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**Paul Stein
Sydney**

Chapter 1: Introduction

The importance of occupational health and safety and its enforcement

- 1.1 Every year, notwithstanding annual improvements, large numbers of workers suffer injury or disease from work.¹ Every year too many workers suffer traumatic death from work or occupational disease. The 2004 report of the National Occupational Health and Safety Commission (NOHSC) estimated that 2000 people die each year in Australia as a result of work related injury and disease. That is, more than road fatalities.

The economic cost

- 1.2 The Industry Commission, in its report on *Work Health and Safety* in 1995, conservatively estimated the annual cost of work related injury and disease at \$20 billion. By 2004 the Productivity Commission in its Inquiry into *National Workers Compensation and Occupational Health and Safety Frameworks* estimated the total annual economic cost at \$31 billion or 4.3% of GDP. The NOHSC estimated that when *indirect* costs were included the cost of work-related illnesses and injury was \$82.8 billion.²
- 1.3 By any yardstick workplace health and safety is a highly significant economic issue. The cost of workplace safety is shared between injured workers, employers, insurers and the community through social security and health subsidies.

1. Review Report, injury and disease trends pages 12-14

2. Report on *The Cost of Work-Related Injury and Illness for Australian Employers, Workers and the Community* (NOHSC), 2004

Enforcement in New South Wales

- 1.4 The Industry Commission was critical of state enforcement policies in occupational health and safety law. They tended, it said, to rely solely on persuasion, prosecutions were usually low in numbers and penalties were also low. Enforcement had little or no deterrent value.
- 1.5 However, these criticisms cannot be attributed to New South Wales today. In 2005 384 successful prosecutions occurred and fines ranged from high to low. Certainly some of the fines imposed can be said to have a deterrent effect.
- 1.6 The Industry Commission stated that for sanctions to provide a credible deterrent, there should be an expectation that breaches will be prosecuted.
- 1.7 Enforcement seeks to improve health and safety by ensuring compliance with occupational health and safety legislation. Its effectiveness, according to the Commission, was determined by the extent to which compliance prevents workplace injury and the degree to which it induces compliance.

Deterrence v Persuasion

- 1.8 The approaches of deterrence and persuasion have been the competing philosophies of regulation in Australia, as in many industrialised countries. Most thinking is that a judicious mix of deterrence and persuasion is likely to be the most effective strategy. The strategies must be complementary. While the Industry Commission saw deterrence as essential to effective enforcement, nevertheless it acknowledged that there were limits to its

effectiveness. For example, it could destroy the scope for co-operation between the inspectorate and the workplace and an over-reliance on deterrence could be counter-productive and produce regulatory resistance.

Getting the right balance

- 1.9 Twelve years on this same debate continues. Is there too much enforcement and too little persuasion or has a balance between deterrence and persuasion been found? This report is about seeking the right balance which will allow for the optimum compliance with occupational health and safety legislation and a continuation in the reduction of workplace injuries, deaths and disease.

Chapter 2: The Inquiry and Terms of Reference

2.1 The Minister's Terms of Reference to the Inquiry are:

1. To review the proposals arising from the *Report on the Review of the Occupational Health and Safety Act 2000*, tabled in the NSW Parliament on the 2 May 2006 and consider whether these, or any changes, are required to the occupational health and safety legislation to better secure the health, safety and welfare of people at work.
2. Consider the impacts of the above proposals, having regard to best practice solutions that will remove unnecessary regulatory burdens on business, without compromising safety.

2.2 Accordingly, my Inquiry is into the Review Report itself rather than a wider inquiry into every aspect of occupational health and safety law. My report should therefore be read in conjunction with the Review Report and its Draft Bill. It is also an Inquiry into the *Occupational Health and Safety Act 2000* and not the *Occupational Health and Safety Regulation 2001*, which WorkCover will undertake later.

2.3 The process of the Inquiry has been a simple one. All of the submissions to the Review, including public comment on the five Issues Papers, have been read. Importantly, a large number of submissions were received **after** the Review Report had been tabled in Parliament in May 2006 and these were also carefully read and taken into account.

- 2.4 Newspaper advertisements advertising the Inquiry were published in papers throughout the State in the week commencing 13 November 2006. Previous submittees and interested parties were contacted by telephone, letter and email to acquaint them with the Inquiry and to see if they desired to make a submission. The Terms of Reference to the Inquiry was also placed on the WorkCover website.
- 2.5 Sixty-six submissions were received and these were, subject to the permission of the submittees, placed on the WorkCover website. A list of these submissions and also the submissions made after the Review Report was tabled in Parliament are appended to this report.
- 2.6 A literature review was conducted with emphasis being placed on the occupational health and safety systems in other State jurisdictions.
- 2.7 Given time and resource constraints it was felt unnecessary to have personal interviews with the submittees, especially since their written submissions were comprehensive and plain in content.
- 2.8 In this report reference to WorkCover's *Report on the Review of the Occupational Health and Safety Act 2000* will generally be to the 'Review' or 'Review Report'.

