



**MASTER BUILDERS
AUSTRALIA**

Submission to

Review Panel for Occupational Health and Safety

on the

**Nature of the Offences for Wrongful Death under a
National System of Occupational Health and Safety**

April 2008

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building australia



EXECUTIVE SUMMARY

Master Builders proposes that the legislative drafters of the model laws draw on the following modified Victorian reckless endangerment provision as a template for the provision dealing with workplace deaths in the model laws. This modified provision contains the phrase ‘without reasonable excuse’, unlike the existing Victorian provision which refers to the narrower phrase ‘without lawful excuse’. We also note that the maximum prison term in Western Australia is two years.

Master Builders’ proposed provision for the model laws, based on a modified version of the Victorian provision:

A person who, without reasonable excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence and liable to—

- (a) in the case of a natural person, a term of imprisonment not exceeding [x] years, or a fine not exceeding [“an appropriate penalty”]¹, or both; and
- (b) in the case of a body corporate, a fine not exceeding [“an appropriate penalty”]².

¹ Although the Victorian provision refers to a maximum prison term of 5 years, the WA provision refers to a maximum prison term of only 2 years. The Victorian provision refers to 1800 penalty units. For the 2007-2008 financial year, a penalty unit is \$110.12. (So $110.12 \times 1800 = \$198,216$.) The penalty for 2007-2008 is \$198,216.

² The Victorian provision refers to 9000 penalty units. (So $110.12 \times 9000 = \$991,080$.) The penalty for 2007-2008 is \$991,080.

1.0 INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Inc (Master Builders).
- 1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 31,000 members.
- 1.3 The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by more than 200,000 to around 1.2 million employees over the next decade.

2.0 PURPOSE OF THIS SUBMISSION

- 2.1 This submission is made in the context of the proposed national model occupational health and safety (OH & S) laws, and the review of existing OH & S State and Territory legislation by the Review Panel to determine the content of those model laws. The Council of Australian Governments (COAG) at its meeting of 26 March 2008 agreed to reach an Intergovernmental Agreement by May 2008 to harmonise OH & S laws. It will consider an implementation timetable at its meeting in July 2008.
- 2.2 Master Builders is concerned about the provisions that could be adopted in relation to workplace deaths in any national system. Accordingly Master Builders puts forward this submission for the Review Panel's consideration.
- 2.3 This submission sets out Master Builders' position concerning the most appropriate provision concerning workplace deaths for adoption in the model laws. It also provides some commentary on some of the other State and Territory provisions that the Review Panel may consider.
- 2.4 Master Builders is committed to improving the industry's OH & S record. Master Builders contends that an appropriate offence regime will encourage improved OH & S rather than create a climate of separation and defensiveness. Master Builders actively works with members to assist in reducing workplace fatalities.

3.0 OVERVIEW OF MASTER BUILDERS' POSITION

- 3.1 Master Builders considers that industrial manslaughter provisions are not appropriate in circumstances where companies are otherwise liable for workplace deaths.
- 3.2 Master Builders considers that reckless endangerment style provisions strike a more appropriate balance than industrial manslaughter provisions in

circumstances where companies are liable for workplace deaths. Reckless endangerment style provisions are located at the apex of the enforcement pyramid within OH & S legislation whereas industrial manslaughter provisions are located within the criminal law.

- 3.3 Master Builders' submission is that the Victorian provision in s 32 of the *Occupational Health and Safety Act 2004 (Vic)* is the most appropriate "reckless endangerment" style provision but that it should be modified by the insertion of the wording "without reasonable excuse". This modified Victorian provision should be adopted as part of the model national OH & S laws. The maximum prison term in the Victorian provision should also be considered in light of the maximum 2 years in Western Australia.

4.0 INDUSTRIAL MANSLAUGHTER IN THE ACT

- 4.1 The ACT became the first, and is the only Australian jurisdiction, to enact a specific offence of "industrial manslaughter" in the *Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT)* (an amendment to the *Crimes Act 1900 (ACT)*). The legislation took effect in March 2004. This remains the only specific industrial manslaughter offence in Australia, as other jurisdictions have sensibly rejected this approach, and instead enacted reforms imposing liability for reckless conduct causing workplace deaths.
- 4.2 In terms of the significance of the ACT legislation in setting a legislative standard that the national laws might follow, the fact that most active States have already considered, then retreated from the criminal law model over recent years means that the ACT legislation should be less influential as a model for national laws. Master Builders reinforces that point in this submission.
- 4.3 Jurisdictions that have considered and ultimately rejected the introduction of an industrial manslaughter offence include Victoria (2004), New South Wales (2005) and South Australia (2007). Queensland (2003) and Western Australia (2004) have also introduced alternative offences with shorter potential penal sanctions, rather than industrial manslaughter (IM) provisions. The alternative offences introduced by some of these jurisdictions are considered in more detail below.
- 4.4 Master Builders has consistently argued that punitive provisions do not provide the best mechanism of improving workplace safety, which was the main goal of the

ACT legislation, and that alternative strategies are likely to be more effective, including further education, advice and improved compliance strategies.³

4.5 The ACT's industrial manslaughter provisions are currently untested⁴, contributing to uncertainty about how they might ultimately be applied by the courts. This also suggests that to use as a model a provision from an alternative jurisdiction where there is more case law interpreting its general wording would be more sensible. In fact, the ACT is atypical so far as workplace fatalities are concerned. The ACT is a very small jurisdiction and has significantly lower industrial fatality rates than other Australian jurisdictions.⁵ Indeed the enactment of the IM provisions may have simply been part of a symbolic exercise by the ACT government, designed primarily to 'send a message' to employers.⁶

4.6 In the ACT, the industrial manslaughter offence applies in addition to both the provisions at the top of the enforcement pyramid in the *Occupational Health and Safety Act 1989* (ACT), and to the independent offence of manslaughter in s15 of the *Crimes Act 1900* (ACT). There is considerable overlap between the industrial manslaughter provisions and existing offences in the ACT, which Master Builders submits, apply more appropriately in the context of workplace deaths. Indeed one of the main reasons other legislatures (for instance South Australia) have rejected industrial manslaughter legislation is because it would duplicate existing offences.

4.7 *Distinction between the nature and characteristics of OH & S offences and criminal law offences*

4.7.1 Master Builders has consistently questioned the appropriateness of locating offences which arise from a workplace death within the criminal law, and has argued instead that the preferable approach is to locate this type of offence at the tip of the enforcement pyramid within OH & S law.⁷ The traditional criminal law usually refers to outcome or result based offences such as murder or manslaughter. By contrast regulatory criminal offences have typically been located in separate OH & S statutes and are more duty based.⁸

³ R Calver, "Developments in Industrial Manslaughter Legislation" *ACLN* 98 September/October 2004, pp 16, 17.

⁴ Based on a Case base search as at 19 February 2008.

⁵ K Wheelwright, "Prosecuting corporations and officers for industrial manslaughter -- recent Australian developments." (2004) 32 *ABLR*, 239 (sourced electronically through Lexis).

⁶ R Calver, "Developments in Industrial Manslaughter Legislation" *ACLN* 98 September/October 2004, p 10.

