[95] Babcock and Brown Power, *Submission No.97*, p.36

[96] For example, see Babcock and Brown Power, *Submission No.97*, p.35; Ramsay Health Care, Submission No.81, p.8; Minerals Council of Australia, *Submission No.201*, p.40; South Australian Wine Industry Association, *Submission No.127*, p.11; Cement Concrete & Aggregates Australia, *Submission No.170*, p.24; AiG and EEASA, *Submission No.182*, pp.62-63; ACCI, *Submission No.136*, p.53

[97] Queensland Government, *Submission No.32*; Commonwealth Government, *Submission No.57*; Tasmanian Government, *Submission No.92*; Western Australian Government, *Submission No.112*; NSW Government, *Submission No.137*; South Australian Government, *Submission No.138*; Victorian Government, *Submission No.139*

[98] Victorian Government, *Submission No.139*, pp.77-78

[99] Queensland Government, *Submission No.32*, p.31

[100] CFMEU, *Submission No.218*, p.35

[101] South Australian Government, *Submission No.138*, p.50

[102] ibid

[103] Victorian Government, *Submission No.139*, p.78

CFMEU,[104] indicated a preference that notices should not be stayed on appeal. The TFCA also agreed that notices should remain in force during an appeal but recommended that where, on appeal, it is found that a notice should not have been issued, compensation should be available.[105]

41.159 A preference for notices to be stayed on appeal was expressed most strongly among industry representative submissions, including those of ACCI, the NSW Minerals Council, the Minerals Council of Australia and the Australian Meat Industry Council.[106]

41.160 On the other hand, a number of submissions, including those of the Western Australian and South Australian Governments and AiG, indicated that a stay on appeal should apply automatically to improvement notices but not prohibition notices, given the seriousness and immediacy of the risk to be averted by such notices.[107] Some of these submissions also indicated that, although a stay of operation on appeal should not apply automatically to prohibition notices, it should be possible to apply for a stay of operation.

41.161 A number of submissions from companies, industry representatives and professional associations, including the Law Society of NSW, MBA, AiG and Telstra indicated support for inspectors being able to modify, amend or cancel notices, but generally did not differentiate between different types of notices.[108] Reasons for providing this power included where:

- the notice was issued on an error of fact or contains incorrect information;
- there has been a change in circumstance warranting action;
- additional information relevant to the decision to issue a notice becomes available; or
- there was insufficient time for a person on who a notice was issued to make the required rectification/s.

41.162 Most submissions did not specify whether this power should only be available to the original issuing inspector or to any inspector with jurisdiction.

41.163 Those submissions which expressed opposition to inspectors having the power to modify, amend or cancel notices generally did so on the grounds that they believed it was more appropriate for such decisions to be made via the regulators internal review processes.[109]

41.164 Among governments, the Tasmanian, South Australian and Commonwealth Government submissions supported the amendment, modification or cancellation of notices by inspectors.[110] The South Australian Government indicated that this power would be appropriate where a notice or instruction needs to be superseded, amended for clarity or improvement,

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[104] Queensland Government, *Submission No.32*, p.31; Tasmanian Government, *Submission No.92*, p.21; Unions NSW, *Submission No.108*, p.48; CFMEU, *Submission No.218*, p.154; National Safety Council of Australia, *Submission No.180*, p.17;

[105] TFCA, *Submission No.66*, p.7

[106] Law Council of Australia, *Submission No.163*, p.32; Law Society of NSW, *Submission No.113*, pp.22-23; Australian Meat Industry Council, *Submission No.143*, p.10; Cement Concrete & Aggregates Australia, *Submission No.170*, p.24; NSW Minerals Council, *Submission No.183*, p.25; Minerals Council of Australia, *Submission No.201*, p.38; ACCI, *Submission No.136*, p.53; John Holland, *Submission No.107*, p.8;

[107] AICD, *Submission No.187*, p.12; Western Australian Government, *Submission No.112*, p.37; South Australian Government, *Submission No.138*, p.50; AiG & EEASA, *Submission No.182*, p.62; Telstra, *Submission No.186*, p.29

[108] For example, see CPSU/SPSF Group, *Submission No.230*; Law Society of NSW, *Submission No.113*; SIA, *Submission No.128*; AICD, *Submission No.187*; National Safety Professionals, *Submission No.129*; MBA, *Submission No.9*; Cement Concrete & Aggregates Australia, *Submission No.170*; NSW Minerals Council, *Submission No.183*; Minerals Council of Australia, *Submission No.201*; Property Council of Australia, *Submission No.185*; CCI WA, *Submission No.44*; AiG & EEASA, *Submission No.182*; Delta Electricity, *Submission No.79*; John Holland, *Submission No.107*; Ergon Energy Corporation, *Submission No.94*; Australian Vinyls Corporation, *Submission No.104*; Telstra, *Submission No.186*; Business SA, *Submission No.22*

[109] VACC, *Submission No.152*, p.29; Australian meat Industry Council, *Submission No.143*, p.9; TFCA, *Submission No.66*, p.6; National Safety Council of Australia, *Submission No.180*, p.16

[110] South Australian Government, *Submission No.138*; Tasmanian Government, *Submission No.92*; Commonwealth Government, *Submission No.57*

provide for flexibility of timelines, changes of address or other circumstances, or errors made in the notice or instruction, and further noted that:[111]

> *"The ability to alter the notice according to fair and transparent but non-bureaucratic procedures, is a benefit for both the regulator and recipients. Any alteration needs to be done in a manner which is clear to all parties affected by the notice and all parties involved should retain the right to object to the alteration (and request higher level review of the decision where appropriate)."*

41.165 The Tasmanian Government and Law Society of NSW suggested that an inspector's power to amend, modify or cancel a notice issued by the inspector should only be able to be exercised in consultation with the regulator.[112] The Commonwealth Government recommended that decisions by an inspector to modify, amend or cancel a notice should be subject to internal and external review processes.[113]

41.166 The Western Australian Government was supportive of inspectors being able to modify, amend or cancel notices in very limited circumstances such as for minor typographical errors, or incorrect dates or sections of the Act referred to, but indicated this should be left up to individual jurisdictions to decide. The Western Australian Government went further to say:

> *"As a general rule an "inspector" should not be able to modify, amend or cancel any notice/instrument (unless there is an obvious error and then the Interpretation Act could possibly be used to correct the error, which would depend on the type of error). It might be more appropriate for any modification, amendment or cancellation to only be done on review at a higher level than the inspector. Such a process would protect an inspector from any potential pressure from the recipient to change the notice in any way. It would also prevent any uncertainty or concern about different versions of a notice and whether there have been changes (and any question about how any changes came to be made)."*

41.167 The Queensland Government did not support the amendment, modification or cancellation of notices by inspectors on the basis that such actions should only occur through an internal review process.[114]

Discussion

Safety directions

41.168 Issuing 'safety directions' particularly oral directions, may often be an appropriate alternative step before issuing an improvement or prohibition notice.[115] Accordingly, we consider that the model Act should empower an inspector to do so.

41.169 Our attention was drawn to some potential difficulties in the use of safety directions. These would arise from a lack of clarity or limitation as to what the safety directions may contain or require the conditions for giving them, and the risk of misunderstanding where the direction is given orally. Concerns have been raised that safety directions are, or might be used as, an easy alternative to improvement or prohibition notices, or to produce the same outcome where such a notice could not be justified.

41.170 We consider that these difficulties do mean safety directions are inappropriate, but we accept that safeguards must be provided. We consider that the model Act should clearly specify:

- what a safety direction may require;
- when a safety direction may be given;

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[111] South Australian Government, *Submission No.138*, pp.45-47
[112] Tasmanian Government, *Submission No.92*, p.18; Law Society of NSW, *Submission No.113*, p.21
[113] Commonwealth Government, *Submission No.57*, p.6
[114] Queensland Government, *Submission No.32*, p.28
[115] The health or safety of persons may otherwise continue to be at risk while a written notice is drafted; the required step may be able to be undertaken immediately and quickly.

- that an oral direction must be confirmed in writing as soon as practicable; and
- that a safety direction may be the subject of the same process of review as other directions or notices issued by an inspector.

41.171 We consider s.38 of the Tas Act is a good example of the approach that could be taken in the model Act.

Improvement and prohibition notices

41.172 Improvement and prohibition notices have for many years been fundamental elements in securing compliance with OHS legislation and regulations, and requiring that a hazard or risk to work-related health or safety be eliminated or controlled. We recommend that the power to issue and assess compliance with these notices be available under the model Act to inspectors, and we note that there was no significant opposition to this.

41.173 In recognising the continued need for prohibition notices, we also agree with the views of Maxwell[116] who proposed that the use of the term 'immediate', which is generally used to describe the circumstances in which a prohibition notice may be issued, was misleading and suggested that unless the relevant risk is present before the inspector's eyes, the power is not exercisable. In our view, such literal interpretation is not in line with the intent of prohibition notices and could preclude the issuing of a notice in circumstances where there is a serious risk to health or safety that is not immediate, for example inappropriate handling of asbestos or other hazardous substances. As such we recommend that the issuing of prohibition notices should be dependent on the 'severity of the risk', not the immediacy.

41.174 As discussed in Chapter 39, we consider that the model Act should make it clear that an inspector can provide advice. In keeping with this recommendation and the majority view of submissions, we believe it is important that where an improvement or prohibition notice has been issued, the issuing inspector should, at their discretion, be able to make recommendations and provide such advice to the recipient of the notice as considered necessary to assist that person in complying with the notice. However, it should not be compulsory that such advice be followed or recommendations implemented.

41.175 As previously noted, all OHS Acts require a timeframe for compliance to be specified in the improvement notice. It is necessary that improvement notices include a timeframe for compliance otherwise the breach may be allowed to continue indefinitely. However, in some cases the timeframe for compliance may be a period expiring before the time within which a review of the notice may be sought. The effect of this is the curious position where a person may potentially be required to comply with a notice (or be in breach of a notice) that may subsequently be cancelled upon review. We therefore recommend that the minimum timeframe for compliance with an improvement notice should be consistent with the minimum timeframe allowed for seeking a review of the notice.

41.176 We note that there was some support in submissions for improvement and prohibition notices to be stayed upon appeal. We also note that there were compelling arguments made that this should not be the case for prohibition notices, since these notices are only issued in circumstances of serious or immediate risk to health and safety. The staying of the operation of prohibition notices would therefore allow a potentially serious or immediate risk to health and safety to continue until the outcome of the appeal. The continued exposure of persons at a workplace to such risk is unacceptable. We therefore recommend that a stay of operation on appeal should apply to improvement notices but not prohibition notices.

Non-disturbance notices

41.177 Similarly, we consider that the use of non-disturbance notices is appropriate in many situations, and that inspectors should have the power to issue them. Except in circumstances of urgency, the non-disturbance notice should be in writing. This will assist as evidence in the event

[116] Ibid, p.334

of a contravention, and provide clarity as to what is to be left undisturbed. Again, this was generally accepted by all stakeholders.

Infringement notices

41.178 Unlike other powers of inspectors relating to notices and directions, there was considerable disagreement among stakeholders about providing the power to issue infringement notices.

41.179 Those who support infringement notices consider that they provide an immediate 'message' to the offending duty holder and an immediate incentive to prevent a recurrence. Infringement notices are a quick and lower cost option than prosecution for enforcing minor breaches. Limited resources of the regulator and the delays and costs associated with a prosecution are such that a prosecution might not be taken for minor, technical (process) breaches. The result would be their going unpunished in the absence of a quicker, less complex response, such as the ability to issue an infringement notice.

41.180 Those who oppose the use of infringement notices do so because:

- the notices do not require any specific action to be taken by the offender to address the breach;
- the breach may be significant and justify a far higher penalty;
- once an infringement notice has been expiated a person's liability for the offence is taken to be discharged and further proceedings cannot be taken for the offence; and
- infringement notices may be less likely to be challenged, given the time and cost involved compared to the penalty, meaning that they might be more likely to be issued invalidly or inappropriately.[117]

41.181 We consider, on balance, that infringement notices can be a useful tool to secure compliance with specific administrative requirements. We recommend that the model Act provide for an inspector to have the power to issue an infringement notice. The matters in respect of which an infringement notice may be issued should be dealt with in regulations.

41.182 We recommend that the giving of an infringement notice be subject to the same review processes as provided in the model Act for other notices and directions of an inspector.

Compliance agreements

41.183 Compliance agreements may be a useful tool at the bottom of the enforcement pyramid, providing certainty that may not be present with oral directions or warnings. The compliance agreements may also be able to provide more flexibility than more formal tools such as an improvement notice.

41.184 We note, however, that an inspector is able to obtain the agreement of a person to undertake OHS improvements or measures, and that can be confirmed in a written report of the entry of the inspector to the workplace. We do not therefore see a need to add a further process.

41.185 We are also concerned that any agreement and surrounding interactions should be available when considering the subsequent issuing of notices, or for a prosecution. Knowledge is part of determining what is reasonably practicable and in assessing culpability for the exercise of prosecutorial discretion or sentencing.

41.186 We accordingly do not recommend that compliance agreements be provided for by the model Act.

[117] A concern often raised is that infringement notices may be used by an inspector to demonstrate 'performance', or used by a regulator as a measure of performance of an inspector.

Revocation and alteration, defects and errors

41.187 For transparency, persons affected by notices issued by inspectors should be able to seek alteration or revocation of the notice through internal (i.e. the regulator) and external (i.e. a court or tribunal) review mechanisms.

41.188 However, in the interests of co-operative compliance and reducing bureaucracy it is important that where a timeframe for compliance with a notice proves to be inadequate, inspectors should have discretion to amend that timeframe, providing it has not already lapsed. In making this determination we believe it will be necessary for the inspector to take into consideration (either through the inspectors own opinion or consultation with relevant parties such as HSRs) the individual circumstances of the person affected by the notice. We do not see this as an action to only be exercised by the inspector who originally issued the notice, since there are legitimate circumstances that may arise, which prevent the original inspector from attending to the notice.

41.189 We also see that there are legitimate circumstances where an inspector should have the power to make other minor amendments to notices, such as where a notice or instruction needs to be superseded, amended for clarity or improvement, changes of address or other circumstances, or to correct errors or references made in the notice. Such decisions to make changes should be open to review.

41.190 Inspectors should not be able to withdraw or revoke a notice, except upon ascertaining compliance with the notice. Rather, we see this as a role more appropriate for the regulator through formal channels of review.

41.191 We agree with the findings of Maxwell that notices should be protected against challenge on grounds of technical non-compliance and recommend that, in preventing such challenges, the model Act clearly state the minimal content requirements for notices and contain provisions similar to s.116 of the Vic Act.

RECOMMENDATION 171

The model Act should provide power to an inspector to issue the following notices and directions upon entry to a workplace:

a) safety directions;

b) infringement notices;

c) improvement notices;

d) prohibition notices; and

e) direction to leave a site undisturbed.

RECOMMENDATION 172

The model Act should clearly state:

a) the circumstances in which notices or directions may be issued;

b) on whom they may be issued;

c) requirements for confirmation in writing of any direction given orally;

d) procedures for service and display of written notices or directions; and

e) the availability of processes for review of a decision by an inspector to issue any notice or direction.

RECOMMENDATION 173

The model Act should provide that an inspector may, at their discretion, make recommendations and provide advice and assistance in improvement and prohibition notices, and that the actioning of such recommendations and advice is not compulsory.

RECOMMENDATION 174

For improvement notices, the model Act should provide that:

a) the minimum timeframe for compliance with an improvement notice should not be less than the timeframe provided to seek a review of the notice; and

b) an application for review of an improvement notice should automatically stay the notice.

RECOMMENDATION 175

For prohibition notices, the model Act should provide that:

a) the issuing of prohibition notices should be dependent on the 'severity of the risk', not the immediacy;

b) an application for review of a prohibition notice does not stay the operation of the notice.

RECOMMENDATION 176

Inspectors should be provided powers to make minor amendments or modifications to notices, including:

a) to extend the timeframe for compliance with the notice;

b) for improving clarity;

c) for changes of address or other circumstances; and

d) to correct errors (e.g. date) or references (e.g. to a section of an Act or Regulation).

Such decisions should not substantially change the effect of the notice and should be open to review.

INJUNCTIONS AND REMEDIAL INTERVENTIONS

Current arrangements

Injunctions

41.192 The ability to request an injunction (or compliance order) to ensure compliance with a notice issued by an inspector is available in the majority of OHS Acts.[118]. Injunctions may compel a person to take, or refrain from taking, a specified action.

41.193 Injunctions are generally required to be sought by the regulator, but in some cases can be sought by others, and may only be issued by a court. Failure to comply with an injunction is a contempt of court and can attract imprisonment.

41.194 Under the Vic, Qld and Tas Acts[119], an injunction can be sought to seek compliance with an improvement or prohibition notice.

41.195 The NT, ACT and Cwth Acts[120] allow injunctions to be sought if a person has committed, is committing or is likely to commit an offence against the Act.

[118] Vic, Qld, Tas, NT, ACT and Commonwealth.
[119] s118 of the Vic Act; s119 of the Qld Act; s42 of the Tas Act.

41.196 In all cases, the evidentiary requirements upon which an injunction may be sought are not specified in the OHS Act.

Remedial interventions

41.197 Inspectors in South Australia have the power to take action, or cause action to be taken by another, such as a contractor or consultant, to rectify an OHS issue identified in an improvement notice if the person to whom the notice was issued has not complied with the notice in the specified manner and timeframe. The cost of such action is charged to the offender.[121]

41.198 Similar provisions existed under the *Work Health Act 1986* (NT), but were repealed following the recommendations of the NT Review,[122] which found that:

> *"Whilst [such a provision] may have the effect of ensuring that remedial work is actually undertaken in the workplace, it fails to do this through an escalation of enforcement measures; that is, the enforcement triangle is thwarted. Such a provision runs the risk of subtly shifting the perceived sense of responsibility from the duty holder to the Authority."*

41.199 The ACT Act[123] grants inspectors similar powers to those provided under the SA Act, but they are only exercisable to prevent an 'imminent risk of serious harm'. The action may be taken even where an improvement notice or prohibition notice has been issued and the timeframe for compliance has not expired. The inspector must, to the extent reasonably practicable consult the occupier of the premises and the Chief Executive of the Authority about the action to be taken.

41.200 The SA and ACT Acts both allow the Authority to recover costs arising from the performance and exercise of certain functions and powers by inspectors.

41.201 The ACT Act provides that costs incurred by the Authority as a result of action taken by an inspector to prevent or minimise a risk[124] or the necessary destruction or disposal of a seized[125] or forfeited[126] item are recoverable by the Authority.

41.202 The SA Act[127] has a similar provision which allows the Authority to recover the costs of actions taken by an inspector to ensure compliance with an improvement or prohibition notice.

41.203 Inspectors in Queensland may issue a notice requiring the destruction of a workplace, relevant workplace area, plant or substance that is a serious risk to health and safety.[128] Similar provisions exist under the ACT Act, which allow inspectors to require the destruction of 'unsafe things'.[129]

Stakeholder views

41.204 A range of views was expressed regarding injunctions. Governments, unions, union organisations and professional associations generally supported provision for injunctions in the

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[120] s160 of the ACT Act; s79 of the NT Act; cl14 of Schedule 2 of the Cwth Act.
[121] SA Act, s.45.
[122] NT Review, p.140
[123] See s.81 of the ACT Act.
[124] See s.83 of the ACT Act.
[125] See s.87 of the ACT Act.
[126] See s.108 of the ACT Act.
[127] See s.45 of the SA Act.
[128] See s.123 of the Qld Act.
[129] See s.87 of the ACT Act.

model Act.[130] Opinion among industry representatives, employer organisations and companies was more evenly divided.[131]

41.205 Those who supported the model Act including provisions to allow the seeking of injunctions, typically saw the injunction as an alternative step to costly proceedings to prosecute, and an effective means of obtaining immediate compliance.

41.206 These same submissions generally also supported injunctions only being available to the regulator and only available from a court of law based on evidence of the breach.

41.207 The CPSU/SPSF Group noted that the ability to seek an injunction would be particularly useful where a prohibition notice has been ignored, since currently under some Acts the only option is to prosecute is this circumstance.[132]

41.208 The Queensland, Tasmanian and Victorian Governments also indicated support for provisions to seek injunctions under the model Act.[133] The Victorian Government further provided that injunctions should only be available where:

- there is evidence of a breach;
- there has been a failure to comply with a notice issued by an inspector; and
- an imminent risk is identified.

41.209 The Western Australian Government declined to express a view either way, noting that injunctive relief is already available in WA via general law, but did note that the ability to seek injunctions under the model Act could be advantageous since:[134]

- failure to comply with an injunction is a contempt of court and can attract imprisonment; and
- may carry the added weight of being issued by a Supreme Court as opposed to an inspector.

41.210 Similar to the points made by the Western Australian Government, those stakeholders who did not support the model Act including provisions for seeking injunctions generally argued that prohibition notices already allow the regulator to prevent an activity, and injunctions are already available under alternate legislation.

41.211 The South Australian Government indicated that it did not support injunctions in the legal sense, but rather preferred the achievement of a similar outcome via a prohibition notice issued by an inspector.[135]

41.212 There was no discussion identified in any submission regarding inspectors' powers under some OHS Acts, to carry out remedial interventions to rectify unsafe situations.

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[130] For example, see Queensland Government, *Submission No.32*; Tasmanian Government, *Submission No.92*; Victorian Government, *Submission No.139*; AWU Qld, *Submission No.84*; Unions NSW, *Submission No.108*; CPSU/SPSF Group, *Submission No.230*; Law Council of Australia, *Submission No.163*; National Safety Council of Australia, *Submission No.180*; AICD, *Submission No.187*

[131] For example, those supporting injunctions include Optus, *Submission No.196*; Telstra, *Submission No.186*; RailCorp NSW, *Submission No.150*; John Holland, *Submission No.107*; ACCI, *Submission No.136*; AiG & EEASA, *Submission No.182*; WA Farmers Federation, *Submission No.106*; Australian Motor Trades Industry Council, *Submission No.158*; Energy Networks Association, *Submission No.165*; HIA, *Submission No.175*.
Those who disagree with the model Act including provisions for injunctions include Law Society of NSW, *Submission No.113*; TFCA, *Submission No.66*; Master Grocers Australia, *Submission No.109*; Australian Meat Industry Council, *Submission No.143*; Cement Concrete & Aggregates Australia, *Submission No.170*; NSW Minerals Council, *Submission No.183*; Minerals Council of Australia, *Submission No.201*; Business SA, *Submission No.22*; CCI WA, *Submission No.44*

[132] CPSU/SPSF Group, *Submission No.230*, p.64

[133] Queensland Government, *Submission No.32*, p.32; Tasmanian Government, *Submission No.92*, p.22; Victorian Government, *Submission No.139*, p.79-81

[134] Western Australian Government, *Submission No.112*, pp.38-39

[135] South Australian Government, *Submission No.138*, p.51

Discussion

Injunctions

41.213 We consider that the model Act should include provision for injunctions (including interim injunctions) to be obtained to restrain a breach of a prohibition notice, or to compel compliance with an improvement notice after the expiry of the time for compliance. This provides a timely means for the regulator to ensure that breaches and health and safety risks are addressed, rather than having to wait for the lengthy process of prosecution.

Remedial interventions

41.214 A person conducting a business or undertaking will ordinarily be better placed than an inspector to determine, in the context of that business or undertaking, the best means by which a hazard or risk can be eliminated or minimised. There will be different costs (including disruption) associated with different means of elimination or minimise of risk. Permitting the intervention of the regulator to take action, in place of the person conducting the business or undertaking, may impose on that person costs that may be unnecessarily high, or require changes to the way in which the business or undertaking is conducted.

41.215 We consider that the regulator should only take direct remedial action where there is an immediate and serious risk to the health and safety of a person and the person conducting the business or undertaking in which the risk arises:

- is not available; or
- fails or refuses to comply with proper and reasonable directions of an inspector in respect of that risk.

41.216 The reasonable costs to the regulator in taking such action should be recoverable from the relevant obligation holders, but they should be able to challenge in a court or tribunal the need for, and the reasonableness of the action and associated cost. An applicant in such a challenge should have the onus of proving that the action or cost was not necessary and reasonable and, if necessary, satisfy the court or tribunal that the applicant would have taken adequate alternative action to remedy the breach or risk.

RECOMMENDATION 177

The model Act should make provision for the regulator to seek an injunction to:

a) restrain ongoing breach of a prohibition notice; or

b) compel compliance with an improvement notice after the time for compliance has expired.

RECOMMENDATION 178

The model Act should allow a regulator to take remedial action where:

a) there is an immediate and serious risk to the health or safety of any person; and

b) the person conducting the relevant business or undertaking in which that risk arises is unavailable, or they or another person fails or refuses to comply with proper and reasonable directions of an inspector in respect of that risk and the action taken by the regulator; and

c) the person is first informed of the intention of the regulator to take such action and recover the costs of the regulator from that person.

The costs of the regulator should be recoverable from the person conducting the relevant business or undertaking, or such other person to whom an inspector has properly issued a notice or direction in respect of the risk, but:

a) the person from whom recovery is sought shall be entitled to challenge in a court or tribunal the necessity for and reasonableness of the action and/or cost; and

b) that person shall have the onus of proving the action and/or cost was not necessary or was not reasonable.

CHAPTER 42: QUESTIONING AND RELATED PRIVILEGES AND RIGHTS

42.1 As we have noted above, to enable inspectors to perform their functions effectively, they should, among other things, have strong powers to obtain information. The information might be contained in documents, held electronically or provided orally by a duty holder or other person. The powers that we consider that the model Act confer on an inspector include powers to require the production of documents and to ask questions.

42.2 An inspector may obtain information relating to current circumstances at a workplace to enable the inspector to ensure ongoing compliance and the protection of health and safety. The information may indicate, or help to prove, a breach of OHS laws by the person supplying the information. That may flow directly from that information, or from other information discovered or obtained as a result of its having been provided.

42.3 Providing information to an inspector may assist in identifying or proving a breach of the legislation or regulations by the person providing the information.

42.4 As we have noted in our first report, breaches of the model Act and regulations (particularly those relating to duties of care) would be criminal in nature, with substantial potential penalties, including high fines and imprisonment. OHS must be promoted and supported through various compliance mechanisms. The deterrent effect of prosecution is a key part of securing that compliance. Nonetheless, a balance must be struck between the interests of the community and those exposed to work-related hazards and risks on the one hand and the rights of an accused person on the other.

42.5 We therefore believe that we must take account of the protections available to an accused person under the criminal law (both the common law and legislation) and review the extent to which they should be provided or limited in the model OHS Act.

42.6 The legal protections afforded by the law to an accused are usually referred to as rights or privileges. The rights and privileges that are most relevant to the obtaining of information, orally or in documents, are:

- the right to silence;
- the privilege against self incrimination; and
- legal professional privilege.[1]

42.7 The law provides for alternative legal protection where the right to silence and the privilege against self-incrimination are unavailable, through the availability of an immunity against the use of information obtained from the person (known as a 'use immunity') and in some circumstances an immunity against the use of information discovered from the information obtained from the person (known as a 'derivative use immunity').

42.8 A discussion of the law relating to each of these, and consideration of them in recent reviews not specific to OHS, is contained in Appendix E.

A summary of our recommended approach

42.9 To balance the interests of the community and the individual, we have developed and recommend an approach which is not currently applied in OHS legislation, although elements of the approach are commonly found in OHS Acts.

42.10 We recommend that different, but complimentary, rules apply to the two main purposes for which an inspector will seek information, being:

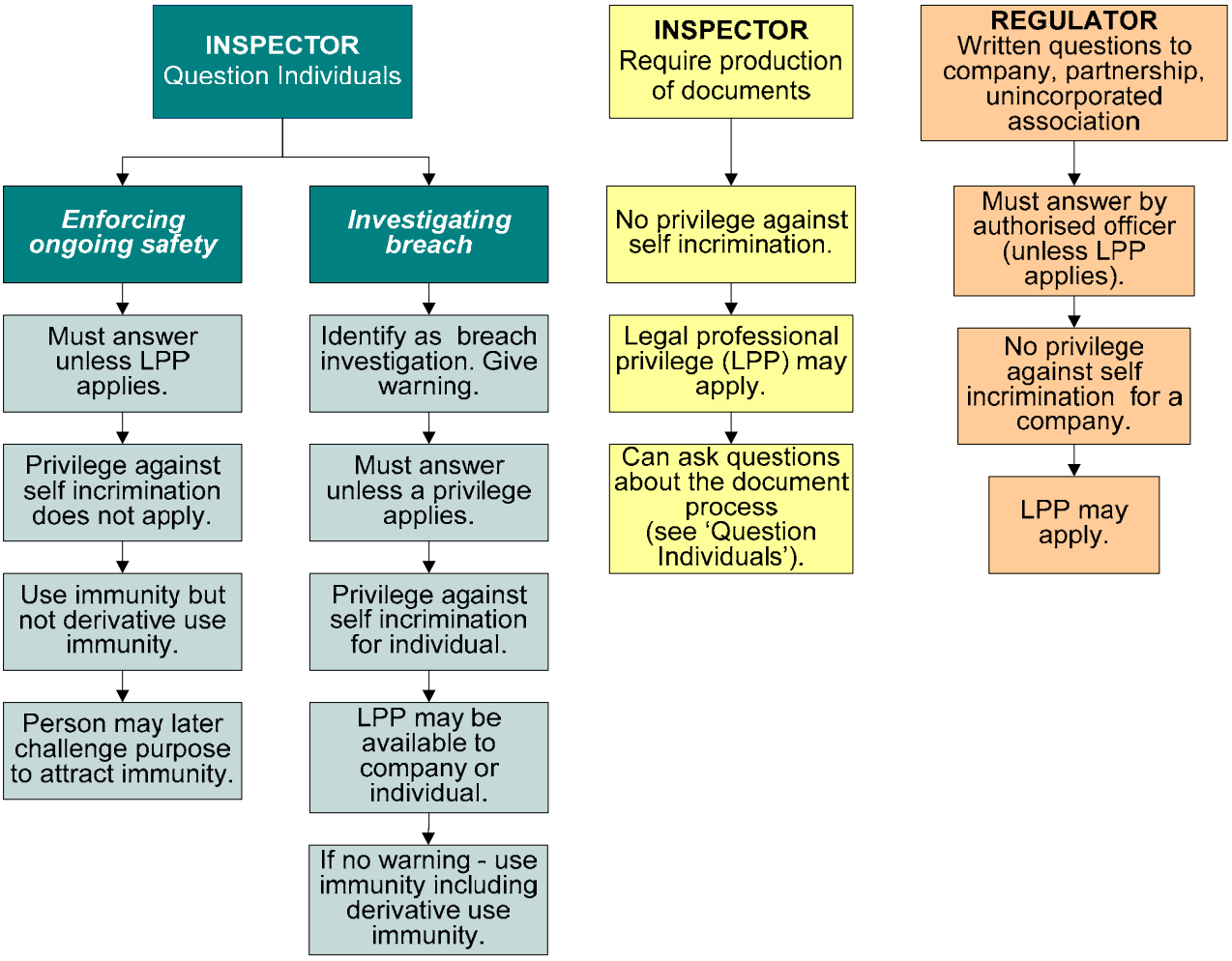
1. Enforcing ongoing compliance and securing health and safety; and

[1] We note that this term is replaced in the *Evidence Act 1995* (Cwth) by the term 'client legal privilege'. This reflects the fact that the legal right of being able to refuse disclosure of (in this case) documents containing legal advice may only be invoked by the principal party, not the legal adviser.

2. Investigating breaches.

42.11 To assist the reader to understand the issues and our approach, we provide in the following diagram a summary and comparison of the approach and rules we recommend be adopted in the model Act.

Regulator's powers to compel information



42.12 In recommending this approach, we seek to ensure:

- that the strongest powers to compel the provision of information currently available to regulators are available for securing ongoing health and safety; and
- that the rights of persons under the criminal law are appropriately protected.

42.13 It is our view that this can best be achieved by adopting the streamed approach that we recommend.

42.14 Each of these elements will be considered in turn in this chapter, identifying where the relevant principles are currently applied and why we recommend they be adopted in the model Act.

QUESTIONING, THE RIGHT TO SILENCE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

Current arrangements

42.15 All OHS Acts empower inspectors to ask questions and make enquiries upon entering a workplace (see Table 58 in Chapter 43).

42.16 The NSW, Vic, Qld, WA, NT and ACT Acts all allow inspectors to request individuals to provide their personal details (i.e. name and address) (see Table 58 in Chapter 43). Generally such a request can only be made if someone has committed an offence against the relevant Act. In some cases an inspector can also make such a request if they suspect a person is about to commit an offence against the relevant Act. The NSW and Qld Acts also allow inspectors to request reasonable proof of the person's identity.

42.17 The Maxwell Review [2] and SA Review[3] both found that it was important that inspectors be able to require the name and address of a person whom the inspector reasonably suspects has committed, is committing, or is about to commit, a breach of the Act. However, both reviews also identified shortcomings in the provisions of the relevant state Acts, which did not allow inspectors to request proof or evidence of the correctness of the response. As a result, each review recommended that inspectors have the power to request proof or evidence of the correctness of a person's name and address.

42.18 Maxwell proposed that the power to require a name and address should be identified separately from the general powers of inspectors.[4]

42.19 No OHS Act contains provisions that specifically refer to the right to silence. However, the majority of OHS Acts[5] contain provisions which require answers or information to be given in certain circumstances, subject to privilege against self-incrimination, reasonable excuse or a 'use immunity.' Such provisions effectively abrogate the right to silence in those circumstances.

42.20 In some OHS Acts, a person may refuse to answer inspectors' questions if the information may incriminate the person to whom the question was directed[6], or the information is subject to legal professional privilege.[7]

42.21 The Maxwell Review suggested that:

- inspectors' powers to ask questions should be explicit;
- inspectors should be required to provide a warning that a failure or refusal to answer the question is an offence; and
- a defence of 'reasonable excuse' should be available for a failure or refusal by the person to answer the question.[8]

42.22 Maxwell also suggested that:[9]

- it should be an offence to provide false or misleading information in response to an inspector's question; and
- if they have not already done so, inspectors should be required to show their ID Card where making such a request.

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[2] Maxwell Review, p.308
[3] SA Review, Vol. 3, p.99-100
[4] Maxwell Review, p.304
[5] NSW, Victoria, Western Australia, Tasmania, Northern Territory and ACT.
[6] In particular see the Vic and Qld Acts.
[7] In particular see the Vic, SA and Tas Acts.
[8] ibid, pp.307-308
[9] ibid

42.23 The SA Review recommended that inspectors should be able to direct a person to attend at specified premises at a specified date and time, to answer questions if the inspector has reasonable grounds to believe that the person can assist in respect of a possible breach of the legislation.[10]

42.24 The WA Review recommended that inspectors be given explicit powers to make audio recordings of answers provided[11] and the NT Review supported inspectors having powers to compel persons to answer questions.[12]

42.25 The common law privilege against self-incrimination entitles persons to refuse to answer questions, or produce documents, if the answer or the production would incriminate them.[13] The privilege also provides protection against self-exposure to a civil or administrative penalty.[14] The common law privilege against self-incrimination is not available to corporations.[15]

42.26 Most OHS Acts expressly abrogate or modify the privilege against self-incrimination (see Table 62 below).[16] Under the NSW, WA, Tas and ACT Acts, the privilege against self incrimination is expressly abrogated, subject to restrictions on the use of the material against the person in later proceedings (commonly referred to as 'use immunity'). In this way, individuals are not entitled to refuse to produce documents or information or answer questions, but information, which is provided by a person and that incriminates that person cannot then be used as evidence in proceedings against the person.

42.27 The NSW and Tas Acts also specifically provide that persons must be informed that they may object to providing statements, information or answers on the grounds of self-incrimination.

42.28 In Victoria, individuals may invoke their privilege against self incrimination; however this privilege does not apply to documents required to be provided under the Act.

42.29 The NT Act fully abrogates the privilege against self incrimination, while in Queensland, South Australia and the Commonwealth[17] the privilege against self incrimination is not abrogated or modified.

TABLE 62: Privilege against self-incrimination under OHS Acts

State	Section	Provisions
NSW	s.65	A person is not excused from providing statements, information or answers on the grounds that it may incriminate them. However, statements, information and answers provided may not be used as evidence in criminal proceedings against the person. Documents are still admissible as evidence in criminal proceedings against the person. Persons must also be warned that they may object to providing statements, information or answers on the grounds of self-incrimination.
Vic	s.154	A natural person may refuse to provide information on the grounds that it might incriminate them. The production of a document and the provision of a persons name and address are specifically excluded from the privilege of self-incrimination.

[10] SA Review, Vol. 3, pp.97-98
[11] WA Review, p.167
[12] NT Review, pp.144-146
[13] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328
[14] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477
[15] See *Environmental Protection Authority v Caltex Refining Company Pty Ltd* (1993) 118 ALR 392 at 412
[16] NSW, WA, Tas, NT and ACT Acts.
[17] The Commonwealth Act remains silent on the issue of privilege against self-incrimination, therefore this privilege appears to remain.