2.9 Reference to WorkCover in this report should, where it is relevant, be taken to also refer to the Department of Primary Industries in relation to mines.

Chapter 3: The Review and its processes

- 3.1 On 16 June 2005 the Honourable John Della Bosca MLC, Minister for Commerce, announced the 5 year statutory review of the *Occupational Health and Safety Act 2000* (OHS Act). The primary task of the Review into the OHS Act was to respond to the Minister on whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. This is provided for in section 142 of the OHS Act which imposes a statutory obligation to review the Act as soon as possible after 5 years from the date upon which the Act was assented to.
- 3.2 The task of conducting the Review fell to the WorkCover Authority of NSW, a statutory corporation vested with responsibility for the OHS Act, except in relation to mines. The Department of Primary Industries is responsible for OHS compliance as it applies to mines. I understand that although WorkCover conducted the Review, the Department of Primary Industries was consulted and provided input into the Review.
- 3.3 The Review process was overseen by a reference group convened by the Minister. The reference group was comprised of two peak employer representatives, two peak employee representatives and an independent chair, Mr Greg McCarthy, Chairperson of the WorkCover Board and Workers Compensation and Workplace OHS Council. The role of the Reference Group was to provide high-level input into the methods and direction of the Review through:

- Contributing to the framing of the processes and consultative arrangements;
- Identifying issues for consideration;
- Representing the collective views and opinions of its member constituents; and
- Providing a forum for exchange and deliberation of ideas and issues arising out of the Review.

3.4 On 26 June 2005 the *Review of the Occupational Health and Safety Act 2000 Discussion Paper* (“Discussion Paper”) was released for public comment until 19 August 2005, however late submissions were received up until 26 October 2005. The release of the Discussion Paper was followed by a number of public information sessions held in July 2005 in various locations around New South Wales, which were attended by more than 760 people. In addition, seven issues based workshops were held in July-August 2005. These workshops addressed specific issues relating to small and medium size businesses, rural and regional businesses, suppliers and controllers, public sector organisations, non-traditional work arrangements and large businesses. The workshops were facilitated by an independent consultant and were attended by 104 people.

3.5 In order to address concerns raised by Unions NSW about the ability of workers to attend the workshops, two additional meetings were held with Unions NSW and its affiliates which were attended by 22 people representing 11 union groups.

- 3.6 Information briefings were held with the eleven Industry Reference Groups, the Workers Compensation and Workplace Occupational Health and Safety Advisory Council and WorkCover Board.
- 3.7 The Review determined that some of the issues raised in the Discussion Paper did not generate significant response or the responses indicated a level of confusion about a suggested proposal. As a result, the Review sought further comment through a second public comment process on a range of issues.
- 3.8 On 22 December 2005, WorkCover released five Issues Papers for public comment on Clothing Outworkers, Recognition between Safety Inspectorates, Offences for Fraudulent Activities, The Role of Codes of Practice in the OHS framework and Controllers of Work Premises. Submissions were received up until 10 February 2006.
- 3.9 Copies of the submissions made in response to the Discussion Paper were placed on WorkCover's website with the permission of the author.
- 3.10 On 2 May 2006 the *Report on the Review of the Occupational Health and Safety Act 2000* was tabled in Parliament and the draft *Occupational Health and Safety Amendment Bill 2006* was released for public comment until 18 May 2006, but submissions were received up to 7 July 2006.

3.11 Copies of all public submissions made to the Review have been provided by WorkCover to the Inquiry. Of primary concern to my Inquiry are the submissions made in response to the Review Report and Draft Bill in July of 2006 and the submissions made specifically to the Inquiry in November-December of 2006. Review and consideration of these submissions are the primary source of public comment considered in this report. A list of these submissions can be found in the Appendix.

3.12 On 20 October 2006 the Minister referred the Review to me to conduct an independent inquiry and to report by 30 April 2007.

Chapter 4: Key themes of Inquiry

Greater certainty in general duties

- 4.1 The Inquiry's objective is for balanced occupational health and safety legislation, which delivers workplace safety. To this end general duties should be more certain and coherent and accompanied by as much definition as possible to aid that certainty. To assist further there should be greater practical guidance provided by WorkCover on compliance and on interpretation of the legislation.