⁷ R Calver, "Developments in Industrial Manslaughter Legislation" *ACLN* 98 September/October 2004, p 10.

⁸ *Ibid*, p 10.

- 4.7.2 In OH & S the emphasis of the law is different, and prosecutions have a different character. As a general rule, offences may be committed whether or not harm was caused. Proof of breach usually does not require evidence of a relevant state of knowledge or intent (*mens rea*).⁹ Accordingly the shift of industrial manslaughter from an OH & S offence into the criminal law in the ACT is not a natural fit.¹⁰
- 4.7.3 In this sense, Master Builders prefers the approach taken by Chris Maxwell QC in the Maxwell Report which reviewed OH & S offences in Victoria. That Report rejected the introduction of industrial manslaughter provisions.¹¹ It distinguished between OH & S offences and manslaughter, noting their different character.
- 4.7.4 The Maxwell Report commented that with OH & S offences it is the breach of the duty not the *causing* of the death which gives rise to the offence. With manslaughter, on the other hand, it is the causing of a death, which constitutes the offence, and that "...properly remains within the province of the general criminal law."¹²
- 4.7.5 The Maxwell Report argued that the fact that somebody is injured or dies in an OH & S context is relevant only:
- (a) as evidence of the existence of a risk to health and safety which the duty holder failed to take adequate measures to prevent; and
 - (b) in providing some indication (perhaps) of the "severity of the hazard or risk" and, therefore, as a pointer to what the duty holder ought reasonably to have done.¹³
- 4.7.6 Master Builders submits that a "tall" OH & S enforcement pyramid, with many levels, provides scope for a proper escalation of enforcement responses by regulators, and provides regulators with flexibility to tailor their response to the facts. A "tall" OH & S enforcement pyramid¹⁴ provides a framework to facilitate an agency's efforts to promote prevention. Even if the sanctions at the peak are criminal, prosecutions should be launched under the OH & S statutes, to preserve the integrity of the system. The diagram below provides an illustration of the enforcement pyramid, and the appropriate movement up that pyramid within a model OH & S statute:

⁹ R Calver, "Developments in Industrial Manslaughter Legislation" *ACLN* 98 September/October 2004, 10, citing C Maxwell, "Occupational Health and Safety Review" March 2004, Government of Victoria.

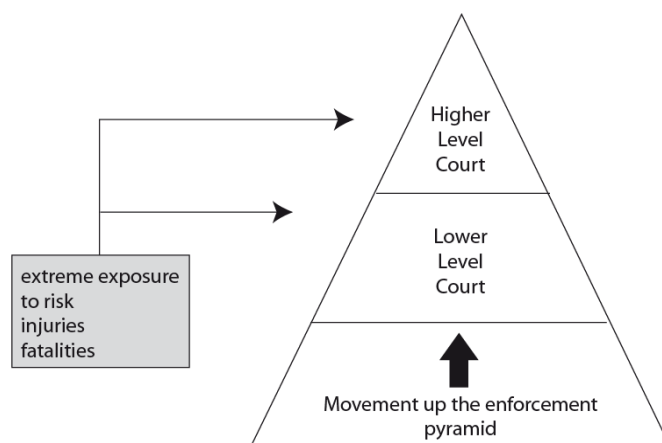
¹⁰ *Ibid*, pp 16, 17.

¹¹ C Maxwell, "Occupational Health and Safety Review" March 2004, Government of Victoria, pp 13, 14

¹² *Ibid*, p 14.

¹³ *Ibid* p 355, 356.

¹⁴ Drawing broadly on N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions* (1999), p 184.



Source: N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions* (1999) p 200.

4.7.7 Furthermore, as noted above, this enforcement pyramid may be combined with other more effective ways of reducing workplace deaths¹⁵, and improving workplace safety, which are the aims of the legislation. In Master Builders' view, as part of the optimal approach for improving workplace safety, a reckless endangerment style of offence consistent with the Victorian model, should be combined with funding for education and advice for employers and improved assistance with compliance strategies separate from that provided by the agencies that enforce the legislation.

4.8 *Brief overview of some of the more punitive aspects of the IM legislation*

4.8.1 *Harsh Penalties*

The industrial manslaughter provisions in the *Crimes Act 1900* (ACT) provide for a punitive penalty regime which is much harsher than that which applies in South Australia, NSW, Victoria, Queensland, and Western Australia. It provides that employers and senior officers may face up to 20 years imprisonment for industrial manslaughter, and/or substantial fines. (By contrast, for equivalent offences in other jurisdictions, the maximum prison term is usually around 5 years or less. It is 2 years in Western Australia.) In this sense, the ACT singles out employers, given that the usual law of manslaughter also continues to apply to employers as well as to all citizens.

4.8.2 Under those same industrial manslaughter provisions, usually the maximum fine for a company is up to \$1 million. However in certain circumstances, where a prison term and a fine are imposed on a company,

¹⁵ R Calver, "Developments in Industrial Manslaughter Legislation" *ACLN* 98 September/October 2004 p 16, 17.

a fine of up to \$1.75 million may apply.¹⁶ Thus the maximum fine that may be imposed on a company for industrial manslaughter, taking into consideration the *Legislation Act 2001 (ACT)*, also exceeds the penalty regimes in South Australia, NSW and Victoria.

4.8.3 These harsh penalties are for an offence located within the criminal law, which is combined with broad definitions and very extensive imputation provisions. Broad definitions increase the scope of the Act; then the imputation provisions increase dramatically the likelihood of a successful prosecution, and the difficulty of defending one, even where an employer has put in place measures to protect employees from harm. Furthermore, the prosecution only need show negligence, by contrast to the Acts in the other states and territories which refer to the need to show recklessness or knowledge. Recklessness implies something more than mere negligence but less than intent.¹⁷

4.8.4 The penalties under the *Crimes Act* may apply if an employee dies, and the employers' or senior officers' conduct caused the deaths, and the employer or senior officer is reckless or negligent about causing the death of the worker. An omission can be 'conduct', triggering the industrial manslaughter provisions (s49B).¹⁸ So, an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from 'anything in the employer's possession or control' may constitute conduct. This is potentially quite onerous, as these kinds of duties are usually broadly based, in the context of OH & S legislation, which may increase the probability of establishing an omission. Further, the criminal law usually punishes active antisocial behaviour rather than seeking to punish omissions.

4.8.5 *Broad Definitions Expanding the Scope of the Act*

4.8.5.1 The Act defines "worker" and "employer" very broadly in s49A.¹⁹ In terms of the definitions of employer, the Act covers government and private sector employers, and employers who are corporate or natural persons.²⁰ A person is an "employer" even if the worker was engaged by an agent. Wide definitions of "agent" and "worker"

¹⁶ Section 161(3)(f) *Legislation Act 2001 (ACT)* provides that 20 years in prison translates to \$750,000.

¹⁷ *Butterworths Concise Australian Legal Dictionary* (1998), p 370.

¹⁸ *Criminal Code 2002*, Division 2.2.2, s13.

¹⁹ K Wheelwright, "Prosecuting corporations and officers for industrial manslaughter -- recent Australian developments." (2004) 32 *ABLR*, 239 (sourced electronically through Lexis).