State	Section	Provisions
Qld	s.108(5), s.121(6), & s.122(3)	An individual may refuse to provide information on the grounds that it may incriminate them.
WA	s.47(2), (3) & (4)	A person is not excused from answering questions or providing information or documents on the grounds that it may incriminate them. However, such information provided may not be used as evidence in civil or criminal proceedings against the person. This exclusion does not apply to documents and evidence required to be provided to an inspector under s43(1)(i).
SA	ss.48(9) & 54(2)c	A person is not required to provide information if it would incriminate them of an offence.
Tas	s.37(3) & (4)	A person is not excused from providing information or answering questions on the grounds that it may incriminate them. However, such information provided may not be used as evidence in proceedings against the person. Persons must also be warned that they may object to providing statements, information or answers on the grounds of self-incrimination.
NT	s.94	A person is not excused from providing information required under the Act if that information would incriminate them.
ACT	s.123	A person is not excused from providing information on the grounds that it may incriminate them. However, such information provided may not be used as evidence in civil or criminal (some exclusions apply) proceedings against the person.
	s.78 (Note 3)	Section 170 of the *Legislation Act 2001* (ACT) provides that an Act or statutory instrument must be interpreted to preserve the common law privileges against self-incrimination and exposure to the imposition of a civil penalty.

Recent Reviews

42.30 The Maxwell Review recommended that the privilege against self-incrimination in relation to questioning be preserved, but that it should not apply to the requirement (a) to produce documents or (b) the requirement of a person to give an inspector his or her name and residential address or (c) to verify such details.[18] Maxwell also recommended that the privilege against self-incrimination not apply to corporations and that legal professional privilege be explicitly preserved.[19]

42.31 The Tas Review also recommended that the privilege against self-incrimination applying to questioning be preserved.[20]

Stakeholder views

42.32 The ability of an inspector to question individuals and other associated powers and privileges was not widely discussed in the submissions to the Review. Those submissions that did comment on these issues were usually made on behalf of governments, employer organisations, industry associations and unions, although several submissions from companies and professional associations also made comment.

[18] Maxwell Review, p.320, para 1527; p.324, paras.1546, 1549
[19] ibid, p.322, para.1535; p.324, para.1544.
[20] Tas Review, pp.254-255

42.33 Regarding interviews and questioning, the ACCI, VECCI, Business SA and Master Plumbers & Mechanical Services Association of Australia all indicated support for inspectors being given powers under the model Act to require the name and address of a person.[21]

42.34 The CPSU/SPF Group added that:[22]

- inspectors should have the power to make recordings of interviews and to require someone to attend another site (e.g. Authority's offices) for questioning; and
- as a matter of policy, in interviews with employers supported by private lawyers there should be two persons present from the regulator.

42.35 The Victorian and South Australian Governments each indicated that the provisions of their respective Acts were a suitable basis for providing for inspectors powers to conduct interviews and questioning, while the Western Australian Government did not support inspectors' powers being addressed in the model Act at all, as these were viewed as a jurisdictional issue. [23] Additionally, the Victorian Government indicated that in respect of the exercise of coercive powers, the model Act should impose a duty on inspectors to provide identification in specific circumstances.[24]

42.36 Similar to the recommendations in CPSU/SPF Group submission, the South Australian Government also suggested that inspectors should be able to require a person to attend another location for an interview with an inspector. The South Australian Government suggested that this would be useful in gathering evidence "in circumstances where deliberate evasion from the investigation process is apparent". In these circumstances, the South Australia Government suggested the 'normal' caution (which is presumably that it would be an offence to not comply with the direction of the inspector) would still apply for a natural person. [25]

42.37 With regards to legal protections during interviews and questioning, all submissions that discussed self-incrimination indicated support for preserving the privilege in the model Act.

42.38 The MBA recommended that:[26]

> *'Where criminal sanctions are proposed, OHS law should not modify the normal criminal standards in any respect including maintenance of the right to silence. If the right to silence is removed, there should be a strengthening of the fundamental protection against self-incrimination as is provided in the BCII Act.'*

42.39 Similarly, the AMWU and OneSteel consider that the model OHS Act should provide for protection against self-incrimination, with OneSteel noting that;[27]

> *'Should the model OHS Act create indictable offences which carry heavy monetary penalties and specific offences carrying terms of imprisonment, OneSteel considers this should tend against any abrogation of the privilege against self-incrimination. OneSteel does not consider that the privilege against self-incrimination should be available to corporations.'*

42.40 This view was shared by the Victorian Government, which indicated a preference that the privilege against self-incrimination should not be disturbed, except in relation to corporations, which should not possess such privilege.[28] The Victorian Government also added that existing

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[21] ACCI, *Submission No.136*, p.47; VECCI, *Submission No.148*, p.25; Business SA, *Submission No.22*, p.56; MPMSAA, *Submission No.156*, p.7
[22] CPSU/SPF Group, *Submission No,230*, pp.62, 64
[23] Victorian Government, *Submission No.139*, p.67; South Australian Government, *Submission No.138*, p.45; Western Australian Government, *Submission No.112*, p.32
[24] Victorian Government, *Submission No.139*, p.67
[25] South Australian Government, *Submission No.138*, p.48
[26] MBA, *Submission No.9*, p.37
[27] AMWU, *Submission No.217*, p.64; OneSteel, *Submission No.115*, p.21
[28] Victorian Government, *Submission No.139*, p.92,

evidentiary provisions, rights and protections in the general body of evidence law are adequate, and recommended there should be provisions in the model Act requiring inspectors to inform persons, who are subject to questioning, that they may refuse to answer any question if it would tend to incriminate him or her.[29]

42.41 The Law Society of NSW and Law Council of Australia also support protection from self-incrimination, along with 'use immunity' in the model Act.[30] Specifically, the Law Council of Australia commented that:[31]

> *"There must be clear and proportionate powers for the regulator (or another nominated investigative body) to conduct investigations at workplaces. However, these powers would not extend to include the power to require persons to answer questions that might incriminate them, with the protection that their answers cannot be used against them in a subsequent prosecution."*

LEGAL PROFESSIONAL PRIVILEGE

Current OHS laws and recent OHS reviews

42.42 Legal professional privilege ("LPP") is not abrogated or modified under any OHS Act in Australia. Some OHS Acts remain silent on the issue of LPP, while others specifically provide that LPP is available[32] (see Table 63 below).

TABLE 63: Legal professional privilege under OHS Acts

Jurisdiction	Section	Provisions
NSW	NA	Not specified.
Vic	s.155	A person is not required to provide information that is subject to legal professional privilege.
Qld	NA	Not specified.
WA	NA	Not specified.
SA	s.34(2)	Employers are not required to provided information subject to legal professional privilege to HSRs.
	ss.38(3) & 54(2)a	A person is not required to provide information that is subject to legal professional privilege.
Tas	s37(2)	A person is not required to provide information that is subject to legal professional privilege.
NT	NA	Not specified.
ACT	s.78 (Note	Section 171 of the *Legislation Act 2001* (ACT) provides that an Act or statutory instrument must be interpreted to preserve the common law

[29] ibid, p.67
[30] Law Society of NSW, *Submission No.113*, p.20; Law Council of Australia, *Submission No.163*, p.30
[31] Law Council of Australia, *Submission No.163*, p.30
[32] s155 of the Vic Act; s38(3)(a) and s54(2) of the SA Act. Note also s20(8) of the UK Act.

Jurisdiction	Section	Provisions
	3)	privilege in relation to legal professional privilege.
Cwth	ss.28(6) & 30(3)	Employers are not required to provided information subject to legal professional privilege to HSRs or HSCs.

Recent reviews

42.43 The Maxwell Review considered the issue of LPP and, while noting that the High Court had determined that LPP will only be taken to have been abolished by express language or clear and unmistakable implication, recommended that the then Victorian Act should explicitly preserve legal professional privilege as a form of "reasonable excuse".[33]

Stakeholder views

42.44 As already noted, the ability of an inspector to question individuals and other associated powers and privileges was not widely discussed in the submissions to the Review, with the specific issue of LPP only being discussed in a handful of submissions, including those of the Victorian Government and OneSteel.[34]

42.45 The Victorian Government considered that legal professional privilege should not be disturbed, and specified that "a capacity for a witness or duty holder to maintain legal professional privilege should also be maintained." The Victorian Government also suggested that existing evidentiary provisions, rights and protections in the general body of evidence law are adequate.[35]

42.46 OneSteel proposed that the model OHS Act should specify that:[36]

> *"…nothing in the Act or regulations entitles or requires a person to disclose information that is the subject of legal professional privilege or affects the law or practice relating to legal professional privilege."*

42.47 OneSteel indicated that s.155 of the Vic Act provides an acceptable model to achieve this.[37]

DIFFERENT ROLES REQUIRE DIFFERENT APPROACHES

42.48 We recognise that there are different imperatives and different circumstances relating to the exercise of powers for enforcing ongoing compliance and securing health and safety; and investigating breaches. These require different approaches to be taken for each of these roles of an inspector, to achieve the appropriate OHS outcomes and to balance competing interests and rights.

[33] Maxwell Review, pp.324-325
[34] Victorian Government, *Submission No.139*, p.92; OneSteel, *Submission No.115*, p.21
[35] Victorian Government, *Submission No.139*, pp.65, 92
[36] OneSteel, *Submission No.115*, p.21
[37] ibid

Discussion – the right to silence and privilege against self-incrimination

Should the right to silence and privilege against self-incrimination be available?

42.49 Inspectors will normally have physical evidence available to them when seeking to determine the state of health and safety at a workplace and compliance with the model Act and Regulations. Even so, an inspector may not be aware of all of the circumstances or may need certain aspects explained to him or her. For example, the inspector may need an explanation of complex systems of work, the operation of plant and equipment, chemical transformation, or the inter-relationship between various activities by persons.

42.50 The inspector may, therefore, need to have access to documents, or information and to have explanations provided orally. That information may indicate, or prove, a breach of the Act or Regulations by the person providing it. The right to silence and privilege against self-incrimination, described above, would ordinarily be available to the person being asked to provide the information.

42.51 The exercise of the right to silence is clearly capable of limiting the information that may be available to an inspector. That may compromise the ability of the inspector to ensure ongoing health and safety protection, or to prove a breach of the Act or Regulations.

42.52 For this reason, we must consider whether or not the accepted rights to silence should be removed or limited in the model Act. In so doing, we consider the reason for the existence of that right, and limitations placed on that right by the Courts. We refer the reader to the discussion of the law and justifications for the privilege, in Appendix E.

42.53 We consider that securing ongoing compliance with the model Act and Regulations, and ensuring ongoing health and safety, are sufficiently important objectives as to justify some limitation of the right to silence.

42.54 In our view, the model Act should clearly require a person to provide information, including by answering questions, where that information is needed for this purpose.

42.55 The protection of health and safety justifies requiring a person to provide information to an inspector even though that information may assist an inspector to prove a breach of the model Act or Regulations, or lead to the discovery of other information that may do so. We consider that the availability to the inspector of the information should not be limited by the availability of a privilege against self-incrimination.

42.56 We note the following relevant factors[38] which have persuaded us to this view:

- the immediate protection of one or more persons from a risk of death or serious injury should be considered to be of greater social utility than the protection of an individual's right to silence where a breach might be disclosed by the information;
- the rights of the individual required to provide the information can otherwise be protected, for example, by prohibiting or limiting the use of the information in legal proceedings for a breach of the model Act or Regulations (allowing the information to be available for immediate health and safety protection, without directly exposing the person to criminal liability); and
- as the facts may be acquired by the inspector by other means, requiring the person to provide the information may simply expedite that occurring.

42.57 We also note that the rationale for the privilege against self-incrimination not being available to a corporation is equally valid in relation to the right to silence.[39] Because the privilege

[38] See Appendix E for a discussion of these factors.

against self-incrimination is not available to a corporation, the issue of the right to silence is predominantly (if not entirely) only relevant to a natural person.

42.58 OHS Acts in a number of States directly or arguably by implication abrogate the right to silence, by requiring a person to answer questions and provide information.[40] We are aware of legal arguments that may be raised as to whether or not those provisions abrogate the right to silence. We consider the model Act should make the position clear.

RECOMMENDATION 179

The model Act should include a requirement that a person must answer questions and provide information requested by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.

RECOMMENDATION 180

A person should not be entitled to rely on a privilege against self-incrimination in response to a request for information by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.

How might the rights of a person otherwise be protected?

42.59 We have referred to the social utility in abrogating the privilege against self incrimination by requiring a person to provide information. This is needed to ensure that the social objectives of OHS legislation are achieved. It must, however, be remembered that the person required to provide the information may in doing so be exposed, for certain breaches, to significant criminal penalties (which we have recommended in our first report may include imprisonment of up to 5 years). We also note that the potential penalties may provide an incentive to a person to provide false and misleading information (to the detriment of ongoing health and safety), and that the power to compel answers may be abused. We consider that it is desirable for an abrogation of the privilege against self incrimination be accompanied by safeguards to prevent these outcomes.

42.60 A person from whom an inspector is seeking information should be entitled to be made aware of the purpose for which the information is sought, how it may affect them, and any rights that they may have in relation to the provision of that information.

42.61 Later in this chapter we recommend[41] that the privilege against self-incrimination be available to a person in respect of information sought during an investigation of a breach of the model Act or Regulations. We also recommend below that the inspector inform the person of the availability of that privilege. The power that we recommend an inspector have to require answers to questions and the provision of information for ongoing compliance and health and safety, without the availability of the privilege against self incrimination, should not be used to obtain information for the purposes of the investigation of a breach of the model Act or Regulations.

42.62 Accordingly, the model Act should protect the rights of the person providing the information in the following ways:

1. prohibiting the use of the information in any proceedings against the person providing the information for a breach of the model Act or regulations (the 'use immunity' referred to above);

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[39] See the discussion and references in Appendix E and in particular the discussion in *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477.

[40] For example, ss.59(e) and 62(1) of the NSW Act; s.9 of the Vic Act; s.38(1)(g) of the SA Act. Note also that s.20(2)(j) of the UK Act expressly requires the answering of questions.

[41] See Recommendation 189

2. requiring the inspector to inform the person from whom the information is sought that:
    a) the information is required for the purpose of ensuring compliance and ongoing health and safety protection;
    b) the person must answer the questions and provide the information;
    c) the privilege against self incrimination is not an excuse for failing to answer the questions or provide the information;
    d) the information may not be used in any proceedings against the person for a breach of the model Act or Regulations; and
    e) legal professional privilege may apply to the information that it is being sought;
3. in the absence of the inspector providing the information referred to in 2. above, it should be assumed that the information has been requested for the purposes of the investigation of a breach of the model Act or Regulations; and
4. if the inspector does not provide the information noted in 2 above, any information obtained or discovered by reason of the provision of the information by the person cannot be used in a prosecution against that person for a breach of the model Act or Regulations. This is the 'derivative use immunity' referred to above.

42.63 The Queensland Law Reform Commission (QLRC) has expressed the view that, where the privilege against self incrimination is abrogated, an immunity against the use of the information obtained as a result of the abrogation should generally be provided to compensate for the loss of that right and its concomitant protection.[42]

42.64 It is for this reason that we consider that the failure of an inspector to inform the person of the matters noted above should mean that the request for information is deemed to be a request relating the investigation of a breach; and in the absence of the information and warnings associated with a request of that nature, provide not only a 'use immunity' but also a 'derivative use immunity' to the person providing the information.

42.65 We consider that an appropriate balance must be struck between, on the one hand, the interests of society and those whose health and safety that is sought to be protected and, on the other, the interests of the person providing the information. The proposed combination of the abrogation of the right to silence and the privilege against self-incrimination, but with the availability of the relevant use immunities, would, in our view, provide that balance.

42.66 This approach is not a novel one. Most current OHS Acts provide for the abrogation of the privilege against self-incrimination, together with a use immunity.[43] An example of a requirement to give a warning before asking questions is s.100(3) of the Vic Act.[44]

42.67 Legal professional privilege is ordinarily only relevant to and available in relation to communications after an incident. It is therefore ordinarily only relevant to the investigation of potential breaches of the model Act or Regulations. Legal advice, and associated communications, prior to an investigation or attendance of an inspector at a workplace, would ordinarily relate to an explanation of what the law requires, how to comply with it, or whether a breach of the law has occurred. It will rarely relate to the circumstances in existence at the time of a visit by an inspector to a workplace and consideration of ongoing compliance and health and safety (unless the communications involving the lawyer occur at a time close to the visit of the inspector, or the circumstances have not changed).

42.68 Given the view that we have reached on the importance of maintaining legal professional privilege (see Recommendation *) and the unlikely or tenuous relevance of such communications to enforcing ongoing compliance and securing health and safety, we explain below why we

[42] QLRC, '*The Abrogation of the Privilege Against Self-Incrimination*', Report No 59, December 2004, p.94.
[43] See s65 of the NSW Act; s47 of the WA Act; s37 of the Tas Act; s94 of the NT Act; s123 of the ACT Act; see also s20(7) of the UK Act which provides a use immunity in relation to answers required to be given under s20(2)(j).
[44] This relates to the requirement to answer questions when requiring the production of documents.

consider that legal professional privilege should apply to requests by an inspector for information for that purpose.

RECOMMENDATION 181

The requirement that a person answer questions, and the unavailability of a privilege against self-incrimination, for the purpose of enforcing ongoing compliance and securing health and safety, should be subject to:

a) a specific prohibition against the use of the information in any proceedings against the person providing the information for a breach of the model Act or Regulations;

b) the inspector being required to inform the person from whom the information is sought that:
   i) the information is required for the purpose of ensuring compliance and ongoing health and safety protection;
   ii) the person must answer the questions and provide the information;
   iii) the privilege against self incrimination is not an excuse for failing to answer the questions or provide the information;
   iv) the information may not be used in any proceedings against the person for a breach of the model Act or Regulations; and
   v) legal professional privilege may apply to the information that it is being sought;

c) in the absence of the inspector providing the information referred to in b. above, it should be assumed that the information has been requested for the purposes of the investigation of a breach of the model Act or Regulations; and

d) if the inspector does not provide the information noted in b. above, any information obtained or discovered by reason of the provision of the information by the person shall not be able to be used in proceedings against that person for a breach of the model Act or Regulations.

RECOMMENDATION 182

A request for documents, for whatever purpose it is made under the model Act, would not be subject to a privilege against self-incrimination.

RECOMMENDATION 183

An inspector may ask questions about the circumstances in which a document came into existence and the means by which the document may be verified, and such questions would not be subject to a privilege against self-incrimination.

RECOMMENDATION 184

Questions relating to matters referred to within a document would be subject to the provisions relating to the asking of questions, as are applicable to the purpose for which the questions are asked.

Discussion – Legal professional privilege

42.69 We agree with the conclusions of the ALRC and Maxwell[45] that legal professional privilege should be maintained in the model Act. We consider that its objectives, particularly securing

[45] Maxwell Review, p.324, para 1549

ongoing compliance and protecting health and safety, would be compromised if duty holders felt constrained in obtaining legal advice about their obligations and how to meet them.

42.70 During consultation, we were told that the remedying of deficiencies following an incident may be compromised by "the lawyers running the show", and causing information to be withheld from workers for fear of incrimination. Concern has also been expressed that claims of legal professional privilege are made in relation to investigations and documents that were not commissioned for the dominant purpose of obtaining legal advice.

42.71 The ALRC specifically addressed this issue and considered the solution to lie not in the abrogation of LPP, but in the implementation and enforcement of procedures to ensure only proper reliance on the privilege. While it is a matter for procedure of the regulator, rather than a matter for the model Act, we encourage an appropriately robust approach be taken to verifying the validity of claims for legal professional privilege.

42.72 We also note that legal protection and the interests of ongoing safety following an incident need not be in conflict. Factual information gained during an investigation of an incident can, and we believe should, be made publicly available without compromising legal protection. It may also not benefit a person to rely on LPP where the information is otherwise available. Failing to disseminate and act on information that can be shown otherwise than through privileged communications to have been in the possession of a duty holder, may represent further breach by the duty holder.

42.73 In summary, we consider that the model Act should specifically state that nothing in the model Act shall in any way affect the availability of legal professional privilege, but that its proper use should be facilitated by guidance material from the regulator.

RECOMMENDATION 185

The model Act should explicitly provide that nothing in the model Act shall in any way affect the availability of legal professional privilege.

RECOMMENDATION 186

Legal professional privilege should be confirmed to apply:

a) to companies and to natural persons; and

b) to documents as well as statements.

RECOMMENDATION 187

If legal professional privilege is not explicitly confirmed in the model Act, then any provision that allows for a 'reasonable excuse' for not complying should explicitly include the availability of legal professional privilege as a reasonable excuse.

INVESTIGATION OF BREACHES

Discussion – the right to silence and privilege against self-incrimination

42.74 An investigation by an inspector of a possible breach of the model Act or Regulations will occur after an incident has occurred, or a breach has been identified by the actual or potential exposure of persons to risks to their health or safety. Where the risk is ongoing, then the matters referred to in the section above relating to *enforcing ongoing compliance and securing health and safety* are relevant.

42.75 The investigation of a breach of the model Act or Regulations will normally focus on the circumstances as they are and what has led to them, rather than a consideration of what is

necessary to ensure compliance and health and safety into the future. The investigation of a breach is, by itself, not acutely time sensitive (once the initial inspection of the site, taking of measurements and photographs etc has been undertaken) and not ordinarily subject to the imperatives for immediate provision of information for health and safety as referred to above.

42.76 We accordingly consider that there is less of a case for the compromise of the rights of a natural person (individual) from whom information is sought, during that investigation than there is for enforcing compliance and securing health and safety.

Right to silence and privilege against self incrimination for a natural person

42.77 A breach may be demonstrated from the facts and circumstances, with the conduct or omissions of a person measured against the relevant standard. It may be necessary, however, for the inspector to obtain information to enable those facts to be identified, or put into perspective. An individual, who may become an accused, may be the only person able to provide information as to the whereabouts of documents or things, or to explain certain facts, such as how machinery or systems of work operate. There may therefore be many circumstances in which a prosecution would fail through a lack of evidence, if the inspector was not able to obtain that information from the person.

42.78 Information relating to the existence or whereabouts of physical evidence, or providing an explanation of that evidence or circumstances (e.g. systems of work) will be 'neutral' and not directly incriminating. Requiring a natural person to provide that information will therefore not directly compromise their rights. On the other hand, a failure to require the person to provide that information may fatally compromise the investigation.

42.79 As the effective prosecution of offences is critical for the ongoing enforcement of OHS laws, we consider that a natural person should not be entitled to rely on a right to silence to refuse to answer questions during an investigation of breaches.

42.80 A requirement that a natural person provide information or answer questions during an investigation of breach should, however, be subject to the protections ordinarily available to a person accused of a criminal offence.

42.81 We accordingly recommend that the privilege against self incrimination be available to a natural person from whom information is sought during an investigation of breach of the model Act or Regulations.[46]

42.82 The Victorian Parliament Law Reform Committee, in its report, '*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*' recommended that statutes conferring powers of entry, search, seizure and questioning of authorised persons, should clearly state the purpose of every provision which confers powers and contain separate provisions for each identified purpose[47]. The Committee went further, recommending that particular legislation[48] should differentiate more clearly between powers granted for the purpose of acting in emergencies and those which inspectors can exercise where they reasonably suspect that an offence under the Act has been committed[49].

42.83 This approach is consistent with the approach that we recommend be taken in the model Act, differentiating between the exercise of the power to question and the availability of the privilege against self incrimination having regard to the different purposes for which an inspector seeks information.

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[46] An example of an incriminating answer may be providing information as to the knowledge of the accused of hazardous circumstances, particular risks, or the availability of particular risk controls, which will be relevant to determining what was reasonably practicable for that person.

[47] Victorian Parliament Law Reform Committee, '*Inquiry into the Powers of Entry, Search, Seizure and Questioning by Authorised Persons*', Parliament of Victoria, May 2002. See recommendation 2 at page xix.

[48] *Prevention of Cruelty to Animals Act 1986* (Vic)

[49] ibid, see recommendation 5.

42.84 The Committee recommended that the privilege against self incrimination should only be abrogated where it has been shown to be absolutely necessary for the adequate functioning of the relevant law; and that any answers given or documents or items produced are not admissible in evidence in any subsequent criminal proceeding, except where false answers are given[50].

42.85 We do not consider that the abrogation of the privilege against self-incrimination, together with a use immunity (as we recommend in respect of questions relating to securing ongoing compliance) would provide sufficient protection for the natural person, given the further incriminating evidence that may be discovered (or derived) from the information provided.

42.86 We recommend that the privilege against self-incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.

RECOMMENDATION 188

The model Act should require that a person answer questions asked by an inspector investigating a breach of the model Act or regulations.

RECOMMENDATION 189

The privilege against self incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.

RECOMMENDATION 190

Legal professional privilege should be available to a natural person or corporation in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.

RECOMMENDATION 191

The requirement that a person answer questions for this purpose should be subject to the requirement in Recommendation * that the inspector provide a warning to the person from whom the information is sought.

Corporations

42.87 A corporation is an artificial legal being that can only operate through its officers, employees and agents. A corporation does not have a memory other than as recorded in documents, or as constituted by the collective memory of its officers, employees and agents. While an individual may speak for themselves, a corporation may only do so through individuals who are authorised to speak for the corporation. The nature of a corporation brings with it challenges for the effective and fair investigation and prosecution of offences. Similar challenges exist in relation to other forms of collective organisation of businesses or undertakings, by way of partnership and unincorporated associations. In this part of this report we deal with those challenges and make recommendations.

42.88 The Commonwealth's 2004 *Guide to framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states that neither the privilege against self-incrimination nor any

[50] ibid, see recommendation 34 at page xxvii.

immunity against the use of self-incriminatory material should be conferred on a body corporate.[51].

42.89 The High Court has determined that the privilege against self incrimination does not apply to a corporation, unless legislation provides for it to apply[52]. That does not occur directly in OHS legislation in Australia, but can occur indirectly[53].

42.90 Information relevant to the activities or conduct of a corporation may be obtained through:

1. the documents of the corporation;
2. information provided, or admissions made, by persons authorised to do so on its behalf;
3. information provided by individuals in their own right (not representing the corporation); and
4. documents maintained by individuals personally, not being documents prepared for (and thereby owned by) the corporation.

42.91 The documents referred to in 1. above are the property of the corporation and should only be required to be provided by, or obtained from, persons authorised to do so on behalf of the corporation. Information provided by way of answer to questions should only be considered to be admissions on behalf of the corporation, where provided by a person authorised to do so on its behalf. Information of the kind referred to in 3. or 4. above may assist an inspector in finding evidence of a breach by a corporation, but should not be considered to be an admission of breach by the corporation.

42.92 A corporation suspected of breaching the model Act or Regulations will ordinarily be requested to authorise a person to attend an interview as a representative of the corporation. In some States and Territories questions must be answered and information provided. In other jurisdictions, the corporation need not comply with such a request, but if it does so, the person authorised to speak on its behalf may make admissions for the corporation.

42.93 An investigation of a breach by a corporation may relate to a broad range of circumstances and issues, which may not be within the knowledge of a particular person. The requirement for a corporation to authorise a single officer to respond to all questions may not be an effective means of obtaining all necessary information from the corporation. An incomplete answer by the authorised person (through limitation of knowledge) could be thought to be a evasive, or be taken to admit deficiencies. Information obtained from a corporation in this manner may accordingly be either unfair to it, or may be given less weight, or probative value.

42.94 Inspectors do not ordinarily provide details of the questions that may be asked. This does not assist a corporation to identify the most appropriate person to be authorised to speak for it.

42.95 There is also a practical problem in how the regulator or inspector can compel a corporation to answer questions. There is nothing in current OHS Acts that empowers a regulator to require a corporation to authorise someone to speak on its behalf. Even if that was provided, the identity of an appropriate person is likely to be an issue. A person who has sufficient knowledge to provide meaningful answers for the corporation may be so closely involved in the circumstances as to be susceptible to personal liability. That person could, quite properly, decline

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[51] *A Guide to framing Commonwealth Offences, Civil Penalties and Enforcement Powers* Commonwealth of Australia, 2004, p.87.

[52] see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178CLR477 at 503. At common law, a body corporate is not entitled to claim the privilege against self-incrimination: *Caltex* (1993) 178 CLR 477, *TPC v Abbco Ice Works* 123 ALR 503.

[53] Some OHS statutes in Australia provide specifically for the availability to a 'person' of the privilege against self incrimination. The legislation that provides for the interpretation of Acts in the relevant jurisdictions provides that a 'person' includes a body corporate. This means that the privilege is available to a corporation. Some States overcome this effect of the interpretation legislation by providing that the privilege against self incrimination is only available to a 'natural person' or 'individual'.

to accept the authorisation on the basis of the privilege against self-incrimination. A person not so closely involved may not be able to speak meaningfully for the corporation.

42.96 A means by which these difficulties may be overcome would be to require a corporation to answer in writing questions put to it in writing by the regulator.[54]

42.97 The corporation should be required to answer questions as to facts, but should not be required to answer questions as to law. This would mean that the facts would be available to the prosecuting authority, but the corporation would not be required to make admissions as to guilt (which would require a judgement on the law – which is for the courts to do).

42.98 We consider the following to be an effective process for obtaining credible evidence from a corporation, in addition to that otherwise available from individuals:

- the corporation would not have a right to silence;
- the privilege against self-incrimination would not apply to a corporation;
- a corporation would be required to provide documents;
- a corporation would not be required to authorise a person to answer questions on its behalf at an interview, but instead could be required to answer in writing questions as to facts (but not law) submitted to it in writing by the regulator; and
- a claim of legal professional privilege may be made in respect of requests for documents and answers to questions.

42.99 The limitation of written questions to matters of fact, not law, is consistent with the approach taken in the process of interrogation in civil litigation. We are also of the view that although a person may be properly required to assist in discovering facts that may demonstrate guilt, no person should be required to expressly make an admission of guilt.[55]

42.100 This process would mean that a corporation could not excuse a failure to answer on the basis that it did not 'know' the relevant information, as it would be able to make enquiries within the corporation. The need for a 'free ranging' enquiry with questions dependent upon earlier answers, may be met by allowing the regulator to make more than one written request for information. This process would not displace the power of an inspector to ask questions of an individual.

Partnerships and unincorporated associations

42.101 A partnership or unincorporated association each comprises the individuals who are members of it. Each member would be subject to the provisions of the model Act relating to questioning and requests for information by an inspector. Many partnerships and unincorporated associations are very large and operate through centralised administrative structures. Similar issues apply to them as to a corporation.

42.102 It may be useful for the requirement to provide written answers to questions that we recommend apply to a corporation, also apply to a partnership or unincorporated association. As those who may incur liability for a breach are natural persons, the privilege against self-incrimination should however, apply to a partnership or unincorporated association.

[54] An example of this is section 9 of the Vic Act. See also s27(1) of the UK Act.

[55] There is in our view a significant difference between facts which 'speak for themselves' and which may be otherwise discoverable in any event, and a direct admission of guilt.

RECOMMENDATION 192

The model Act should make clear that a corporation does not enjoy any right to silence or privilege against self incrimination and must respond, through its authorised officers, to requests for documents or information by the regulator or requests for documents by an inspector, subject to the availability of legal professional privilege.

RECOMMENDATION 193

The model Act should make clear that the members and officers of a partnership or unincorporated association do not enjoy any right to silence and must respond, directly or through their authorised officers, to requests for information from the regulator or an inspector. Such requests may be subject to the privilege against self-incrimination and legal professional privilege.

RECOMMENDATION 194

An inspector should have the power to require, by written notice, the production of documents from a corporation, partnership or unincorporated association. Such a request may be subject to legal professional privilege.

RECOMMENDATION 195

The regulator should have the power to ask questions as to facts (but not law), in writing, of a corporation, partnership or unincorporated association and answers in writing must be provided, subject to the availability of legal professional privilege or (in the case of members or officers of a partnership or unincorporated association) the privilege against self-incrimination.

Discussion – Legal professional privilege

42.103 As we have previously discussed, it would be common and appropriate for a duty holder (a corporation, self-employed person, officer or worker) to seek and obtain legal advice during the course of an investigation for breach of the model Act or Regulations. That advice may relate not only to whether or not a breach may have occurred, but also as to what may be necessary for ongoing compliance. It may also relate to the powers of the inspector or regulator and the legal rights and privileges of the person.

42.104 The promotion of ongoing compliance and the proper administration of the criminal justice system, support the availability of legal professional privilege in respect of investigations of breaches of the model Act or Regulations. We refer to the comments at paragraphs 42.69 to 42.73 and note that Recommendations 185 to 187 apply equally to the investigation of breaches as to the enforcement of ongoing compliance and securing health and safety.

RECOMMENDATION 196

Legal professional privilege should be available to a natural person or corporation in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.

The provision of information and warnings

42.105 As discussed above, the possible lack of sophistication of a person being questioned, the potential legal complexities associated with the powers of the inspector and the rights and privileges of the individual, lead us to the view that an inspector should provide information (a warning) before seeking the information or asking questions.

42.106 The Victorian Parliament Law Reform Committee recommended that persons who are to be questioned by an inspector should, prior to such questioning, have their rights and obligations explained to them, including their right to rely on the privilege against self incrimination[56]. This is consistent with the obligation on an inspector under s.100(3) of the Vic Act.

42.107 We consider that the following information or warning should be provided to a person from whom information is requested, or of whom questions are asked, during an investigation of a breach:

- that the information is being sought or the questions are being asked for the purpose of an investigation of a breach of the model Act or Regulations by that person, or may (depending upon the information or answers) give rise to an investigation of a breach by that person;
- the person must provide the information, or answer the questions unless a relevant privilege is available to that person;
- the person shall not be required to provide the information, or answer a question if to do so may tend to incriminate them;
- legal professional privilege may apply in respect of the information sought; and
- the person is entitled to seek and obtain legal advice with respect to the request for information.

42.108 The provision of this information, which might be considered to be a warning, is necessary to balance the interests of the State and the person from whom the information is sought.

42.109 To encourage the provision of the information or warning by the inspector, we recommend that the model Act provide that any information obtained from or by reason of a request by an inspector without the provision of the information or warning by the inspector should not be available for use in evidence in any action against the person from whom the information was obtained (that is, the use immunity and derivative use immunity referred to above).

RECOMMENDATION 197

The requirement in the model Act that a person answer questions relating to the investigation of breaches should be subject to a requirement that the inspector warn the person from whom the information is sought:

a) that the information is being sought or the questions are being asked for the purpose of an investigation of a breach of the model Act or Regulations by that person, or may (depending upon the information or answers) give rise to an investigation of a breach by that person;

b) the person must provide the information or answer the questions unless a relevant privilege is available to that person;

[56] Victorian Parliament Law Reform Committee, '*Inquiry into the Powers of Entry, Search, Seizure and Questioning by Authorised Persons*', 2002, R.34 and see discussion at p127 and following.

c) the person shall not be required to provide the information or answer a question if to do so may tend to incriminate them;

d) legal professional privilege may apply in respect of the information sought; and

e) the person is entitled to seek and obtain legal advice with respect to the request for information.

RECOMMENDATION 198

The model Act should provide that in the event of a failure by an inspector to give a required warning before requesting information from a person in the course of investigating a breach, a use immunity and derivative use immunity will apply to all information obtained by reason of the request.

Managing the overlap between different purposes for questioning

42.110 An obvious question arises as to what occurs when the role of the inspector is mixed or changes during the course of an attendance at a workplace or the asking of questions.

42.111 The requirement of an inspector to give information or a warning to the person questioned, should direct the mind of the inspector to the true purpose of the questioning. The consequences of a failure to give the appropriate information and warning, being a derivative immunity, should ensure the inspector takes a cautious approach. If the inspector could be considered, through comments or conduct or circumstances, to have in fact been investigating a breach, then the derivative immunity would also apply.

42.112 If during the course of investigation of a breach an inspector identifies an ongoing health and safety concern or potential ongoing non-compliance, the inspector can make appropriate enquiries in relation to that. As the inspector is able, for that purpose, to require an answer without the availability of a privilege against self-incrimination, it is in the interests of safety (and the inspector) that the inspector inform the person of that reason for further questions.

OPPORTUNITY TO OBTAIN ADVICE AND CONSIDER A REQUEST

42.113 Our objective is that our recommendations, if accepted, will lead to a simple and easy to understand and apply model Act. OHS regulation is, however, an area of some complexity, particularly provisions for balancing the interests of effective enforcement and the civil rights of a person. We consider it to be appropriate for a natural person or corporation, partnership or unincorporated association to have an opportunity to obtain legal advice. This should be supported by a warning or advice from the inspector or regulator seeking to exercise a power.

42.114 Given the coercive nature of the powers and proposed penalties relating to a failure to co-operate with or comply with a direction of an inspector, the model Act should make clear that a person is not failing or refusing to comply, or hindering or obstructing an inspector in the exercise of powers, merely by seeking and taking a reasonable time to obtain legal advice. That legal advice may be needed to clarify:

- the nature, scope and application of the request for information or documents, including the precise detail of what is required to meet the request
- the applicability of the privilege against self-incrimination or legal professional privilege

RECOMMENDATION 199

The model Act should make clear that a person shall not be taken to fail or refuse to comply with a requirement, request or direction, or to hinder or obstruct an inspector in the exercise of powers under the Act, merely by seeking and taking a reasonable time to obtain legal advice.

Note: *This recommendation is supported by Recommendation 181 and Recommendation 197 in relation to the provision of information and warning to a person of whom a request is made, and Recommendation 198 providing for a use immunity and derivative use immunity for a failure to provide that information and warning.*

CHAPTER 43: PROTECTION AND OFFENCES RELATING TO INSPECTORS

43.1 In this chapter we discuss and make recommendations on the various protections that should be available to inspectors as well as offences against inspectors performing their roles and functions and exercising their powers being available where there is 'negligence' on the part of the inspector.