Alternatives to prosecution

- 4.2 Also, there should be an emphasis on alternatives to fining. The relatively new existing alternatives (sections 113-116 – restoration orders, publicity orders and community service orders) should be more frequently used and enforceable undertakings should be introduced. So too should safety recommendation notices. The idea is to provide greater flexibility and balance in compliance mechanisms. The Attorney-General should apply for an appropriate Guideline Judgment under section 125 of the *Occupational Health and Safety Act* for greater consistency in sentencing. Penalty notices should be reviewed to widen their scope and range of penalties. A list of my recommendations is to be found in the Appendix.

Level of fines

- 4.3 Overall, however, the number of prosecutions is not disproportionate and is consistent with them being seen as appropriate to be brought where death or

serious injury has occurred in the workplace. Nonetheless, prosecution should continue to be seen as a last resort in the compliance pyramid. WorkCover statistics prove this to be generally the case.

- 4.4 Despite trenchant criticisms by many employers the level of fines imposed by the Courts does not seem excessive or particularly harsh. In 2005 the average fine was in the \$25,000 range for breach of the general duties. This does not seem to be unduly harsh bearing in mind the maximum penalties provided by the legislation. My conclusion is borne out by JIRS statistics from the Judicial Commission which reveal that 79% of cases between 1999 and 2004 involved a penalty of 20% or less than the maximum.

Search for a judicious mix of persuasion and deterrence

- 4.5 Having said this I repeat that it has been stated that a judicious mix of persuasion and deterrence is likely to be the optimal regulatory strategy. Again, balance is what is required and it has been observed that an over-reliance on deterrence can be counter-productive. However, voluntary compliance by the majority of firms has been said to be dependant on deterring the incorrigible minority.

Chapter 5: A brief history of Occupational Health and Safety Legislation in New South Wales

Early prescriptive legislation

- 5.1 The first factory legislation was passed in New South Wales in 1896. It was narrow in its coverage and scope. This was followed by the *Scaffolding and Lifts Act* in 1912. This statute was to become the *Construction Safety Act*. Factories Acts were amended from time to time and a notable enactment was the 1962 *Factories Shops and Industries Act*.
- 5.2 However, these enactments were prescriptive in nature and it became clear that with fundamental changes in workplaces a new less prescriptive approach to occupational health and safety was required.

The Robens' report

- 5.3 The milestone in legislative approaches to occupational health and safety came in 1972 with the Robens' *Report of the Committee on Safety and Health at Work* presented to the parliament of the United Kingdom. The report had a profound effect on occupational health and safety policy-making in countries, including Australia, which adopted the 'Robens model'. It resulted in widespread legislative changes directed towards a more self-regulatory approach to the prevention of work related injuries. The move was away from prescriptive standards.

United Kingdom legislation

- 5.4 The report led to the enactment in the United Kingdom of the *Health and Safety at Work etc. Act 1974*. Remarkably this Act has survived 33 years in virtually the same form.

Williams' Report

- 5.5 In 1979 the NSW Government appointed the former Chief Industrial Magistrate Mr T G Williams to examine the state of safety law in New South Wales. He presented his report, *Report of Commission of Inquiry into Occupational Health and Safety* in 1981. The report made it plain that the older preventive legislation had not adequately prevented industrial injuries and ill health. The legislation was narrow in its focus and many workplaces were largely unregulated. A broad statute was required if most workers were to enjoy protection from unsafe and hazardous work practices.

Occupational Health and Safety Act 1983

- 5.6 Many of the recommendations of the Williams' report echoed the Robens' report. Although not all the recommendations made by Williams saw the light of day in legislation, the enactment of the *Occupational Health and Safety Act 1983* was a landmark development in addressing safety and health issues in the State, indeed in Australia.
- 5.7 The 1983 legislation contained many innovations. It moved away from the previous detailed and prescriptive approach. It was based on the Robens' philosophy that it was not the Government's role to run the workplace but

rather to enforce legislation. Those in control of workplaces were given the capacity to organise so that safety was ensured. The basis of this Act was a general duty of care framework. It created a stronger duty than the common law duty of care. This was an absolute duty to ensure the health, safety and welfare at work of all workers subject only to the defences available under section 53.

- 5.8 The Act was supported by regulations and codes of practice. The legislation broadened the scope of safety legislation to encompass every workplace in the State.