²⁰ *Ibid.*

are designed to catch the broad range of contracting and subcontracting arrangements that occur in some workplaces.²¹ These appear to encompass circumstances where there is a chain of contractors and subcontractors providing services “... in relation to matters over which the employer has control, or would have had control apart from an agreement between the employer and the agent”.²²

4.8.5.2 In other words, this suggests that the connection between the “employer” and the “worker” may be quite tenuous, yet an employer could still be liable. A “worker” means an employee, an independent contractor, an outworker, an apprentice or trainee, or a volunteer. These broad definitions increase the scope of the Act so that employers may find themselves liable in a broader set of circumstances. An employer may potentially be liable for the death of a contractor, a contractor’s employees or agents, including subcontractors of those contractors. There may also be issues for principal contractors on a building site where they retain liability for all equipment or tools used by those in the contracting chain due to the wording of s49B(3).²³

4.8.5.3 Master Builders suggests that the scope of these provisions combined with the negligence standard and imputation provisions discussed below have the potential to operate harshly for employers.

4.8.6. *Negligence standard, in addition to recklessness*

4.8.6.1 The industrial manslaughter provisions refer to definitions in the model *Criminal Code* that clarify and expand the scope of the industrial manslaughter offence. S20 and 21 contain definitions of recklessness and negligence respectively.

4.8.6.2 The elements of the offences of industrial manslaughter are arguably far easier to satisfy than the elements for general manslaughter.²⁴ While both industrial and general manslaughter require there to be a death, industrial manslaughter attributes

²¹ Ibid.

²² Definition of “Agent” in s49A, Part 2A Crimes Act (ACT) 1900.

²³ R Calver, “Developments in Industrial Manslaughter Legislation” *ACLN* 98 September/October 2004, p 14.

²⁴ P Harpur, “Occupational Health and Safety Issues and the Boardroom”, *Corporate Governance eJournal*, 2008, p 6.

criminal liability for negligent conduct, where general manslaughter requires recklessness or criminal intent.²⁵ The main difference between these two standards is that negligence is judged against objective criteria, while recklessness focuses upon the defendant's subjective state of mind.²⁶

4.8.6.3 The adoption of the negligence standard for industrial manslaughter means an employer can be prosecuted for industrial manslaughter based on inferred knowledge. In other words, even though an employer acted diligently in a subjective sense, if they fell below the objective standard, then they would be liable. General manslaughter requires more than negligence. To obtain a prosecution in general manslaughter, the prosecution must prove that the defendant's degree of negligence amounted to recklessness.²⁷

4.8.7 *Excessively broad imputation provisions particularly for establishing intention, knowledge or recklessness*

4.8.7.1 The industrial manslaughter provisions refer to definitions in the model criminal code ('imputation provisions'), regarding fault elements imputed to corporations which increase the likelihood that the actions or decisions of employees can be attributed to a corporate offender. This is arguably the most problematic element of the industrial manslaughter provisions in the ACT.

4.8.7.2 The *Criminal Code 2002 (ACT)* provides in s51 that in deciding whether the fault element of intention, knowledge or recklessness exists for an offence in relation to a corporation, the fault element is taken to exist if the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence.

In terms of establishing whether the corporation authorised or permitted the commission of the offence, this may be established in a number of different ways. It essentially includes:

- proving that the corporation's board of directors intentionally, knowingly or recklessly engaged in the conduct, or expressly or impliedly authorised or permitted the commission of the offence; or

²⁵ Ibid, p 6.

²⁶ Ibid, p 6.

²⁷ Ibid, p 6.

- proving that a high managerial agent of the corporation intentionally, knowingly or recklessly engaged in the conduct or that he or she expressly or impliedly authorised or permitted the commission of the offence; or
- proving that a corporate culture existed within the corporation that directed, tolerated or led to non-compliance with the relevant law; or
- proving that the corporation failed to create and maintain a corporate culture requiring compliance with the relevant law.

4.8.7.3 In terms of proving that a high managerial agent of the corporation intentionally, knowingly or recklessly engaged in the conduct or that he or she authorised or permitted the commission of the offence, this will not be established if the corporation proves that it exercised appropriate diligence to prevent the conduct, authorisation or permission.

4.8.7.4 In terms of establishing the defects in corporate culture referred to above, relevant factors include whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the corporation; and whether the employee, agent or officer who committed the offence reasonably believed, or had a reasonable expectation, that a high managerial agent of the corporation would have authorised or permitted the commission of the offence.

4.8.7.5 The principles in the *Criminal Code* are very different in their approach to that taken by the common law in attributing the physical and mental elements of criminal offences, like manslaughter, to corporations. In establishing recklessness under the *Criminal Code* principles, the physical element of an offence consisting of conduct will be committed by a corporation if it is committed by an employee, agent or officer acting within the actual or apparent scope of their employment or within their actual or apparent authority.²⁸ A company will have a fault element of 'intention, knowledge or recklessness' in relation to an offence if it expressly, tacitly or impliedly authorises or permits the commission

²⁸ K Wheelwright, "Prosecuting corporations and officers for industrial manslaughter -- recent Australian developments." (2004) 32 *ABLR*, 239 (sourced electronically through Lexis).

of the offence.²⁹ This occurs if the board of directors or a high managerial agent carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence.

4.8.7.6 A company may also be taken to have exhibited that fault element if it can be shown a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non compliance with the relevant provisions. A corporate culture is defined as an attitude, policy or rule, course of conduct or practice existing within the body corporate generally or in part of the body corporate in which the relevant activities take place.³⁰ It is difficult to see how employers can ensure that all elements of a 'corporate culture' at all times and in every circumstance promote an appropriate atmosphere that always leads to compliance.

4.8.7.7 It is not yet clear how the provisions will be applied in practice, as there is no case law interpreting them. Master Builders supports a change in culture in OH & S. Master Builders argues in its *Occupational Health and Safety Policy Blueprint* that:

The culture required at all levels is to move from a punitive focus (punish those responsible for the incident) to a learned and correction focus (fix up the problems created by the incident) and ultimately to a prevention focus (have in place systems that prevent the incident in the first place). That prevention focus should be everyone's responsibility – outcomes are what count.³¹

4.8.7.8 In relation to establishing negligence by a corporation, s52 provides that if no individual employee, agent or officer of a corporation has the fault element, then the fault element of negligence may exist for the corporation if the corporation's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).

4.8.7.9 Equivalent imputation provisions in South Australia are far narrower. Master Builders submits that the ACT provisions do not strike the right balance, by contrast with provisions in other jurisdictions such as Victoria which has adopted a reckless endangerment provision.

²⁹ S51 (2) (a) *Criminal Code 2002 (ACT)*

³⁰ R Calver, "Developments in Industrial Manslaughter Legislation" *ACLN* 98 September/October 2004, p13.

³¹ *Master Builders Occupational Health and Safety Policy Blueprint: 2005- 2015*, p 12.