IMMUNITY

Current arrangements

43.2 Inspectors under all OHS Acts are protected from personal liability for things done or omitted in good faith and in connection with the exercise, or purported exercise, of powers, duties or functions under the Act (see Table 64 below). In Queensland the protection is also specifically limited by not being available where there is 'negligence' on the part of the inspector.[1]

43.3 Inspector protection typically only relates to civil liability, however, in the Northern Territory this protection has been extended to criminal liability.[2] The majority of OHS Acts also provide that any civil liability that would otherwise be incurred by an inspector, rests instead with the Crown.

43.4 With the exceptions of the NSW and Vic Acts, inspector protections are generally provided under the OHS Act. In NSW, protection of inspectors from personal liability is provided under s.240 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). Similarly, Victoria provides protection for inspectors from personal liability under s.22(5) of the *Accident Compensation Act 1985* (Vic).

TABLE 64: Protection of Inspectors

State	Immunity from liability
NSW	*Workplace Injury Management and Workers Compensation Act 1998* (NSW), s.240 – Inspector not personally liable for anything done under the direction of the authority in good faith in connection with the execution of the act.
Vic	*Accident Compensation Act 1985* (Vic), s.22(5) – Inspector not liable for anything done or omitted in good faith for the purposes of performing a duty or carrying out a power or function of the Authority under this or any other Act.
Qld	s.183 – Inspector not civilly liable for any act or omission made honestly and without negligence. Civil liability rests with the State.
WA	s.59 – Inspector not personally liable for anything done or omitted in good faith or in connection with the exercise, or purported exercise, of powers, duties or functions under the Act.
SA	s.51 – Inspector not personally liable for anything done or omitted in good faith or in connection with the exercise, or purported exercise, of powers or functions under the Act. Liability rests with the State.
Tas	s.44 – Inspector not personally liable for anything done or omitted in good faith or in connection with the exercise, or purported exercise, of powers or functions under the Act. Liability rests with the State.
NT	s.20 – Inspector not civilly or criminally liable for anything done or omitted in good faith or in connection with the exercise, or purported exercise, of powers or functions under the Act.

[1] Qld Act, s.183.
[2] NT Act, s.20.

State	Immunity from liability
	Civil liability rests with the Territory.
ACT	s.182 – Inspector does not incur civil liability for acts or omissions done honestly and without negligence for the purposes of the Act. Civil liability rests with the Territory.
Cwth	s.49 – Inspector does not incur civil liability for any act done in good faith in connection with the conduct of an investigation or the exercise of powers in relation to an investigation.

Recent Reviews

43.5 The Maxwell Review[3], Stein Inquiry[4] and Tas Review[5] all recommended that advice provided by inspectors should not result in any liability on the part of the inspector. The Maxwell Review also recommended that liability should continue to rest with the Crown.

Stakeholder views

43.6 As noted earlier in Chapter 39, the ability of inspectors to provide advice was consistently raised as a major concern in many submissions.

43.7 The majority of submissions support inspectors having specific roles, functions and supporting powers to provide advice and also indicated that where an inspector does provide advice, that advice should not result in any personal liability on the part of the inspector.[6]

43.8 The Australian Government, Telstra, HIA and National Safety Professionals further clarified that this immunity should only apply in those circumstances where the inspector provided the advice in good faith in the performance of their official functions or the exercise of their powers.[7]

Discussion

43.9 An inspector has a difficult role to play, being required to exercise judgement, make decisions and exercise powers, often with limited information and in circumstances of urgency. Many of their decisions are aimed directly at eliminating or minimising immediate and serious risks to health and safety. Inspectors should not be deterred from exercising their skill and judgement in such circumstances by the potential for legal liability.

43.10 We have recommended that the role of an inspector in providing advice on OHS should be explicitly recognised and supported. Concern has been raised in submissions and during consultation that inspectors are reluctant to provide advice for fear of incurring personal liability if they are wrong (even if unintended, adverse outcomes may result from incorrect or inadequate information provided to them).

43.11 We recommend that the protection from personal liability of an inspector be clearly provided in the model Act for the exercise (or purported exercise) in good faith by an inspector of his or her role, functions and powers. The reference to 'exercise in good faith' is important. While we consider it will be rare for an inspector not to behave in good faith, an inspector should be accountable for any loss suffered by others from any improper exercise or failure to exercise any

[3] Maxwell Review, p.264
[4] Stein Inquiry, p.76
[5] Tas Review, p.263, para 761
[6] Telstra, *Submission No.186*, p.28; Commerce Qld, *Submission No.93*, p.7; NSW Minerals Council, *Submission No.183*, p.23; HIA, *Submission No.175*, p.28; MBA, *Submission No.9*, p.40; National Safety Professionals, *Submission No.129*, p.40; Independent contractors of Australia, *Submission No.67*, p.3; OneSteel, *Submission No.115*, p.16; Ramsay Health Care, *Submission No.81*, p.8
[7] Commonwealth Government, *Submission No.57*, p.6; Telstra, *Submission No.186*, p.28; HIA, *Submission No.175*, p.28; National Safety Professionals, *Submission No.129*, p.40;

power or improper performance (or non-performance) of a function. In the absence of protection in the model Act, legal action may be taken in respect of such conduct[8]. We note that a consideration of what is 'good faith' will include all of the circumstances, such as the knowledge of the inspector.

RECOMMENDATION 200

The model Act should provide for immunity of an inspector from personal liability in relation to the bona fide exercise by the inspector of his or her role, functions and powers.

OFFENCES

Current arrangements

43.12 With the exception of the Cwth Act, all OHS Acts variously provide offences for:

- hindering or obstructing etc inspectors;
- assaulting etc inspectors;
- threatening, intimidating etc inspectors
- concealing information from inspectors;
- impersonating inspectors;
- providing false or misleading statements and documents to inspectors; or
- preventing others from assisting an inspector.

43.13 Some OHS Acts[9] provide a defence of 'reasonable excuse' to the above offences. For example, in the Northern Territory the defence of reasonable excuse may apply in situations where the inspector failed to identify themself or to warn a person that a failure to comply with a requirement or request was an offence.[10] In other OHS Acts these offences also extend to acts committed against persons assisting an inspector and to the act of inducing others to commit the offence. [11]

43.14 We understand the laws in each jurisdiction provide for the protection of public officials, through offences relating to obstruction or other misconduct in relation to them. This is relevant since, as indicated earlier in Chapter 38, in most instances ongoing inspectors are only permitted to be appointed from the ranks of the relevant State or Territory public service. This might also explain why some offences are not specified in the Qld, SA, Tas, NT and ACT Acts (see Table 65 in Appendix C).

43.15 Article 18 of the *ILO Labour Inspection Convention 1947* (C81) requires adequate penalties for obstructing inspectors and that they be effectively enforced.

Recent Reviews

43.16 The Maxwell Review supported offences for knowingly providing false or misleading answers to questions put by an inspector, or documents requested by an inspector[12], while the

[8] For example, an action for fraud, malicious damage or misfeasance or malfeasance in public office.
[9] See the Qld and NSW Acts.
[10] NT Act, s.74.
[11] For an example of an offence of inducing others to commit an offence, see the Vic Act, s.125(1)(a). For an example of an offence of committing an offence against an assistant, see the NT Act, s.73(b) and the Vic Act, s.125(1)(c), (2).
[12] Maxwell Review, pp.306-308

NT Review recommended creating new offences for obstructing and hindering inspectors.[13] The recommendations of each review have been implemented.

43.17 The Stein Inquiry questioned the use of 'reasonable excuse' as a defence to the offences of obstructing, hindering, threatening or intimidating an inspector on the basis that there were no identifiable circumstances where such an excuse could be warranted.[14] On this basis, Stein recommended that the defence of 'reasonable excuse' be removed from these offences.[15]

43.18 With regard to providing false or misleading information, the Stein Inquiry suggested in response to the identification of fraudulent activities in NSW, that new offences be created for false representation of qualifications, certificates, accreditations or registrations etc.[16] See Chapter 34 for a discussion on 'Permits and Licensing'.

Stakeholder views

43.19 The inclusion of provisions for offences against inspectors was only discussed in a handful of submissions, including those of the Victorian and Western Australian Governments, and OneSteel.[17]

43.20 The Victorian Government recommended that the model Act include the offences of hindering and obstructing inspectors when they are exercising their powers.[18] However, the Victorian Government also suggested the model OHS Act specify that before such an offence can be committed, the inspector must, where practicable, first identify themselves as an inspector with authority to exercise certain powers and warn the person that hindrance or obstruction is an offence.[19]

43.21 The Western Australian Government supported the Victorian Government recommendation but suggested that abuse or assault of an inspector should also be an offence.[20]

43.22 OneSteel believes that the model Act should incorporate offences for refusing or failing to comply with a requirement by an inspector, whether that requirement is to produce documents or to answer questions.[21] However, OneSteel also suggested that a defence of 'reasonable excuse' should be available, consistent with the Vic Act.[22]

Discussion

43.23 Consistent with our view that inspectors must be provided with support and protection in the exercise of their roles and powers, we consider that the model Act should include a consolidation of all offences relating to inspectors and inspections, currently provided in OHS Acts in Australia.

43.24 Given the importance of the role of the inspector, and that the inspector is the most immediate personification at the workplace of the regulatory system, offences in relation to inspectors and inspections should be considered to be serious and the subject of significant penalties.

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[13] NT Review, p.144
[14] Stein Inquiry, p.174
[15] ibid
[16] ibid, p.135
[17] Victorian Government, *Submission No.139*, p.66; OneSteel, *Submission No.115*, p.21; Western Australian Government, *Submission No.112*, p.41
[18] Victorian Government, *Submission No.139*, p.66
[19] ibid
[20] Western Australian Government, *Submission No.112*, p.41
[21] OneSteel, *Submission No.115*, p.21
[22] For example, see ss.100(2), 110(4), 120(2) and 121 of the Vic Act.

RECOMMENDATION 201

The model Act should provide a consolidation of the offences for assault and intimidation etc of an inspector in current OHS Acts.

The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered:

a) for a corporation – $250,000; and

b) for an individual – $50,000 and/or 2 years imprisonment.

RECOMMENDATION 202

The model Act should provide for the following additional offences:

a) hindering or obstructing an inspector in the exercise of functions and powers;

b) impersonating an inspector;

c) concealing from an inspector the existence or whereabouts of a person, document or thing; and

d) making false or misleading statements or providing false or misleading documents.

The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered:

a) for a corporation – $50,000; and

b) for an individual - $10,000.

CHAPTER 44: ACCOUNTABILITY OF INSPECTORS

44.1 The general conduct of inspectors (e.g. manner, professionalism etc) is typically not dealt with under OHS Acts. In this chapter we discuss the means by which inspectors may be held accountable when performing their roles and functions and exercising their powers and make recommendations on provisions in the model Act to address this issue.

Current arrangements

44.2 OHS and other legislation contain various means for ensuring the accountability of inspectors. A number of these means are discussed here.

Conduct – Review and disqualification

44.3 The general conduct of inspectors (e.g. manner, professionalism etc) is typically not dealt with under OHS Acts.

44.4 However, the action of public officials, which includes inspectors, is governed by a range of measures including codes of conduct and Public Service or similar Acts in each jurisdiction.

44.5 For example, the conduct of Commonwealth public servants is primarily governed by the *Public Service Act 1999* (Cwth) and the APS Code of Conduct.

44.6 These instruments are often supported by individual departmental policies and procedures that outline complaints and review processes.

44.7 A failure to comply with such instruments is punishable via a number of avenues, including, for example:

- termination of employment;
- reduction in classification;
- re-deployment or re-assignment of duties;
- reduction in salary;
- deductions from salary, by way of a fine; and
- reprimand.

44.8 The Victorian Parliament Law Reform Committee, in its report '*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*' recommended that the requirement for internal complaints mechanisms relating to inspectors powers be enshrined in legislation[1].

Conflict of interest

44.9 Only the SA and Tas Acts include specific requirements for an inspector to divulge a conflict of interest (see Table 66 below).

44.10 Under the SA Act,[2] an inspector is required to divulge to the Director of the Authority any 'pecuniary or other personal' interest in any business carried on at a workplace, which the inspector is to inspect. The inspector is not to proceed with such an inspection without the express approval of the Director. An inspector who fails to adhere to either aspect of this provision may be fined.

44.11 A similar provision exists under the Tas Act, however the inspector is not prevented from proceeding with the inspection nor are they required to seek approval. Additionally, the interest which is required to be disclosed to the Authority is limited to a 'financial' interest, whether direct or indirect, and is only required to be disclosed as soon as is reasonably practicable.

[1] Op. cit. Recommendation 28
[2] See s.38(11)

44.12 Similar requirements are also available in other jurisdictions but are provided under other relevant Acts guiding the conduct of public officials.[3]

44.13 The Maxwell Review noted that inspectors should be independent from the person under inspection, such that there is no conflict between duty and interest.[4]

44.14 Under Article 15 of the *ILO Labour Inspection Convention 1947* (C81), inspectors must not have any direct or indirect interest in any undertakings under their supervision.

Minimisation of disturbance and damage, and payment of compensation

44.15 The WA, Tas, NSW, Qld and ACT Acts each place obligations on inspectors to minimise disturbance or damage during the exercise of their functions and powers, although there are some minor differences in the wording of each (see Table 66 below).

44.16 The NSW, Qld and ACT Acts also provide that a person may seek compensation for any loss or expense incurred as a result of the exercise of a power or function by an inspector under the Act. The ACT Act also specifically extends the right of a person to claim compensation for any loss or expense incurred to that which occurs as a result of the actions of a person assisting an inspector. The Qld Act appears to provide a similar extension, although this is not explicitly stated.

Confidentiality and disclosure of information

44.17 The majority of OHS Acts require inspectors to maintain the confidentiality of certain information, subject to specific conditions and limitations on when such information may be disclosed (see Table 66 below). Disclosure outside of these specific limitations can result in penalties.

44.18 Although the confidentiality provisions are generally consistent, there are some minor differences in relation to what information the requirement applies to and the circumstances in which the information may be disclosed.

44.19 Information that is typically considered to be confidential in nature includes, among other things:

- information obtained throughout the course of their official duties or in connection with the administration or execution of the relevant Act;
- manufacturing and commercial secrets; and
- information relating to the personal affairs of a person (e.g. the state of a persons physical or mental health).

44.20 Some of the circumstances in which such information may be disclosed include:

- for the purpose of the performance of official duties;
- the information is required to be provided under another Act;
- the information is required by a court, tribunal, authority etc authorised by law to request such information;
- the disclosure of the information would be in the public interest;
- the person who provided the information, or to who the information relates has provided permission; or
- the information is already public.

44.21 NSW, ACT, NT and Vic Acts specifically extend the confidentiality of information requirements to current and former inspectors.

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[3] For example, see the *Public Service Act 2008* (Qld) and the *Public Service Act 1999* (Cwth).
[4] Maxwell Review, p.286

44.22 The NT Act also expressly provides that an inspector may disclose confidential information "to an agency responsible for the administration of legislation dealing with occupational health and safety in some other Australian jurisdiction".[5] The Qld, Vic and NSW[6] Acts incorporate provisions which would appear to allow similar disclosures.

44.23 The SA Act is the only Act which specifically prohibits an inspector from disclosing to an employer the name of a person who has made a complaint to which the inspector is responding.[7] A breach of this provision results in a fine.

44.24 Article 15 of the *ILO Labour Inspection Convention 1947* (C81) requires inspectors not to reveal:

- the source of complaints being investigated or intimate that an investigation is occurring as a result of a complaint; or
- during or following the completion of their service, any commercial or manufacturing secrets or processes obtained in the course of their duties.

TABLE 66: Inspectors accountabilities

State	Conflict of interest	Minimisation of disturbance	Minimisation of damage	Compensation	Confidentiality and disclosure of information
NSW	–	–	s.61	s.56	s.137
Vic	–	–	–	–	s.10
Qld	–	–	s.128	s.125	s.185C
WA	–	s.43(3)	–	–	–
SA	s.38(11)	–	–	–	s.55
Tas	s.43(4)	s.36(7)	–	–	s.43(1)
NT	–	–	–	–	s.18
ACT	–	s.116	s.116	s.117	s.211
Cwth	–	–	–	–	–

Discussion

44.25 The ability of an inspector to effectively carry out his or her various roles in a workplace depends in part on the credibility of the inspector and the inspectorate more broadly. Just as inspectors should be given broad powers and protections, there should be accountability for their conduct. That accountability should be both the review of the merits of decisions made by them, and providing for review of their conduct more broadly. Improper conduct by an inspector should result in serious consequences.

44.26 We recommend that the model Act specifically provide for circumstances in which the authorisation of an inspector may be suspended or cancelled. The model Act should include a consolidation of all of the provisions noted in this chapter, presently included in OHS Acts relating to the accountability of inspectors and their liability for improper conduct.

[5] See s.18(2)a of the NT Act.
[6] In NSW the Minister may approve the disclosure of confidential information if it is considered to be in the public interest.
[7] See s.55(2) of the SA Act.

RECOMMENDATION 203

The model Act should specifically provide for circumstances in which the authorisation of an inspector may be suspended or cancelled.

RECOMMENDATION 204

The model Act should include a consolidation of provisions presently included in OHS Acts relating to accountability of inspectors, confidentiality of information, and their liability for improper conduct.

PART 11

ROLE OF OTHERS IN SECURING COMPLIANCE

- **Authorised Right of Entry**
- **Who May Prosecute**

CHAPTER 45: AUTHORISED RIGHT OF ENTRY

45.1 In this chapter we canvas several options on issues associated with the questions of whether the model Act should confer powers on authorised representatives and the extent of those powers and what safeguards should exist.

Current arrangements

45.2 The majority of Australian OHS Acts confer powers on authorised representatives of unions to enter workplaces. The Qld, ACT, NT, NSW and Vic Acts currently provide for such a right of entry. In WA, right of entry for OHS purposes is provided for under the *Industrial Relations Act 1979* (the WA IR Act). We are advised that Tasmania is currently considering amendments to its OHS laws to include right of entry provisions and SA has released a Bill on right of entry for public comment.

45.3 Table 67 below provides a broad comparison of right of entry provisions currently available under various Australian OHS Acts and the WA IR Act.

TABLE 67: Current Arrangements for Authorised Right of Entry

	NSW	Vic	QLD	WA	NT	ACT
Selection and Appointment						
Term of appointment (not more than)	–	3 years	3 years	–	2 years	–
Issuing Authority	Industrial registrar (under the NSW *Industrial Relations Act* 1996)	Magistrates Court	Industrial Registrar (under the *IR Act 1999)*	Industrial Registrar	OHS Regulator	Registered Organis-ation
Purpose for entry						
Investigate breach	✓ [1]	✓	✓	✓ [2]	✓	✓
Discuss OHS issues	–	–	✓	✓	✓	–
Rights upon Entry						
Observe or inspect systems of work, plant, equipment, materials and substances	✓	✓[3]	✓	✓	✓	✓

1 Provisions in the NSW legislation allow for entry to investigate suspected breaches of the Coal Mine Health and Safety Act 2002 and the Mine Health and Safety Act 2004.

2 The IR Act 1979 (WA) provides for investigating breaches of the IR Act, the *Long Service Leave Act 1958*, the MCE Act, the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award etc. Only entry to investigate breaches of the OSH Act and the Mines Safety and Inspection Act are subject to the additional requirements of the Commonwealth *Workplace Relations Act 1996*.

3 Powers limited to the extent that is reasonable for enquiring into the suspected contravention, powers must not be exercised if it will cause work to cease unless with the permission of the employer. Powers extend to consultation with employee during breaks and allow warning of significant and immediate risk of serious injury or death.

	NSW	Vic	QLD	WA	NT	ACT
Interview[4] members or eligible persons of the employee organisation	–	✓	✓	–	✓	✓
Speak with occupier/ employer	–	✓	✓	–	–	–
Take measurements and making records[5]	✓	–		–	✓	✓
Examine, copy, or take extracts from any document produced	✓	–	✓	✓	✓	✓
Require reasonable assistance to exercise function	✓	–	✓	–	–	✓
Conditions of exercising rights						
Entry only to workplaces of a member or an eligible member	✓	✓	✓	✓	✓	✓
Prohibited from entering residential premises without permission	✓	✓	✓	✓	✓	✓
Entry only during working hours	✓	✓	–	✓	✓	✓
Show ID/authorisation etc on request	✓	✓	✓	✓	✓	✓
Comply with reasonable workplace OHS requirements	–	–	✓	–	✓	–

Interaction with Workplace Relations laws

45.4 The *Workplace Relations Act 1996* (Cwth) ('the Commonwealth WR Act') specifically addresses right of entry for OHS purposes in Part 15, Division 5. Where premises are occupied or controlled by a constitutional corporation or the Commonwealth, or are located in a Territory or Commonwealth place, the Commonwealth WR Act imposes obligations on the employer, employees and any contractors providing services for a constitutional corporation or the Commonwealth.

4 Interviews with workers are only allowed where they have consented.
5 Records include sketches or drawings, photographic records and video, audio or audiovisual recordings.

45.5 The Commonwealth WR Act[6] prevails over State and Territory OHS laws to the extent of any inconsistency. Subject to that, the Act preserves, refers to and qualifies the operation of prescribed OHS laws of the States or Territories in relation to rights of entry.[7] Any union official who wishes to exercise the federal right of entry must apply for and be assessed against the requirements of the federal Act.[8] A permit will not be issued unless the applicant is a fit and proper person. In deciding that, the Industrial Registrar must consider various matters, including whether the applicant has been disqualified from having a right of entry under a State or Territory OHS law or has had such a right cancelled, suspended or made subject to conditions. Moreover, a federal permit cannot be issued while the applicant is suspended or disqualified under a State or Territory OHS law from having a right of entry. Similar grounds apply in relation to the suspension or revocation of a federal permit.

45.6 The Commonwealth WR Act further provides that an official of an organisation who has a right of entry under a State or Territory OHS law must also hold a federal permit in order to be able to exercise the right conferred by the State or Territory law where the entry is to any place within the scope of Part 15. Part 15 thereby provides the paramount rules for exercising a right of entry to such places. Those rules form a detailed code, including in relation to the purposes of entry, notice, when and how the right is exercisable (during working hours)[9] and provisions about obstruction and hindering (both of a person at a place that the official has entered and of the official entiled to enter the place).

45.7 We understand that the *Fair Work Bill 2008* provisions relating to right of entry for OHS purposes are substantially the same as those contained in the Commonwealth WR Act. Under the Bill, a union official intending to inspect or gain access to an employee record must give the occupier of the premises and any 'affected employer' written notice (and reasons) at least 24 hours before exercising the right. In addition, a permit holder exercising a State or Territory OHS right:

- must not contravene a condition imposed on the entry permit (clause 496);
- must produce the entry permit for inspection when requested to do so by the occupier of the premises or an affected employer (clause 497);
- may exercise a State or Territory OHS right only during working hours (clause 498);
- must comply with any reasonable request by the occupier of the premises to comply with an OHS requirement that applies to the premises (clause 499);
- must not intentionally hinder or obstruct any person, or otherwise action an improper manner (clause 500); and
- must not misrepresent his or her authority under Part 3-4 (clause 503).

45.8 A number of submissions from employer organisations and employers oppose including right of entry for unions under the model Act because right of entry already exists under industrial laws, principally the Commonwealth WR Act. However, these submissions also express the view that OHS and industrial relations should remain separate matters. Government submissions favoured the model Act recognising that OHS is distinct from industrial relations.

45.9 It has been said:

> *"Occupational health and safety has never been a major focus of the industrial relations process in Australia. There is a number of reasons for this … the most important was*

[6] The constitutionality of the Cwth WR Act was upheld in *New South Wales v Commonwealth* (2006) HCA 52. Paragraphs 279 – 286 of the judgment deal with the provisions concerning rights of entry.
[7] Section.737, definition of *OHS law*.
[8] Division 2, Issue of Permits.
[9] See ss.756-759 of the Commonwealth WR Act.

probably a widespread view that the prevention of work-related injury and disease was best left to the legislature."[10]

45.10 Even so, the reality is that rights of entry under industrial relations laws and OHS laws co-exist and there are overlaps in their regulation. For example, to be eligible to work on Commonwealth-funded building and construction work, employers in the industry must comply with the *National Code of Practice for the Construction Industry* and its Implementation Guidelines. The guidelines require strict compliance with the procedures governing entry of union officials and employees under the Cwth WR Act and any relevant and applicable OHS or State laws.

45.11 Creighton and Rozen note in relation to the Vic Act:[11]

"This clearly suggests that it would not be consistent with the Code for an employer to permit entry to a workplace by any union employee or official who did not have both an entry permit under the WR Act and an authorisation under (the Vic Act)*. It also suggests that it would not be consistent with the Code to permit entry even by an authorised representative for any purpose other than those set out in* (the Vic Act)*."*

45.12 The Royal Commission into the Building and Construction Industry observed that a lack of uniformity of entry and inspection provisions in Commonwealth and State law had the effect of making it difficult for employers, employees, occupiers of premises, unions and union officers and employees to know their rights and obligations. This led to the law being disregarded or flouted.

45.13 The Commission went on to make a series of recommendations about right of entry requirements designed to overcome such uncertainty and also to address problems that the Commission found to exist in the exercise of the right of entry in the industry.

45.14 The contemporaneous operation of the Commonwealth WR Act, and State laws presents a legally complex system. The application of the Commonwealth WR Act's requirements depends on the legal identity of the business or workplace concerned or the geographical location of the work activities. The necessary overlay of State laws that also deal with rights of entry for industrial and OHS purposes adds to the complexity. Unless considerable care is taken in designing the system and making it work effectively, there may bee the undesirable consequence of uncertainty for the various interested parties. There could be particular difficulties where different types of businesses (for example, incorporated and unincorporated businesses) operate side by side. This might create the prospect of an unintended failure to comply with the relevant law.

Recent Reviews

45.15 The recent reviews of OHS laws have, with one exception, supported including right of entry provisions in those laws. The Maxwell Review found a widespread lack of representation of workers' health and safety interests within workplaces and found that this could be alleviated by conferring a right of entry on authorised representatives of unions. Maxwell supported right of entry, subject to specific limitations and only for the purposes of investigating suspected breaches of OHS laws.[12]

45.16 The NT Review supported the inclusion of right of entry provisions in the NT Act . The provisions were to be based on Part 7A of the Qld Act, providing for consultation and for the investigation of suspected breaches.[13]

45.17 The Stein Inquiry recommended retaining the existing provisions in NSW with three amendments:[14]

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[10] W. B. Creighton and P. Rozen, *Occupational Health and Safety Law in Victoria* (3rd. ed.), (2007), p.153.
[11] ibid, p.292, para.1432
[12] Maxwell Review, pp.219-221, paras.1018-1032
[13] NT Review, p.123
[14] Stein Inquiry, pp.112-117

- to extend the provisions to introduce a provision for an authorised representative to enter a workplace to discuss OHS matters;
- to provide for disputes regarding entry onto worksites to investigate suspected breaches to be referred to WorkCover and the IRC for resolution; and
- to insert a new offence provision for misuse of an authorised representative's power.

45.18 However, the WA Review concluded that inserting specific provisions in the WA Act rather than the WA IR Act was unlikely to have anything more than a symbolic effect.[15]

Research relating to the intervention of unions in OHS

45.19 Considerable evidence exists that underscores the value of trade union officials being able to enter workplaces to assist, in various ways, in securing improved OHS performance and effective outcomes, particularly with respect to the provision of support to workers elected as health and safety representatives (HSRs). At the international level, the involvement of workers and their representatives in OHS is mandated by the ILO's *Occupational Safety and Health Convention 1981*.

45.20 Johnstone, Quinlan and Walters have observed that participatory mechanisms at jurisdictional, industry and workplace leves play a pivotal role in post-Robens OHS legislation in Australia.[16] They point to studies that establish a positive relationship between indicators of objective OHS performance and workplaces with joint arrangements or union involvement in worker representation, or both.

45.21 An American study (2000) found that deaths from hydrogen sulphide poisoning were more frequent in non-unionised workplaces than unionised ones.[17] A further American study of OHS committees and public sector workplaces found where there was more worker involvement; fewer illnesses and injuries were reported.[18]

45.22 In Norway (1994) a study found that reductions in absences through sickness were more significant where companies had adopted a participatory approach and where trade union representatives were active.[19]

45.23 In the United Kingdom (2000) a number of studies were carried out on British Workplace Industrial Relations Survey material linking lower injury rates to workplaces with joint arrangements (particularly where trade unions were involved) or alternatively, higher rates of injuries where management failed to consult over OHS.[20]

45.24 In Canada (1997) a study suggested that 'empowerment of the workforce' (which included unions, shop stewards, union support for joint health and safety committees and general worker participation and decision-making) was one of a number of organisational factors consistently related to lower injury rates.[21]

45.25 Johnstone, Quinlan and Walters[22] also cite a series of Australian studies that generally support the positive relationship between the presence of representative participation and

[15] WA Review, p.71, paragraph 4.32

[16] R. Johnstone, M. Quinlan, and D. Walters, Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market, *The Journal of Industrial Relations*, March 2005, Vol. 47(1), pp.93-116

[17] D. Fuller, A. Suruda, Occupationally Related Hydrogen Sulphide deaths in the United States from 1984 – 1994, *Journal of Occupational and Environmental Medicine,*2000*,* Vol.42(9), pp.939-942

[18] A. Eaton, T. Nocerino, The effectiveness of Health and Safety Committees; results of a survey of Public Sector workplaces, *Industrial Relations,* 2000, Vol.39(2), pp.265-290

[19] L. Anderson, *Sykefravaevstrosjektet* 1991 -1994. Oslo: Sintef Ifim

[20] A.S. Litwin, *Trade Unions and Industrial Injury in Great Britain,* Discussion Paper 468, London: Centre for Economic Performance, London School of Economics and Political Science, 2000

[21] H. Shannon, J.S. Mayr, T. Haines, Overview of the relationship between organisational and workplace factors and injury rates. *Safety Science*, 1997, Vol.*2*6, pp.201-217

[22] Op. cit.

improved OHS management arrangements, and also conclude that the introduction of such representative arrangements leads to major positive changes in attitudes.

Changing Labour Market

45.26 Significant changes have occurred in industry (in both the private and public sectors), including the reduction of union density across Australia.[23] For further discussion of trade union membership, see Chapter 2 of our First Report. The impact of these changes and the change in the nature of employment have affected the capacity of OHS law to balance the interests and roles of the various parties at a workplace level. We consider that OHS laws should continue to protect workers and others in two ways; firstly, through the establishment of clear duties of care and secondly, by providing workers and their representatives with a direct participative role at a workplace level.[24]

45.27 Having regard to the views of the stakeholders, together with the findings of recent reviews and the research already referred to, we consider that effective participatory mechanisms supported by the model Act are essential. The promotion of positive union involvement is a critical element in making such arrangements effective, including by assisting workers to raise and resolve OHS issues.[25]

45.28 Walters, in discussing moves in modern OHS regulation to greater self-reliance, self-regulation and greater employer and worker responsibility, has pointed to the importance of worker participation. After reviewing the evidence for the effectiveness of representation and participation, he has drawn attention to the demonstrated importance of trade union support from within and outside workplaces for effective worker representation. After considering how various factors affect participative arrangements, Walters concluded that, among other things, clear legislative support was necessary. Importantly, he also concluded, after considering some other approaches that trade unions remained the single most powerful support for workers' representation on health and safety.[26]

Stakeholder views

45.29 Broadly, most government submissions supported right of entry being included in the model Act (the Commonwealth did not comment). For example, the Queensland Government stated that: [27]

> *"The Queensland experience is that the union right of entry provision in WHSA have not been abused and ensured that workers have had an additional source of advice on OHS issues. It is important that authorised representatives approved to enter workplaces for OHS related issues have had appropriate OHS training. The national model OHS laws should include adequate checks and balances such as: requirements for periodical issuing of permits; successful completion of training and refresher courses; as well as disciplinary action if necessary and appropriate."*

45.30 There was also support for the inclusion of specific right of entry provisions in the model Act by the South Australian and Tasmanian governments (such provisions do not currently exist in their OHS laws). The responsible WA department, DOCEP, supported such provisions being in the mdoel Act (as opposed to the State industrial legislation, as now).

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[23] ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia Aug 2007* (Cat. No. 6310.0), Australian Government, Canberra, 2008

[24] N. Gunningham, 'Occupational Health and Safety, Worker Participation and the Mining Industry in a Changing World of Work', *Economic and Industrial Democracy 2008*; Vol. 29; p.336.

[25] P. Haynes, P. Vowles, and P. Boxall, 'Explaining the Younger-Older Worker Union Density Gap: Evidence from New Zealand', *British Journal of Industrial Relations,* 2005, Vol.43(1), pp93-116

[26] D. Walters,' Workplace Arrangements for Worker Participation in OHS' in *OHS Regulation for a Changing World of* Work, L. Bluff, N.Gunningham and R Johnstone (eds), Federation Press, 2004.

[27] Queensland Government *Submission No 032*, p25

45.31 The issue of right of entry was discussed in the written submissions in strongly opposing terms. Some employer bodies emphatically opposed such provisions. Unions and their peak bodies were strongly in favour. Interestingly, of the twenty-nine industry or employer bodies who submitted a view, eighteen either supported the provision or alternatively, gave cautious support, subject to reasonable requirements being provided under the model Act. Individual employers expressed conflicting views on the issue, some supporting such provisions in the model Act and others opposed. The most frequent concern raised by the opponents of right of entry provisions was that such rights could be used inappropriately as a means to confuse OHS and industrial issues. For example, the MCA commented that:[28]

> *"The unfortunate use of OHS laws for industrial purposes by unions has the potential to significantly undermine workplace consultative arrangements and detract from real safety and health management."*

45.32 Submissions from AMMA, Rio Tinto, the MCA and the Civil Contractors Federation stated that right of entry under a model OHS Act should be limited to regulators and inspectors.[29] AMMA added that: [30]

> *"Employees can continue to exercise their right to be represented by their union, which can raise any health and safety issue with the employer and inspector without any need to enter the workplace. Any right of entry afforded to unions under the model OHS Act must set appropriate boundaries to ensure such rights are not used as a means to pursue industrial agendas. The limitations contained within the current Workplace Relations Act 1996 are considered appropriate. Mechanisms must be available to remove any right of entry where it is abused."*

45.33 The MBA submitted that that right of entry provisions should continue to contain strict conditions to ensure that the right could only be exercised by fit and proper persons who were appropriately qualified.[31] John Holland expressed a similar view:[32]

45.34 The ACTU, which drew our attention to the ILO's recognition of the crucial role of unions in securing safer and healthier work, highlighted how unions were critical to securing safer workplaces through right of entry: [33]

> *"Unions provide crucial logistical support (training, information and protection from victimisation) to formal representative structures in the workplace, especially HSRs … Right of entry also performs a critical role in monitoring compliance with OHS legislation. At present no State or Territory inspectorate in Australia has the capacity to visit more than a tiny fraction of the total workplaces it covers in any given year."*

45.35 The ACTU supported a statutory right of entry for OHS matters at all work sites, irrespective of union membership for the purposes of educating workers and monitoring compliance, including inquiring into suspected breaches.

45.36 The majority of union submissions supported the right of entry as currently reflected in NSW's OHS laws. The CFMEU Mining and Energy Division submission drew our attention to the right of entry provisions that currently exist in NSW and Qld under mining laws, referring to the importance of check inspectors (NSW) and industry health and safety representatives (Qld).[34]

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[28] MCA, *Submission No.201*, p.28
[29] AMMA, *Submission No.118*, p.4; Rio Tinto, *Submission No.142*, p.6; MCA, *Submission No.201*, p.28; Civil Contractors Federation, *Submission No.99*, p.8
[30] AMMA, *Submission No.118*, p.4
[31] MBA, *Submission No.9*, pp.2-3
[32] John Holland, *Submission No.107*, p.5
[33] ACTU, *Submission No.214*, pp.41-46
[34] CFMEU Mining and Energy Division, *Submission No.224*, pp. 8-9

Discussion

45.37 The primary issue concerns whether the model OHS Act should include provisions relating to an entitlement for union employees or officials to enter a workplace. As previously discussed, provisions currently exist in the majority of Australian OHS laws with varying limitations.

45.38 Having earlier referred to stakeholder views on the issue of right of entry in general it is important to consider specific positions provided by the stakeholders in written submissions and raised during consultation. One national employer organisation said of the right for unions to enter workplaces being inserted in the model Act: [35]

> *"Union right of entry provisions have been relatively recent inclusions in the legislation in Victoria, Queensland and the Northern Territory. Whilst they were introduced with much trepidation amongst employers they do not generally appear to have caused significant issues in industry.*
>
> *Our members report that the role of unions assisting them in the workplace is often positive however unions also exist for reasons of representation in bargaining over wages and employment conditions, and the legislation needs to assume that there is always a potential for OHS right of entry to be confused with other issues … Therefore, if union right of entry is to be included in the Model OHS legislation it must carry the types of protections that are currently in place to discourage an inappropriate mix of OHS and industrial agendas. It should be restricted to an appropriately authorised official of a registered trade union who has members, or people entitled to be members, at the place of work."*

45.39 The ACTU cited research demonstrating that unionised workplaces in Australia were three times as likely to have a health and safety committee and twice as likely to have undergone a management occupational health and safety audit in the previous 12 months.[36]

45.40 The ACCI noted that OHS right of entry issues involved a range of balancing considerations as well as interactions between union rights of entry into workplaces under non-OHS legislation. We were assisted by the ACCI encouraging business organisations to present submissions to us which provided both a principle-based and practical assessment of how right of entry provisions currently operated in industry sectors and jurisdictions to inform policy in this area.[37]

45.41 An important consideration is that currently health and safety representatives do not exist in the majority of workplaces in Australia.