Review of the 1983 Act

- 5.9 In 1997-1998 the Standing Committee on Law and Justice of the Legislative Council carried out an Inquiry into workplace safety and the perceived need to overhaul the 1983 Act. It was an acknowledgment of the changes which had been taking place in the nature of working life and work places over time. Earlier in 1996 the Minister had appointed a *Panel of Review* of the legislation chaired by Professor McCallum to report to the Legislative Council Committee. The *Final Report of the Panel of Review* reported in February 1997 and much of the report was adopted by the Committee.
- 5.10 The Panel recommended the modernisation of the legislation as a means of improving workplace health and safety. It argued for enhanced workplace consultation with a stronger focus on training, education and publicity. It recommended a broader and more flexible approach to penalties and a

modernisation of the Act to eliminate technicalities and make its provisions more understandable and accessible.

5.11 The Panel also recommended a complete revision of the objects of the Act, which was largely adopted in the subsequent legislation in 2000. The Panel reaffirmed the approach to the absolute general duties. The Panel noted that unlike other States the term “reasonably practical” was not included in the general duty but rather as a statutory defence, the onus falling on the defendant to prove on the balance of probabilities. The Panel rejected the criticism that it imposed an impossible burden on the employer. The provision was seen as not exceptional in legislative terms where the law imposes an absolute duty.

5.12 The Panel recommended that the phrase ‘a person concerned in the management’ in section 50 be clarified to remove uncertainty. It further recommended that the criminal jurisdiction, which had been removed from the Supreme Court in 1987, be retained by the Industrial Relations Commission in Court Session.

5.13 The Panel report recommended that the use of non-monetary penalties should be encouraged. It espoused a balanced approach to enforcement with a graduated system and a mix of enforcement strategies. Prosecutions were to be left to more serious breaches where injury or illness occurred. The Panel also recommended enhanced consultation mechanisms noting that

serious and adequate consultation was one of the best methods of eliminating workplace accidents and risks.

- 5.14 In its final report (No. 10) of November 1998 the Upper House Committee reiterated the recommendations it had made in its interim report of December 1997 for a comprehensive overhaul of the legislation adopting most of the Panel of Review's recommendations.

Occupational Health and Safety Act 2000

- 5.15 The *Occupational Health and Safety Act 2000* was enacted and commenced on 1 September 2001. Section 142 of the Act required its review as soon as possible after 5 years of assent. The Act continued the broad performance based general duties on employers and others to ensure so far as was practical the safety and health of employees and persons at places at work. All of the old safety regulations were consolidated into a new *Occupational Health and Safety Regulation 2001*. Criminal sanctions were still to be ones of last resort but seen as 'necessary teeth' to back up consultation, inspectorial warnings, improvement notices and prohibition notices.

Advice relating to workplace death and other matters 2004

- 5.16 In January 2004 the WorkCover Authority of NSW sought *Advice relating to Workplace Death and other matters* from a Panel of four experts lead by Professor McCallum.

5.17 The Panel recommended the creation of a new offence, with higher penalties, to apply in instances of workplace death involving some culpable act or omission. The Panel answered a series of other questions, many of which are relevant to the current Inquiry.

Reckless conduct causing death amendments 2005

5.18 The *Occupational Health and Safety Act 2000* was amended later in 2005 by the insertion of sections 32A and 32B concerning reckless conduct causing death at a workplace. These provisions commenced on 15 June 2005.

Review of the 2000 Act

5.19 On 16 June 2005 the Premier announced the commencement of the Review of the 2000 Act. The review was conducted by WorkCover. The *Report on the Review of the Occupational Health and Safety Act 2000* was completed in May 2006 and tabled in Parliament. It presented a draft amending Bill containing recommendations for changes to the Act and cognate legislation. It is this Review which is the subject of my Inquiry.

Chapter 6: Objects of the Occupational Health and Safety Act 2000

The objects of the *Occupational Health and Safety Act*

6.1 The Review sought comment on whether the objects of the *Occupational Health and Safety Act* remained valid and whether the objects omitted any important details (refer to page 26 of the Review Report). The objects of the *Occupational Health and Safety Act* are set out in section 3 and provide:

“The objects of this Act are as follows:

- (a) to secure and promote the health, safety and welfare of people at work,*
- (b) to protect people at a place of work against risks to health or safety arising out of the activities of persons 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,*
- (d) to provide for consultation and co-operation between employers and employees in achieving the objects of this Act,*
- (e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,*
- (f) to develop and promote community awareness of occupational health and safety issues,*
- (g) to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,*
- (h) to deal with the impact of particular classes or types of dangerous goods and plant at, and beyond, places of work.”*

6.2 Following consideration of public comment, the Review formed the opinion that there were no fundamental issues of concern with the Act objects and

that they remained valid. It noted that the objects of the Act were significantly modernised in 2000 following recommendations of the Legislative Council Standing Committee on Law and Justice Inquiry into Workplace Safety and the objects largely reflect the recommendations made in the Final Report of the Panel of Review.