4.8.8 *Other Features of the Act*

4.8.8.1 Section 49D contains a separate senior officer offence of industrial manslaughter. This offence applies if the officer's own conduct caused the death of a worker. The provision applies if the senior officer was negligent or reckless. The comments made above about negligence are thus equally applicable in this context; negligence is likely to be easier to establish than recklessness. Senior officers are thus singled out as they also continue to be subject to the ordinary law of manslaughter which applies to all citizens. Senior officers may be subject to up to 20 years imprisonment and/or a fine of up to \$1 million.

4.8.8.2 A senior officer is defined slightly differently depending on whether the employer is a corporation.³² In the case of corporations, a senior officer is defined very broadly. A senior officer is anyone who is an "officer" under section 9 of the *Corporations Act 2001*, which includes persons holding official positions such as director, secretary, receiver, receiver and manager, administrator, liquidator and trustee.³³

4.8.8.3 Part 9(b) of the Corporations Act definition also covers a person "who makes or participates in making, decisions that affect the whole or a substantial part of the business of the corporation"³⁴ or who has the capacity to affect significantly, the corporation's financial standing, or a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act. This is very broad and could create a situation where officers, so defined, were held responsible under the statute but were only remotely responsible for the conduct leading to death. The courts have also interpreted Pt 9(b) of the *Corporations Act* definition of officer to include executive officers. In the context of a government employer and non-corporate entities, the phrase "senior officer" in section 49D includes a person occupying a chief executive position or executive position.³⁵ These definitions all further expand the reach of the legislation.

³² K Wheelwright, "Prosecuting corporations and officers for industrial manslaughter -- recent Australian developments." (2004) 32 *ABLR* 239 (sourced electronically through Lexis).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

4.8.9 *Other Remedies*

4.8.9.1 The maximum fine for an employer who is a corporate offender may in some circumstances, as noted above, rise to a maximum of \$1.75 million. The court may also make other orders in addition to (or instead of) a fine. The court may order the company to publicise its offence, the consequences of its conduct and any penalties imposed or orders made. This type of order has the potential to seriously affect the reputation of a business, and could exacerbate the publicity that might naturally arise from this type of case, leading to insolvency.

4.8.9.2 A court may also order the company to carry out a project for the public benefit even if that project is unrelated to the offence (s49(e)(2)). The total cost to a company of compliance with orders under s49E cannot exceed \$5 million.³⁶ In some circumstances, the court must consider, as far as practicable, the financial circumstances of a corporation and the nature of the burden that compliance with the order will impose.

4.8.9.3 This is an important provision, given that these penalties have the potential to bankrupt many businesses, particularly small and medium sized businesses. An employer who is not a corporation, and senior officers, are liable to maximum fines of \$200,000 or a maximum prison sentence of 20 years or both. This is a very lengthy sentence compared to those in other jurisdictions.

4.8.9.4 Master Builders submits that the size of these potential penalties are too high, given that the large majority of businesses in the building and construction sector are small businesses. Most of these small businesses would struggle to pay or be bankrupted by the penalties contemplated in the legislation, even where responsibility for a death is clouded.

4.8.9.5 The following figures provide some illustration. In the building and construction industry, nearly all firms are small businesses (404, 352 non employing firms or firms employing between 1-19 people).³⁷ The industry also has some medium sized firms (2,709 firms employing between 20 - 199 people) and a small number of

³⁶ Ibid.

³⁷ ABS Cat No 8155, November 2007, Table 2.1, p 22.

large firms (127 firms employing 200 or more people).³⁸ Master Builders is concerned about the potential impact of these fines, particularly on small and medium sized businesses.

5.0 GENERAL DUTY PROVISIONS – OCCUPATIONAL HEALTH AND SAFETY ACT 1989 (ACT)

- 5.1 The industrial manslaughter provisions in the *ACT Crimes Act* operate in addition to provisions under the *ACT Occupational Health & Safety Act*. Master Builders considers that there is considerable duplication in the scope of these provisions. An offence under s48 of the *Occupational Health and Safety Act 1989 (ACT)* occurs where a person fails to comply with a safety duty and the failure exposes anyone to a substantial *risk* of serious harm, and the person is reckless or negligent about whether the failure would expose anyone to the risk of serious harm. In other words, there is no need to establish that actual harm occurred under this offence. The penalty potentially includes imprisonment for up to five (5) years as well as a fine.
- 5.2 The most serious offence occurs under s49 where a person fails to comply with a safety duty, the failure *causes* serious harm and the person acted recklessly or negligently. For this offence the penalty is up to \$1,000,000 for a corporation and \$200,000 for an individual or 7 years imprisonment.³⁹ These penalties are amongst the largest in Australia. This penalty regime is based upon the consequences of offending rather than the nature of the act or omission which gave rise to the commission of an offence.⁴⁰
- 5.3 Combined with the penalties under the *Crimes Act* relating to industrial manslaughter, Master Builders' view is that the regime in the ACT is draconian for employers, executives and companies generally, and is a disincentive for employers to locate businesses in the ACT.

6.0 THE BENEFITS OF THE VICTORIAN MODEL – s32 OCCUPATIONAL HEALTH AND SAFETY ACT 2004 (VIC)

- 6.1 The Victorian aggravated offence provision would appear to have been adapted and used as a model for the most recent workplace deaths provision enacted in South Australia in late 2007. The fact that the Victorian provision was used as a model by South Australia, over the New South Wales (and ACT IM provisions),

³⁸ *Ibid*, p 22.

³⁹ However I note that the provisions of the Legislation Act (ACT) may have the effect of increasing the financial penalty for corporations as specified above in relation to the industrial manslaughter provisions.

⁴⁰ *10th Report of the Inquiry into the law and processes relating to workplace injuries and death in South Australia*, of that Parliament's Occupational Health Safety, Rehabilitation and Compensation Committee, p113. (Refer to the section dealing with the ACT.)

supports Master Builders' argument that the Victorian provision is the most appropriate starting point as a model for any national laws, with some minor adjustments. This is particularly the case as the introduction of the South Australian legislation was preceded by an extensive inquiry.

6.2 The South Australian provision is certainly far closer to the Victorian provision than to equivalent provisions in the ACT (industrial manslaughter) and in NSW. S32 of the Victorian legislation provides that:

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence and liable to—

(a) in the case of a natural person, a term of imprisonment not exceeding 5 years, or a fine not exceeding [\$198, 216]⁴¹, or both; and

(b) in the case of a body corporate, a fine not exceeding [\$991,080]⁴².

6.3 The Victorian Government ultimately chose not to introduce an offence of industrial manslaughter, like all other jurisdictions who have actively contemplated the issue.⁴³ As noted above, the Maxwell Report commissioned by the Victorian Government argued that industrial manslaughter provisions were inappropriate as OH & S offences are of a different character. In OH & S offences it is the breach of the duty not the *causing* of the death which gives rise to the offence.⁴⁴

6.4 The Second Reading Speech noted that the Victorian provision in s32 is similar to an offence in s23 of the *Crimes Act 1958* (Vic) and applies the same standards, tests and penalty.⁴⁵ As a result, there is considerable case law from which to draw in interpreting s32.