45.42 Having regard to the significant changes that have occurred in the Australian workforce, we are of the view that involvement by unions in OHS issues at the workplace remains at least as important for the effective operation of OHS participatory mechanisms under the model Act as it did when Robens style legislation was first introduced in Australia in the 1980s.

45.43 It is against this background of research, the findings of recent reviews of OHS laws and of stakeholder views that we have considered several options. One option, supported by some stakeholders, would be to omit right of entry provisions for OHS purposes from the model Act. Such arrangements would instead be addressed by the Commonwealth WR Act (or any subsequent Federal labour law) and any associated State labour law, with appropriate amendments. In our view, right of entry provisions should not be left solely to the Commonwealth WR Act (or its replacement) or State industrial laws. First and foremost, they would be out of context and removed from the framework of harmonised OHS laws. Secondly, the federal powers do not extend to all business entities or industries, so there are gaps that must be filled by

[35] AiG and EEA(SA), *Submissions No.102*, pp.48-49
[36] A. Hawke and M. Wooden, The 1995 Australian Workplace Industrial Relations survey, *The Australian Economic Review*, 1997, Vol.30(3), pp.323-328.
[37] ACCI, *Submission No.136*, p.39

State laws. Thirdly, existing industrial laws do not generally provide for right of entry for OHS purposes or facilitate it (e.g., providing for a right to entry for OHS purposes in an agreement under the Commonwealth WR Act would be 'prohibited content') We also consider that such an option would at the very least have the potential to blur the OHS and industrial relations environments, an issue a number of stakeholders (particularly employers) warned us against.

45.44 A second option would allow right of entry for authorised union officials under the OHS legislation. It recognises the importance of effective workplace participatory mechanisms in a post-Robens environment. By providing for union officials to be authorised under the model Act to enter workplaces and assist in securing compliance, this option would add an additional resource to those of the regulators. We recommend that the second option should be adopted, establishing in the model Act, clear provisions which identify the purpose of right of entry for OHS.

RECOMMENDATION 205

The model Act should provide right of entry for OHS purposes to union officials and/or union employees formally authorised for that purpose under the model Act.

45.45 In our view, this would contribute in a positive manner to OHS compliance at a workplace level. We propose that the system of right of entry under the model Act be subject to safeguards to ensure that it is carried out in an effective and fair manner. We deal later in this chapter with the characteristics we consider appropriate for such a scheme.

45.46 Right of entry for authorised persons will continue to be subject to the provisions of Commonwealth labour law. That would leave to the model Act the questions of:

- what the scope and effect of any harmonised right of entry laws for OHS purposes should be;
- what requirements should be placed on a person who is entitled to exercise rights and perform functions under such a law, and what safeguards might be provided to ensure that it is done competently and fairly; and
- what rules should apply where a person is authorised under more than one law to exercise a right of entry for OHS purposes but is found, for one reason or another, not to be qualified under one of the laws to continue to exercise the right.

REQUIREMENTS FOR RIGHT OF ENTRY AUTHORISATION

Current Arrangements

45.47 The Vic, Qld, NT and ACT Acts provide similar conditions for a person to be eligible for appointment as an authorised representative. The NSW Act provides a definition of an authorised representative which is linked to the provisions of the NSW *Industrial Relations Act 1996* (NSW IR Act) and the WA IR Act sets out who can issue the authority.

45.48 Table 68 below provides a broad comparison of conditions for appointment of authorised representatives currently available under various Australian OHS Acts and the WA IR Act.

TABLE 68: Eligibility to hold a Right of Entry Authorisation

Jurisdiction	Conditions for appointment
NSW	s.76 Definition *authorised representative* of an industrial organisation of employees, means an officer of that organisation (including any person who is concerned in, or takes part in, the management of that organisation) who is authorised under Part 7 of Chapter 5 of the *Industrial Relations Act 1996.*
Vic	s.81 Who may hold an entry permit A person may only hold an entry permit as an authorised representative of a registered employee organisation if he or she— (a) is a permanent employee or officer of the organisation, whether engaged on a full-time or part-time basis; and (b) has satisfactorily completed a course of training approved (in writing) by the Authority for the purposes of this paragraph; And (c) is not disqualified from holding an entry permit by an order of the Magistrates' Court.
QLD	s.90D Appointment of authorised representative (a) the person is an employee of, or holds an office with, the employee organisation; and (b) the person has satisfactorily finished training approved by the chief executive for this section; and (c) the industrial commission has not, within the previous 3 years, cancelled an appointment of the person as an authorised representative.
WA	s.49J. Provisions as to authorities issued to representatives (1) The Registrar, on application by the secretary of an organisation of employees to issue an authority for the purposes of this Division to a person nominated by the secretary in the application, must issue the authority. (2) The Registrar must not issue an authority for the purposes of this Division to a person who has held an authority under this Division that has been revoked under subsection (5) unless the Commission in Court Session on application by any person has ordered that the authority be so issued.
NT	s.50 Appointment of authorised union OH&S representatives (1) The Authority may, on application by an employee organisation, appoint an officer or employee of the organisation as an authorised union OHS representative. (2) Before making the appointment, the Authority must be satisfied that the prospective appointee: (a) has qualifications and experience appropriate to a person holding an appointment as an authorised union OH&S representative; and (b) is a fit and proper person to hold the appointment. .
ACT	s.62 Authorised representative (2) However, the person may be authorised only if— (a) the person— (i) is an employee of the registered organisation; or (ii) holds an office in the organisation; and (b) the person has completed the training prescribed by regulation; and (c) the person satisfies any condition of office prescribed by regulation.

Stakeholder views

45.49 As discussed earlier, views on who should be provided entry rights under a model OHS Act varied from empowering union officials to enter workplaces to limiting right of entry to the

regulator and emergency services [38] and providing rights for registered industry/employer bodies.[39]

45.50 There was widespread support for ensuring that persons authorised to enter workplaces under OHS laws are appropriately trained.[40]

Discussion

45.51 Most OHS Acts limit the right of entry arrangements to elected officers and/or employees of unions. The ACT extends the right to include authorised representatives of employer organisations. However, we note that since the ACT provisions commenced on 1 January 2005, they have not been used by employer organisations[41]. We do not consider it necessary to extend the right of entry provisions beyond union representatives.

45.52 "Union" as defined in current OHS laws provides a useful basis on which to draw a definition for insertion in the model Act under the right of entry section. In this respect, see the definition of union proposed in Chapter 23.

RECOMMENDATION 206

Authorised persons for right of entry purposes are those persons who are elected officers and/or employees of unions registered under relevant State or Federal labour law and:

a) hold current authorisation under the OHS Act; and

b) hold current authorisation required under any other relevant law.

Note*: Union is defined in the chapter containing the definitions*

TRAINING REQUIREMENTS

Current Arrangements

45.53 Under the ACT, NT, Qld and Vic OHS Acts, authorisations must only be given to persons who are appropriately qualified or have successfully completed approved training. Such courses maybe prescribed in regulations (ACT) or approved by the regulator.

Discussion

45.54 Given the strong support expressed across the board by regulators, industry and unions for authorised persons to be trained, we recommend that a condition of authorisation be that the applicant seeking authorisation demonstrate competency in the following areas:

- the right of entry requirements of the model Act, regulations and any guidance notes;
- issue resolution processes under the model Act;
- an understanding of the duties and framework of the model Act;
- how to apply risk management principles at a business or undertaking; and

[38] Law Council of Australia, *Submission No.163*, p.26
[39] National Safety Council of Australia, *Submission No.180*, p.3
[40] See for example: Master Builders Australia, *Submission No. 9 Part 3*; p13, pp33-34; Unions NSW *Submission No. 108*, p41; Law Council of Australia, *Submission No. 163*, p.26; Hutton, A, *Submission No. 121*, p12 and Australian Constructors Association, *Submission No. 184*, pp.6-7
[41] See list of authorised representatives in ACT: http://www.ors.act.gov.au/workcover/pdfs/WorkSafe/InfoSheets/IB0213-Authorised_Reps.pdf

- the relationship between the model Act and any relevant labour laws.

45.55 Such training would enhance the ability of union officials to contribute to workplace consultation arrangements through advice to workers and assist in compliance activities through the investigation of suspected breaches under the model Act.

45.56 While each jurisdiction could develop its own training requirements, we prefer that a national approach is taken in developing the core competencies. The standardisation of training may facilitate the mutual recognition of authorised persons to exercise right of entry across jurisdictions. The training should:

- be developed in consultation with a tripartite forum such as the ASCC or its replacement body;
- be consistent with the Australian Qualifications Training Framework (AQTF);
- have regard for any refresher training that may be required when authorisations are re-issued; and
- be regularly reviewed.

45.57 Refresher training should be required on re-issuing right of entry authorisations.

RECOMMENDATION 207

The authorising authority must be satisfied that the union official and/or union employee who is the subject of an application to be an authorised person (applicant) is competent in:

a) the right of entry requirements of the model Act, regulations and guidance notes;

b) issue resolution under the model Act;

c) an understanding of the duties and framework of the model Act;

d) how to apply risk management principles at a business or undertaking; and

e) the relationship between the model Act and any relevant labour laws.

RECOMMENDATION 208

At the first periodic review of the model Act, the issue of whether mutual right of entry authorisations (able to be exercised across jurisdictions but subject to the same limitations) should be introduced.

ISSUING THE AUTHORISATION

Current Arrangements

45.58 Current legislative arrangements require a registered organisation to apply to the issuing authority for an authorisation. Issuing authorities differ across the jurisdictions and include the Industrial Registrar (Qld, WA and NSW), the OHS authority (NT) and the Magistrates Court (Vic). The arrangements in the ACT differ significantly, enabling registered organisations to issue authorisations themselves.

Discussion

45.59 One option would be to follow the ACT provisions and provide under the model Act for unions to carry out the process of authorisation. A second option would be to follow the system in the NT where the task of issuance of authorisations is allocated to the OHS regulator.

45.60 A third option is to adopt one of the approaches of Queensland, NSW, Victoria or WA where the role is undertaken by a court or tribunal, -or administratively by a registrar. Consideration of this option requires regard to be had to the fit and proper person test in the Commonwealth WR Act. In determining if a person is fit and proper to hold a permit under the Commonwealth WR Act, consideration has to be given to whether the person has completed appropriate training concerning the rights and responsibilities of a permit holder and consideration of any previous or current suspensions or disqualifications relating to right of entry. In this option, we consider it appropriate for the authorising body to consider a similar test but in the context of the model Act.

45.61 In such circumstances the process of issuing an authorisation would require an application by a union (as defined in Recommendation 92) to a court or tribunal specified by the particular jurisdiction.

45.62 The application would require a statutory declaration to be submitted reflecting that the relevant person:

- has achieved the training required under the model Act; and
- holds or will hold a current permit under any other relevant law such as Federal labour law; and
- has not at any time within the previous three years, had an OHS authorisation to enter a workplace revoked or suspended; or
- has not within the previous three years, had a permit to enter workplaces under any other relevant law revoked.

45.63 A court or tribunal, for example, could:

- publicly advertise the receipt of an application from a union for authorisation;
- allow a 14 day period prior to issuance; and
- a person conducting a business or undertaking or the regulator may submit an objection to the issuance of the authorisation.

45.64 In the first instance the court or tribunal could:

- determine whether the objector had a sufficient interest in the matter; and
- if determined in the objector's favour, then the matter could be heard and determined.

45.65 In considering the matter the court could be required to determine whether the authorisation should issue having regard to the objects of the model Act and the object of union right of entry for OHS purposes. In such proceedings the onus would be on the organisation raising the objection to prove that the authorisation should not issue. Where the court or tribunal has upheld an objection then the relevant person should not be able to reapply for authorisation under the model Act for 12 months.

45.66 We consider that the third option should be adopted providing a process with safeguards and ensuring independent consideration of any concerns that may be raised.

RECOMMENDATION 209

A union (as defined) may apply for authorisation on behalf of persons who are elected officers and/or employees of the union to the specified court or tribunal within the jurisdiction. The application must include a statutory declaration confirming that the applicant:

a) has satisfactorily achieved the training required under the model Act;

b) meets the fit and proper person test specified in the model Act;

c) holds or will hold a current permit under any other relevant law; and

d) has not within the previous three years, had their OHS authorisation revoked or suspended; or

e) has not within the previous three years, had a permit to enter workplaces under state or Federal labour law revoked.

TERM OF APPOINTMENT

Current Arrangements

45.67 The OHS Acts in Victoria and Queensland limit the term of appointment of an authorised representative to three years. Appointments in the NT are limited to two years. Authorisations do not continue if employment with a registered organisation ends, including if the organisation is no longer considered a registered organisation.

Discussion

45.68 One option would be to allow an authorisation for right of entry for OHS to continue for as long as the union official/employee worked in that capacity within the jurisdiction. Such an approach would be inconsistent with the time limits now placed on other types of authorisations such as licences for high risk work.

45.69 A second option would be to insert a requirement in the model Act for a right of entry authorisation to be issued for a period of three years, allowing for an application for a further authorisation beyond that period to be made prior to the end of the three year period. In such circumstances the authorised person would not be restricted from entry to work places. An important means of ensuring that authorisations are kept up to date would be a provision in the model Act that where the union official or employee leaves the union, the authorisation automatically lapses. The onus in such circumstances would be on the union to advise the regulator of the change to the circumstances. Each regulator should keep an up-to-date, publicly available register of authorised persons within itsr jurisdiction.

45.70 We propose that the second option should be adopted.

RECOMMENDATION 210

The process of authorisation (including term, approved forms, training, refresher training, procedure for application and any issue relevant to the process) should be contained in regulations under the model Act.

RECOMMENDATION 211

The model Act should provide that:

a) authorisation for right of entry for OHS may be issued for up to three years;

b) application for a further authorisation may be made prior to the conclusion of the three year period;

c) in circumstances where the elected official or employee leaves the union the authorisation automatically lapses;

d) the union in such circumstances is to advise the regulator of officials/employees' changed circumstances as envisaged by (c); and

e) the regulator is to keep an up-to-date, publically available, register of authorised persons.

PURPOSE OF RIGHT OF ENTRY

Current Arrangements

45.71 All the OHS Acts that have right of entry provisions allow authorised persons to enter workplaces for the purposes of investigating a suspected breach. However, the OHS Acts in Qld and NT also allow right of entry for the purpose of discussing OHS matters with workers. Similarly, the WA IR Act allows right of entry for holding discussions and investigating suspected breaches.

45.72 The South Australian Government is currently consulting the community over draft amendments that would include right of entry provisions in the SA Act. Proposed s.38B of Clause 7 of the *Occupational Health, Safety and Welfare (Miscellaneous) Amendment Bill 2009* provides that an authorised representative may only enter a workplace for the purposes of viewing the workplace and engaging in consultation.[42]

Stakeholder views

45.73 Of those submissions that support a right of entry for union officials for OHS matters, the majority view is that right of entry provisions should only be provided for the purpose of investigating suspected breaches of the OHS legislation. However, the ACTU argued that right of entry provisions should allow for union involvement more broadly: [43]

> *"The ACTU supports union right of entry for OHS matters, at all work sites, irrespective of union membership - not just for suspected breaches (e.g. NSW OHSA 2000 – s.76-85) but including for the purposes of educating workers about OHS issues."*

Discussion

45.74 Pivotal to the successful operation of right of entry in the model Act is, in our view, is the need to specify whether this would include the right to:

- investigate a suspected breach of OHS legislation; and
- consult workers on OHS issues; and
- advise workers and persons in management or control of workplaces on OHS issues.

45.75 The Maxwell Review (2004) recommended limiting the right of entry to investigating any suspected breach of the OHS legislation.[44] Johnstone et al interpreted the Maxwell Review recommendation on right of entry as allowing, in the absence of adequate internal provisions for worker representation and participation, union officials to be brought in to investigate suspected contraventions of the OHS laws.[45] The Victorian OHS laws were amended to reflect the recommendation of the Maxwell Review. However the provision retained the right that had been introduced in the 1985 Act, for a HSR to:

> *"58.(1) (f) whenever necessary, seek the assistance of any person."*

[42] Available at http://www.safework.sa.gov.au/show_page.jsp?id=7754
[43] ACTU, *Submission No.214*, p.42; para.151
[44] Maxwell Review, pp.219-221, paras.1018 – 1032
[45] R. Johnstone, L. Bluff & M. Quinlan, *Submission No.55*, p.32

45.76 We were advised it was by way of this provision, although unintended, that Victorian union officials gained entry to workplaces between 1985 and 2004 to carry out consultations with HSRs.

45.77 One option would be to place safeguards on the exercise of right of entry by an authorised person, while ensuring that a duly authorised union official can investigate a breach of OHS legislation, consult and advise workers and persons conducting the business or undertaking (or their relevant representatives).

45.78 A second option would be to limit the purpose of right of entry by an authorised person to the investigation of suspected breaches of the model Act.

45.79 A third option would be to limit the purpose of entry by authorised persons to investigation of a suspected breach of OHS legislation and consultation only with relevant workers on OHS issues. In such circumstances the person conducting the business or undertaking or the person in management or control (or his/her representative) would not be involved in the arrangements or outcomes of discussions, thereby not fully benefiting from any contribution to be made by the authorised person.

45.80 We consider the first option should be adopted for the model Act as it allows for the most positive contribution to be made in the area of OHS to workers by authorised representatives.

RECOMMENDATION 212

The model Act should provide authorised persons with the capacity to:

a) investigate a suspected contravention of the model Act or regulations;

b) consult workers on OHS issues; and

c) provide advice to workers, and consult with the person in management or control of a business or undertaking or relevant workplace area, on OHS issues.

LIMITATIONS ON RIGHT OF ENTRY

Current arrangements

45.81 All the OHS Acts that have right of entry provisions place various limitations on the exercise of that right, such as restricting access to workplaces during working hours and only where there are members or eligible members (refer to Table 69 below for a comparison of these arrangements).

Stakeholder Views

45.82 Submissions generally supported having limitations and safeguards upon the right of entry, however, there were only few comments regarding specific limitations on entry for authorised representatives.[46] These included restricting right of entry during working hours and to sites where the union represented by the authorised representative actually has members, showing their permit on entry, providing 24 hours notice to the employer and complying with OHS requirements while at the workplace.

[46] See Victorian Automobile Chamber of Commerce *Submission No.152*, p.23; NSW Business Chamber et al, *Submission No.154*, p.10; A. Hutton, *Submission No.121*, p.13; Local Government OHSR Network Group - Southern Region NSW, *Submission No.027*, p.5; AMMA, *Submission No.118*, p.15

Discussion

45.83 A number of limitations to right of entry for OHS purposes currently apply across the jurisdictions. Those limitations are not harmonised and appear to result in some uncertainty, particularly for industry.

45.84 One option would be to specify limitations such as:

- access only to those areas of the workplace where persons work who are members or eligible to be members of the relevant union;
- ensuring no undue disruption during the entry period;
- the authorised person to comply with any reasonable request to follow any OHS requirements that apply to the site;
- the person on site to be notified by the authorised person on entry and where requested to provide the relevant authorisations;
- entry during working hours;
- compliance with any condition imposed on the authorised person's authorisation; and
- consultation with a worker within the eligible group (subject to the person's consent).

RECOMMENDATION 213

The model Act should limit right of entry by authorised persons to:

a) areas of the workplace where work is being carried out as part of a business or undertaking by workers who are members or eligible to be members of the relevant union;

b) consultation with, and/or provide advice to, any worker within the eligible group referred to in (a) (subject to that person's consent); and

c) where necessary, advice and/or consultation with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on the resolution of OHS issues and/or the suspected breach of the model Act

and, be subject to:

a) the right being exercised during working hours; and

b) ensuring there is no undue disruption to any business or undertaking at the workplace; and

c) reasonable OHS requirements that may apply to the workplace being followed by the authorised persons.

RECOMMENDATION 214

The authorised person is prohibited from the exercise of powers under the model Act at domestic premises unless:

a) such entry is provided for under a regulation under the model Act, or the premises are otherwise declared by regulation to be a business or undertaking; or

b) such entry is permitted by the owner or other person with the management or control of the premises.

REQUIREMENTS FOR ENTERING A WORKPLACE

Current arrangements

45.85 All the OHS Acts that have right of entry provisions, and the WA IR Act, require authorised representatives to show the appropriate permit on request. However there are differing notification requirements, depending on the jurisdiction and the purpose of the entry.

45.86 The Qld OHS Act and the WA IR Act specify that authorised representatives must give 24 hours notice before entering premises to hold discussions, while there are no requirements specified in the NT Act.

45.87 When authorised representatives seek entry to investigate a breach, there is no notification required in the WA IR Act and Tas OHS Acts. The other OHS Acts allow entry without notice, however require notice to be given either immediately on entering (Vic Act) or as soon as reasonably practicable after entering the premises (NSW, Qld and ACT Acts). The NSW, Qld and ACT Acts also make some exceptions for the requirement.

45.88 When authorised representatives seek entry to inspect documents, the NSW, Vic and NT Acts have no notification requirements, while written notice is required in the WA IR Act and Qld and ACT OHS Acts.

45.89 See Table 69 below for a comparison of these requirements.

TABLE 69: Requirements to exercise a right of entry

State	Show Permit on request	Notice – consultation	Notice- investigate breach	Notice – inspect documents
NSW	✓	NA	May enter without notice. Must notify occupier as soon as reasonably practicable after entering premises unless to do so would defeat purpose for entry or would unreasonably delay in case of urgency, or occupier notified in advance or already aware of entry	No requirement
Vic	✓	NA	immediately on entering a place take reasonable steps to give notice including description of the suspected contravention	No requirement
QLD	✓	24hrs notice before entry to discuss OHS	Written notice of the entry and the reasons for the entry as soon as practicable after entry. Must tell occupier of presence as soon as practicable after entry.	24hrs written notice
WA	✓	24hrs notice before entry to hold discussions	No requirement	24hrs written notice to access documents kept

State	Show Permit on request	Notice – consultation	Notice- investigate breach	Notice – inspect documents
				on the premises 48hrs written notice to access documents kept elsewhere
NT	✓	No requirement	No requirement	No requirement
ACT	✓	NA	May enter without notice. Must tell occupier as soon as reasonably practicable after entering the premises. No need to notify on entry where to do so would defeat purpose for entry or if the occupier already notified in writing. Provide occupier and chief executive written notice whether believes contravention of the Act within 2 days of entering premises	14 days written notice

Discussion

45.90 One option would be to provide for authorisation under the model Act without recognising the existence of the overarching Federal labour law. Adopting such an approach in the model Act could result in inconsistency with the Federal labour law. The second and preferred option is to require an authorisation under the model Act in addition to any other permit that might be required under relevant Federal or State labour law. This would also require that the provisions in the model Act are consistent with those for workplace entry under the Federal labour law. We prefer the second option and make the following recommendation on the requirements for the exercise by an authorised person of a right of entry under the model Act.

RECOMMENDATION 215

The exercise of a right of entry for OHS purposes under the model Act by an authorised person will be subject to:

a) current authorisation of the authorised person under the relevant OHS Act; and

b) any other permit required under relevant Federal, or state labour law for the authorised person to enter the workplace; and

c) written notice of at least 24 hours by the authorised person to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to consult or advise workers; or

d) notice as soon as reasonably practicable after entry to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers

who are members or eligible to be members of the relevant union where the authorised person is investigating a suspected breach, unless to do so would defeat the purpose for which the premises were entered; or unreasonably delay the authorised person in a case of urgency; or

e) written notice of at least 24 hours to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to inspect documents relevant to the suspected breach of the model Act or regulations.

RIGHTS OF AUTHORISED PERSON ON ENTRY

Current arrangements

45.91 All the OHS Acts that have right of entry provisions, and the WA IR Act, confer rights on authorised representatives entering premises for the purpose of investigating a suspected breach. While there are some differences in the scope of the rights, they all allow authorised representatives who are investigating a suspected breach rights to inspect relevant premises and items, interview or consult with relevant persons and request production of relevant documents. With the exception of the Vic Act, they also provide for authorised officers to copy relevant documents.

45.92 Table 70 below provides a broad comparison of these rights currently available under various Australian OHS Acts and the WA IR Act.

TABLE 70: Rights on entry

Jurisdiction	Rights on Entry
NSW	s.81 for the purpose of investigating a suspected breach: • make searches and inspections (and take photographs and make video and audio recordings), • require assistance to exercise a function • require the production of and inspect any documents • take copies of or extracts from any such documents.
Vic	s.89 to the extent that it is reasonable for the purpose of enquiring into the suspected contravention, may — • inspect any plant, substance or other thing at the place; • observe work carried on; • consult with one or more employees (with their consent) who are members or are eligible to be members of the registered employee organisation; • consult with any employer at the place about anything relevant to the matter.
QLD	s.90I • inspect any plant, substance or other thing at the place relevant to the suspected contravention…; or • observe work carried on at the place; or • speak to a person, with the person's consent, who is an eligible member of the employee organisation; or

Jurisdiction	Rights on Entry
	• speak to the occupier of the place about anything relevant to the suspected contravention …; or • require the production for inspection of documents, including employment records, relevant to the suspected contravention …; or • copy a document at the place relevant to the suspected contravention…; or • require the occupier to give the authorised representative reasonable help to exercise the authorised representative's powers under paragraphs (a) to (f). 90J discuss matters relating to workplace health and safety at the place with a worker who— • is an eligible member of the employee organisation; and • wishes to take part in the discussion; and • only when the worker is on a work break, including a meal break.
WA	s.49H • hold discussions at the premises with relevant employees who wish to participate in those discussions. s.49I For the purpose of investigating a suspected breach may — • require production documents related to the suspected breach • make copies of documents related to the suspected breach; and • inspect or view any work, material, machinery, or appliance that is relevant to the suspected breach.
NT	s.53 • observe or inspect work and systems of work, the workplace, workplace infrastructure or equipment, materials and substances; • interview (with the consent of the interviewees) members, or persons who are eligible to become members, of the employee organisation; • take measurements and make records at the workplace; • require the production of documents; • examine and copy, or take extracts from any document produced
ACT	s.66 investigate a contravention by: • inspecting or viewing work, materials, plant or systems at the premises; • interviewing members of the registered organisation (or people who are eligible to be members of the organisation) with their consent; • taking measurements and making sketches, drawings or any other kind of record; • inspecting documents • examining and copying, or taking extracts from documents • requiring assistance to exercise a function

Stakeholder Views

45.93 Stakeholder views varied on the matter of the rights available to authorised representatives on entry. In particular, views were polarised on a right to issue notices (such as a provisional improvement notices), a right to access documents, particularly employment records, and a right to direct unsafe work to cease. For example, AiG and EEA(SA) did not support

allowing access to 'employment records' as this could breach privacy and confidentiality obligations.[47] The Law Society of NSW noted that an authorised representative should be allowed to enter and inspect upon notice, but that it was not appropriate for anyone other than the regulator to be given the power to take statements or require the production of documents.[48]

45.94 Unions supported more extensive powers[49], for example, the ACTU submitted that: [50]

> *"Unions must have the powers of an HSR at the place of work, but particularly be able to issue notices, inspect workplaces and systems, copy documents and to make audio/visual recordings for education and information gathering purposes."*

Discussion

45.95 The provisions relating to right of entry in the NT, NSW, Vic, Qld and WA legislation vary significantly. Jurisdictions such as Victoria limit right of entry for OHS to investigation of a suspected breach of the Act in that State while the more recent changes in the NT and Qld Acts provide for both investigation of suspected breach and consultation. One option would be to adopt the Vic Act model and limit the right of entry provisions in the model Act to the investigation of a suspected breach.

45.96 A second option would be to allow both consultation and investigation of suspected breaches of the model Act and require any activity undertaken by an authorised representative on site to be limited to those work areas/processes where persons work who are members of, or eligible to be members of the authorised representative's union. Activities able to be undertaken must be broad enough to allow the authorised representative to make a positive contribution to OHS at work.

45.97 Such activities could include:

- inspection of work systems, plant or processes;
- inspection of any documents specific to the suspected contravention subject to the provision of at least 24 hours written notice;
- an authorised representative to request an inspector visit the work area and determine whether any action should issue;
- allow for a formal review of the action taken by the inspector (even when no action is taken) to be requested by the authorised representative;
- in circumstances where the authorised representative reasonably believes there to be a significant and immediate risk of injury to one or more workers, to warn them of that risk.

45.98 We prefer the framework of activities provided in the second option for inclusion in the model Act. Based on our consultation with industry, regulators and unions, we concluded that the initial fears accompanying the introduction of OHS right of entry provisions in some jurisdictions had not been realised. Examples of union officials, workers and persons with management or control working closely together on OHS issues were identified during our consultative process. We noted that safeguards would be available.

RECOMMENDATION 216

An authorised person exercising a right of entry under the model Act may do any of the following:

[47] AiG and EEA(SA), *Submission No.182*, pp.49-50
[48] Law Society of NSW, *Submission No.113*, p.16
[49] See TWU *Submission No.227*, p.21 and Australian Workers' Union, Queensland, *Submission No.84*, p.14-15
[50] ACTU, *Submission No.214*, p.44

a) consult with or advise those workers who are members of or eligible to be members of the union, subject to written notice of 24 hours;

b) consult with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on an OHS issue;

c) inspect work systems, plant or processes contained within the area where relevant workers work;

d) investigate a suspected breach of the model Act or associated subordinate instrument(s), subject to the provision of proof of authorisation to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union unless to provide such proof of authorisation would defeat the purpose of the investigation or, it is considered by the authorised person to be an urgent case;

e) inspection of documents of the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union relevant to a suspected breach of the model Act or regulations, subject to:

   i) provision of 24 hours written notice with a reasonable time given for the person from whom the documents are requested to produce them; and

   ii) written notification to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union of details of the particular contravention suspected; and

   iii) a list of the documents sought being provided with the request.

f) warn any person that the authorised person reasonably believes to be exposed to a significant and immediate risk of injury;

g) request an inspector visit the workplace to determine whether a notice should be issued; and

h) have the right to seek a review of the action taken by the inspector (including a decision of the inspector to not take any action).

Any right exercised by an authorised person is limited to matters affecting the health or safety of those workers who are members of or eligible to be members of the authorised representative's union.

DEALING WITH DISPUTES

Current Arrangements

45.99 All of the statutes which cover right of entry for OHS purposes, except the ACT Act, include provisions to deal with disputes relating to the operation of those powers. Such dispute resolution processes may variously be commenced by the regulator, the employer, an employee or other persons affected by the exercise of the authorised representative's powers and functions. Matters of dispute are dealt with by the relevant court or authority within the jurisdiction.

45.100 Table 71 below provides a broad comparison of the process for dealing with disputes arising from right of entry provisions currently contained under various Australian OHS Acts and the NSW and WA IR Acts.

TABLE 71: Dealing with disputes

Jurisdiction	Section	Applicant	Decision maker
NSW	s.299 *NSW IR Act*	N/A	Industrial Registrar
Vic	s.85	• the authority • an employer	Magistrates' Court
QLD	s.90O	• the chief executive • an occupier	Industrial Commission
WA	s.49J *WA IR Act*	• any person	The Commission
NT	s.52	• employer • other person • the authority of its own initiative	OHS Authority
ACT	NA		

Discussion

45.101 In each jurisdiction the OHS right of entry provisions have in place a range of safeguards which we were advised are rarely used but from time to time are considered necessary to ensure that the standards required are being upheld. We found that a dispute relating to the operation of the right of entry provisions under the model Act should be able to be referred to the relevant court or tribunal within the jurisdiction. In most cases such matters would, in our view, be resolved through conciliation.

RECOMMENDATION 217

A relevant court or tribunal may deal with a dispute relating to the exercise or purported exercise by an authorised person of a right of entry under the model Act. The process may involve conciliation, mediation and, where necessary, arbitration.

SAFEGUARDS

Current arrangements

45.102 Most statutes providing a right of entry for OHS purposes include safeguards against misuse of the right of entry powers conferred on authorised representatives we discuss the question of protection for the person exercising a right of entry elsewhere). The Vic, Qld and NT OHS Acts, and the NSW and WA IR Acts, set out grounds for taking action against the authorised representative, and list the resulting action(s). The actions include amendment, suspension or revocation of the authorisation by the issuing authority and disqualification from holding the position. The ACT Act does not contain such a provision.

45.103 Table 72 below provides a broad comparison of contraventions and resulting actions currently available under various Australian OHS Acts and the NSW and WA IR Acts.

TABLE 72: Contraventions and action that may be taken

Jurisdiction	Section	Grounds for Action	Action that may be taken
NSW	s.299 *NSW IR Act*	• Intentionally hindered or obstructed employers or employees during their working time • Otherwise acted in an improper manner	• Revocation
Vic	s.85	• intentionally hindered or obstructed an any employer or employee • acted unreasonably or otherwise than for the purposes of exercising a power under this Part; or • intentionally used or disclosed, for a purpose not reasonably connected with the exercise of a power under this Part, information that was acquired from any employer or employee	• Revocation • Disqualification
QLD	s.90Q	• contravention of a provision of the Part (7a Authorised representatives) • contravention of a condition of appointment	• Suspend • Cancel • Amend conditions of appointment
WA	s.49J *WA IR Act*	• act in an improper manner • intentionally and unduly hindered an employer or employees during their working time.	• Revoke • Suspend
NT	s.52	• Contravene a condition of appointment, which includes: o entering a workplace other than in accordance with this Division; o non-compliance with any relevant law of the Commonwealth; o intentionally hinder or obstruct an employer or a worker; o misrepresent the extent of the representative's authority; o use or disclose of information acquired at the workplace for a purpose not reasonably connected with the health and safety of a worker; • Misuse of power	• Remove from office • Disqualify from holding office
ACT	NA		

Stakeholder Views

45.104 Some submissions on safeguards for right of entry provisions expressed concerns about the potential for right of entry provisions to be misused for industrial purposes, frequently referring to the findings of the Cole Royal Commission. These stakeholders considered that right of entry provisions must include measures to protect against misuse of that right, and penalties to deter and address any such misuse.[51]

Discussion

45.105 In matters of a more serious nature a person conducting an undertaking (or his or her representative) or the regulator should be able to apply for a person's authorisation to be suspended or revoked, in whole or in part. In such circumstances, it would be up to the relevant court or tribunal in the jurisdiction to determine that the authorised person was no longer a fit or proper person to hold such authorisation, or specific limitations should be imposed on the continued operation of the authorisation.

45.106 The grounds for the suspension, revocation or taking of alternative action by the court or tribunal should include:

- the authorised representative is no longer qualified for a permit under the relevant Federal labour law in which case any action to be taken reverts to the decision of the relevant Federal tribunal; or
- the court or tribunal has determined that the authorised representative has acted in an improper manner in the exercise of the right under the model Act in unduly and/or intentionally hindering the person conducting a business or undertaking or the workers of the business or undertaking.

45.107 Where action has been taken by the Federal labour tribunal against a federal permit holder who is also an authorised person under a State or Territory law, the State or Territory court or tribunal should convene to allow the authorised person to show cause why complementary action (e.g. revocation of OHS authorisation) ought not be taken. Any relevant matter should be considered in such a proceeding.

RECOMMENDATION 218

Authorisation of an authorised person under the model Act may be suspended or revoked, in whole or in part, or limitations imposed where, after providing the authorised person a reasonable opportunity to be heard it is determined by a court or tribunal (civil process) that such action should be taken.

RECOMMENDATION 219

Grounds for suspension, revocation or the taking of alternative action (including imposing limitations) should include where:

a) the authorised person has ceased to satisfy the requirement under relevant Federal labour law, in which case the action to be taken is subject to the operation of the decision of the relevant Federal labour tribunal; or

b) a relevant court or tribunal determines it is satisfied the authorised person has:

i) acted or purported to act in an improper manner in the exercise of the rights conferred under the model Act; or

ii) unduly and/or intentionally hindered a person conducting a business or undertaking or the workers during working hours; or

[51] See for example AMMA, *Submission No.118*, p.15; AiG and EEA(SA), *Submission No.182*, p.49

iii) no longer meets the fit and proper person test required for authorisation under the model Act.

Where action has been taken under (a) by the Federal labour tribunal, the OHS court or tribunal is to convene to enable the authorised person to show cause why complementary action ought not be taken under the model Act.

In proceedings brought under (b) the onus is on the applicant.

RECOMMENDATION 220

In determining whether to revoke or suspend or impose limitations on the authorisation of an authorised person the court or tribunal shall have regard for:

a) the seriousness of any findings of the court or tribunal having regard to the objects of the model Act; and

b) the requirement for an authorised person to continue to meet the fit and proper person test; and

c) any other matter considered relevant.

In proceedings initiated under this provision the onus is on the authorised person to show cause why complementary action should not be taken.

OFFENCES FOR REFUSING ENTRY

Current arrangements

45.108 Most statutes covering right of entry for OHS purposes include offences to deter anyone from intentionally hindering or obstructing an authorised representative in properly performing their duties. The Vic, NT and ACT OHS Acts, and the NSW and WA IR Acts, set out the relevant offences. The Qld Act does not contain such a provision.

45.109 Table 73 below provides a broad comparison of offences against refusing entry to authorised representatives currently contained under various Australian OHS Acts and the NSW and WA IR Acts.

TABLE 73: Obstructing etc Authorised Representative

Jurisdiction	Provision
NSW	The following clause is provided in the *Industrial Relations Act 1996* (NSW): s.301 Offences (2) A person must not deliberately hinder or obstruct an authorised industrial officer in the exercise of the powers conferred by this Part.
Vic	s.93 Offence to obstruct etc. authorised representative A person must not— (a) refuse an authorised representative entry to a workplace; or (b) intentionally hinder, obstruct, intimidate or threaten an authorised representative in the exercise of his or her powers under this Part, or induce or attempt to induce any other person to do so.
QLD	N/A

Jurisdiction	Provision
WA	s.49M. Conduct giving rise to civil penalties (1) The occupier of premises must not refuse, or intentionally and unduly delay, entry to the premises by a person entitled to enter the premises. (2) A person must not intentionally and unduly hinder or obstruct an authorised representative in the exercise of the powers conferred by this Division.
NT	s.50 Appointment of authorised union OH&S representatives (6) A person must not refuse or unduly delay entry to premises by an authorised union OH&S representative who is entitled to enter the premises.
ACT	s.72 Authorised representative—obstructing etc (1) A person commits an offence if the person— (a) obstructs, hinders, intimidates or resists a person who is an authorised representative in the exercise of the representative's functions

Discussion

45.110 These provisions are inserted in a number of OHS Acts to help ensure that authorised persons are not unduly delayed or prevented from properly exercising their powers or performing their functions in accordance with the Act. They include circumstances where such delay or obstruction is unreasonable and hinders the contribution able to be made by union officials in the course of their day to day work. An example of such a provision is reflected in s.93 of the Vic Act. We consider such a clause should be included in the model Act.

RECOMMENDATION 221

A provision be inserted in the model Act prohibiting a person from:

a) refusing an authorised person gaining entry to the workplace in accordance with the provisions of the model Act; or

b) delaying, obstructing, intimidating or threatening an authorised person acting in accordance with the provisions of the model Act, or inducing or attempting to induce another person to do so.

COMPLIANCE WITH LIMITATIONS IMPOSED ON RIGHT OF ENTRY

Current arrangements

45.111 The statutes which cover right of entry for OHS purposes include offences which relate to failure by authorised representatives and others to comply with conditions and obligations imposed by the issuing authority.

45.112 Table 74 below lists the range of offences and which jurisdictions include them in their provisions dealing with right of entry for OHS purposes.

TABLE 74: Offences regarding authorised right of entry

Offences	NT	Vic	ACT	NSW	QLD[52]	WA
Impersonate Authorised Representative	–	✓	✓	✓	–	✓
Enter workplace other than in accordance with legislation **Failure to comply with relevant obligations under Cwth law**	✓	–	–	–	–	–
Intentionally hinder or obstruct employer or worker	✓	✓	–	–	–	✓
Misrepresentation of the extent of authority	✓	✓	–	–	–	✓
Disclose information for a purpose not connected to OHS	✓	✓	✓	–	–	–
Intimidate or threaten an employer or employee	–	✓	–	–	–	–
Failure to return ID card within specified timeframe	✓	–	–	–	✓	✓

Discussion

45.113 Impersonation of an authorised person is an offence in a number of jurisdictions and should be included in the model Act.

45.114 Additionally, we have recommended that issuing authorities and relevant courts or tribunals can 'impose limitations' on a person's right of entry.

45.115 We consider the model Act should make a breach of either category by a person an offence.

RECOMMENDATION 222

An authorised person must not contravene any limitation imposed by the issuing authority on their right of entry authorisation; and

It is an offence for any person to impersonate an authorised person under the model Act.

[52] While not offences, under the Qld Act the following conduct may result in suspension, cancellation etc. of appointment:
- Unreasonably hinder or obstruct worker
- Intimidate or threaten a worker
- Exercise a power other than for OHS purposes
- Disclose information without the consent of the person to whom it relates.

OTHER CONSIDERATIONS RELATING TO RIGHT OF ENTRY – GUIDANCE NOTES AND REGULATIONS

Discussion

45.116 We have recommended that a number of provisions relating to right of entry be included in. In the event that it is considered further requirements are necessary (e.g., specific to industry arrangements), we propose that such detail be provided by way of regulation.

45.117 Our consultations demonstrated that the production of guidance material on OHS right of entry provisions has been useful in assisting workers, authorised representatives, industries and regulators.

RECOMMENDATION 223

Any specific requirements on union right of entry, additional to those contained in the model Act, are to be specified in regulations.

Guidance material on right of entry is to:

a) be drawn up by the regulator in consultation with the relevant tripartite body; and

b) issued and distributed in that jurisdiction.

CHAPTER 46: WHO MAY PROSECUTE

46.1 In this chapter, we consider the question of who should have standing to bring proceedings for offences under the model Act.

46.2 The issue warrants particularly careful consideration because:

a) enforcement is a key element of effective OHS regulation;

b) there is not a consistent approach to the question of standing under existing OHS laws; and

c) strong differences of view exist about whether anyone other than government officials should be able to bring actions before the courts for offences against the model Act.

46.3 In considering this matter, we have sought to ensure that our recommendations are made in the context of the policy and practice of graduated enforcement that we consider must be one of the underpinnings of the model Act.

Current arrangements

46.4 Private prosecution,[1] which has its origins in the common law, is a right that has been preserved in Australian and British criminal law.[2] At common law, all citizens possess the right to initiate a prosecution for a criminal matter. This common law right has been interpreted by the courts to extend to a right to enforce legislation where the legislation creates public offences.[3] It is not, however, universally available or unqualified, nor has it been uniformly extended to contraventions of OHS laws.

46.5 Table 75 below outlines how the OHS Acts provide for standing to prosecute (two expressly limit standing to officials; three provide for a 'person' to be authorised to prosecute; three identify specific persons other than officials who may bring prosecutions; one is silent).

TABLE 75: Provisions in OHS Acts relating to standing to prosecute for breaches

Jurisdiction	Only officials may prosecute or breaches	Unions expressly allowed to prosecute	Other persons allowed to prosecute
NSW	No	Yes – s.106	No
Vic	Yes	No	No
Qld	No	No	Person authorised by the Minister or Chief Executive – s.164(5)
WA	No	No	Person authorised by the Commissioner – s.52(1)
SA	No	No	Person who suffered injury as a result of a contravention – s.58(7)
Tas	No provision	No provision	No provision
NT	No	No	Person who has approval of the Authority – s.80(1)

[1] By 'private prosecution', we mean a prosecution that may be brought by a person who is not an official acting in the course of a public office or duty.
[2] For discussion, see T. Kirchengast, *Private prosecution and the victim of crime*, Macquarie Law Working Paper 17, 2008; and the British Law Commission, *Consents to Prosecution*, Report LC255, 1998.
[3] See ACT Review, Part 15.6, p.78

Jurisdiction	Only officials may prosecute or breaches	Unions expressly allowed to prosecute	Other persons allowed to prosecute
ACT	No	Yes – s.218(2)	Employer association – s.218(2)
Cwth	Yes	No	No

46.6 Three other arrangements are of interest.

46.7 First, under s.38 of the UK Act, proceedings for an offence under any of the relevant statutory provisions must not, in England and Wales, be instituted except by an inspector or by or with the consent of the DPP.

46.8 Secondly, under s.54A of NZ's *Health and Safety in Employment Act 1992* (the NZ Act) an inspector may lay an information in respect of an offence, but another person may also do so if:

a) enforcement action has not been taken by the inspector or another person;

b) no prosecution has been brought by another enforcement body in relation to the incident, situation or set of circumstances concerned[4]; and

c) any person has been notified by the Secretary of the responsible department that an inspector has not and will not take enforcement action against any possible defendant in relation to the same matter.

46.9 Another approach is illustrated by Victorian legislation. Although only a government official may bring a prosecution for an offence under the Vic Act, the *Outworkers (Improved Protection) Act 2003* (Vic) provides for a prosecution for a breach to be brought by an officer of the Timber and Construction Workers Union, (TCWU), Vic Branch.[5]

Recent Reviews

46.10 We also found a divergence of views on this point in the previous Australian reviews of OHS regulation that we examined. Three reviews supported a right of private prosecution, two expressly opposed it, one found that it was not contemporary Australian practice and one could not reach an agreed view. The various views are outlined below.

46.11 After reviewing similar competing views to those made to us, the IC recommended in its 1995 report that the right to bring private actions be provided in all OHS legislation. It considered that private actions would not negate the role of inspectorates (a concern raised in some submissions to the 1995 inquiry) but serve as a 'safety valve'. Limited inspectorate resources were likely to mean that the inspectorate could not proceed with all OHS offences which were worthy of prosecution.[6]

46.12 The report also noted that the scope for abuse would be limited because private actions under OHS legislation would face the same costs and legal procedures as private legal actions.

46.13 Maxwell reviewed the position under the then Vic Act which gave a monopoly on prosecutions for breaches of the Act to the regulator. Maxwell concluded that that position should remain. In his view, the prosecution of persons for criminal offences was a matter of the utmost seriousness. It was 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 the OHS regulator. Maxwell saw no justification for conferring on any other party – whether a union, a worker or anyone else – a statutory right to bring a prosecution.

[4] Even where this has occurred, a person may apply to a court under s.54A(3) for leave to lay an information, but this can only occur if the conditions described in (a) and (c) are met.
[5] See s.55(1)(b) of the Vic Act..
[6] IC Report, pp.124, 125, recommendation 18

46.14 In so finding, Maxwell dismissed the arguments that, for a variety of possible reasons, the regulator was under-prosecuting and thereby failing to secure the best OHS outcomes. If the problem was insufficient resources, it should be addressed directly and if it were by reason of poor decision making, the regulator should have greater accountability, with a more effective review mechanism.

46.15 Maxwell's reasons for retaining the prosecutorial monopoly were:

a) the relevant expertise should be concentrated in one place as prosecution was a specialist role, and the duties of a prosecutor, to the court and the defendant, were onerous;

b) giving the regulator exclusive control over prosecutions was important for the integrity and consistency of enforcement, given the considerable potential for conflict if third parties had a right to prosecute – e.g. where the regulator had already issued a notice or (assuming power to do so) had accepted an enforceable undertaking in lieu of prosecution;

c) the regulator "*must be able to select the most appropriate enforcement response to any given issue, and duty holders must be confident that they will not be exposed to different treatment instigated by a third party*"; and

d) for unions to be able to prosecute employers would, in Maxwell's view, prejudice the development of trust and the dialogue between them and employers which was essential for improving workplace health and safety.[7]

46.16 The NSW WorkCover Review and the Stein Inquiry of WorkCover's recommendations both accepted the continuation of the position under the NSW Act whereby a union secretary had standing to bring a prosecution.

46.17 In its review, WorkCover stated that it did not recommend removing or qualifying a union's ability to bring a prosecution. In forming that recommendation, WorkCover observed that trade unions had been able to prosecute breaches of workplace safety legislation in NSW for more than 60 years. Regardless of whether WorkCover or an industrial organisation undertook an OHS prosecution, it was ultimately up to the relevant court to determine whether or not the prosecution was successful.[8]

46.18 The Stein Inquiry confirmed the position taken by the WorkCover Review. In so finding, the Stein Inquiry noted that the union right to prosecute did not appear to have been abused and that union prosecutions were relatively few in number. They were subject to supervision by the court (as necessary, a court could dismiss proceedings and order a union to pay costs).[9]

46.19 The ACT Review was unable to reach a consensus position on the question of third party prosecutions. In examining the competing views, the review noted that in the ACT, all private citizens retained some ability to prosecute a criminal action, including one under the OHS Act. This right was limited, however, depending on whether the alleged offence is a summary or indictable offence. A citizen's right to prosecute an indictable offence was limited to prosecuting up to committal for trial. If an accused was committed for trial, and the Attorney-General elected not to proceed, a private citizen could not continue the prosecution without the permission of the Supreme Court.

46.20 Consideration was given to the existing provisions in Australian OHS law and of s.54A of the NZ Act (outlined above). The review observed that in New Zealand, the parliamentary committee examining the then proposed private prosecution provisions argued that:

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[7] Maxwell Review, pp.360-361

[8] NSW WorkCover Review, p.64

[9] Stein Inquiry, pp.127-128 and recommendation 31. The Stein Inquiry's endorsement of a union's right to prosecute under the NSW Act was in the context of lower penalties than we have recommended; his support for the view that the regulation of OHS did not involve the 'real or traditional mainstream' criminal law; and his recommendation that imprisonment not be a sanction (para. 7.27, recommendation 5).

> *There are a number of reasons for removing the Crown's monopoly on prosecutions. These include enhancing the deterrent effect of enabling a greater range of persons to enforce the Act; providing an alternative means of seeking justice for aggrieved parties where a case is not prosecuted by OSH; and providing a safeguard against potential official inertia, incompetence or biased reasoning.*[10]

46.21 This was contrasted with Maxwell's findings and conclusions. The review noted that the Victorian Government had accepted Maxwell's position and implemented it in the Vic Act.[11]

46.22 The WA Review, undertaken by Richard Hooker, reached similar conclusions to those of Maxwell. An issue raised with Hooker was whether unions ought to be permitted to enforce the Act formally. In rejecting this, the inquiry found that the arguments against any expansion of the power in s.52(1) fairly strongly outweighed those in favour of it. There was no tenable case to suggest that the role of WorkSafe in enforcing OHS legislation in Western Australia was being undertaken other than professionally, sensitively and properly. There would always be scope for disagreement as to particular decisions regarding enforcement. To expand the category of person empowered to bring prosecutions was unnecessary in furtherance of the statutory objects of the WA Act or, for that matter, the goals and aspirations formulated at the national level.[12]

46.23 The NT Review dealt briefly with this issue, commenting that the NSW Act was the only statute that provided unions with the authority to launch a prosecution, which therefore could not be considered contemporary Australian practice.[13]

Stakeholder views

Government

46.24 Five governments expressly opposed including a right of private prosecution in the model Act. No government submission expressed support, but we infer that the ACT Government would not oppose such an approach, having recently conferred such a right under the ACT Act on employer and employee associations.[14]

46.25 The Queensland Government observed that proceedings should be commenced by the safety regulator rather than the DPP or another person. Using the impartial regulator to instigate proceedings is desirable as the use of trade union officials to bring prosecutions could add to the adversarial nature of Australian industrial relations by undermining relations between management and unions within a workplace.[15]

46.26 The South Australian Government does not support the concept of private prosecutions. However, if it is pursued, an arrangement based upon the current SA Act is suggested. Section 58(7)(c) of the SA Act provides that if after a certain period the State declines to commence proceedings, the victim has a residual right to commence proceedings subject to Ministerial discretion.[16]

46.27 The Tasmanian Government drew our attention to its protocol of providing prosecution briefs to the DPP for decision and action in respect of further proceedings. Allowing other parties to commence proceedings could undermine or skew the regulator's overall enforcement strategy as it may relate to targeted enforcement and the use of infringement notices and enforceable undertakings.

46.28 In particular, the concept of private prosecutions, whether by an individual or a representative organisation, was not supported. Tasmania, like other jurisdictions, had a

[10] NZ Parliament, House of Representatives, Select Committee on Transport and IR, 2002, p.14
[11] ACT Review, Part 15.6, pp.77-82
[12] WA Review, pp.111-113
[13] NT Review, p.123
[14] Section 218 of the ACT Act
[15] Queensland Government, *Submission No.32*, p.34, para.8.3
[16] South Australian Government, *Submission No.138*, p.54

prosecution policy (applicable to OHS prosecutions) based on guidelines published by the DPP. DPPs across Australia apply similar principles. Private prosecutors are not bound by such requirements and to allow prosecutions to occur without the application of the 'tests' incorporated in the DPP's guidelines would defeat the purpose of the regulator applying them.

46.29 Further, duty holders were entitled to know the basis on which decisions to prosecute would be made, and this could not be known with any certainty if private prosecutions were part of the framework. Related to these matters was the potential for inconsistency if there were private prosecutions. Other difficulties in private prosecutions pertained to the lack of separation of the investigatory and prosecutorial functions, and the lack of impartial review of the decision to prosecute.[17]

46.30 The Victorian Government stated that the model OHS Act should limit the right to commence criminal prosecutions to the regulator, an authorised officer and the local Office of Public Prosecutions. Consistent with the principles of natural justice, accountability and transparency, a person should have a right under the model Act to seek review of prosecutorial discretion.

46.31 Our attention was drawn to the 'utmost seriousness' of prosecutions for criminal offences and the role of the Crown. The exclusion of third parties from the prosecutorial role was justified by the need for consistency, proportionality and fairness in bringing prosecutions. The consequences for an individual of a conviction were underscored.

46.32 Duty holders had to be confident that they would not be exposed to unwarranted prosecution instigated by a third party. The public expectation was that those making prosecutorial decisions would be accountable through the courts and Parliament. The integrity of prosecutorial discretion was critical to the credibility of enforcement decisions and therefore to deterrence, and this discretion may be diluted if it spread beyond the Crown.

46.33 Another concern was the possible undermining of official compliance and enforcement policies (relying on the prosecutorial guidelines of the Australian Directors of Public Prosecutions) and model litigant guidelines, which preserved the highest standard of legal and prosecutorial conduct. The Victorian Government pointed out that these standards did not apply to third party litigants such as unions, potentially derogating from the consistent application of the standards in OHS prosecutions.

46.34 In addition, in Victoria, the *Victims Rights Charter*[18] and the *Victorian Human Rights Charter*[19] impose obligations on prosecuting agencies. These protections and safeguards would not apply to private prosecutions. The right of victims of crime to make victim impact statements and have them properly presented by a government prosecutor with the relevant knowledge, understanding and professional obligations would not apply to private prosecutors.

46.35 The Victorian Government noted that third party prosecutions are not published unless otherwise reported by the court concerned and not subject to the same transparency or scrutiny as Crown prosecutions. This would put at risk credibility and community confidence in prosecutions.

46.36 There was also said to be considerable potential for conflict and duplication in allowing third parties to initiate prosecutions, since prosecution was not the only enforcement tool available to a regulator. Third parties could undermine non-prosecution measures (which are contained in all jurisdictions' principal OHS legislation) by prosecuting where a regulator had already used or intended to use other enforcement tools, such as a notice or an enforceable undertaking.[20]

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[17] Tasmanian Government, *Submission No.92*, p.24

[18] Since 2006 the *Victims Charter Act 2006* (Vic) has provided a victims charter setting out principles on how the criminal justice system and victim support agencies respond to victims of crime.

[19] The *Charter of Human Rights and Responsibilities Act 2006* (Vic) now constitutes the Charter of Human Rights and Responsibilities (s.1).

[20] Victorian Government, *Submission No.139*, pp. 86-89

46.37 The Western Australian Government submitted that only the regulator or the local DPP should have the right to prosecute for breaches of the model Act. Prosecution for a criminal offence was a matter of the utmost seriousness and properly the State's exclusive function. The Western Australian Government supported the conclusion of the Maxwell Review that giving any other party a statutory right to bring a prosecution was not justified.[21]

Unions and union organisations

46.38 Unions consistently and strongly urged us to recommend that the model Act confer standing on unions to prosecute breaches of the model Act. We summarise some of the views put to us by peak bodies and a public sector union as representative of those views.

46.39 In its submission,[22] the ACTU emphasised the union movement's view that it was essential that the entitlement to prosecute extend beyond regulatory authorities to trade unions. This was justified on grounds of principle and by reference to practice and to outcomes.

46.40 Giving trade unions standing to prosecute was consistent with their role as representatives of workers and was said:

a) to optimise the efficient use of resources by permitting trade unions, which have extensive experience in a particular industry or workplace, to deploy their resources in a manner calculated to bring about organisational and cultural change; and

b) to encourage trade unions to be actively involved in OHS management and potentially to encourage employers to actively involve trade unions in such management.

46.41 Our attention was drawn to other areas of regulation where private prosecutions were permitted, such as environmental legislation. As to the question of whether having a statutory right to bring proceedings that could result in large penalties would foment industrial difficulties, the ACTU pointed to the right of unions to bring certain civil proceedings under the Commonwealth WR Act and noted that it had not had such consequences.

46.42 In the ACTU's view, the NSW Act was an appropriate model, striking an appropriate balance between:

a) promoting workplace safety;

b) encouraging participation in OHS management in the workplace; and

c) giving appropriate protection to defendants.

46.43 The ACTU emphasised that the NSW system restricted standing to a union with a member or members who were concerned in the matter to which the prosecution related.[23] Thus, the legislation required the union to have a genuine interest in the matter. In addition, the ACTU stated there was no evidence to suggest that this power had been abused in any way. Actions were brought by unions with experience of an industry and its standards and brought about positive organisational and cultural change in that industry.

46.44 In practice, because OHS prosecutions are often difficult to prepare and expensive to conduct, it is inherently unlikely that trade unions or other third parties with standing would commence or maintain proceedings lacking in merit. Our attention was drawn to the judicious use of the union right to prosecute under the NSW legislation over the last 10 or 15 years which had, without exception, been successful.[24] Unions typically brought the proceedings where the regulator did not and had been able to achieve systemic and industry wide improvements.

46.45 The State Public Service Federation Group, the CPSU, (SPSF Group CPSU), which represents public sector employees in all States, also strongly supported the provision of union

[21] Western Australian Government, *Submission No.112*, p.42.
[22] ACTU, *Submission No.214*, pp.56-60
[23] Section106(1)(d) of the NSW Act
[24] The ACTU provided relevant information about a number of cases brought by unions in NSW, both in its submission (see pp.58-60) and in consultations.

standing for prosecution purposes.[25] The SPSF Group CPSU criticised the arguments against such a right for being unsubstantiated.

46.46 In this respect, the SPSF Group CPSU referred to five prosecutions that the PSA of NSW had successfully brought in that State. Our attention was brought to the fact that the proceedings were only taken after WorkCover declined to prosecute (for reasons that the union stated were never disclosed). Each action was successful and, in the view of the union, produced major, ongoing OHS improvements.

46.47 The SPSF Group CPSU also commented that the awarding of a moiety upon securing a conviction only went some way towards meeting the union's costs in bringing a prosecution.

46.48 Unions NSW provided us with a detailed examination of the experience of unions in that State with prosecutions under the NSW Act and reasons for carrying over such provisions to the model Act.[26]

46.49 We were informed that the majority of prosecutions brought by unions had occurred since 1997. Ten such cases were summarised.[27] Five of the cited cases were prosecutions brought against the Crown (as a state government department or agency or the police service), and, of the balance, four were prosecutions of banks for failing to protect workers from the risk of armed hold-ups. Most of the prosecutions so listed involved incidents in which physical harm was suffered. All of the completed proceedings resulted in convictions. Unions NSW also advised us that in one case involving a government department, the regulator had reversed its decision not to prosecute when the relevant union indicated that it would do so if no proceedings were brought by the regulator. A conviction resulted.[28]

46.50 According to Unions NSW, the prosecutions resulted in a number of systemic benefits. For example, since the prosecutions of the banks and the resulting improvements to worker protection, there had been a marked reduction in armed hold-ups.[29] This demonstrated the value of unions being able to bring prosecutions.

46.51 Unions NSW strongly believed that the legal right to prosecute employers was an additional deterrent to employers who attempted to evade their OHS legal responsibilities and de facto, it was an additional enforcement arm to the NSW Regulator's activities. In addition, the prosecutions had positive effects resulting in significant improvements to the OHS of workers in the defendants' employment.

46.52 Unions NSW also pointed out that a union's decision to prosecute was not taken lightly because an investigation, the collection of evidence and the organising of expert and other witnesses presented a significant resource issue for most unions who took such action. The evidence to date demonstrated that the right to prosecute under the NSW Act had not been abused by any union since its introduction in 1983.

46.53 The effectiveness of union prosecutions should not, Unions NSW observed, be underestimated, given that the total number of union initiated prosecutions in the period 2001-2008 was approximately one per cent of the total number of prosecutions commenced by the NSW Regulator (2057) in a lesser period.[30]

46.54 Unions NSW also pointed out that, by conferring standing on unions for prosecution purposes, a solution was provided to the question of whether a regulator that itself breached OHS laws in respect of its own workers would be (or be seen to be) irretrievably compromised in terms of deciding upon and taking enforcement action against itself.[31]

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[25] SPSF Group CPSU, *Submission No.230*, pp.37-44
[26] Unions NSW, *Submission No.108*, pp.53-58
[27] At pp.53-56. One prosecution was still under way at the time the submission was provided to us.
[28] Unions NSW stated (p.57) that the NSW regulator has not given reasons for its decisions not to prosecute.
[29] ibid, p.56
[30] In support, the submission cites: *NSW CaseLaw – Industrial Relations Commission Statistics. 2001-2008*
[31] Unions NSW, *Submission No.108*, p.58

46.55 Finally, Unions NSW saw no objection to giving a right of private prosecution to an individual worker, but pointed out that there would be problems for such a person in collecting evidence and exposure to costs in the event of a prosecution failing.[32]

Employer organisations

46.56 The ACCI was strongly opposed to private prosecutions. The ACCI observed that the overriding factor in deciding upon a prosecution must be that criminal proceedings should only ever be commenced in the public interest. Under no circumstances should proceedings for an offence be brought by any other person, organisation or authority (i.e. unions, workers' representatives). It was antithetical to the integrity of the justice system that criminal proceedings could be initiated by someone other than the State.

46.57 Indictable offences should be prosecuted by the relevant Office of Public Prosecutions (OPP), in accordance with its relevant legislation and prosecution policy or guidelines.

46.58 The OHS authority should conduct the investigation and brief the relevant OPP. The OPP may develop a unit or section which could develop expertise in this area, consistent with current frameworks amongst Federal and State agencies.

46.59 The OPP brought criminal proceedings not for any interest group, nor even the victim, but on behalf of all of the Crown and the community. It must only concern itself with the law and the attainment of justice.[33]

46.60 The ACCI also relied on the Commonwealth's Prosecution Policy,[34] noting that there are a number of factors that should not influence a decision whether or not to prosecute. These include "... the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision."[35] In the ACCI's view, a union would be caught by this consideration.

46.61 To allow third party 'agents of the Crown' the ability to initiate and commence criminal proceedings threatens the integrity of the justice system. Such a function should not be outsourced in any manner, including by authorising unions and interest groups to carry out such a function.

46.62 The ACCI also adopted Maxwell's findings and conclusions against private OHS prosecutions.

46.63 The NSW Business Chamber and others also argued against any provision for private prosecutions under the model Act.[36] In their view, the right to prosecute for offences under OHS legislation should rest with the Crown or an instrument of the Crown. One industrial party should not have a right of prosecution against the other. We were provided with a history of the NSW provision, which had its origin in the Factories and Shops (Amendment) Act 1943 (NSW), which the Chamber argued showed that the current provision had moved further than the Parliament had originally anticipated (in the Chamber's view, the right was intended to be predominantly an instrument of trade protectionism).[37]

46.64 It was irrelevant that the current right in the NSW Act was seldom exercised and that rights of private prosecution existed under other legislation. Repeating Maxwell [38] giving one industrial party the right to prosecute the other was not conducive to the collaborative relationship needed for OHS at the workplace. While unions had the right to prosecute and receive moieties

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[32] ibid, pp.57 and 58

[33] A similar argument was put by the MBA: 'A prosecutor represents all members of the community and cannot, therefore, act as if representing private or factional interests. Unions, by their very nature, represent the interests of employees and therefore cannot represent the entire community', submission 9, part 4, p.45.

[34] Commonwealth of Australia, *Prosecution Policy of the Commonwealth*, 2nd Ed, 1990

[35] ibid, para.2.13(d)

[36] NSW Business Chamber *et al*, *Submission No.154*, p.14

[37] ibid, Attachment A

[38] ibid

(as in NSW), the system could not, in the Chamber's view, avoid being regarded as open to misuse and abuse, particularly where the onus of proof rested on the defendant (as under the NSW Act where there was an alleged breach of a duty of care).

46.65 The AiG and EEA(SA) submitted that the question of who performs the prosecution role should be determined by considering how it helps the total enforcement regime to work better in terms of producing safer workplaces.

46.66 In their view, there should be no right of private prosecution.[39] Only the regulator, in its corporate capacity as the regulator, should have the capacity to initiate a prosecution. Other parties, including individual inspectors and registered industrial organisations, should not be able to do so.

46.67 The criminal jurisdiction underpinning OHS law should operate, and be seen to do so, in accordance with the normal protections and processes of criminal law.

46.68 To ensure that the prosecutor's focus always included newly emerging risks and behaviours, there could be a process for any party to inquire into why a prosecution had not commenced and ask the regulator to investigate. Section 131 of the Vic Act was suggested as a model.[40]

46.69 The AiG and EEA(SA) further proposed that the regulatory and prosecution functions be separated, with the latter the responsibility of a separate public prosecutor. This would allow the regulator to concentrate on actions that would obviate the need for prosecutions in the first place.

Academic and legal

46.70 In the view of the Law Council of Australia, criminal prosecution should only be commenced by the regulatory authority or relevant state/territory prosecution agency. This has the benefit of ensuring a consistent prosecutorial policy and practice.[41]

46.71 According to the Law Society of NSW[42], the single Regulator specified in the model Act should have the sole authority to commence and maintain criminal proceedings. The Law Society did not support a situation where there could be multiple prosecutors, be it a Department of Mines or a trade union. There should be a single independent and accountable prosecutor entitled to commence proceedings.

Discussion

46.72 As appears from the outline of submissions above, there are fundamental differences in the views about whether any person other than an official should be entitled to take proceedings for a breach of the model Act. For most Australian governments, the answer is no. That position is shared by most employer bodies with whom we engaged and by the Law Council of Australia.

46.73 On the other hand, the union movement strongly supports a right for unions to prosecute, and points to the positive experience of unions in NSW in securing convictions and, more importantly, often obtaining ongoing improvements in OHS outcomes.

46.74 The previous reviews that we examined were also divided on this point.

46.75 Private prosecution has been judicially found to be, 'a valuable constitutional safeguard against inertia or partiality on the part of authority'.[43] On the other hand, as pointed out in the Commonwealth's Prosecution Policy, it may be "open to abuse and to the intrusion of improper

[39] AiG and EEA(SA), *Submission No.182*, pp.69-70.

[40] Section 131 of the Vic Act confers a right on any person to request in writing that a prosecution be brought where that has not occurred within 6 months of the perceived offence. The regulator must investigate within 3 months of the request and then advise the person of what has happened or is going to happen in relation to a prosecution. A further review by the DPP is available.

[41] Law Council of Australia, *Submission No.163*, p.35

[42] Law Society of NSW, *Submission No.113*, p.26

[43] LJ Wilberforce, *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477

personal or other motives".[44] The Policy also observes that there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed ... or be allowed to remain in private hands'.[45]

46.76 We were not able to discover any meaningful evidence about whether private prosecutions resulted in better OHS overall compared with the jurisdictions in which they were not available. In this respect, we note the observation in the Victorian Government's submission about the lack of transparency in such prosecutions, with the result that information about such prosecutions and their outcomes was not easily found. We also note that the number of prosecutions brought by unions has been relatively small, although they have often had significant outcomes.

Options

46.77 Against the background of all the submissions made to us, the consultation with stakeholders over the issue, and the rebalancing of rights, responsibilities and regulatory approaches that we are proposing, we have identified four options. We show in brackets after each option jurisdictions where such an arrangement already exists.

1. Confer a right of private prosecution in addition to the regulator's rights to initiate a prosecution (ACT, NSW).
2. Allow a private prosecution where no official action has been taken and is not intended to be taken (NZ, SA).
3. Give the responsible Minister or an official the power to authorise a 'person' to bring a prosecution (Qld, WA).
4. Reserve the right to prosecute to the Crown (Vic, Tas, Cwth, Britain), with accountability for no action or for any decision not to prosecute (Vic).

Option 1: A right of private prosecution

46.78 Under this option, provision could be made as in NSW for a trade union to be able to bring a prosecution for a breach of the Act, or as in the ACT, for a trade union or employer association to have that right. There might also be some provision for an individual who had suffered from the breach to take such action. Apart from the capacity of the courts to deal with unmeritorious prosecutions, a safeguard would be the usual availability of official intervention on public interest grounds to take over or to end a prosecution for an indictable offence. Summary offences subject to this process may in some cases need to be prescribed under the applicable DPP Act.[46]

46.79 Such an option would supplement the resources for enforcing the legislation and strengthen the position of representative organisations. The arguments for private prosecutions have been outlined above and most need not be repeated here. We should mention, however, the views expressed that such a right of action is warranted where the potential defendant is the Crown. In such circumstances, a right to bring proceedings may reduce perceptions of institutional reluctance by an official body to take enforcement action against the executive arm of government and, in particular, against itself where it has failed to comply with the relevant OHS laws.

46.80 The option has some problems. It is not accepted by many key stakeholders (including most governments and by industry representatives) and is seen by them as compromising the objectivity, credibility and effectiveness of enforcement. This cannot be lightly dismissed.

46.81 There is another serious practical difficulty. A private prosecution will not be able to be brought with the same resources as are available to a regulator (which may undermine the

[44] op cit, p.17, para.4.8
[45] ibid
[46] For example, see s.9 of the *Director of Public Prosecutions Act 1986* (NSW), s.11 of the *Director of Public Prosecutions Act 1991* (WA), and s.25 of the *Public Prosecutions Act 1994* (Vic).

evidence base) or be subject to the same safeguards (application of prosecution policies, review of decisions and other public sector accountability measures). The concern has also been raised with us that a private prosecution could disrupt other enforcement initiatives, such as a proposed enforceable undertaking or other measures that the regulator considers as more appropriate and proportionate in the circumstances of a particular case.

46.82 We do not recommend Option 1. We consider that there are other ways of addressing the concerns that may arise where the defendant is a government entity, which we discuss below.

Option 2: Private prosecution available where no prosecution action taken by regulator

46.83 Under this option, the regulator is given an opportunity to investigate a matter and to decide whether to take enforcement or other action before a private prosecution may be brought.

46.84 We have described above how this is addressed in the New Zealand HSE Act and in the SA Act. Such an approach overcomes the problem of a private prosecution compromising the compliance activity of the regulator. We note that this appears to be the de facto position in NSW. Unions informed us that, in practice, they would not bring a prosecution in NSW if the regulator intended to do so.

46.85 The option does not overcome the other problems associated with private prosecutions. It also runs the risk that a regulator may choose not to pursue a matter on the basis that another person has the capacity to use its resources to take enforcement action. This has the inherent problem that appropriate compliance measures short of prosecution may not be available to that person. In addition, we note Maxwell's view that if the regulator's exercise of its prosecutorial 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.[47]

46.86 We do not recommend Option 2.

Option 3: A person may be authorised to bring an action

46.87 This option would adopt a provision that exists in some jurisdictions. It has the advantage of placing some control over who may bring a prosecution. It allows a decision to be taken about whether some person other than the regulator should bring a prosecution and limits the possibility of a private prosecution being inappropriately taken or a regulator being less rigorous about enforcing a matter because a private prosecution might be available. Significantly, it provides a means of overcoming the problem of the regulator potentially prosecuting itself where it was in breach of the Act.

46.88 We consider that this option is unsatisfactory for the following reasons:

a) it provides no certainty and is, at least in its current form in the relevant OHS Acts, without any criteria;

b) there is a risk of improper decisions or a perception of them;

c) it exposes the decision maker to the possibility of time consuming (and possibly sometimes vexatious) reviews of the decision to authorise a person or not to do so.

46.89 Accordingly, apart from some limited application for prosecuting the regulator for a breach of the Act, we do not recommend this option.

Option 4: Only the Crown may prosecute but with accountability for inaction or a decision not to prosecute

46.90 Reserving the right to bring a prosecution for a criminal offence to the regulator overcomes many of the problems that we see in the previous options. It has the benefits of ensuring that the resources, expertise and accountability of the Crown are always applied to

[47] Maxwell Review, p.361, para.1738

prosecution decisions and proceedings. It also facilitates the graduated enforcement that we consider must underpin securing compliance with the model Act. The option must also be seen in the overall context of the model Act, for which we recommend stronger functions, powers and protections for workers' representatives.

46.91 Option 4 is our preferred approach, provided it is accompanied by very strong safeguards:

a) the process for deciding upon prosecutions must be transparent and taken against the background of clear, publicly available prosecution guidelines (these should be expressed in an overall compliance policy);

b) the regulator's decisions about not taking prosecution action should be speedily reviewable by an external authority (we propose that, subject to wider considerations of criminal justice administration, the DPP in each jurisdiction have this role);and

c) such a process (which should be based on that under s.131 of the Vic Act[48]) may be initiated by a person who considers that a particular action or inaction constitutes a serious breach of a duty of care (a category 1 or 2 offence) under the model Act may request in writing that there be a prosecution in relation to the matter.

46.92 In our view, decisions about less serious breaches of duties of care should not be reviewable by the DPP to avoid unnecessarily using the resources of the DPP.

46.93 Even so, the regulator should be required to explain in writing to a person what action is proposed by the regulator where the person informs the regulator in writing that the person believes that:

a) a category 3 breach of a duty of care has occurred; and

b) the alleged offender should be prosecuted.