6.5 The Victorian offence, like the South Australian offence, deals with the *risk* of harm, and does not require an incident to have occurred. This means that the offence does not require that there already has been harm caused to an individual. The operation of the provision therefore permits a more 'proactive' approach to be taken to OH & S matters, so that the appropriate agency can prosecute where risks to persons are evident but no incident or injury has occurred.⁴⁶

⁴¹ The provision refers to 1800 penalty units. These change from financial year to financial year. For the 2007-2008 financial year, a penalty unit is \$110.12. So $110.12 \times 1800 = \$198, 216$.

⁴² The provision refers to 9000 penalty units. So $110.12 \times 9000 = \$991,080$.

⁴³ J Clough, "A Glaring Omission? Corporate Liability for Negligent Manslaughter" (2007) 20 *AJLL* 29 citing C Maxwell QC, "Occupational Health and Safety Act Review", Discussion Paper, 2004, pp 355-6.

⁴⁴ C Maxwell, "Occupational Health and Safety Review" March 2004, Government of Victoria, p 14.

⁴⁵ Cited in P Rozen, "Significant Change or Merely Fine Tuning? The Occupational Health and Safety Act 2004 (Vic)" (2005) 18 *AJLL* 79.

⁴⁶ *10th Report of the Inquiry into the law and processes relating to workplace injuries and death in South Australia*, of that Parliament's Occupational Health Safety, Rehabilitation and Compensation Committee, p 102.

- 6.6 Provided that the penalties applied by the courts reflect whether harm has actually occurred or not, this provision is likely to be of greater utility for both employers and employees. It means that where the relevant agency performs its role effectively, action is more likely to be taken to prevent deaths or injuries occurring in the first place.
- 6.7 An exception to the conduct giving rise to the offence is where it is undertaken with a lawful excuse. It would appear that a lawful excuse consists only of “a reason recognised by law as sufficient justification for such failure, whether by way of answer, defence, justification or other legal right or immunity.”⁴⁷
- 6.8 In other words, an employer with a ‘reasonable excuse’ for their conduct (including omission), may still find themselves subject to large financial and penal sanctions because that reason does not fall within the existing legal rights or immunities afforded to them. Master Builders submits that the phrase ‘without lawful excuse’ should be modified and the model laws should instead adopt ‘without reasonable excuse’, which is broader.
- 6.9. In terms of the maximum penalties for breach, the Victorian Act imposes a potential prison term for individuals of the same length as South Australia, but imposes lower fines than South Australia for both individuals and companies. An individual found guilty is liable for a term of imprisonment not exceeding 5 years, or a fine not exceeding \$198,216 or both. A corporation is liable for a fine not exceeding \$991,080. In Master Builders’ submission, these fines are sufficient to act as a deterrent especially when combined with other remedies for breach, and the possibility of manslaughter under the general criminal law.
- 6.10 The relevant offence is an indictable offence, like that in South Australia, although there is provision within the *Magistrates’ Court Act 1989 (Vic)* for it to be heard and determined summarily. This process makes it easier and cheaper to prosecute (as indictable offences are otherwise usually associated with higher costs).⁴⁸ Unlike in NSW, employers retain appeal rights, which are extremely important. The fact that the NSW equivalent provision does not contain appeal rights where employers are penalized with sometimes heavy fines is unconscionable. Indeed, this is one of its main defects.

⁴⁷ *Attorney General of the Commonwealth v Breckler* (1999) 197 CLR 83 at 17 citing *McGuinness v Attorney General (Vict)* (1940) 63 CLR 73 at 105.

⁴⁸ *10th Report of the Inquiry into the law and processes relating to workplace injuries and death in South Australia*, of that Parliament’s Occupational Health Safety, Rehabilitation and Compensation Committee, p 102. (Refer to the section dealing with Victoria).

6.11 Unlike in South Australia, where the offence created is comparatively new (it came into effect in January), the Victorian offence has been in existence for a longer period. Although there have not yet been any decided cases interpreting s32, there is currently a case before the Victorian courts involving the prosecution of two employees. It is currently listed for the circuit commencing 28 April 2008.⁴⁹ However the provision in the *Crimes Act* on which s32 has been based has been the subject of judicial interpretation.

7.0 'WITHOUT REASONABLE EXCUSE' – A MODIFICATION TO THE VICTORIAN PROVISION

7.1 It is Master Builders' submission that the phrase "without reasonable excuse" should be adopted in the model OH & S laws, rather than the narrower Victorian phrase of "without lawful excuse", as an element of the offence that the prosecution must establish. "Without reasonable excuse" is wider than the phrase "without lawful excuse"⁵⁰, which is an improvement for employers on the Victorian and South Australian Acts.

7.2 The NSW legislation by contrast refers to a defence of "without reasonable excuse". By analogy, this may also be helpful in ascertaining what might amount to a "reasonable excuse" where this is instead an element of the offence that the prosecution must prove. The NSW defence is currently untested, so it is not clear what might amount to a 'reasonable excuse'. However, this appears to mean that 'the actions were justified given all the facts and circumstances of the case'.⁵¹

7.3. In *Taikato v R*⁵², a majority of the High Court held that what is a 'reasonable excuse' depends on the circumstances of the case and the purpose of the provision which is subject to the defence. As a result, decisions on the defence in the context of other statutes do not provide sufficient guidance. Perhaps in certain emergency situations a decision to proceed may be reasonable, despite the possibility that death could result.⁵³

⁴⁹ Two employees, Brian Eller and Joel Elkington are being prosecuted by Worksafe Victoria under s32 of the OH and S Act after making acetylene gas bombs at one of the men's workplaces. The employees pleaded not guilty in the Wodonga Magistrate's Court on 1 March 2007 and the matter was adjourned for a case conference at Wangaratta County Court on 11 May 2007.

⁵⁰ J Catanzariti, "Industrial Relations – New Penalties For Workplace Deaths" *ACLN* 103 July/August 2005, 31 citing Attorney – General (Cth) v Breckler (1999) 197 CLR 83; and Second Reading Speech by Minister Hickey (in relation to the draft Bill).

⁵¹ J Catanzariti, "Industrial Relations – New Penalties For Workplace Deaths" *ACLN* 103 July/August 2005, 31 citing John Della Bosca, Minister for Industrial Relations, Workplace Deaths – Ministerial Statement', 5 May 2005 (released with the 2nd draft Bill).

⁵² (1996) 139 ALR 386, cited in J Catanzariti, "Industrial Relations – New Penalties For Workplace Deaths" *ACLN* 103 July/August 2005, p 31.

⁵³ J Catanzariti, "Industrial Relations – New Penalties For Workplace Deaths" *ACLN* 103 July/August 2005, p 31.

7.4 For instance, if a flash flood occurred and the concrete footings of a building under construction were undermined by the floodwaters, the building could potentially collapse. In this emergency situation, the appropriate action would then be to provide temporary shoring and bracing to the columns and supporting concrete pads, to provide lateral support to prevent the building from subsiding and totally collapsing. This is hazardous work especially in flood conditions. It is possible that it might constitute a 'reasonable excuse' where say an escalation in the level of flood water causes a death or serious injury.