46.94 The time frame would be similar to that set out below.

46.95 We set out below a process that we consider would be appropriate (the process involves greater speed than that under s.131 of the Vic Act):

a) such a request should not be able to be made earlier than six months after the event concerned, or later than twelve months after that event (an extension should be provided where there is a coronial inquest so that the time limit runs from the time of a coronial finding of a breach of the model Act);

b) the regulator must respond in writing within one month of receiving the request, advising the person of:

   i) the action, if any, that has been taken and is proposed to be taken in relation to the matter; and

   ii) if there is not to be a prosecution, the reasons for not prosecuting;

c) if the person is not satisfied with the decision not to prosecute, the person may within one month request in writing that the regulator refer the decision to the DPP for review;

d) where the regulator receives such a request, the regulator must forthwith refer the matter to the DPP and provide the DPP with all relevant information and assistance;

[48] The Victorian Government advised us (*Submission No.139*, p.89) that since 1 July 2005, nine requests were made under s.131(3) of the Vic Act for WorkSafe to refer matters it had already investigated and decided not to prosecute to the DPP for its consideration. Under the Act, the DPP must then advise WorkSafe as to whether a prosecution should be brought. No request was made by a union representative. There were also six requests by unions under s131(2) for WorkSafe to undertake an investigation in circumstances where no prosecution had previously been brought in regard to the alleged offence within six months of it occurring. The decision not to prosecute was communicated in five of the matters. No request was subsequently made for a review of the decision by the DPP in any of the matters. There was one other outstanding matter in which WorkSafe was still to consider a request from a trade union for a review of a decision not to prosecute

e) where such a referral occurs, the DPP must advise the person that the referral has occurred and decide within one month of receipt of the referral whether, in the opinion of the DPP, a prosecution should be brought for a breach of the model Act;

f) the DPP must inform the regulator and the person in writing of the DPP's findings as soon as possible after making them;

g) if the regulator does not accept the findings of the DPP, the regulator must advise the DPP and the person in writing of the regulator's reasons.

46.96 As a further safeguard, we propose that the model Act make it clear that the DPP is entitled to bring a prosecution for an indictable offence under the model Act. Accordingly, if the DPP considered that the regulator was wrong in not prosecuting in circumstances where the DPP had advised the regulator that such action was appropriate, the DPP would be able to bring the proceedings.[49]

RECOMMENDATION 224

We recommend that the model Act provide that:

a) only an official who is acting in the course of a public office or duty may bring a prosecution for a breach of the Act;

b) in accordance with the process and time frame described in our discussion of Option 4, in the case of an alleged category 1 or 2 breach of a duty of care, a person may request in writing that the regulator bring a prosecution for the breach and, if no prosecution is to be brought, have the decision of the regulator reviewed by the DPP; and

c) the model Act should provide that the DPP is able to bring proceedings for an indictable offence under the model Act notwithstanding any other provisions in the model Act.

[49] An example is provided by s.130(5) of the Vic Act.

PART 12

REGULATIONS, CODES OF PRACTICE AND OTHER MATTERS

- Regulation Making Powers
- Codes of Practice
- Other matters

CHAPTER 47: REGULATION MAKING POWERS

47.1 While each of the OHS Acts vests the relevant minister with the power to make new regulations dealing with OHS matters, the scope of these powers varies. In this chapter, we discuss the regulation making powers that we consider should be provided in a model Act.

Current arrangements

47.2 The OHS Acts contain conventional regulation making powers, providing for regulations to be made with respect to matters that are required or permitted to be prescribed by the law; or that are necessary or convenient to be prescribed for giving effect to the objects of the law.

47.3 Despite the consistency in these general regulation making powers, there are some significant variations in relation to the application of regulations and penalties.

47.4 For example, in NSW a relevant contravention of the regulations is admissible in evidence in any proceedings for an offence. Compliance with the regulations is not in itself a defence for an offence under the Act and the regulations. The regulations may also create criminal penalties under 250 penalty units (approximately $27,500). The regulations may limit civil liability.[1]

47.5 In Victoria, if a regulation makes a provision for, or with respect to a duty or obligation imposed by the Vic Act and a person complies with the regulation, the person is taken to have complied with that Act. Penalties for any contravention of the regulations must not exceed 100 penalty units (approximately $11,300) for a natural person and 500 penalty units (approximately $56,500) for a body corporate. [2]

47.6 In Queensland, if a regulation prescribes a way of preventing or minimising exposure to a risk a person discharges its obligation only by following the prescribed way. At the same time, following the way prescribed in the regulation is a defence in a proceeding against a person for a contravention of an obligation. Offences for a breach of a regulation impose a maximum penalty of not more than 40 penalty units (approximately $4,000).[3] In Western Australia regulations may provide that a contravention of a regulation constitutes an offence and different penalties are set for first and subsequent offences.[4]

47.7 Another significant difference between jurisdictions relates to the description of the matters authorised to be regulated under the principal Act. In general, OHS laws provide for broad regulation making powers followed by more specific regulation making powers prescribing those matters that are not expressly identified within the scope or objects of the Act for which regulations may be required. There are significant differences between the levels of detail provided. For example, the NT Act does not provide any detail of the matters that could be addressed by regulations. On the other hand, the WA Act[5] provides a detailed schedule describing the matters that may be covered by regulations. Victoria[6] has taken an intermediate approach and consolidated its regulation-making powers into a more compact list that is more broadly worded.

Recent Reviews

47.8 The Maxwell Review noted that 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

[1] NSW Act, ss.29, 39 & 39A
[2] Vic Act, ss.152 & 158
[3] Qld Act, ss.26,37 & 38
[4] WA Act, s.60
[5] See WA Act, Schedule – Subject matter for regulations
[6] See Vic Act, s.158

impose obligations which are properly to be regarded as additional to the general duties imposed by the Act.[7]

47.9 The NT Review observed that a lot of the prescriptive detail that was formerly contained in legislation has been transferred to regulations and many state regulations are still far more prescriptive than was intended or is desirable. Good practice examples were seen to be the NSW regulation (for its emphasis on risk management and requirements for practices and procedures to be established in consultation with workers) and Victoria for its then proposed consolidated regulation, which had been scrutinised for consistency with National Standards.[8]

47.10 The WA Review, conducted by Richard Hooker, considered a question of whether the legislative mix and balance of the general duties in the WA Act and the quantity and depth of prescription in the regulations (and the 'quasi-legislative' content of codes of practice) produced a mismatch. Hooker set out a useful discussion of the strengths and weaknesses of prescriptive regulations. These included, on the one hand, their clarity and ease of enforcement, and, on the other hand, the regulatory burden and danger of them becoming outdated and deterring or preventing better responses to new hazards and risks. In the event, Hooker concluded that, while the relationship between the WA Act's general duties and the more prescriptive regulations (and the guidance provided by codes of practice) was sensible and appropriate, he recommended that there be a formal examination of the regulations by the WA OSH Commission.[9]

Stakeholder views

47.11 The South Australian Government[10] submitted that regulation making powers should be broad enough to encompass all relevant matters arising from the provisions of the Act. Regulations should provide for summary offences; however the scale of penalties should be flexible enough to deal with breaches of regulations which might give rise to serious/significant consequences.

47.12 The Victorian Government[11] supports the inclusion of regulation making powers that are sufficiently broad to enable the making of all agreed regulations while not being so precise and detailed as to require regular amendment of the principal Act. The Act should contain provisions to allow the regulations to provide for summary offences with lower penalties. The regulations should also ensure the most serious obligations under the regulations, such as those regulations setting out the way in which general duties or obligations imposed by the Act are carried out, do not have their own penalties but rather refer back to the relevant Act, its provisions and associated penalties.

47.13 The ACCI drew our attention to industry's concerns about the volume and complexity of OHS regulations underpinning the various Australian OHS statutes. In the ACCI's view, as a general principle, the volume of OHS regulations should be kept to a minimum. Nonetheless, the ACCI proposed that as the model Act should only contain core legislative components, the regulation making power needed to be broad to enable regulations to be made beyond the core legislation.[12]

47.14 By contrast, the ACTU strongly opposed dropping items from the Act down the legislative hierarchy to the regulations, codes or guidance materials.[13]

Discussion

47.15 We note that a number of the matters raised with us in relation to regulations and the power to make them were outside our responsibilities. We do not express a view on the nature of

[7] Maxwell Review, p.365, para.1763
[8] NT Review, p.43
[9] WA Review, pp.134-139
[10] South Australian Government, *Submission No.138*, p.63
[11] Victorian Government, *Submission No.139*, p. 109
[12] ACCI, *Submission No. 136*, p.87
[13] ACTU, *Submission No. 214*, p.81

the possible regulations, beyond stating that we strongly support the now orthodox view that the Act should be expressed at a high level, containing general duties, with the regulations providing more detail. There are, of course, various other important matters to be provided for in the Act, but again we consider that matters of process and detail should normally be dealt with in the regulations. This has implications for the breadth of the regulation making power. We discuss that later.

47.16 The most important function of OHS regulations is to specify steps that are required for compliance with the general duties under the Act. Various matters may be included in regulations in order to streamline the primary legislation. The decision as to whether a particular matter should be included in regulations may be influenced by the nature of the matter and a variety of other factors such as its seriousness.

47.17 Regulations can only be made if authorised in primary legislation. In general, it is necessary that:

- the matters covered by proposed regulations are authorised by the principal Act, whether generally or specifically; and
- the proposed regulations do not extend the purpose, scope and general operation of the Act.

47.18 We note that the law relating to the making of regulations and their scope and effect is well settled in all jurisdictions. There is also considerable guidance about the general principles concerning what is appropriate for inclusion in subordinate legislation (for example, through guidance given by the various Offices of Parliamentary Counsel and Parliamentary Committees that are responsible for the scrutiny of legislation). Accordingly, we need not reflect on that, but we note that there may be some differences between the jurisdictions as to what is acceptable in a regulation as opposed to an Act. Care may be needed to avoid differences emerging in the implementation of the model Act as a result of such requirements.

47.19 Some jurisdictions go into considerable specific detail in stipulating in their Acts exactly what matters can and, by omission, cannot be the subject of regulation. This approach may provide for greater certainty; however it may limit regulatory options and require ongoing amendments to the authorising Act.

47.20 The Vic Act takes a different approach and consolidated its previous regulation-making powers into a more compact and more broadly worded list. We agree with that approach, which should be capable of ensuring adequate regulation making powers and avoiding the need for regular amendments to the Act.

47.21 To facilitate enforcement actions in relation to less serious breaches, the regulations should provide for summary offences with lower penalties.

RECOMMENDATION 225

The model Act should contain broad regulation making powers, which allow for the development of regulations necessary or convenient to carry out or give effect to the provisions of the model Act.

RECOMMENDATION 226

There should also be more specific regulation making powers (that expressly do not limit the broad general regulation making power) prescribing those matters that are not expressly identified within the scope or objects of the model Act for which regulations may be required.

RECOMMENDATION 227

To assist in identifying the specific matters mentioned in Recommendation 226, the range of existing regulation making powers in each jurisdiction's OHS Acts should be consolidated into a workable list of more broadly worded, specific regulation making powers. This should be used to settle the specific matters to be included in the model Act's regulation making power.

Note*: The range of such matters will only able to be finalised once the extent of matters that will be dealt with by the model Act are finalised.*

RECOMMENDATION 228

The model Act should allow the regulations to provide for summary offences with lower penalties.

CHAPTER 48: CODES OF PRACTICE

48.1 Codes of practice play an important role in assisting duty holders to meet the required standard of OHS practices at work. In this chapter we consider and make recommendations about the development of Codes of Practice and how duty holders can make the best use of the materials they contain.

Current arrangements

48.2 All Australian OHS Acts allow relevant Ministers to approve codes of practice[1] or compliance codes to provide duty holders with practical ways for managing exposure to risk and achieving legislative compliance.

48.3 Requirements for approving a code vary across the jurisdictions. Some of the requirements include:

- consultation and advertising arrangements;
- consideration of recommendations from the OHS authority or advisory body; and
- submission to Parliament.

48.4 The use of codes in proceedings also varies across the jurisdictions (see Table 76, below).

TABLE 76: Key characteristics of codes of practice by Jurisdiction

Jurisdiction	NSW	VIC	QLD	WA	SA	TAS	NT	ACT	Cwth
Code is approved by	M	M	M	M	M	M	M[2]	M	M
Code is a disallowable instrument	No	Yes	Yes	No	Yes	No	?	Yes	Yes
Code may incorporate any document from time to time	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Code may incorporate any document as in force at specific time	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Code of Practice is evidence in proceedings in relation to breaches of the Act or Regulations	Yes	Yes[3]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
A duty holder may discharge their obligations under the Act or regulations by following the code or by other means which provide an equivalent level of protection to	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes

[1] Also known as an 'Approved Industry Codes of Practice' under the NSW Act; a 'Compliance Code' under the Vic Act; and an 'Approved Code of Practice' under the Tas, ACT and Cwth Acts.
[2] Approved by the Minister if applies generally and approved by Authority if applies to specific workplace
[3] WorkSafe may use a relevant Code as evidence of the state of knowledge (per s.21(2)(c) OHS Act 2004) as to what a defendant ought to have known.

Jurisdiction	NSW	VIC	QLD	WA	SA	TAS	NT	ACT	Cwth
health and safety									
The duty holder is responsible for proving compliance with the Act or regulations by other means if a breach of the code is presented as evidence (reverse onus of proof)	No	No	Yes	No	No	Yes	No	No	Yes
Compliance with the code is deemed to be compliance with the Act	No	Yes	Yes	No	No	No	No	No	No
Compliance with a code is a defence in proceedings	No	Yes	Yes	Yes	No	Yes	Yes	No	No
Consultation on the development of a code is mandatory	Yes	Yes[4]	Yes	Yes	Yes	Yes	No	Yes	No
Development of a RIS for the development of a code is mandatory	No	No	No	No	Yes[5]	No	No	No	No
Code must be gazetted and/or registered	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Notice of the approval of a code must be published in newspaper	No	Yes	No	No	No	Yes	No	Yes	No

M = Minister

48.5 Approved codes of practice are documents of legislative character. In general, the legislation provides for their use as evidence in court proceedings, without further 'proving' in court. Under Criminal Codes a mistake about, or ignorance of, the existence or contents of an approved code of practice is not an excuse and does not affect its admissibility as evidence.

48.6 There are approved codes of practice with a rebuttable presumption of non-compliance, approved codes of practice (compliance codes) that are 'deemed to comply' (as in Victoria) and approved codes of practice that are evidentiary but have no 'rebuttable presumption' or 'deemed to comply' status.

48.7 In addition to codes, some OHS Acts allow ministerial notices and/or guidelines that prescribe methods of work to prevent or minimise exposure to risk. Voluntary codes and non-statutory guidance materials are flexible instruments that provide advice and may be admissible as evidence in proceedings but don't have legal status.

48.8 In a report reviewing the key characteristics that determine the efficacy of OHS instruments, Gunningham and Bluff observed that:[6]

[4] Subject to s.7(4) OHS Act 2004, which states that WorkSafe need not consult if the Minister considers it is in the public interest that the proposed compliance code be made as soon as possible.
[5] Requirement to undertake a RIS in SA is outlined in a Cabinet Circular.
[6] E Bluff and N Gunningham, *'A Review of Key Characteristics that Determine the Efficacy of OHS Instruments'*, Office of the Australian Safety and Compensation Council, Canberra, Australia, 2008.

"In the continuum of quasi-legal and purely advisory instruments, we suggest the principal basis for selecting a quasi-legal instrument over a purely advisory one is the need for unequivocal, authoritative advice. An 'approved' code of practice is a more appropriate choice when it is important to provide clarity and certainty about an acceptable way(s) to comply with the OHS statute or regulations, and it needs to be clear and unambiguous that the instrument has legal status and/or can be used as evidence in proceedings. A statutory guideline is appropriate if there is a need to provide definitive interpretation of a particular provision of an OHS statute or regulation. In other circumstances, where the principal aim is to provide practical advice and solutions, guidance materials (in various forms) are appropriate."

48.9 The Maxwell Review recommended that compliance with a code of practice should be encouraged and should therefore, be deemed to constitute compliance with the relevant duty or obligation. Maxwell noted that a similar type of provision existed in s.26(3) of the Queensland OHS Act: [7]

"(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."

48.10 The Vic Act was subsequently amended to allow the Minister to make an order approving a compliance code. Under the Vic Act, if a person complies with a compliance code, with respect to a duty or obligation imposed by the Act or the regulations, the person is taken to have complied with the Act or the regulations in relation to that duty or obligation.[8]

48.11 The NSW WorkCover Review sought comment on issues relating to approved industry codes of practice and their role in the health and safety framework, particularly in regard to the role of codes of practice in demonstrating that occupational health and safety obligations have been discharged.

48.12 Public comment supported a role for codes of practice in providing practical guidance and specific advice on how obligations under OHS legislation can be satisfactorily met. It was generally considered that codes of practice should have a non-mandatory status. However, there was mixed support for codes being able to be used as evidence in proceedings for an offence under the OHS Act or as part of a defence to demonstrate compliance with occupational health and safety obligations.

48.13 A range of suggestions were made supporting appropriate consultation practices (generally tripartite consultation arrangements) incorporating the involvement of appropriate specialists. Comment on whether consultation arrangements for the drafting of codes should be legislated was divided. Public comment supported the regular review of codes of practice. Periods of between three and five years were suggested as appropriate timeframes for the review of codes. Some submissions further suggested that there ought to be a mandatory review process for codes of practice.

48.14 In response, WorkCover NSW noted that amending the general duty provisions of the OHS Act to introduce the concept of 'reasonably practicable' and removing the existing defences under s.26 would address the issue of the status of codes. This is because codes of practice are designed to provide practical guidance on what is a reasonably practicable approach and therefore would be able to be used to demonstrate that a duty holder has or has not discharged their obligation. WorkCover NSW also recommended that the collaborative review process for

[7] Maxwell Review, p.361, paras.1729-1730
[8] See ss.49 and 152 of the Vic Act

updating codes of practice continue so as to ensure codes remain current.[9] The recommendations of the review were supported by the Stein Inquiry.

48.15 The WA Review recommended that codes of practice should retain their status as being designed to provide genuine "practical guidance" to industry participants in meeting legislative obligations and that there was no need to enhance their normative force or legal status. In particular, the alternative of enacting provisions of the kinds in force in South Australia and the Commonwealth would only serve to complicate and disturb the satisfactory balance that has been achieved in Western Australia. Equally, the Victorian model, which "essentially effects the opposite purpose of enabling a defence to a prosecution to be established through demonstration of compliance with a code provision", was rejected.[10]

48.16 The ACT Review recommended that a specific provision be included in the OHS Act to clarify that approved codes of practice may be used as evidence in relation to any of the duties of care.[11]

48.17 The 1995 IC inquiry into OHS stated there should be no impediment in regulation to voluntary codes of practice being developed by industry associations or other groups of employers, employees and, as appropriate, unions. [12] The IC favoured the development of industry-specific codes (versus hazard-based codes) as being more useful, encouraging industry bodies to take an active role in the preparation of practical guidance material. Under this scheme, while OHS regulators should support industry developed codes, they would not necessarily 'approve' or validate them.

48.18 At the time of the IC report, Australian OHS regulatory regimes were not supported by well developed bodies of codes of practice. In the years since, all jurisdictions have progressively developed and adopted OHS codes. New South Wales and Queensland each have over forty approved codes of practice, and South Australia has more than sixty codes relating to OHS. Efforts have also been made across jurisdictions to work more closely with industry bodies in developing codes. WorkCover NSW, for example, has focused on working with industry groups in developing guidance which can be approved as industry codes of practice and has made specific legislative provision to underpin this.[13] WorkSafe WA has developed *Guidelines for the development of Industry Codes of Practice for Approval under the Occupational Health and Safety Act 1984*.

Stakeholder views

48.19 Although most submissions support a three tier regulatory approach there were some comments in relation to the role and operation of Codes of Practice.

48.20 The MBA[14] proposes that codes of practice should be re-engineered to fit within the Robens structure. The MBA submitted that codes of practice should be used for guidance and have no separate legal force. However, where a builder could demonstrate compliance with a code of practice, that should be prima facie evidence of discharging the builder's duty. In essence, the MBA believes that codes of practice should not become instruments of constraint or de facto law, particularly given the pace at which technology changed practice in the building and construction industry.

48.21 The Tasmanian Government[15] suggested that the use of a tripartite approach had been successful in the development of codes of practice. The Tasmanian Government believed codes

[9] NSW WorkCover Review, pp.47-48
[10] WA Review, pp.139-140, para.8.16
[11] ACT Review, p.84
[12] IC, '*Work, Health and Safety: Inquiry into Occupational Health and Safety*', Report No 47, Canberra, p.93
[13] Part 4 of the NSW Act provides for the preparation of industry codes of practice including the incorporation of documents prepared by industry bodies.
[14] MBA, *Submission No.9*, pp.14 & 46
[15] Tasmanian Government, *Submission, No.92*, p.30

should be given the status of 'deemed to comply' and place a 'reverse onus' of proof onto a person who chooses to use means other than the code.

48.22 The New South Wales Law Society[16] proposed that, if it were considered that there should be a specific evidentiary procedure related solely with respect to codes of practice, then a prosecutor should be able to lead evidence of non-compliance with a code of practice as part of its case to make out a breach of the principal duty. The Law Society did not support the creation of a new defence based upon compliance with a code of practice. Generally, codes were written as advisory documents and within codes scope was given to industry to adopt various measures. The Law Society supported the establishment of a Robens type of system in the model OHS Act and did not consider that giving special evidentiary status to a code of practice or a regulation other than as referred to above was consistent with a Robens system.

48.23 The Victorian Government[17] considers that regulators are significant repositories of expert knowledge on compliance solutions and guidance, and that duty holders are entitled to have confidence that a regulator's roles in providing advice and developing statutory instruments are integrated with its compliance and enforcement roles.

> *"Certain instruments developed under OHS legislation, if followed, should provide duty holders with certainty in selecting their compliance solutions. Accordingly, when a regulator develops a statutory instrument which answers the duty holder's question 'How do I comply?' it is reasonable for the duty holder to expect that that advice will represent the current state of knowledge. It follows that in implementing this state of knowledge advice the duty holder is entitled to be confident they will meet their legislated obligations. It is axiomatic that a solution proposed by a regulator should not be in breach of legislated duties."*

48.24 The Victorian government suggested that compliance with a regulation or code of practice should be deemed to be compliance with the particular requirement of the model OHS Act in order to:

- satisfy the regulatory principles of transparency, consistency and impartiality
- provide assurance to duty holders that regulatory advice is state of knowledge and meets legislated compliance standards, and
- encourage compliance with regulatory guidance.

Discussion

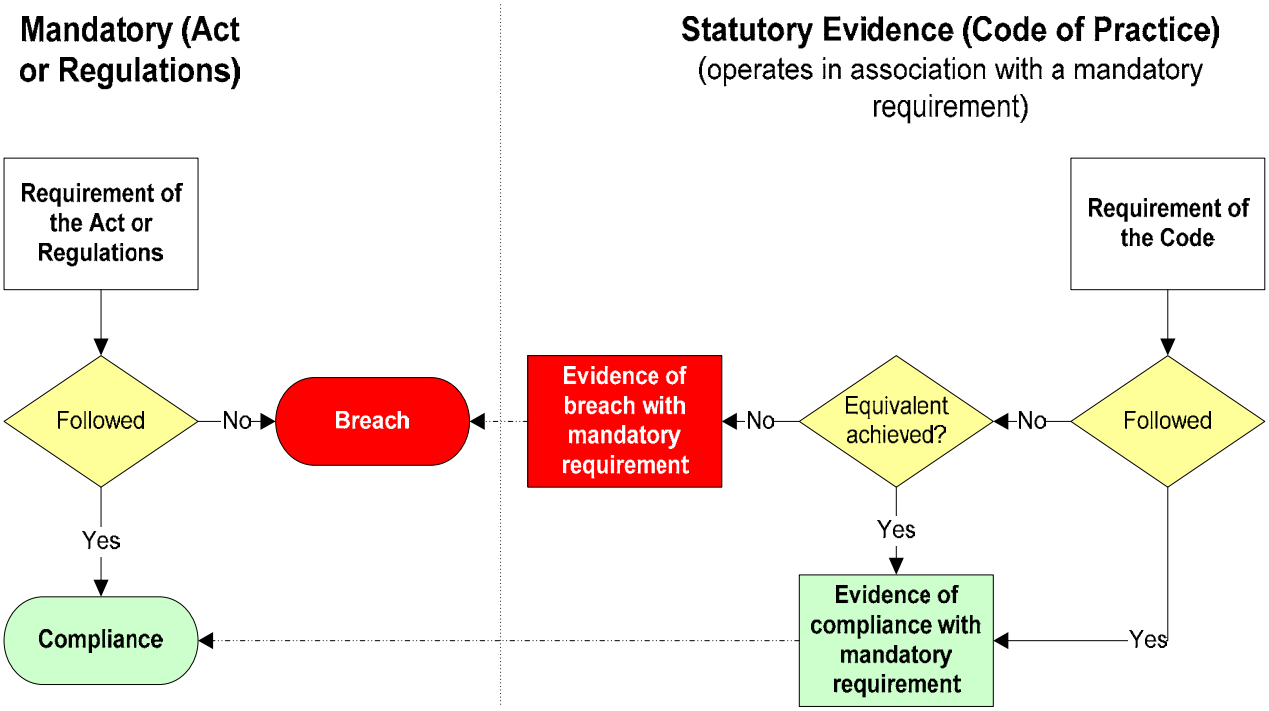
48.25 Codes of practice play an important role in explaining the requirements of the Act and regulations and setting out practical ways to meet the required standard of OHS practices at work. Codes were originally designed to enable duty holders to meet the requirements of the Act and regulations. This was by allowing flexibility to cope with invention and technological changes and to implement measures most appropriate for their individual workplaces without reducing safety standards.

48.26 There is no requirement that codes of practice be complied with. They are meant to guide duty holders in how to meet their obligations. It is not appropriate that they have a binding or prescriptive character. They may not be directly applicable to each business or workplace. If a person can otherwise show compliance with the duties under the Act, then compliance with a code of practice is not normally expected or required. Codes of practice do, however, represent evidence of knowledge of risk and risk control. They are evidence of what would be reasonably practicable in the circumstances.

[16] New South Wales Law Society, *Submission No.113*, p.26
[17] Victorian Government, *Submission No.139,* p.109

48.27 However, there is confusion about how far a code of practice will have an effect at law, if operating on a 'deemed to comply'[18] or reverse onus basis. Even if it is a 'deemed to comply' basis, the deeming is only to the extent to which the code is relevant to the duty and there may be a breach of the duty for matters falling outside the code.

48.28 The following flowchart outlines how codes should apply:



48.29 We propose that the model Act provide that a code is to be taken by a court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.

48.30 Codes should be developed through a tripartite process to ensure they are relevant, useful and accepted as practical guidance. In a report reviewing the key characteristics that determine the efficacy of OHS instruments, Gunningham and Bluff raised serious concerns about the knowledge and expertise contributed to the development of codes, and the lack of engagement with those expected to implement the code, stating that: [19]

> *"For efficacy, there is a need to ensure relevant knowledge, skills and experience are contributed with regard to: the hazard/risk or other subject matter; existing OHS legislation; the standards development process; practical understanding of the industry sector(s), workplace(s) and work process(es) for which a code or guidance is intended; and plain language drafting and user friendly presentation."*

48.31 We therefore recommend that codes of practice should be developed through a tripartite process, with expert involvement, and approved by the relevant minister. This should mandated by the model Act. Such approved codes, being documents developed in this way, would be given more weight by a court than other material such as Australian Standards or guidance material.

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[18] Refer paras. 51.5 and 51. 8 for discussion of 'deemed to comply' codes

[19] E Bluff and N Gunningham, *'A Review of Key Characteristics that Determine the Efficacy of OHS Instruments'*, Office of the Australian Safety and Compensation Council, Canberra, Australia, 2008.

RECOMMENDATION 229

The model Act should provide for codes to be developed through a tripartite process, with expert involvement, and approved by the relevant Minister.

RECOMMENDATION 230

The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.

RECOMMENDATION 231

The model Act should make it clear that a duty holder may achieve and demonstrate compliance with relevant provisions of the Act and regulations by ways other than the ways set out by an approved code of practice.

CHAPTER 49: OTHER MATTERS

IMPUTATION OF CONDUCT

49.1 The model Act will contain various duties of care, obligations and prohibitions. The conduct of a person will be a significant matter in determining whether the person has complied with the Act or committed an offence. In this section we consider the means by which a corporation may be considered to 'act'.

Current arrangements

49.2 Most current OHS Acts include provisions that impute to a corporation the conduct of an officer, agent or employee acting within the actual or apparent (or ostensible) scope of that person's authority or employment.[1] Most also impute to the corporation the intention or state of mind of the officer, agent or employee acting within the actual or apparent (or ostensible) scope of that person's authority or employment.[2]

49.3 Some of the current OHS Acts also provide that where the conduct or state of mind of a person is imputed to a corporation, it will be a defence for the corporation if it is proved that the corporation took '*all reasonable and practicable measures*'[3] to prevent the offence occurring (or apply a similar test).[4]

49.4 A slightly different approach is taken in the Model Criminal Code,[5] which has been generally adopted in the Cwth and ACT[6], and specifically applied (with limitation) in the Cwth Act.[7] The Model Criminal Code provides for intention, knowledge or recklessness to be imputed to exist where the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence. It also allows for negligence of a corporation if the corporation's conduct is negligent when viewed as a whole (through the aggregation of the conduct of any number of employees, agents or officers).[8] There is a defence of due diligence.[9]

49.5 The Cwth Act, while applying the Model Criminal Code generally, does so with the exception of the imputation provisions of that Code and instead makes specific provision, including a defence.[10]

Recent reviews

49.6 The Maxwell Review, while not dealing with the issue of imputation of conduct to a corporation, stated that there would not be a need for a defence of due diligence or reasonable precautions, where the standard of reasonably practicable applies and the prosecution bears the onus of proof. Maxwell commented[11]:

> *"…No need for defence of due diligence*

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[1] See s.78(2) of the Cwth Act; s.85 of the NT Act; s.217(4) of the ACT Act; s.143 of the Vic Act; s.59A(1) of the SA Act; and s.166(4) of the Qld Act. The SA Act also refers to 'usual authority'.

[2] See s.78(1) of the Cwth Act; s.85(2) of the NT Act in relation to intention, recklessness or negligence; s.217(3) of the ACT Act; s.59A(1) of the SA Act; s.166(3) of the Qld Act.

[3] See s.59A(2) of the SA Act

[4] See s.166(4) of the Qld Act, which requires the exercise of due diligence; ACT Act s.217(5) refers to reasonable precautions and appropriate diligence; Cwth Act s.78(2) refers to reasonable precautions and due diligence.

[5] See the Model Criminal Code, Part 2.5.

[6] In the *Criminal Code Act 1995* (Cwth) and the *Criminal Code 2002* (ACT).

[7] See s.15A. of the Cwth Act

[8] See ss.12.3 and 12.4 of the *Criminal Code Act 1995* (Cwth)

[9] See the Model Criminal Code, s.12.3.3

[10] See s.78 of the Cwth Act

[11] Maxwell Review, p.358, paras.1721 and 1722

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…"

Stakeholder comments

49.7 Business SA noted:[12]

"…South Australia has recently passed amendments to its OHS&W Act that relates to 'imputation of knowledge' and thus responsibility of officers of the body corporate. The result of this poor amendment is a growing reluctance of the business community to participate on voluntary boards etc. It must be recognised that there is already legislation dealing with responsibilities for officers of the body corporate…"

49.8 When opposing industrial manslaughter provisions, the MBA expressed concern about *"…excessively broad imputation provisions particularly for establishing intention, knowledge or recklessness…"*[13]

49.9 The imputation of conduct or intention to a body corporate was specifically opposed by the AMTIC[14], who *"…would not accept any waiving of the ordinary rules of evidence given, for example, serious charges of reckless endangerment/indifference and the consequences of being proven guilty…".*

49.10 The South Australian Government[15] referred to s.59A of the SA Act and noted how that provision operates. That section was considered by the National Generators Forum[16] to be appropriate.

Discussion

49.11 A corporation is an artificial, legal being that can only think and act through individuals. While discussing liability of officers, the Queensland Government placed this in perspective when commenting[17]:

"…in a corporation, especially a large corporation, as in any complex organisation, decision-making is diffuse. The breaching conduct sought to be criminalised may be the outcome of a series of disparate acts and thoughts spread over a number of departments and self-standing branches of the firm. It can become even more complicated when the enterprise acts through a set of connected corporate legal affiliates and subsidiaries…"

49.12 Similar comments were made by the Victorian Government.[18] It is therefore necessary to determine whose conduct and state of mind should represent that of the corporation.

49.13 The general law in Australia provides that only the conduct of the 'directing will and mind of the corporation' (the directors and senior managers who make the decisions for the

[12] Business SA, *Submission No.22*, p.39-40
[13] MBA, *Submission No.9*, p.10-12, para. 4.8.7.
[14] AMTIC, *Submission No.158*, p.16
[15] South Australian Government, *Submission No.138*, pp.55-56
[16] National Generators Forum, *Submission No.122*, p.27
[17] Queensland Government, *Submission No.32*, p.35
[18] Victorian Government, *Submission No.139*, p.96

corporation) is to be imputed to the corporation.[19] In some circumstances, particularly where necessary to avoid the frustration of the law, the conduct of a broader group of employees may be attributed to a corporation.[20] In short, the general law is unclear.[21]

49.14 It is in this context that most of the current Acts provide for the imputation of conduct and the state of mind of employees, agents and officers to a corporation.

49.15 We also note that a corporation will, as a primary duty holder or one of a specified class of duty holders, be required to ensure so far as reasonably practicable that persons are not put to a risk to their health and safety from the conduct of the business or undertaking of the corporation. The business or undertaking is only conducted through the officers, employees and agents and the corporation should be found to have breached the duty should the conduct of such persons collectively fail to meet that standard.

49.16 An officer, employee or agent of a corporation may act outside the scope of their actual authority, or even contrary to specific directions or limitations on their authority. Those with whom they deal may not be aware of such directions or limitations. Should the corporation in those circumstances have that conduct attributed to it?

49.17 Contemporary practice in OHS legislation is for the imputation of conduct or the state of mind to a corporation to occur when the officer, employee or agent is acting within the *apparent* or *ostensible* scope of their authority.

49.18 Providing for the imputation of conduct and the state of mind of individuals to a corporation may also assist in promoting compliance with the model Act, as it makes clearer to the officers of the corporation that the corporation should have measures in place to ensure compliance through themselves and employees and agents.

49.19 Including in the model Act a defence for a corporation if it is proved that the corporation took '*all reasonable and practicable measures'* to prevent the offence occurring, should prevent the inappropriate or unfair application of an imputation provision. This is approach is taken in 4 of the 6 OHS Acts that currently include imputation provisions.

49.20 We accordingly recommend that the model Act include a provision:

- imputing to a corporation the conduct or state of mind of an officer, employee or agent acting within the actual or apparent scope of that persons authority; and
- setting out a defence for a corporation if it is proved that the corporation took '*all reasonable and practicable measures'* to prevent the offence occurring.

49.21 We note the specific comments in the Maxwell Review that such a defence is not necessary. Maxwell relied on the qualifier of 'reasonably practicable' and the onus of proof being on the prosecution as protections for the defendant against harsh application of the law. Maxwell did not, however, discuss the issue of imputation of conduct or state of mind to a corporation and therefore did not consider the potential for this to have unintended harsh application of the law (particular the imputation of conduct within apparent or ostensible authority).

49.22 As we noted in our first report[22] we agree with Maxwell that 'reasonable care' and the onus of proof being on the prosecution do not ordinarily require a defence to be provided. The position of a corporation is, however, different to others with duties and obligations under the model Act, because of the imputation of conduct and the state of mind of others to it.

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[19] The High Court decision of *Hamilton v Whitehead* (1988) 82 ALR 626, applying the House of Lords decision in *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127.

[20] The approach taken by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 and applied in *ACCC v Australian Safeway Stores Pty Ltd and Anor* (2003) 198 ALR 657 and *AAPT Ltd v Cable & Wireless Optus Ltd and Ors* (1999) 32 ACSR 63.

[21] See the discussion in R. Johnstone, *Occupational Health and Safety Law and Policy, Text and Materials*, 2nd Ed, Lawbook Co, 2004 at p.467 and following.

[22] At paragraphs 19.10 and 19.11 and in Recommendation 75.

49.23 We note that this is a defence that would apply not only to duties of care, but also to other obligations or prohibitions (e.g. prohibition against discrimination based on OHS activities). This defence would, however, only apply to a corporation and only because of the imputation to that corporation of the conduct and state of mind of others. As it is a defence, the corporation would have the burden of proving the defence, on the balance of probabilities.

RECOMMENDATION 232

The model Act should provide for:

1. the imputation to a corporation of the conduct and the state of mind of officers, employees and agents of the corporation acting within the scope of their actual or apparent authority; and
2. a defence for a corporation if it is proved that the corporation took 'all reasonable and practicable measures to prevent the offence occurring.

PERIODIC REVIEW OF THE MODEL ACT

Current arrangements

49.24 The NSW, NT, SA and WA Acts each provide for the Act and regulations to be reviewed by or at the initiative of the responsible Minister:[23]

- The NSW Act provides for a once only review of the Act after 5 years of operation.
- The NT and WA Acts each provide for five yearly reviews starting five years after the respective Act's commencement.
- The SA Act has a similar requirement for reviews on a five-yearly basis.

49.25 The review provisions all require consideration of whether the Acts are meeting their objectives. There are various other requirements relating to the administration of the Act. In each case, the report of the review must be tabled in the Parliament.

Recent Reviews

49.26 The SA Review recommended that to ensure that the legislation remained up-to-date and reflected changes in the labour market and OHS trends, the SA Act should be reviewed every five years.[24]

49.27 The NT provision was included following the 2006 Review of the former NT Act which recommended such a provision.[25]

49.28 The WA Review considered some views that the current WA requirement for five-yearly reviews could be more flexible. Hooker found that the intent of the provision may have reflected a view that the dynamic content of the subject matter required regular monitoring and assessment. No change was recommended.[26]

[23] NSW Act, s.142, WA Act, s.61, SA Act, s.67C, NT Act, s. 95
[24] SA Review, Vol.3, p.11
[25] NT Review, p.41, part 5.4
[26] WA Review, pp.170-171

Stakeholder views

49.29 In consultations, we found some support for a legislative requirement for the periodic review of the model Act.

Discussion

49.30 We agree with the observations in the report of the Stanley review. There is considerable value in legislation as significant as an OHS Act being regularly re-examined to ensure that it is up-to-date and suitably responsive to the dynamic conditions and arrangements in the world of work. This applies equally to the subordinate legislation.[27] In addition, given the underpinning national scheme of harmonisation, periodic reviews, conducted within the same time frame, will be invaluable for the Ministerial Council with oversight of the arrangements. It should also provide the opportunity to review and strengthen or rationalise the relationships between OHS regulation and related areas of regulation.

RECOMMENDATION 233

The model Act should provide for the review of its content and operation and that of the subordinate regulation at least once in each period of five years after the model Act's commencement.

The review must be part of or take account of any national review of the content and operation of the principal OHS Acts.

Any persons who are affected by the operation of the model Act and regulations must be given a reasonable opportunity to provide their views for the purposes of the review.

The report of the review must be presented to the responsible Minister and presented to the Parliament within a reasonable time after the Minister has had an opportunity to consider it.

[27] This is consistent with the Commonwealth's approach to the five-yearly review of all Commonwealth regulations that are not subject to statutory review or sunset requirements – see Office of Best Practice Regulation at http://www.finance.gov.au/obpr/reviews/five-yearly.html

APPENDICES

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APPENDIX C – Tables

APPENDIX D – Structure of the Model Act

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APPENDIX B: SUBMISSIONS

TABLE OF SUBMISSIONS TO THE REVIEW

Submission Number	Submitter	Organisation/State
1	Mr Paul Harpur	Queensland University of Technology
2	Ken Scannell	Noise and Sound Services
3	Kelvin Johnson	INDOCC Consultants
4	Geoff Taylor	WA
5	Henning A. Klovekorn	Joint Submission Group S.A.
6	Julian S Richards	NSW
7	Andrew See	Qld
8	William Shannon	NSW
9	Richard Calver	Master Builders Australia
10	Allan Wollard	Vic
11	Karen Thornton	Australian Nuclear Science and Technology Organisation
12	Gena Ginnane	Vic
13	Margaret Riley	Evans Community Options
14	Barrie Mair	Qld
15	Bryan Bottomley	Bryan Bottomley and Associates
16	G.F. Barker	Steam Management Committee, National Historical Machinery Association
17	Tony Cooke	Commission for Occupational Safety and Health (Western Australia)
18	Michael Donovan	Shop Distributive and Allied Employees Association (Vic)
19	Lawrence McIntyre	NSW
20	Graham Pring	SA
21	Kevin Skauge	Australian Institute of Building Surveyors
22	David Frith	Business SA
23	David Foster	WA
24	Marc Steen	Trades Monitor
25	Eric Wilson	Lutheran Education Australia
26	Stafford Sanders	SmokeFree Australia
27	Dianne Haydon	Local Government OHSR Network Group - Southern Region NSW
28	Sue McCarrey	Public Transport Authority (WA)
29	Jeff Brundell	Crane Industry Council of Australia

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Submission Number	Submitter	Organisation/State
30	Neil Foster	NSW
31	Warren Doubleday	Association of Tourist and Heritage Rail Australia
32	Queensland Government	Queensland Government
33	Joseph Kelly	Association of Professional Engineers, Scientists and Managers Australia
34	Bruce Ham	N/A
35	Gavin Kenny	ABB Australia
36	Dr Helen J Leonard	Qld
37	Dr Helen J Leonard	Qld
38	Terry George	Tyree Industries
39	Sandra Dann	Working Womens Centre (SA)
40	Greg Kempton	Watpac
41	Anthony Farley	Catholic Commission for Employment Relations (NSW/ACT)
42	Prof Ron McCallum, Dr Suzanne Jamieson, Dr Tony Schofield, Ms Belinda Reeve	NSW
43	Nadia Schoner	Vic
44	Anne Bellamy	Chamber of Commerce and Industry Western Australia
45	Damon Thomas	Tasmanian Chamber of Commerce and Industry
46	Peter Warren	Australian Sugar Milling Council
47	Ron Hardaker	Australian Finance Conference & Australian Equipment Lessors Association
48	Peter Verberne	Airconditioning and Mechanical Contractors Association
49	Donald Dingsdag	Cardiac Arrest Survival Foundation
50	Jeff Priday	Group Training Australia
51	Ardele Blignault	GE Capital Finance Australasia
52	Michael Roche	Queensland Resources Council
53	Wendy Sturgess	Crisis Support Services
54	Martin Jones	CSR
55	Prof Richard Johnstone, Liz Bluff and Prof Michael Quinlan	Qld

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Submission Number	Submitter	Organisation/State
56	Ruth Dunkin	Business Council of Australia
57	Melissa Ryan	Australian Government Department of Education, Employment and Workplace Relations
58	Rob Howse	NatRoad
59	Ross Clark	Australian Institute of Architects
60	Judith Fox	Chartered Secretaries Australia
61	Mike Gavin	Edith Cowan University
62	Russell Foote	Toro Australia
63	Paul Cook	Insolvency Practitioners Association
64	Joe Boswell	WA
65	Geoff Hurst	Risk Engineering Society
66	Ferdie Kroon	Tasmanian Forest Contractors Association
67	Marie-Louise MacDonald	Independent Contractors of Australia
68	Dr Rosemary Nixon, A/Prof LaMontagne, Tessa Keegel	Skin and Cancer Foundation (Vic)
69	Fiona Murfitt	Self Insurers Association of Victoria
70	Margaret Hogg	Non-Smokers Movement of Australia
71	A/Prof LaMontagne, Tessa Keegel	McCaughey Centre, VicHealth Centre for the Promotion of Mental Health and Community Wellbeing, The University of Melbourne
72	Nicole Prince	Vic
73	Prof Malcolm Sim	Dept of Epidemiology & Preventive Medicine, Monash University
74	Ross Hansen	Qld
75	Bryan Woodford	Yooralla
76	Ron Yates	Abigroup Contractors
77	Tony Marino	Victorian Construction Safety Alliance
78	Steve Burrows	Queensland Prison Officers Association
79	James Della Bosca, Steve Gambrill, Teresa Richardson	Delta Electricity
80	Duncan West	CGU Insurance
81	Gavin O'Meara	Ramsay Health care Australia
82	Australian Nursing Federation	Australian Nursing Federation

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Submission Number	Submitter	Organisation/State
83	Martin Jennings	Australian Insitute of Occupational Hygienists
84	Bill Ludwig	Australian Workers Union Queensland
85	John O'Rourke	Lion Nathan
86	Graeme Peel	Qld
87	Ken Malcolm	SA
88	Peter Whowell	Australian Federal Police
89	Standards Australia	Standards Australia and Standards New Zealand Joint Technical Committee OB7 – Risk Management
90	Grant Purdy	Technical Committee OB7 – Risk Management
91	Ralf Hartmann	Australian OH&S Risk Management Services
92	Tasmanian Government	Tasmanian Government
93	Steve Griffiths	Commerce Queensland
94	Ross Pocock	Ergon Energy Corporation
95	Dale Cole	Recovre
96	Ian Argall	Australian Higher Education Industrial Association
97	John Runnalls	Babcock and Brown Power
98	Richard Croft	N/A
99	Chris White	Civil Contractors Federation
100	A/Prof Lin Fritschi	WA
101	Andrew Ferguson	CFMEU NSW Branch
102	PJ Fleming	ACT
103	Dr Ben Brooks, Dr Diana Bowman	Centre for Applied Behaviour Science, School of Psychology, University of South Australia and Monash Centre for Regulatory Studies, Faculty of Law, Monash University
104	Trish Kerin	Australian Vinyls Corporation
105	Ken Pidd	Alcohol and Other Drugs Council of Australia
106	Andy McMillan	Western Australian Farmers Federation
107	John Holland	John Holland
108	Mary O'Donoghue	Unions NSW
109	Jos de Bruin	Master Grocers Australia
110	Peter Barda	Australian Construction Industry Forum
111	Cheryl Cartwright	Australian Pipeline Industry Association
112	Brian Bradley	Western Australia Department of Consumer and Employment Protection

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Submission Number	Submitter	Organisation/State
113	Hugh Macken	Law Society of NSW
114	Fiona Murfitt	Shell
115	Shane Murphy	Onesteel
116	Kath Deakin	Womens Health Victoria
117	Joe de Bruyn	Shop Distributive and Allied Employees Association (National)
118	Christopher Platt	Australian Mines and Metals Association
119	A/Professor Wendy Macdonald	Centre for Ergonomics & Human Factors, La Trobe University
120	Patrick Gilroy	Mining and Resource Contractors Safety Training Association
121	Allison Hutton	Qld
122	John Boshier	National Generators Forum
123	Julie Mills	Recruitment and Consulting Services Association's
124	Medical Technology Association of Australia	Medical Technology Association of Australia
125	Nicole Rooke	Chamber of Minerals and Energy of Western Australia
126	Michael Boyle	Thiess
127	Egon Schwidder	South Australian Wine Industry Association
128	Sue Pilkington	Safety Institute of Australia
129	Keith Jonson	National Safety Professionals
130	Lea Baker	AMP
131	Peter Ramshaw	NSW Taxi Council
132	Greg Ford	QR Limited
133	Susan Hopgood	Australian Education Union
134	Ian Ross	Australian Logistics Council
135	Stephen Jones	Community and Public Sector Union
136	Kellie Quayle	Australia Chamber of Commerce and Industry
137	NSW Government	NSW Government
138	South Australian Government	South Australian Government
139	Victorian Government	Victorian Government
140	John McConnel	Local Government Association of NSW and Shires Association of NSW
141	Allan Mulvena	Electrical Trades Union (Southern States Branch)

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Submission Number	Submitter	Organisation/State
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143	Ken McKell	Australian Meat Industry Council
144	Deborah Vallance	Vic
145	Dr John Culvenor	Vic
146	Professor Jean Cross	NSW
147	Louise Baldwin	Centennial Coal
148	John Smith	Victorian Employers Chamber of Commerce and Industry
149	Michael Cassar	Bluescope Steel
150	Clare Kitcher	RailCorp NSW
151	P.S. Clarke	Vic
152	Patrick D'Alessandri	Victorian Automobile Chamber of Commerce
153	James Tinslay	National Electrical and Communications Association
154	Greg Pattison	NSW Business Chamber and Others
155	Megan Motto	Association of Consulting Engineers Australia
156	C Harnath	Master Plumbers' and Mechanical Services Association of Australia
157	Andrew Antony	Santos
158	Australian Motor Trades Industrial Council	Australian Motor Trades Industrial Council
159	Australia Post	Australia Post
160	Kate Blenkiron	Association of Independent Schools of Victoria
161	John Knowles	Vic
162	Mark Burgess	Police Federation of Australia
163	Nick Parmeter	Law Council of Australia
164	Peter Olah	Hotel Motel and Accommodation Association
165	Michael Kilgariff	Energy Networks Association
166	Leo Ruschena	RMIT University
167	Anthony Wilson	Woolworths
168	Ross Trethewy	Mirvac
169	John Glover	Group Training Association of Victoria
170	Ken Slattery	Cement Concrete & Aggregates Australia
171	Ian Cairns	Australian Steel Institute
172	Denita Wawn and	National Farmers Federation

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Submission Number	Submitter	Organisation/State
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173	Ken Baker	National Disability Services
174	David Bond	Transfield Services
175	Melanie Foster	Housing Industry Association
176	Pamela Marriott	Vic
177	Graham Wilson	Australian Services Union – Victorian Authorities and Services Branch
178	Peter McIntyre	PBS Building
179	Maurice Baroni	Asciano
180	Helen Borger	National Safety Council of Australia
181	James Freestun	Solutions IE
182	Australian Industry Group and Engineering Employers Association of South Australia	Australian Industry Group and Engineering Employers Association of South Australia
183	Dr Nicole Williams	NSW Minerals Council
184	Jim Barrett	Australian Constructors Association
185	Paul Waterhouse	Property Council of Australia
186	Telstra	Telstra
187	John Colvin	Australian Institute of Company Directors
188	Phil Sochon	Australasian Railway Association
189	Brett Holmes	NSW Nurses Association
190	Institute of Public Affairs	Institute of Public Affairs
191	Rob Duckworth	Qld
192	Professor Ian Olver	Cancer Council Australia
193	Andrea Shaw	Shaw Idea
194	Pauline Thorneloe	Australian Tax Office
195	Russell Brandon	Building Designers Association of Australia
196	Dean Smith	Optus
197	David Bell	Australian Bankers Association
198	Jackie Zelinski	Institute of Strata Title Management
199	Bruce Hodgkinson SC, Jeffrey Phillips SC, Wendy	NSW

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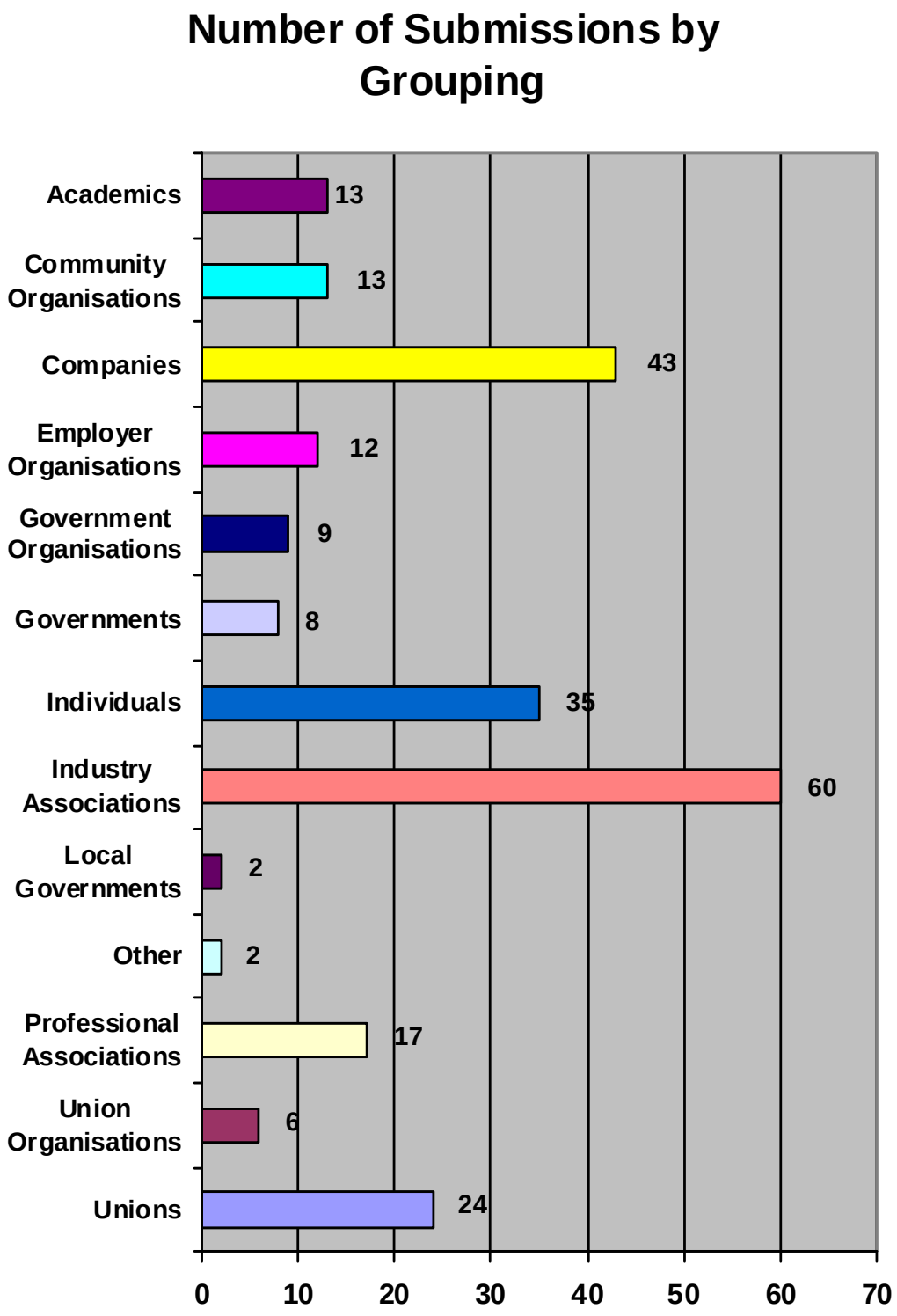
Submission Number	Submitter	Organisation/State
	Thompson, Michael Tooma, Paul Cutrone and Lea Constantine	
200	Chris Reynolds	Baulderstone Hornibrook
201	Mitchell Hooke	Minerals Council of Australia
202	Barry O'Farrell MP, NSW Opposition Leader	NSW Liberal/Nationals Parties
203	Rod Noble, Warwick Pearce and Serge Zorino	Health Safety Environment Research and Consultancy Services
204	Richard Green	Australian Council of Built Environment Design Professionals
205	Clare Moylan	QBE Insurance
206	Darren De Bortoli	Riverina Winemakers Association
207	Terry McKay	Australian Automotive Air
208	Robert McLean	Murdoch University
209	Shay Deguara	Public Service Association of NSW
210	Linda Morich	UnionsWA
211	Igor Nossar	Textile Clothing and Footwear Union of Australia
212	Ron Monaghan	Queensland Council of Unions
213	Gayle Burmeister	National Union of Workers
214	Geoff Fary	Australian Council of Trade Unions
215	Stuart St Clair	Australian Trucking Association
216	Cathy Butcher	Victorian Trades Hall Council
217	David Oliver	Australian Manufacturing Workers Union
218	John Sutton	Construction, Forestry, Mining and Energy Union of Australia
219	Alice Gibson	National Mine Safety Framework Steering Group
220	Cliff Bromily	Stockland
221	Monica Sarder	Australasian Institute of Mining and Metallurgy
222	Prof Drew Dawson, A/Prof Verna Blewett, Dr Matthew Thomas, Dr Benjamin Brooks, Dr Sally Ferguson, Valerie O'Keeffe	University of South Australia
223	Dick Williams	Electrical Trades Union Queensland

APPENDIX B: SUBMISSIONS

Submission Number	Submitter	Organisation/State
224	Andrew Vickers	CFMEU Mining and Energy Division
225	ACT Government	ACT Government
226	Chris Watt	Independent Education Union of Australia
227	David Tritton	Transport Workers' Union of Australia
228	Andrew Thomas	Australian Rail Tram & Bus Union
229	Peter Tighe	Communications, Electrical and Plumbing Union
230	David Carey	State Public Service Federation Group, the Community & Public Sector Union (SPSF Group CPSU)
231	Simon Cocker	Unions Tasmania
232	Graham Peachey	Australian Maritime Safety Authority
233*	Helen McIntyre	NSW
234*	Nick Dimopoulos	National Transport Commission
235*	Ian Kerr	Post Office Agents Association
236*	Milton Cockburn	Shopping Centre Council of Australia
237*	Mark Dearlove	Energex
238*	Submission withdrawn	
239*	Dusanka Sabic	Accord
240*	Trevor Evans	Australian Hotels Association South Australia
241*	Gavin Jackman	BP Australia
242*	Malcolm Richards	Electrical and Communications Association Queensland
243	Brett O'Donnell	SA

* This submission was made after the closing date for submissions.


Number of Submissions by Grouping
Academics
13
Community Organisations
13
Companies
43
Employer Organisations
12
Government Organisations
9
Governments
8
Individuals
35
Industry Associations
60
Local Governments
2
Other
2
Professional Associations
17
Union Organisations
6
Unions
24
0
10
20
30
40
50
60
70

APPENDIX C: TABLES

PART 6 – SCOPE, OBJECTS AND DEFINITIONS

TABLE 21: General comparison of objects in OHS Acts

Number	Purpose	Existing objects	How existing objects are framed
1	Protect workers from risk of harm to their health or safety from: a) work-related activities; or b) dangerous goods, substances or plant; or c) hazards.	ACT Act, ss.6(1)(a) and (d) Cwth Act, s.3(a) NSW Act, ss.3(a), (h) NT Act, s.3(b) Qld Act, ss.7(1), (2) SA Act, s.3(a) Tas Act, long title Vic Act, s.2(1)(a) WA Act, ss.5(a),(b)	The relevant existing objects are variously expressed to apply to: • employees (Cwth); • employees and other persons at work (Vic); • people at work (ACT and NSW); • a person (Qld); • persons employed in, engaged in or affected by industry (Tas); • persons at work (SA and WA); • workers (NT). They refer to: • death, injury or illness (Qld); • health and safety (NT, Tas); • health, safety and welfare (Cwth, NSW, SA, Vic); • safety and health (WA); • work safety (ACT). The objects of the NSW and Qld Acts include a reference to protection from harm from dangerous goods (NSW only), substances (Qld only) or plant (both). The WA Act refers to protection from hazards.
2	Protect other persons and the public from risk of harm to their health or safety: a) at a workplace; or b) near a workplace.	ACT Act, s.6(1)(b)(c) Cwth Act, s.3(b) NSW Act, s.3(b) NT Act, s.3(c) Qld Act, s.7(2) SA Act, s.3(c) Tas Act, long title Vic Act, s.2(1)(c)	Existing objects limit scope to: • *(ensuring) the health and safety of... public is not ...at risk by the conduct of undertakings by employers and self employed persons (Vic);* • *making workplaces safe ... for others (NT);* • *preventing or minimising a*

Number	Purpose	Existing objects	How existing objects are framed
			person's exposure to the risk of death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a workplace (Qld); • *protecting people at a place of work against risks to health or safety arising out of the activities of persons at work (NSW, SA);* • *protecting people at a place of work against risks to health or safety arising out of the use or operation of various types of plant (SA);* • *protect persons at or near workplaces from risks to health and safety arising out of the activities of ... employees at work (Cwth);* • *protect people from the risks to work safety resulting from the activities of people at work (ACT);* • *... provide for the safety of persons ...affected by industry...(or) using amusement structures and temporary public stands (Tas).*
3	Eliminate hazards and risks at their source.	ACT Act, s.6(1)(b) SA Act, s.3(b) Vic Act, s.2(1)(b) [Indirect: NT Act, s.3(b), Qld Act, s.7(1), WA Act, s.5(d)]	Existing objects restrict scope to elimination at source of: • *risks to health, safety and welfare of persons at work (SA and ACT) or others (ACT);* • *risks to health, safety and welfare of employees and other persons at work (Vic).* This object may also be inferred from: • *elimination of avoidable risks (NT);* • *preventing death, injury or disease ... caused ... by plant or substances for use at a workplace (Qld);* • *reduce, eliminate and*

Number	Purpose	Existing objects	How existing objects are framed
			control the hazards to which persons are exposed at work (WA).
4	Encourage duty holders to undertake appropriate hazard and risk identification, assessment, elimination or minimisation	NSW Act, s.3(e) NT Act, s.3(b) Qld Act, s.7(2) Vic Act, s.4(2) WA Act, s.5(d)	Existing objects refer to: • *risks (NSW, NT, Qld, Vic);* • *hazards (WA);* and to various processes: • *eliminating or reducing ... risks (Vic);* • *elimination of avoidable risks and control and mitigation of unavoidable risks (NT);* • *preventing or minimising ... exposure to ... risk (Qld);* • *reduce, eliminate and control hazards (WA);* • *risks ... are identified, assessed and eliminated or controlled (NSW).*
5	Promote a safe and healthy work environment	ACT Act, s.6(1)(d) Cwth Act, s.3(d) NSW Act, s.3(c) WA Act s.5(c)	Some objects provide for the promotion of: • *a self and healthy work environment for people at work that protects them for injury and illness and that is adapted to their physical/ physiological and psychological needs (ACT and NSW);* • *an occupational environment for ... employees that is adapted to their needs relating to health and safety (Cwth);* • *securing safe and hygienic work environments (WA)*
6	Encourage and facilitate consultation and co-operation between: a) duty holders, where more than one person has a duty of care or other obligation in relation to the proposed or actual performance of particular or related work activities; b) primary duty holders and workers and their representative	ACT Act, s.6(1)(e) Cwth Act, s.3(e) NSW Act, s.3(d) NT Act, s.3(d), s.29 Qld Act, s.7(3)(e) SA Act, s.3(d) Vic Act, s.4(4) WA Act, s.5(e)	Existing objects do not refer to facilitating consultation between primary duty holders. All existing objects other than in the NSW, SA and Vic Acts refer to fostering or encouraging co-operation and consultation between employers and employees or workers. Qld includes a reference to principal contractors.

Number	Purpose	Existing objects	How existing objects are framed
	organisations.		Some objects (ACT, NT, Qld and WA) also refer to co-operation and consultation with organisations or associations representing: • *employees or workers; and* • *employers.* The Vic Act states in its 'principles of health and safety protection' that employers and employees should 'exchange information and ideas about risks to health and safety' and measures to that can be taken to eliminate or reduce them.
7	Encourage and support the representation of workers in relation to the protection of their OHS.	Qld Act, ss.7(3)(e), (f)(i) and (iv), s.65. SA Act, s.3(e). Vic Act, s.4(5)	Most existing objects do not provide for this matter. The Qld Act has objects relating to workplace health and safety representatives and committees, WHSOs and authorised representatives of workers. The SA Act seeks to encourage registered associations to assist employers and employees to achieve a healthier and safer working environment. The Vic Act's principles include *employees are entitled and should be encouraged, to be represented in relation to health and safety issues.* The NT Act takes a wider approach – see item 9 below.
8	Resolve OHS issues at the workplace	NT Act, s.29(b) Qld Act, s.65(c) SA Act, s.3(d)	The relevant objects seek: • *to ensure that workers are given the opportunity to ... contribute to the resolution of (OHS) issues at the workplace (NT);* • *a process under which employers, principal contractors and workers identify and resolve (OHS) issues ... at the workplace (Qld);* • *to involve employees and*

Number	Purpose	Existing objects	How existing objects are framed
			employers in issues affecting (OHS) and welfare (SA).
9	Balance the rights and obligations of duty holders and their representative bodies.	NT Act, s.49	The NT Act provides an objective of establishing a framework balancing the rights of employee organisations in representing their members and performing certain OHS-related functions (discussion with members, investigation of contraventions) with the right of employers and others to conduct their businesses without undue interference or harassment.
10	Promote education and awareness on matters relating to OHS for: a) duty holders; b) workers; c) representative bodies of industry and workers; d) the community.	ACT Act, s.6(1)(a) Cwth Act, ss.3(c), (f) NSW Act, ss.3(a),(c), (f) NT Act, s.3(f) Qld Act, s.7(3)(c)(ii) SA Act, s.3(e) WA Act, s.5(g)	Existing objects are expressed in broad and specific terms: • *develop and promote community awareness of occupational health and safety issues (NSW);* • *... promote community awareness about workplace health and safety (Qld):* • *... promote community knowledge, awareness and understanding of the nature and importance of issues affecting occupational health and safety (NT);* • *promote education and community awareness on matters relating to occupational safety and health (WA);* • *to encourage registered association to take a constructive role in promoting improvements in occupational health, safety and welfare practices and assisting employers and employees to achieve a healthier and safer working environment (SA);* • *... promote:* • *... health, safety and welfare of people at work (NSW)... or … work safety*

Number	Purpose	Existing objects	How existing objects are framed
			of people at work (ACT).
11	Provide advice to duty holders.	Cwth Act, s.3(c)	Only one Act expressly provides for expert advice: *ensure that expert advice is available on (OHS) matters affecting employers, employees and contractors (Cwth)*
12	Provide effective remedies for non-compliance	Cwth Act, s.3(g) NT Act, s.49(d)	The Cwth Act aims to provide for *... effective remedies if obligations are not met ...* The NT Act provides (in relation to representation rights) for such rights to be *withdrawn in the event of misuse*.
13	Support the graduated enforcement of OHS obligations.	Cwth Act, s.3(g)	The Cwth Act proposes that non compliance be addressed *... through the use of civil remedies and, in serious cases, criminal sanctions.*
14	Accountability of persons exercising powers and performing functions under the Act	NT Act, s.49	The NT Act seeks to balance (a) the rights of employee organisations to discuss OHS matters with their members and to investigate suspected contraventions with (b) ensuring that such rights *are withdrawn in the event of misuse*. No objects relate to the accountability of decision makers (regulators, inspectors).
15	Continuous improvement in OHS	ACT Act, s.6(1)(f) NSW Act, s.3(g) NT Act, ss.3(a), (d)(ii)	The relevant objects seek: • *... a framework for progressively higher standards of work safety, taking into account changes in technology and work practices (ACT and NSW – the ACT adds continuous improvement);* • *... the highest standards of occupational health and safety (NT);* • *to encourage co-operation through consultation between employers and workers and (representative)*

Number	Purpose	Existing objects	How existing objects are framed
			associations ... in achieving progressive improvement in standards and performance in occupational health and safety (NT).
16	Facilitate tripartite consultation over the formulation and application of regulatory policies and practices relating to OHS.	Qld Act, s.7(3)(c), s.43 Vic Act, s.2(1)(d) WA Act, s.5(e)	Few existing objects address tripartite consultation. The Qld Act has objects relating to the establishment of a *workplace health and safety board*. The Vic Act's objects provide for employees, employers and their representative organisations to be involved in the *formulation and implementation of health, safety and welfare standards ...* The WA Act seeks to provide for the participation of employers, employees and their representative associations in *the formulation and implementation of safety and health standards ...*
17	Support research and the collection of data that assist in achieving better OHS	Qld Act, s.7(3)(g) WA Act, s.5(e)	The relevant objects seek: • *providing for the collection of statistical data for the purposes of workplace health and safety regulation and related education and prevention services (Qld);* • *... the formulation and implementation of safety and health standards to current levels of technical knowledge and development (WA).*
18	Facilitate and support the harmonisation of the content and application of Australian OHS laws	NT Act, s.3(e) WA Act, s.5(f)	Relevant objects are: • *to achieve a consistent, properly coordinated and coherent approach to occupational health and safety in the Territory (NT);* • *to provide for ... the coordination of the administration of laws relating to occupational health and safety (WA).*
19	Assist in giving effect to	None	New proposal

APPENDIX C: TABLES

Number	Purpose	Existing objects	How existing objects are framed
	Australia's obligations under international treaties relating to OHS.		

PART 7 – WORKPLACE CONSULTATION, PARTICIPATION AND REPRESENTATION

TABLE 31: Duty to consult provisions – Who has to consult, with whom and when

State	Section	Who has the duty to consult	With whom	When should consultation occur
NSW	ss.13-19	Employer	Employees of the employer	s.15 When: • assessing/reviewing risks to health and safety from work • making decisions about measures to eliminate/control those risks • introducing/altering procedures for monitoring those risks • decisions are made about adequacy of facilities for welfare of employees • changes are proposed to premises, systems/methods of work, plant or substances that may affect health, safety or welfare of employees at work • decisions are made about procedures for consultation • any other matters prescribed by regulation
Vic	ss.35-36	Employer	Employees of the employer, including independent contractors engaged by the employer and any employees of the independent contractor.	s.35 When: • identifying/assessing hazards/risks to health and safety at a workplace under employer's control or from business undertaking • making decisions about measures to control risks to health and safety at a workplace under employer's control or arising from business undertaking • making decisions about adequacy of facilities for welfare of employees • proposing changes to workplace, plant, substances and other things used at the workplace, conduct of work at the workplace, other matters prescribed by regulations that may affect health and safety of employees • making decisions re procedures to resolve health and safety issues, consult employees (under s.35 &36) and monitor health of employees and conditions of workplace • providing information and training to employees • determining membership of HSC.
Qld	s.77, s.97	s.77 -	Workplace HSR	s.77 When changes are proposed to the

State	Section	Who has the duty to consult	With whom	When should consultation occur
	(c)	Employer s.97(c) – employer and principal contractor		workplace, plant or substances used in the workplace that affects, or may affect the health and safety of persons at the workplace s.97(c) When changes are proposed to the workplace, that affects, or may affect, workplace health and safety at the workplace
WA	s.19; s.30; s.35	Employer	s.19 HSRs, and other employees at the workplace s.30 Delegate/s appointed by employees under s.30(3) s.35 HSRs	s.19 regarding OHS at the workplace s.30(3)(a) As the case requires, as to matters required to be determined under s.30 (Consultation on matters relevant to elections of HSRs) s.35 On intended changes to the workplace or the plant or substances used at the workplace where those changes may reasonably be expected to affect the safety or health of employees at the workplace
SA	s.20; s.27; s.31 s.34	Employer	s.20 HSCs and employers and HSRs, as well as registered associations representing employees and/ or employers (conditions apply) s.27, 31 registered associations of which an employee is a member (at the request of the employee) s.34 HSRs and HSCs	s.20 When preparing and maintaining OHS & welfare policies at the workplace. s.27 In relation to any proposal relating to the formation of a work group that could affect the employee. s.31 In relation to the composition of a health and safety committee. s.34(a) When changes proposed to any: • workplace or; • plant (used at workplace) or; • substances (used, handled processed or stored at workplace) or; • work conducted or procedures for carrying out work; where those changes might affect the health, safety or welfare of employees at the workplace. s.34(b) & (c) In relation to occupational health, safety and welfare practices, procedures and policies that are to be followed at any workplace, or changes to them. s.34(d) In relation to any proposed application to the designated person for the modification of the requirements of any regulation.
Tas	s.31, s.39(5)	Employer or responsible officer	s.31 HSC (if there is one)	s.31 On proposed changes at the workplace that may affect the health or safety of persons working at that workplace.

State	Section	Who has the duty to consult	With whom	When should consultation occur
			s.39 Relevant employees	s.39(5) About the development of measures to promote health and safety at any workplaces under the employer's control or management.
NT	ss.29-32; s.47	Employer	s.30, 31 HSC and/or HSR and/or in accordance with other arrangements agreed between employers and workers. s.47 HSC	s.30 When: • assessing/reviewing risks to health and safety from work • making decisions about measures to eliminate/control those risks • introducing/altering procedures for monitoring those risks • decisions are made about adequacy of facilities for health or safety of employees • changes are proposed to workplace, workplace infrastructure or equipment, substances use at work or systems/methods of work that may affect OHS • decisions are made about procedures for consultation • any other matters prescribed by regulation. s.47 (if there is a HSC) on proposed changes at the workplace that may affect the health or safety of workers at the workplace.
ACT	ss. 21, ss.47-57; s.51; s.56	s.21 Person conducting a business or undertaking ss.47-57 employers	s.21 People at the business. ss.47-57 Employer's workers (including workers in a worker consultation unit in accordance with s.54).	s.21 On matters that directly affect the work safety of people at the business ss.47-57 Regarding: • identifying or assessing risks to work safety and measures to be taken to manage risks at the workplace or in relation to conducting the employer's business or undertaking; • adequacy of facilities; • proposed changes that may directly affect work safety; and • anything else prescribed by regulation.
Cwth	s.16; s.24	Employer	s.16 Employees or an employee representative if employee requests. s.24(1) employees and employee representative if requested by employee	s.16 To develop written health and safety management arrangements s.24 If employee wants to establish or vary designated work groups (DWG) s.24(3) If employer wants to vary DWG s.30 On the implementation of changes at any workplace at which some or all of the employees in the DWG perform work for the employer, being changes that may

State	Section	Who has the duty to consult	With whom	When should consultation occur
			s.24(3) HSR and employee representative if employee requests s.30 HSR (if they request)	affect their health and safety at work.

TABLE 35: HSR duties and functions

Jurisdiction	Duties and Function of an HSR
NSW	• review OHS measures at the workplace etc; • investigate OHS risks at the at workplace etc; and • resolution of OHS issues at the workplace, if unable to do so, request an inspector investigate. Other functions include: (from regulation): • Accompany an inspector; • Observe a formal report to employer by inspector ; • Accompany a worker during an OHS interview (by consent); • Observe in-house investigation of incidents; • Participate in developing arrangements for recording hazards and accidents; • Make recommendations on training for HSRs, HSC members and workers; and • receive trainin.
Vic	for the purpose of: • representing members of the work group concerning OHS; or • monitoring OHS measures;or • enquiring into OHS risks to at the workplace etc.; or • resolution of any OHS issues at the workplace etc; an HSR may: • inspect a workplace; • accompany an inspector during an inspection; • require an HSC be established; • accompany a worker during an OHS interview between the worker and an inspector or employer (by consent); • seek necessary the assistance of any person; • issue a PIN; and • direct 'unsafe' work to cease. An HSR may exercise powers only in respect of matters that affect workers that the HSR is representing unless— • there is an immediate risk to health or safety • asked for assistance and it is not feasible to refer the matter
Qld	• inspect the workplace; • be informed of any workplace incident at the workplace; • accompany a worker during an interview about an incident (if the worker asks); • review circumstances surrounding workplace incidents, and report findings and recommendations to the employer; • be consulted on any proposed change to the workplace etc. that affect OHS; • participate OHS issue resolution; • be told of the presence of an inspector at the workplace; • report issues that affect OHS and seek co-operation to remedying, report unsatisfactory action regarding remedy to an inspector; • request the establishment of an HSC and participate as a member;

Jurisdiction	Duties and Function of an HSR
	• attend training including refresher courses at cost to employer.
WA	• inspect the workplace; • carry out investigations into accidents, a dangerous occurrences etc; • keep informed of OHS information provided by employer; • liaise with the department and other Government and private bodies; • report any hazards etc. to the employer; • refer relevant matters to the HSC; • consult and co-operate with employer on OHS matters; • liaise with workers regarding OHS matters; and • accompany an inspector carrying out inspector's functions at the workplace, where requested by the inspector. An HSR has such powers as are necessary for the carrying out functions,
SA	• inspect workplace, (maybe accompanied by a consultant), including carrying out an investigation and discussing any OHS matter with any employee; • accompany an inspector during an inspection; • investigate OHS complaints; • be present at any interview concerning OHS between an inspector or employer and an employee, at the request of the employee; • make representations to the employer on OHS issues; • consult with the employer in relation to investigations including any outcomes; • issue a default notice to address contraventions of the Act, and may cancel any such default notices; and • may direct 'unsafe' work to cease. An HSR powers and functions limited to acting in relation workers the HSR represents.
Tas	**NA**
NT	• inquire into health and safety issues affecting workers; • assist workers in their dealings on OHS issues; • ensure that OHS issues are brought to the attention of management; • mediate between workers and management OHS issues; • assist issues resolution; • issue a notice of safety hazard; and • issue direction to stop work in a case of serious and immediate OHS risk.
ACT	• represent the worker consultation unit in relation to work safety; • inform the workers' employer about potential risks and dangerous occurrences at any workplace where represented workers work; • tell the employer about work safety matters directly affecting the represented workers; • inspect all or part of a workplace where a represented worker works; • issue a provisional improvement notice for a place where a represented worker works; • exercise emergency powers; and • take all reasonable steps to consult the employer to try to resolve a work safety

Jurisdiction	Duties and Function of an HSR
	matter before issuing a PIN or exercising an emergency power.
Clth	• inspect the workplace; • request the regulator conduct an investigation at the workplace; • accompany an investigator during any investigation; • represent the employees in consultations with the employer concerning OHS, in the absence of an HSC; • examine the records of the HSC; • investigate OHS complaints; • accompany a worker during an OHS interview between the worker and an inspector or employer (by consent); • access information relating to OHS risks; and • issue PIN. An HSR is entitled to be assisted by a consultant.