8.0 NEW SOUTH WALES (NSW) OH & S LEGISLATION – A BRIEF EXAMINATION

8.1 It is significant that the South Australian legislature chose not to adopt and modify the equivalent NSW provision, in drafting its legislation on reckless conduct leading to workplace deaths. This supports Master Builders' argument that the Victorian model is preferable to the NSW model as a template for the national laws.

8.2 In NSW, OH & S is regulated by the *Occupational Health and Safety Act 2000* (OH & S Act). S32A of the Act was inserted by the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 (NSW)* with effect from 15 June 2005. A panel of experts prepared a report for WorkCover in late 2004 which recommended against specific industrial manslaughter legislation, instead urging the creation of additional penalties under the OH & S Act.⁵⁴

8.3 The report concluded that it was preferable to locate a workplace deaths provision within the specialist OH & S jurisdiction, rather than locating an industrial manslaughter provision within the general criminal law.⁵⁵ In other words, the report emphasized the importance of continuing to distinguish between the OH & S jurisdiction and its offences, and the general criminal law, which should be separate.

8.4 NSW Aggravated offence provision – s32a Reckless Conduct Causing Death

8.4.1 Section 32A provides that:

- (1) In this section: **conduct** includes acts or omissions.
- (2) A person:
 - (a) whose conduct causes the death of another person at any place of work;

⁵⁴ N Foster, "Manslaughter by Managers" (2006) 9FJLR 108 citing Professor Ron McCallum, et al, *Advice in relation to Workplace Death, Occupational Health and Safety Legislation and Other Matters* (2004) NSW Workcover <http://www.workcover.nsw.gov.au>

⁵⁵ Professor Ron McCallum, et al, *Advice in relation to Workplace Death, Occupational Health and Safety Legislation and Other Matters* (2004), p 17.

- (b) who owes a duty under Part 2 with respect to the health or safety of that person when engaging in that conduct; and
- (c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct,

is guilty of an offence.

8.4.2 The provision is only applicable in the case of death and in that sense is retrospective, focusing on the nature of the outcome of the breach rather than the breach itself. It cannot apply where reckless conduct is evident but a death has not yet occurred even if serious injury has occurred.⁵⁶ This is in contrast to the Victorian and South Australian equivalent provisions.

8.5 *Defects of the NSW model: lack of appeal rights*

8.5.1 Section 32B details the process of prosecution of the offence and states that proceedings for the offence may only be dealt with summarily before the NSW Industrial Relations Commission.⁵⁷ This is one of the main defects of the NSW legislation as it fails to provide adequate rights of appeal against a conviction.⁵⁸ Unlike the general criminal law, a person (including a corporation) convicted of the offence cannot appeal further than a Full Bench of the Commission.⁵⁹ This is “manifestly unfair”⁶⁰ for employers, particularly given that corporations are subject to fines of up to \$1.65 million. It results in the creation of two streams of criminal law, one that applies in the workplace, and one that applies elsewhere.

8.5.2 Although a person sentenced to a term of imprisonment may appeal to the Court of Criminal Appeal, a person who is convicted and sentenced under the provision, would appear still to be liable to pay the prosecutors’ costs. This might consist of hundreds of thousands of dollars, depending on the facts of the case.⁶¹

8.6 *Unreasonable scope of the underlying duty on employers and its effect on related provisions*

8.6.1 It must be shown that the accused “owed a duty under Part 2” of the Act with respect to the health or safety of the accused. Those who owe a duty

⁵⁶ 10th Report of the Inquiry into the law and processes relating to workplace injuries and death in South Australia, of that Parliament’s Occupational Health Safety, Rehabilitation and Compensation Committee, pp 99, 100.

⁵⁷ Ibid, p 100.

⁵⁸ J Catanzariti, “Industrial Relations – New Penalties For Workplace Deaths” ACLN 103 July/August 2005, p 29.

⁵⁹ Ibid, p 29.

⁶⁰ Ibid, p 29.

⁶¹ Ibid, p 32.

of care under Part 2 include employers, self-employed persons, manufacturers, designers, and controllers of premises and plant, and suppliers of plant and substances for use at work⁶² (ss 8, 9, 10 and 11). These provisions have the potential to capture builders, contractors and suppliers in the building and construction industry. Employees may also owe a duty under s20.

8.6.2 The duties owed under Part 2 are broad. These duties are based upon the notion that an employer must “ensure the health safety and welfare” of others. “Ensure” has been interpreted as to “guarantee, secure and make certain”⁶³, the “health, safety and welfare” of others, a standard that is very difficult to meet. This means it will be far easier for the prosecution to establish a breach of a relevant duty. With the exception of those applying to employees, these duties carry an absolute obligation subject to the statutory defences.⁶⁴

8.6.3 The crux of the offence in s32A is that the ‘conduct’ of the person being prosecuted has “caused” the death of the person at a place of work.⁶⁵ Conduct includes acts and omissions under s 32A (1). This may include the failure to ‘ensure’ a safe environment, the failure to carry out risk management or to do it appropriately, and the failure to provide information, instruction, training and supervision⁶⁶.

8.6.4 As noted above, it is extremely difficult to ‘ensure’ a safe environment at all times, due to the breadth of the duty. This may make it easier to establish causation than it would otherwise be, as a broader range of circumstances potentially could be attributed to the employer and found to then have led to the death. In this sense, the scope of the notion of causation may be influenced by the breadth of the duties in Part 2. The legislation specifies that for conduct to “cause the death”, it need not be the only cause, but must “substantially contribute to the death”.⁶⁷

8.6.5 The concept of death at a workplace is extended under s32A(4)(b) to include situations where the death occurs outside the workplace (for

⁶² ss 8, 9, 10 and 11 *Occupational Health and Safety Act 2000 (NSW)*.

⁶³ Employers First, “2005 review of OHS Act”, p 3.

⁶⁴ W Thompson, “Occupational health and safety update including industrial manslaughter” *Workplace and Employment Law 07/08*, Conference paper published by the College of Law, p 29.

⁶⁵ N Foster, “Manslaughter by Managers” (2006) 9 FJLR, 109.

⁶⁶ Employers First “Current legislation – (OHS Act 2000 and OHS Regulation 2001) and the OH S (Workplace Deaths) Bill 2005”, p 5.

⁶⁷ Employers First, “2005 review of OHS Act”, p 109.

instance, in a hospital), as long as the death results from an injury at the workplace. The conduct which caused the death need not be engaged in at the workplace per s32A(4)(c). In other words, a management decision made at head office or outside the workplace then communicated to the work site will still count as part of the causal chain.⁶⁸

8.6.6 This has the potential to operate harshly in some circumstances, when considered in combination with the breadth of the duty owed by employers, and given that a workplace includes a premises where work is conducted. It would seem that an employer at head office or on a business trip interstate, who instructs an employee to perform work at a premises off site, and whose employee is injured at that site and returns home and dies as a result of those injuries, could still be liable in some circumstances.

8.6.7 In most other jurisdictions, reasonable practicability is a component of the offence which the prosecution must prove beyond reasonable doubt.⁶⁹ By contrast in NSW, this notion is incorporated into the general defences, so the onus is on the employer to establish it. Furthermore, the defences in the NSW Act have traditionally been interpreted extremely narrowly by the courts.⁷⁰ Given that the duty imposed on employers is absolute, the NSW regime is thus harsh.

8.6.8 It is worthwhile setting out Justice Gaudron's view of the nature of the statutory OH & S duty that distinguishes it from the common law civil duty. It is submitted that in the context of this particular NSW provision, her comments are particularly relevant as s32A expressly incorporates those general duties within its terms.

8.6.9 The High Court was considering the general statutory OH & S duty in the South Australian legislation, but the analysis would appear to apply to all State and Territory OH & S legislation. It illustrates clearly the breadth of the duty under OH & S legislation.

The statutory duty imposed by s24(2a)(a) of the Act differs from the common law duty of care in at least two important but related respects. The first significant difference between the statutory duty and the common law duty of care is that s24(2a)(a) imposes a duty to ensure the safety of construction workers, not simply to prevent a foreseeable risk of injury to them. The statutory duty is a duty to protect against all risks to construction workers, if that is reasonably practicable. In the words of Lord Upjohn in *Nimmo v Alexander Cowan & Sons Ltd*, the duty is to make the structure

⁶⁸N Foster, "Manslaughter by Managers" (2006) 9 FJLR 109.

⁶⁹ *Chugg v Pacific Dunlop Ltd* (1991) 170 CLR 249 cited in M Tooma, *Tooma's Annotated Occupational Health and Safety Act 2000 New South Wales* (2004), p137.

⁷⁰ M Tooma, *Tooma's Annotated Occupational Health and Safety Act 2000 New South Wales* (2004), p137.

‘100 per cent safe [judged of course by a reasonable standard of care] if that is reasonably practicable and, if it is not, to make it as safe so far as is reasonably practicable to a lower percentage.’⁷¹

8.6.10 Under s 28(a) of the NSW Act, it is a defence for the defendant to prove that it was not reasonably practicable to comply with the provision of the Act which the defendant has been charged with breaching. In the High Court case *Slivak* in the South Australian context, Justice Callinan cited with approval a passage from Lord Oaksey’s judgment in *Marshall v Gotham Co Ltd*⁷² and concluded that ‘reasonably practicable’ requires consideration whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved. This test is similar to that applied by the Chief Industrial Magistrate in *Southam v Petersville Ltd*⁷³.

8.7 Combined with deeming provisions for directors and managers

8.7.1 Directors and managers are deemed under s32A(5) to owe a duty if the corporation they manage owes that duty.⁷⁴ The operation of the clause potentially unjustly reverses the onus of proof for the individuals prosecuted, as it specifies that the duty of care of an individual director or ‘person involved in the management’ is the duty of the corporation under Part 2. Furthermore, as noted above, the duties under Part 2 are very broad. They are owed to employees, and any others at the workplace. This is likely to include contractors and visitors.

8.7.2 The notion ‘person involved in the management’ is potentially a broad class of person⁷⁵, and the lack of clarity regarding the limits of this notion is a defect, given the severity of the provision. In practice it means that individuals who are not prima facie in management, may still in some circumstances be subject to the reverse onus of proof, and potentially found liable.

8.7.3 Unlike other provisions of the Act, an offence under s32A cannot be deemed to have been committed by a company officer under s26 (s32A(6)). This is sensible. This means that the company officer must be shown to personally have the requisite “recklessness” before he or she can

⁷¹ *Slivak v Lurgi Australia P/L* [2001] 205 CLR 304 at para 51.

⁷² [1954] AC 360.

⁷³ (1988) 24 IR 186 at 193, cited by M Tooma, *Tooma’s Annotated Occupational Health and Safety Act 2000 New South Wales* (2004), p138.

⁷⁴ N Foster, “Manslaughter by Managers” (2006) 9 FJLR 109.

⁷⁵ W Thompson, “Occupational health and safety update including industrial manslaughter” *Workplace and Employment Law 07/08*, Conference paper published by the College of Law, pp 28, 29.

be convicted under the section. Once causation of a death and the owing of a duty is established, then it must be proved under s 32A(2)(c) that the accused was “reckless” as to the “danger of death or serious injury to any person to whom that duty is owed that arises from the conduct”.⁷⁶

8.8 *The defence of reasonable excuse*

8.8.1 If these elements of causation, duty, and recklessness are established, there is a defence in s32A(3) of “reasonable excuse”. As stated earlier, this defence is wider than the phrase ‘without lawful excuse’⁷⁷, contained as an element of the offence in the equivalent Victorian and South Australian provisions. As noted above, Master Builders’ view is that the phrase “without reasonable excuse” should by contrast be an element of the offence in the model laws which the prosecution must establish.

8.8.2 s110 of the NSW Act provides that the onus of proving that there was an excuse rests with the defendant. In terms of what might amount to a “reasonable excuse”, this appears to mean that ‘the actions were justified given all the facts and circumstances of the case.’⁷⁸ As noted above, in *Taikato v R*⁷⁹, a majority of the High Court held that what is a ‘reasonable excuse’ depends on the circumstances of the case and the purpose of the provision which is subject to the defence. As a result, decisions on the defence in the context of other statutes do not provide sufficient guidance.⁸⁰

8.8.3 This defence of reasonable excuse appears to be supplemented by the general defences in s28. Thus, under s28, it will be a defence if the person can prove either that compliance was not reasonably practicable or that the causes of the offence were beyond their control and it was impracticable for them to make provision against them. Historically however, these defences under the NSW Act are very difficult to establish, and do not often succeed.⁸¹

⁷⁶ Ibid, p 109.

⁷⁷ J Catanzariti, “Industrial Relations – New Penalties For Workplace Deaths” *ACLN* 103 July/August 2005, p 31 citing Attorney – General (Cth) v Breckler (1999) 197 CLR 83; and Second Reading Speech by Minister Hickey (in relation to the draft Bill).

⁷⁸ J Catanzariti, “Industrial Relations – New Penalties For Workplace Deaths” *ACLN* 103 July/August 2005, 31 citing John Della Bosca, Minister for Industrial Relations, Workplace Deaths – Ministerial Statement’, 5 May 2005 (released with the 2nd draft Bill).

⁷⁹ (1996) 139 ALR 386, cited in Ibid, p 31.

⁸⁰ J Catanzariti, “Industrial Relations – New Penalties For Workplace Deaths” *ACLN* 103 July/August 2005, p 31.

⁸¹ Employers First “Occupational Health and Safety Act 2000 (NSW) – Industrial Manslaughter”, p 7.

8.8.4 Master Builders supports the notion of reasonable practicability being part of the offence in the model laws as an element that the prosecution must prove in order to establish that there has been a breach. This element, together with appropriate defences in the model laws, are extremely important due to the breadth of the duty otherwise imposed under the NSW OH & S statute: ie the duty to ensure the safety of employees, unqualified.