APPENDIX C: TABLES

TABLE 36: Employers' obligations to HSRs

Jurisdiction	Employers obligations to HSR
NSW	(from regulation) • to enable HSRs to carry out functions by: – provide reasonable access to workers – provide paid time to attend to duties – provide access to facilities • allow HSRs to receive training
Vic	• consult with HSRs • allow HSRs to attend training (initial, and annual refresher) • allow HSRs paid time off work to attend training and meet the costs of training – allow HSRs access to information relating to OHS hazards at the workplace, and the health and safety of workers • allow HSRs to accompany a worker during an OHS interview between the worker and an inspector or employer (by consent) • allow HSRs to take paid time off work to exercise powers and to attend training • provide facilities and assistance as are necessary or prescribed by the regulations to enable HSRs exercise powers • allow a person assisting HSRs access to the workplace unless considered unsuitable person because of insufficient OHS knowledge
Qld	• discuss with HSRs if asked • consult HSRs about proposed changes to the workplace etc. that may affect OHS • permit HSRs to make inspections • must not obstruct access of HSRs to training • tell HSRs ASAP about: – workplace incident – any proposed changes that affect OHS; – the presence of an inspector at the workplace – a notice given by an inspector • meet all reasonable costs of HSR training (inc refresher) i.e. fees and paid time off • allow HSRs to perform functions during ordinary working hours.
WA	• make available information relating to hazards at the workplace and the OHS of workers • allow HSRs to accompany a worker during an OHS interview between the worker and employer (by request) • consult with HSRs on changes to the workplace etc. which may affect OHS • ensure HSRs receive any entitlement due • notify HSRs of any accident or dangerous occurrence • provide HSRs with facilities and assistance as are necessary or prescribed for the performance of their functions • allow HSRs paid time off to attend training, pay course fees and other costs incurred by HSR
SA	• consult HSRs on any proposed changes that might affect OHS

Jurisdiction	Employers obligations to HSR
	• consult HSRs on workplace OHS practices, procedures and policies, and any changes to them • allow HSRs to accompany a worker during an OHS interview between the worker and employer (by request) • permit HSRs to accompany an inspector during inspections • permit HSRs access to information relating to OHS risks at the workplace etc, and/or concerning OHS of the employees • immediately notify HSRs in the event of a serious occurrence including any work-related injury • provide HSRs such other facilities and assistance as necessary or prescribed to enable performance of their functions • allow HSRs paid time off work to perform their functions • reimburse HSRs for any reasonable expenses
Tas	• confer with HSRs whenever reasonably requested
NT	• make available information on OHS issues, on request of HSRs • inform HSRs of incidents at the workplace • allow HSRs to attend training, with time off on full pay and meet course costs • facilitate exercise of HSRs functions by: – allowing HSR access to any part of a workplace in which relevant worker works – making available information on OHS issues on request by HSR – allow HSRs to accompany a worker during an OHS interview between the worker and an inspector or management (if wanted by the worker) – allow paid time to carry out HSRs functions – provide any other assistance or facilities required by the regulations.
ACT	• consulting the HSR by— • (a) sharing with the workers information about the matter; and • (b) giving the workers a reasonable opportunity to contribute information about the matter; and express their views about the matter and consider the workers' views.
Clth	• consult with HSRs on the implementation of changes that may affect OHS • permit HSRs to make inspections • permit HSRs to accompany an investigator during investigations • consult with HSRs concerning OHS measures (in the absence of an HSC and at the HSRs request) • permit HSRs be present at any interview entitled to be present • provide HSRs access to information entitled to obtain and to which access has been requested • permit HSRs to take such time off work, without loss of remuneration etc. necessary to exercise the powers • provide HSRs with access to such facilities as prescribed or necessary for purposes of exercising powers

APPENDIX C: TABLES

TABLE 42: Discrimination provisions under jurisdictional OHS Acts

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT*	Cwth
Section	s23	s76-78	s174	s35A - s35B, s56	s56	s18	s93	s43	s76
Action									
By who	Employer	Employer or prospec-tive employer	Employer	Employer or prospec-tive employer	Employer	Employer	Employer	Person	Employer
To whom	employee	employee	worker	person or contract-or	employee	employee	worker or prospec-tive worker	worker	employee
Dismiss	✓	✓	✓	✓ Or end contract	✓	✓	NS	✓	✓
Injure	✓	✓	NS	✓ Demote of fail to promote	✓	NS	NS	✓	✓
Alter position to detriment	✓	✓	✓ Act to detrim-ent of the worker	✓ Including condition of employ-ment	NS	✓ Act to detrim-ent of employ-yee	NS	✓	✓
Threaten to dismiss, injure or alter position to detriment	NS	✓	NS	NS	NS	NS	NS	✓	✓
Threaten, intimidate or coerce	NS	NS	NS	NS	✓	NS	NS	NS	NS
Refuse / deliberately omit offer of employment / treat prospective employee less favourable	NS	✓	NS	✓	✓	NS	NS	NS	NS

Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT*	Cwth
Reason	NS	Dominant reason	Dominant or substan-tial reason	Dominant or substan-tial reason	NS	NS	Predom-inant reason	NS	NS
Made a complaint about health and safety	✓	NS	✓	✓	✓	✓	✓	✓	✓
Proposes to complain about health and safety	NS	NS	In any other way raised an issue	NS	NS	NS	NS	✓	✓
Is an HSR	✓	✓	✓	✓	✓	✓	✓	NS	NS
Has been an HSR	NS	✓	✓	✓	✓	✓	✓	NS	NS
Exercise power / function as HSR	✓	✓	✓	✓	NS	✓	✓	NS	NS
Is a member of an HSC	✓	✓	✓	✓	✓	✓	✓	NS	NS
Has been a member of an HSC	NS	✓	✓	✓	✓	✓	✓	NS	NS
Exercise power / function as member HSC	✓	✓	✓	✓	NS	✓	✓	NS	NS
Assist or give information to inspector	NS	✓	NS	✓	✓	✓	✓	✓	✓
Proposed to assist or give information to inspector	NS	NS	NS	NS	NS	NS	NS	✓	✓
Assist or give information to HSR	NS	✓	NS	✓	✓	NS	✓	NS	NS
Assist or give information to HSC	NS	✓	NS	✓	✓	NS	✓	NS	NS

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Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT*	Cwth
Assist or give information to Authorised Rep	NS	NS	NS	NS	NS	NS	NS	NS	NS
Appointed as a WHSO	NS	NS	✓	NS	NS	NS	NS	NS	NS
Stopped work	NS	NS	NS	NS	NS	✓	NS	✓	✓
Proposed to stop work	NS	NS	NS	NS	NS	NS	NS	✓	✓
Has contacted an Authorised Rep	NS	NS	✓	NS	NS	NS	NS	NS	NS
Has contacted an inspector	NS	NS	✓	NS	NS	NS	NS	NS	NS
Appears as a witness in any proceedings under the Act against the employer	NS	NS	NS	NS	NS	✓	NS	NS	NS
Penalties	NS	NS	Breach of section taken as unfair dismissal under IR Act 1999	NS	NS	NS	Commits an offence	NS	May be subject to civil action (see Sch. 2)
Imprison-ment	NS	6 months	NS	NS	NS	NS	12 months	6 months	NS
Fine	✓	✓	✓	NS	✓	✓	✓	✓	NS

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Provision	NSW	Vic	QLD	WA	SA	Tas	NT	ACT*	Cwth
Remedies	NS	NS	Remedy provided under the *IR Act 1999*	NS	NS	NS	Court may order employer to take other action specified by the court to remedy the contrav-ention	NS	NOTE: Employer who breaches section may be subject to civil action (see Schedule 2)
Payment damages	NS	✓	NS	NS	✓	NS	✓	NS	NS
Reinstate / employ etc	NS	✓	NS	NS	✓	NS	NS	NS	NS
Onus of proof									
If facts constituting the offence, other than the reason, are proved, defendant bears onus proving that the reason alleged was not the dominant reason	✓	✓	NS	NS	✓	NS	✓	✓	NS

PART 8 – OTHER HEALTH AND SAFETY OBLIGATIONS

TABLE 44: Duty to report incidents in principal Acts

Who reports…	Report to…	The duty includes…
New South Wales		
s.86 • Occupier	• WorkCover	• Provide notification of any **serious incident** at a place of work or any incident prescribed by regulations. • Notification of a serious incident must be given immediately upon becoming aware and by the quickest means possible. • Notification of a prescribed incident must be given as soon as practicable but not later than 7 days from the occupier becoming aware, via the method required by the regulations. • 'Serious incident' is subject to a definition in the Act and regulations. • Reporting under *Workplace Injury Management and Workers Compensation Act 1998* satisfies the occupier's obligation in the OHS Act. • Further provisions in regulations.
Victoria		
ss.37 & 38 • Employer • Self-employed person	• The Authority	• Provide notification of an **incident** at a workplace under management and control of the duty holder, or in the immediate vicinity. • Notification of an incident must be given immediately after becoming aware. • A written record of the incident must be given within 48 hours of notifying the Authority of the incident, using the approved format. • 'Incident' is subject to a definition in the Act.
Queensland		
• All incident notification provisions are in regulations.		
Western Australia		
s.23I • Relevant person • Relevant employer • Relevant self-employed person	• The Commissioner	• Provide notification of a **prescribed injury or disease** occurring to employees at a workplace at certain residential premises; or a prescribed injury occurring to other persons at a workplace. • Notification of a prescribed injury or disease must be given forthwith or as required by the regulations, and in the format required by the regulations. • Further provisions in regulations.
South Australia		
• All incident notification provisions are in regulations.		

Who reports…	Report to…	The duty includes…
Tasmania		
s.47 • Person with control or management of the workplace	• An inspector	• Provide notification if **a person is killed or suffers serious injury or illness**, or a **dangerous incident** occurs, at a workplace. • Notification must be given by the quickest available means. • A written record of the incident must be given within 48 hours of the incident occurring. • 'Dangerous incident' is subject to a definition in the Act. • Further provisions in regulations.
Northern Territory		
ss.64 & 65 • Employer	• The Authority	• Provide notification of a **reportable incident**. • Notifications must be given as soon as practicable after the occurrence of the reportable incident. • A written record of the incident must be given within 48 hours of the incident occurring. • 'Reportable incident', 'injury', 'significant injury' and 'work-related accident' are subject to definitions in the Act. • Further provisions in regulations.
Australian Capital Territory		
ss.36-38 & 40 • A person in control of a business or undertaking	• The chief executive	• Provide notification of a **serious event** at or near a workplace. • Notification must be given when and as required by the regulations. • 'Serious event' and 'dangerous occurrence' are subject to definitions in the Act. • The reporting under the *Dangerous Substances Act 2004* is taken to be adequate notice of the event for the OHS Act. • Further provisions to be included in regulations.
Commonwealth		
s.68 • Employer	• The Commission	• Provide notification of: an accident causing **death or serious injury to any person**; an accident causing an **employee to be incapacitated** for a prescribed period; or a **dangerous occurrence**. • Notification must be given as and when required by the regulations. • 'Dangerous occurrence' is subject to a definition in the regulations. • Further provisions in regulations.

PART 9 – ROLE OF THE REGULATOR

TABLE 46: Enforceable undertakings

Jurisdiction	Provisions of OHS Act	To what undertaking relates	Who may accept undertaking	When undertaking may be accepted	Consequences of non-adherence to undertaking
ACT	Part 6, *Compliance measures*, Division 6.6, *Enforceable undertakings.*	Alleged contravention of the Act.	The Chief Executive (of the regulator)	When the Chief Executive alleges that a person has contravened the Act or regs and the person gives a written safety undertaking that conforms to specified requirements.	On application by the Chief Executive, the Magistrates Court may order compliance, require payment of an amount assessed by the court as being the value derived by anyone from the breach, order the payment of compensation and make any other orders that the court considers appropriate.
Cwth	Schedule 2, clause 16, *Undertakings*	The fulfilment of an obligation under the Act	Regulator (Comcare) may accept a written undertaking from the person who is required to fulfil the obligation.	No criteria stipulated. May be accepted even if proceedings have begun before a court for a *declaration of contravention* of the Act.	Order by the Court directing compliance and consequential orders. If Court had adjourned proceedings because Comcare accepted an order, the Court may revive the proceedings.
Qld	Part 5, *Enforceable undertakings*	The alleged contravention of s.24(1) - requirement to discharge an obligation - or s.167(1) - executive officer to ensure that corporation complies with the Act.	The Chief Executive of the Department	A *work health and safety undertaking* may be accepted if it meets the statutory requirements (ss.42D-42E). Note: time limit of 90 days from service of a summons in relation to alleged contravention – *WHS Regulation 2008,* Part 26, r.354	Fine up to 1000 penalty units (s.42G). Orders from an industrial magistrate for compliance, payment of an amount of not more than benefit derived from breach, requirement for a security bond and such other orders as Court may consider appropriate.

Jurisdiction	Provisions of OHS Act	To what undertaking relates	Who may accept undertaking	When undertaking may be accepted	Consequences of non-adherence to undertaking
Tas	Section 55A	A matter in respect of which the Secretary has a power or function under the Act or regulations.	The Secretary of the Department	No criteria stipulated	On application by the Secretary, orders by the Magistrates Court directing compliance, requirement of payment of amount not exceeding financial benefit from breach, compensation for other persons who have suffered loss or damage, and other orders that Court may consider appropriate.
Vic	Part 2, *The Authority*, Division 4, *Power to accept undertakings relating to contravention s*, ss.16,17. Part 11, *Legal Proceedings*, Div. 2, *Sentencing for offenders*, s.137.	A matter relating to a contravention or alleged contravention by the person of the Act or the regs.	The Authority A sentencing court.	No criteria specified in the Act. No criteria specified in the Act.	On application by the Authority, Magistrates Court may order compliance with undertaking or make any other orders that the Court may consider appropriate.

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PART 10 – ROLE OF INSPECTORS

TABLE 65: Offences under OHS Acts relating to Inspectors

State	Hinder and obstruct (incl. assistants)	Assault and intimidation	Concealing information	Personate	False and misleading statements and documents	Prevent others from complying
NSW	s.136(1)a	s.136(1)b	s.66(a)	s.67	s.66(b)	–
Vic	s.125(1)a s.125(1)c s.120(2) – offence not to comply with a direction made by an inspector. s.121 – offence not to provide assistance to an inspector when required.	s.125(2)	s.125(1)b s.100(2) – offence to fail to produce documents and answer questions. s.119(3) – offence not to provide personal details.	s.126	s.119(3) s.153	s.125(1)c
Qld	s.173	–	s.172	s.176	s.171	–
WA	s.47(1)b & s.47(1)c	s.47(1)ba	s.47(1)c	s.47(1)a	s.47(1)d	s.47(1)e
SA	s.38(8) s.38(8) – offence not to comply with a requirement made by an inspector.	–	s.38(8) – offence not to comply with a requirement made by an inspector. Qualified by 'to the best of the persons knowledge'.	–	–	–
Tas	s.37(1)a & b	s.37(1)a	s.37(1)b	–	s.37(1)c	s.37(1)d
NT	s.73 s.70(2) – offence not to provide assistance or operate equipment or facilities when required.	–	ss.70(2) & 72(3) – offence not to provide personal details, answer questions or produce documents when required.	–	–	–

			Qualified by 'to the best of the persons knowledge'.			
ACT	s.80 – offence not to provide assistance to an inspector when required (see s.78(j)). s.86(3) – offence to interfere with things seized by an inspector. s.87(4) – offence to not destroy or dispose of a thing as directed by an inspector.	–	s.80 – offence not to give information, answer questions and provide documents to an inspector when required (see s.78(i)). s.80(5) – offence not to provide name and address when required. s.89(6) – offence to not produce authority to do something if required by an inspector.	–	–	–
Cwth*	–	–	–	–	–	–

* See *Criminal Code Act 1995*.

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   b. Industry coverage
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10. Common features of duties of care

Division 2 – Primary duty of care

11. Primary duty of care

Division 3 – Duties related to specific activities

12. Duty of care of person with management or control of a workplace etc
13. Duty of care of a designer
14. Duty of care of a manufacturer
15. Duty of care of a person building, erecting or installing a structure
16. Duty of care of a supplier
17. Duty of care of an OHS service provider

Division 4 – Duty of care of officers

18. Duty of care of an officer

Division 5 – Duties of care of workers and others at the workplace

19. Duty of care of a worker
20. Obligation of worker to report unsafe circumstances
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73. Proceedings against the Crown, public bodies and successors
74. Sentencing options
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Part 13 – Other matters

79. Mutual recognition
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APPENDIX E: QUESTIONING AND LEGAL PRIVILEGES – LAW AND REVIEWS

THE RIGHT TO SILENCE AND PRIVILEGE AGAINST SELF-INCRIMINATION

Right to Silence

> *'... A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country …"*[1]

The right to silence enables an accused to not be required to provide evidence of guilt from their own mouth. It does not prevent evidence of guilt being obtained from other sources.

The right to silence ordinarily applies during both pre trial investigations and at trial.[2] In this discussion, we are considering the right to silence prior to trial.

The right to silence means that:

- a suspect has a right to refuse to answer questions put to him or her by criminal investigators; and
- where a suspect chooses to exercise this right, the fact that he or she did so cannot be used against him or her at any subsequent trial.

The exercise of the right to silence is clearly capable of limiting the information that may be available to an inspector. That may compromise the ability of the inspector to ensure ongoing health and safety protection, or to prove a breach of the Act or Regulations.

It is therefore necessary that we consider whether or not the rights to silence should be removed or limited in the model Act. As part of that exercise, it is important to consider the reason for the existence of that right, and limitations placed on that right by the Courts.

The right to silence is commonly accepted as having emerged in 17th Century England to overcome what were considered to be the excesses of the Court of Star Chamber and the Court of High Commission in Ecclesiastical Clauses, where an accused person could be compelled by threat of punishment to swear on oath to tell the truth and then interrogated by the Court to determine whether or not an offence had been committed. "Interrogation on oath could thus be used as a "fishing expedition", to try and produce evidence of some as yet undisclosed and unidentified criminality .."[3]

Further reasons for maintaining the pre-trial right to silence were noted by the Australian Law Reform Commission ("the ALRC") in its report on criminal investigation, including that:

- undue emphasis may be given to what an accused may say;
- most suspects are not strong, intelligent and articulate. They are in a frightening situation; they may misunderstand the true significance of questions, and in a hostile atmosphere

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[1] *Petty v The Queen* (1991) 173 CLR 95, at 99; confirmed in *Glennon v R* (1994) 179 CLR 1 where the pre trial right of silence was stated to be a fundamental right; see also *R v Beljajev* [1984] VR 657 at 662, where it was stated that the right of silence is a fundamental principal of the criminal law and is not to be overridden by any other doctrine or principals; see also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281; *Controlled Consultants Pty Limited v Commissioner for Corporate Affairs* (1985) 156 CLR 385.

[2] Although the right of silence is less protected at trial than during pre trial investigations, see for example *Weissensteiner v R* (1993) 178 CLR 217 and the discussion in 'The diminishing right of silence', *Mirko Bagaric* [1997] Syd LREV 20.

[3] Scrutiny of Acts and Regulations Committee , '*The right to silence: an examination of the issues*', Chapter 2 – 'The origins of the right to silence', VIC, June 1998.

> may be prone to ramble or tell foolish lies instead of saying truthfully 'I don't remember', or to contradict themselves.[4]

The ALRC recommended that the pre-trial right to silence be maintained and that suspects should be fully informed of that right.

A further argument in support of maintaining the pre-trial right to silence is that the accused should not have to prove anything, where the prosecution has the burden of proving that the accused is guilty beyond a reasonable doubt.[5]

The pre-trial right to silence exists to varying degrees in most common law jurisdictions including the United Kingdom, Canada, the Republic of Ireland and the United States of America.

The Courts have stated that the right to silence can be subject to specific statutory modifications.[6] There are numerous examples of the right to silent being limited by OHS legislation and other legislation.[7]

Striking the correct balance between the interests of the community and the rights of the individual has been considered to be an important issue in determining whether or not the right to silence should be maintained or limited.[8]

Taking all of the above into account, the following is a consideration of the application or limitation of the right to silence, specifically in relation to the purposes for which an inspector may seek information.

Privilege against self-incrimination

The right to silence has been described as a grouping together of a number of rights and privileges, including the privilege against self incrimination and the privilege against exposure to a penalty[9]. The discussion above in relation to the right to silence, including the historical origins and justification for it, are also applicable to the privilege against self incrimination.

The privilege against self incrimination allows a person to decline to provide information that may tend to incriminate them[10]. The privilege against self incrimination has been described in the following terms:

> *'…a person is not bound to answer any question or produce any document if the answer or the document would have the tendency to expose that person, either directly or indirectly, to a criminal charge, the imposition of a penalty…'*[11]

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[4] ALRC, *'Criminal Investigation'*, Report 2, November 1975.

[5] B. Hocking & L. Manville, *'What of the right to silence: still supporting the presumption of innocence, or a growing legal fiction?'*, Macquarie Law Journal, Vol.1, 2001, pp.63-92

[6] *Petty v The Queen* (1991) 173 CLR 95 at 99; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

[7] The power to require a person to provide their name and address found in s.63 of the NSW Act, s.119 of the Vic Act, s.120 of the Qld Act, s.43(1) of the WA Act, s.70(1)(h) of the NT Act and s.88 of the ACT Act; a requirement on a person to provide information, without the excuse of the privilege against self incrimination, found in s.65 of the NSW Act, s.47 of the WA Act, s.37 of the TAS Act, s.94 of the NT Act and s.123 of the ACT Act; s.34E and s.34L of the *ASIO Act 1979*; and various aspects of the *United Kingdom Police & Criminal Evidence Act 1984*, the *Criminal Evidence (Northern Ireland) Order 1988* and the *Criminal Procedure Code (Amendment) Act 1976* of Singapore, referred to in 'the Right to Silence: an examination of the issues, chapter 6 – the right to silence in the United Kingdom', scrutiny of Acts and Regulations Committee, VIC, June 1998

[8] Royal Commission on Criminal Procedure, Report (UK), noted in 'the Right to Silence: an examination of the issues, chapter 6 – the right to silence in the United Kingdom].

[9] The privilege against exposure to a penalty applies at trial and will accordingly not be considered in this report.

[10] For an extensive discussion on the privilege against self incrimination see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR477.

[11] *Bridal Fashions Pty Ltd v Comptroller-General of Customs & Or.* (1996) 17WAR499 at 504.

The principal rationales for this privilege were considered by the Queensland Law Reform Commission ("the QLRC") in its December 2004 report 'The Abrogation of the Privilege Against Self Incrimination', and included:

- to prevent the abuse of power by the Crown in the examination of suspects or witnesses[12];
- to prevent a conviction founded on a false confession or one which is made under duress and is likely to be unreliable;
- to protect the accusatorial system of justice, being the system by which the prosecution bears the onus of proving that an accused is guilty of an offense and the guilty is presumed to be innocent[13];
- to protect the quality of evidence, as a person compelled to give self incriminating evidence may be tempted to lie in order to protect their own interests; and
- to protect human dignity and privacy, the invasion of which is said to occur in compulsory self incrimination[14].

The privilege against self incrimination can be removed (abrogated) by legislation[15].

The High Court has noted that the privilege may be outweighed by other factors, justifying abrogation of it by statute:

> *'..The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained…'*[16]

The QLRC in its report[17] noted that the privilege against self incrimination may have an affect on he prosecution's ability to collect evidence and may give rise to a perception that the rights of the perpetrator are given priority to those of the victim.

These considerations are very relevant to investigations undertaken by an inspector, whether to ensure ongoing compliance and health and safety, or to identify and prosecute a breach of the model Act or regulations. As the QLRC stated:

> *'…The Commission considers that abrogation of either or both of the privileges may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community…'*
>
> *'…Abrogation may also be justified where there is an immediate need for information to avoid risks such as danger to human life, serious personal injury or damage to human health, serious damage to property or the environment, or significant economic detriment, or where there is a compelling argument that the information is necessary to prevent further harm from occurring…'*[18]

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[12] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178CLR477 at 544.
[13] See *Sorby & Or. v the Commonwealth of Australia & Ors.* (1983) 152CLR281 at 294; *Hammond v the Commonwealth of Australia & Ors.* (1982) 152CLR188 at 201.
[14] See *Accident Insurance Mutual Holdings Ltd v McFadden & Or.* (1993) 31NSWLR412 at 420.
[15] 'The privilege against self incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action' - *Sorby & Or. v the Commonwealth of Australia & Ors.* (1983) 152CLR281 at 298.
[16] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178CLR477 at 503.
[17] QLRC, '*The Abrogation of the Privilege Against Self-Incrimination*', Report No 59, December 2004, pp.31-32.
[18] ibid, p.54.

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The Australian Law Reform Commission in its December 2002 report '*Principled Regulation: Federal Civil and Administrative Penalties in Australia*' stated:

> *'…The courts have clearly expressed the view that the privilege against self incrimination is an important human right. Yet the legislature must balance other public interest considerations against the protection of individual human rights. In the field of regulation, one crucial public interest is securing effective compliance or prosecutions. The policy question for the legislature is to decide in what circumstances public interest considerations should overrule human rights protection, and whether the regulation of particular activities mandates different considerations…'*[19]

The abrogation of the privilege against self incrimination, requiring a person to provide information, may therefore be justified on the grounds of social utility, ensuring the social objectives of the legislation are achieved.

It must, however, be remembered that the person required to provide the information may in doing so be exposed to significant criminal penalties (which we have recommended in our first report may include imprisonment of up to 5 years). We also note that the potential penalties may provide an incentive to a person to provide false and misleading information (to the detriment of ongoing health and safety), and that the power to compel answers may be abused. It is desirable that an abrogation of the privilege against self incrimination be accompanied by safeguards to prevent these outcomes.

A means by which this can be achieved is by prohibiting the use of information obtained by reason of the abrogation of the privilege in any legal proceedings against the person required to provide the information. This is known as an immunity and may take two forms:

- a 'use immunity', whereby the information provided by the person cannot be used in the legal proceedings. That information may however enable the questioner to obtain that information or verification of it, or further incriminating information, from other sources. That further information can be used in legal proceedings; and
- a 'derivative use immunity', whereby the information provided by the person and any information obtained as a result of the information being provided by that person, may not be used in legal proceedings[20].

Documents

Although confirming that the privilege against self incrimination may apply to documents that an individual is required to produce, the High Court in the *Caltex case* raised doubt as to whether it should do so:

> *'…it is one thing to protect a person from testifying to guilt: it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of real evidence…'*[21]

As the QLRC noted[22] to allow a claim of privilege in relation to records that are required by legislation to be kept, could thwart the purpose of the legislation, since it would facilitate a failure to keep the records, or their destruction or falsification, with little fear of detection. To again quote the High Court in the Caltex case:

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[19] ALRC, '*Principled Regulation: Federal Civil and Administrative Penalties in Australia*', Report 95, October 2002, paragraph 18.21.

[20] These immunities are discussed in QLRC, '*The Abrogation of the Privilege Against Self-Incrimination*', Report No 59, December 2004, pp.18-20.

[21] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178CLR477 at 502, 527 and 555.

[22] QLRC, '*The Abrogation of the Privilege Against Self-Incrimination*', Report No 59, December 2004, p.37.

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> *'…Plainly enough the case for protecting a person from compulsion to make an admission of guilt is much stronger than the case for protecting a person from compulsion to produce books or documents which are in the nature of real evidence of guilt and not testimonial in character…;*[23]

The case against the privilege applying to documents is also strengthened by noting that documents are the primary means by which the decisions and conduct of a corporation may be determined.

The Victorian Parliament Law Reform Committee, in its report '*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*' 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[24].

LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege ("LPP") is an immunity enjoyed by a person against the disclosure to any other person of:

- communications, whether oral or in writing; that are
- confidential in character and in fact; and
- are brought into existence for the dominant purpose of:
- in relation to communications (usually) between a client and his or her legal adviser, either:
- enabling the client to obtain, or the legal adviser to give, legal advice; or
- for use in litigation either actual or within the reasonable contemplation of the client; and
- in relation to communications between the client or his or her agent (such as a legal adviser) and a third party, to enable the client to obtain legal advice as to or for use in litigation either actual or within the reasonable contemplation of the client.

LPP is generally available to both individuals and corporations.[25] LPP is not automatic, either at common law or under statute, but must be claimed in order to be applied.[26]

While in this part of this report we are dealing with the privilege as it applies to the disclosure of information to an inspector, the comments are equally applicable to matters in court.

The communications that may be subject to LPP that are most likely to be relevant to the investigations of an inspector are:

- advice as to legal obligations under legislation and requirements for compliance with those obligations;
- information provided by the client to enable the legal adviser to advise (eg the circumstances of operation or of an incident);

[23] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178CLR477 at 503.
[24] See recommendation 34 at page xxvii. See also the comments on page 5.
[25] See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
[26] ibid, p.90

- a report of an investigation into an incident, to enable the legal adviser to give advice as to potential liability or what may be required to remedy and breach and provide for ongoing compliance: and
- advice on the obligations and rights of the client during an investigation.

A claim of legal professional privilege, by its nature, prevents disclosure of the contents of privileged communications even if it appears that such disclosure would be conducive to justice in a particular case. The exclusion is not based on grounds of relevance but rather on the policy that it is necessary for the administration of justice for persons to be able to obtain legal advice and assistance without being prejudiced by such communications being liable to compulsory disclosure to third parties.[27]

LPP is subject to detailed rules, imposed by the courts, in relation to each of the elements noted above. This is to ensure that the privilege only applies where the communication was made to enable the obtaining of legal advice or for use in litigation, rather than to hide information in fact obtained for other purposes.

The High Court has consistently stressed in its examination of legal professional privilege that it has a central role to play in safeguarding an individual's legal rights. As Dawson J remarked in *Baker v Campbell*:[28]

> *"... if communications between legal advisers and their clients were subject to compulsory disclosure in litigation, civil or criminal, there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought. If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part…"*

The application of LPP to advice has been supported as a means to encourage compliance with the law by facilitating the obtaining of legal advice. In considering the exercise of the ACCC's power under s 155 of the Act to obtain information the Dawson Review of the Trade Practices Act described the basis of legal professional privilege as follows:

> *"…The privilege is in the public interest because it facilitates the obtaining of legal advice and promotes the observance of the law. This is particularly desirable in the area of competition law, which is often complex. Corporations and individuals should not be discouraged from seeking legal advice for fear that their communications might subsequently be used against them…"*

LPP has been described as "…a fundamental common law right…"[29], which cannot be abrogated by legislation except by clear words or necessary implication.[30] LPP was found not to be a

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[27] *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ at 685; *Baker v Campbell* (1983) 153 CLR 52 per Murphy J at 85, per Wilson J at 95, per Deane J at 118, per Dawson J at 128; *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141 at 152; *Maurice* (1986) 161 CLR 475 per Gibbs CJ at 480, per Mason and Brennan JJ at 487, per Deane J at 490; *Waterford v Commonwealth* (1987) 163 CLR 54 per Mason and Wilson JJ at 62, per Dawson J at 100

[28] (1983) 153 CLR 52 at 130.

[29] Young, J in *AWB Ltd v Cole (N0 5) [2006] FCA 1234;* see also *Daniels v ACCC (2002) 213 CLR 543.* It is more accurate to describe the doctrine as an immunity rather than a right. See Gummow J in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 565; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553; 192 ALR 561 at [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; at [44] per McHugh J (who stated that the immunity embodies a substantive legal right). Kirby J at [86] described legal professional privilege as an important 'human right'.

[30] see *Daniels v ACCC (2002) 213 CLR 543*

'reasonable excuse' for not disclosing information in a special investigation under a specific statute, the relevant provision being considered to abrogate LPP by implication.[31]

The Victorian Parliament Law Reform Committee, in its report '*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*' recommended that, as a general principle, the application of legal professional privilege (whether it applies or is abrogated) be clarified in statutes containing inspector's powers[32].

The application of LPP represents a finding that the interests of the administration of justice and of the individual have been considered and balanced in favour of the individual. Unless the privilege is abrogated by legislation, no question arises as to whether or not it should apply in a particular case, only whether the communication meets the criteria.[33]

It is therefore necessary to consider whether LPP should be specifically abrogated in the model Act, in the interests of securing ongoing compliance and/or for breach investigations. The ALRC considered the question of the maintenance or abrogation of LPP in its Report 95 '*Principled Regulation: Federal Civil and Administrative Penalties in Australia*'[34] ; and in its Report 107 '*Privilege in Perspective: Client Legal Privilege in Federal Investigations*'[35];and Discussion Paper 73 '*Client Legal Privilege and Federal Investigatory Bodies*'.[36] The ALRC found arguments for abrogation of LPP to include:

- social utility is increased by conviction and punishment rather than by the suppression of evidence;
- the privilege has been thought to be abused and brought the law into disrepute;
- investigations will be more efficient and effective, and compliance improved;
- unlawful conduct may even be effected through the involvement of lawyers;
- burdens, such as taxation, may fall only on the honest and diligent if information cannot be obtained about those who may be negligent or dishonest'; and
- the objectives of legislation may be frustrated if the measures put in place to support these objectives are frustrated by the privilege.[37]

Arguments against abrogation of LPP, in addition to the rationale noted above that it is a fundamental right, include:

- the removal of the privilege may actually damage, rather than enhance, compliance. Fear of compulsory disclosure may deter candid, careful, detailed, written advice being given by lawyers to their clients and increase the amount of oral advice by lawyers;
- it "…*promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline…*"[38]

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[31] *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319; This case has been considered to be limited to the particular facts and the special nature of the investigation, justifying disclosure in the public interest.

[32] Victorian Parliament Law Reform Committee, '*Inquiry into the Powers of Entry, Search, Seizure and Questioning by Authorised Persons*', Parliament of Victoria, May 2002. See recommendation 35 at page xxviii; the committee noted '*…powers granted for the purpose of monitoring compliance with legislation are often more extensive, and/or have fewer safeguards than powers for the purpose of investigating an offense…*' at page 39.

[33] see *Daniels v ACCC (2002) 213 CLR 543*

[34] ALRC, '*Principled Regulation: Federal Civil and Administrative Penalties in Australia*', Report 95, October 2002.

[35] ALRC, *'Privilege in Perspective: Client Legal Privilege in Federal Investigations'*, Report 107, December 2007.

[36] ALRC, *'Client Legal Privilege and Federal Investigatory Bodies'*, Discussion Paper 73, September 2007.

[37] *Discussion Paper 73: Client Legal Privilege and Federal Investigatory Bodies.* at paras 6.10 to 6.27

[38] *Grant v Downs* (1976) 135 CLR 674, at 685

- support for the adversary system of law and the protection of rights of the individual, through "…*the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law*…"[39]
- if LPP was abrogated, clients would not seek legal advice as to their obligations and compliance with the law would be compromised.

The ALRC in its Report 95 referred to a submission by the Australian Compliance Professionals Association that compliance systems require special protection. Compliance systems were noted, and accepted by the ALRC, as being beneficial. Those systems, however, contain elements of legal risk if available to regulators, as they should acknowledge breaches as a tool for rectifying errors and responding to them promptly.[40] This rationale clearly also applies to the disclosure of legal advice relating to compliance.

The ALRC strongly supported the maintenance of legal professional privilege as a fundamental principle of common law that facilitates compliance with the law.[41]

[39] *Baker v Campbell* (1983) 153 CLR 52, at118
[40] Report 95 *Principled Regulation: Federal Civil and Administrative Penalties in Australia* , at para 19.92
[41] See for example ALRC, *'Client Legal Privilege and Federal Investigatory Bodies'*, Discussion Paper 73, September 2007*,* para 6.122