8.8.5 Justice Gaudron's view of the nature of the statutory OH & S duty that distinguishes it from the common law civil duty is relevant as it illustrates the importance of retaining 'reasonable practicability' as an element of the offence. Her comments were also referred to above in the context of the breadth of the duties that tend to apply under OH & S legislation generally.⁸²

8.8.6 Given the breadth of the likely duty in the model laws, if it is based on existing State and Territory OH & S laws, it is crucial that the notion of reasonable practicability be retained as an element of the offence, which the prosecution must prove in order to establish a breach.

9.0 WESTERN AUSTRALIAN (WA) OH & S LEGISLATION – A BRIEF EXAMINATION

9.1 In Western Australia, OH & S is regulated by the *Occupational Safety and Health Act 1984* (WA). The Act was the subject of an extensive review in 2006. The 'Final Report of the Occupational Safety and Health Act 1984' did not recommend any changes to the penalty regime in the Act.⁸³ Part III of the Act contains the duty provisions. Section 18A, which was inserted in 2004, introduces the concept of gross negligence.⁸⁴ It states that a contravention is committed in circumstances of gross negligence if the offender knew that the contravention would be likely to cause the death of or serious harm to a person to whom a duty is owed but acted or failed to act in disregard of that likelihood; and the contravention did in fact cause the death of or serious harm to such a person.⁸⁵

9.2 The provision refers to contravention of certain general duty provisions.⁸⁶ So it applies, for instance, in relation to a contravention of an employer's general

⁸² *Slivak v Lurgi Australia P/L* [2001] 205 CLR 304 at para 51.

⁸³ R Hooker, *Final Report of the Review of the Occupational Safety and Health Act 1984*, 6 December 2006.

⁸⁴ *10th Report of the Inquiry into the law and processes relating to workplace injuries and death in South Australia*, of that Parliament's Occupational Health Safety, Rehabilitation and Compensation Committee, p108.

⁸⁵ S18A (2) *Occupational Safety and Health Act 1984* (WA).

⁸⁶ S18A (1) *Occupational Safety and Health Act 1984* (WA).

duty to, so far as is practicable, provide and maintain a working environment in which employees are not exposed to hazards.⁸⁷ Employees include anyone employed under a contract of employment, and apprentices.⁸⁸

9.3 Employers also owe a general duty to ensure, as far as is practicable, that the safety or health of a person who is not an employee, is not adversely affected as a result of work or any hazard arising from work, undertaken by the employer.⁸⁹ This is likely to apply for example, to visitors to a workplace.

9.4 The Act also imposes general duties over persons who have control of a workplace⁹⁰, and contains a number of provisions that explicitly deal with subcontractors and labour hire arrangements⁹¹. Additional duties are imposed on body corporates affected by the provisions.⁹² The Act imposes general duties over manufacturers, designers, importers and suppliers of plant for use at a workplace, etc⁹³.

9.5 The penalties that apply in relation to gross negligence, for an individual are for a first offence, a fine of \$250,000 and imprisonment for 2 years; and for a subsequent offence, a fine of \$312,500 and imprisonment for 2 years. Alternatively, if the offender is a body corporate, for a first offence, a fine of \$500,000 applies and for a subsequent offence, a fine of \$625 000. Thus breaches involving gross negligence carry the highest penalty followed by those (not involving gross negligence but) causing death or serious harm.⁹⁴

9.6 The Western Australian approach provides, in relation to its penal provisions, a regime which reflects a sufficient deterrent without transgressing equity. Master Builders therefore submits that the Western Australian provision should be considered by the Review Panel in determining the maximum length of the prison sentence for breach of the provision in the model laws.

10.0 SUMMARY OF ARGUMENTS IN FAVOUR OF A VERSION OF THE VICTORIAN PROVISION AS A MODEL

10.1 In South Australia, the Victorian provision appears to have been adopted and adapted as a model by the most recent workplace deaths provision, after extensive inquiry.

⁸⁷ S19 (1) *Occupational Safety and Health Act* 1984 (WA). See s19A of the *Occupational Safety and Health Act* 1984 (WA) for breach.

⁸⁸ S3 *Occupational Safety and Health Act* 1984 (WA).

⁸⁹ S21 (2) *Occupational Safety and Health Act* 1984 (WA). See also s21A for breach.

⁹⁰ S22 *Occupational Safety and Health Act* 1984 (WA). See also s22A for breach.

⁹¹ Ss 23D-23F *Occupational Safety and Health Act* 1984 (WA).

⁹² S21B *Occupational Safety and Health Act* 1984 (WA).

⁹³ S23 *Occupational Safety and Health Act* 1984 (WA). See also s23AA for breach.

⁹⁴ For instance under S19A *Occupational Safety and Health Act* 1984 (WA).

- 10.2 The Victorian provision is based on an existing provision in the Victorian *Crimes Act 1958*, which means that there is already considerable case law which applies the same standards, tests and penalty, and which may be drawn on and which is likely to increase certainty in its interpretation.
- 10.3 The Victorian provision takes a more preventative based approach as regulators may take action prior to serious harm occurring, in the interests of employers and employees.
- 10.4 The Victorian provision does not restrict appeal rights, so it is more equitable for employers than the equivalent NSW provision.
- 10.5 The wording of the Victorian provision generally is preferable to the wording of the NSW provision, as the NSW provision incorporates notions of duty that are unreasonably broad and which may lead to uncertainty in interpretation.
- 10.6 However, as noted above, Master Builders supports the wording “without reasonable excuse” rather than “without lawful excuse” as an element of the offence. It also notes that the equivalent Western Australian provision contains a maximum prison sentence of two years.

11.0 RECOMMENDATIONS

- 11.1 Master Builders considers that the national laws should adopt the Victorian provision as a model on which to base its workplace deaths provision.
- 11.2 However the Victorian provision should be modified through the incorporation of the wording ‘without reasonable excuse’ as an element of the offence which the prosecution must prove. The availability of more general defences otherwise available under the national laws in addition to this wording should also be adopted. Furthermore, the Panel should consider the length of the maximum prison term in light of the Western Australian maximum penalty of 2 years.
- 11.3 Master Builders considers that the national laws should not contain industrial manslaughter provisions, as in the ACT.
- 11.4 Master Builders considers that given the breadth of most general OH & S duties, it is also crucial that the notion of reasonable practicability be retained as an element of any duty, which the prosecution must prove to establish a breach.

- 11.5 The Government should consider providing funding for education and advice for employers and improved assistance with compliance strategies separate from that provided by the agencies that enforce the legislation, as the optimal approach for improving workplace safety.

Master Builders' proposed provision for the model laws, based on a modified version of the Victorian provision:

A person who, without reasonable excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence and liable to—

- (a) in the case of a natural person, a term of imprisonment not exceeding [x] years, or a fine not exceeding [“an appropriate penalty”]⁹⁵, or both; and
- (b) in the case of a body corporate, a fine not exceeding [“an appropriate penalty”]⁹⁶.

⁹⁵ Although the Victorian provision refers to a maximum prison term of 5 years, the WA provision refers to a maximum prison term of only 2 years. The Victorian provision refers to 1800 penalty units. The penalty for the 2007-2008 financial year in Victoria equates to \$198, 216.

⁹⁶ The Victorian provision refers to 9000 penalty units. The penalty for the 2007-2008 financial year in Victoria equates to \$991,080.