Two amendments recommended

6.3 Despite this, the Review recommended two amendments to the objects of the *Occupational Health and Safety Act*. The first amendment it proposed was to clarify that all persons at a place of work have an active role in contributing to a healthy and safe workplace. The Review recommended the insertion after section 3(b) of the *Occupational Health and Safety Act* of the following words:

“to encourage employers, employees and others with occupational health and safety duties to take an active role to protect themselves and other people at a place of work against risks to health or safety at the place of work”.

6.4 The Review recommended this amendment in response to public comment that there was a need to ensure that **all** parties were encouraged to take an active role in occupational health and safety issues.

6.5 The second proposed amendment to the Objects is the deletion of section 3(e) which provides that an objective of the Act is to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled, and its replacement with the following:

“(e) to ensure that risks to health and safety at a place of work are identified, assessed; and

- (i) *eliminated, or*
- (ii) *if that is not reasonably practicable, reduced to the lowest level that is reasonably practicable.”*

6.6 The Review recommended this amendment in response to concerns that there is a need to clearly articulate that the elimination and control of risks is on the basis of what is reasonably practicable.

6.7 These issues did not generate significant response to my Inquiry, however those that addressed the issues were generally supportive of the proposed amendments, with most concern being expressed in regard to the second recommended amendment.

6.8

Recommendation 1

I recommend that the objects in section 3 of the *Occupational Health and Safety Act 2000* be amended in the manner suggested by the Review.

WorkCover’s Functions

6.9 An issue which emerged from the public comment provided to the Review on the objects of the *Occupational Health and Safety Act* was WorkCover’s functions and the need to more clearly articulate WorkCover’s role and functions.

6.10 Although not technically a concern about the *Occupational Health and Safety Act's* objects, the Review responded to public comment on this issue by recommending that a note be inserted in the *Occupational Health and Safety Act* referring to the functions of WorkCover under the *Workplace Injury Management and Workers Compensation Act 1998* (the *WIMWC Act*) and amending those functions to clearly articulate WorkCover's occupational health and safety prevention, advisory, assistance and educational functions.

6.11 The Review proposed that a note be inserted at the end of section 3 (Objects) of the *Occupational Health and Safety Act* which refers readers to sections 22 and 23 of the *WIMWC Act* for the role and functions of WorkCover in securing the objectives of the *Occupational Health and Safety Act*.

6.12 The Review also proposed that sections 22 and 23 of the *WIMWC Act* be amended. It proposed amending section 22, General Functions of the Authority, to insert a general function of WorkCover in section 22(1)(d2) of "providing advice and information to employers, workers and others about the occupational health and safety legislation and workers compensation legislation". It also proposed that the following specific functions be inserted after section 23(1)(n):

To ensure that as part of WorkCover's advisory services, the Authority:

- Disseminates information about the duties, obligations and rights of persons under the occupational health and safety legislation and provides guidance for the purpose of assisting persons to comply with their duties and obligations, and

- Initiates or promotes events such as conferences and forums, and the publication of information, relating to occupational health, safety and welfare, and
- Engages in, promotes and co-ordinates the sharing of information to achieve the objects of the occupational health and safety legislation, and
- Promotes public awareness and discussion of occupational health, safety and welfare issues and an understanding and acceptance of the principles of health and safety protection, and
- Develops and implements programs to provide incentives for employers to implement measures to eliminate or reduce risks to health or safety; and to otherwise improve occupation health, safety and welfare.

6.13 The submissions to my Inquiry were generally supportive of these recommendations and confirm that there is a need to more clearly articulate WorkCover's functions.

6.14

Recommendation 2

I recommend that the proposed amendments to the role and functions of WorkCover in the *Workplace Injury Management and Workers Compensation Act 1998* be implemented in the manner suggested by the Review.

Chapter 7: The general duties and reasonable practicability

The nature of the general duty

- 7.1 Under the *Occupational Health and Safety Act* 2000 (as also the 1983 Act) the general duty is an absolute one but one which is qualified by the defences in section 28 that it was not reasonably practicable for the person to comply or the offence was due to causes over which the person had no control and against the happening of which it was impracticable to make provision. Thus understood it is a *qualified absolute duty* because the onus of proving the defence is on the defendant on the civil standard of proof on the balance of probabilities. Some authorities and indeed some submissions refer to the characterisation of the general duty offences as ones of 'strict' liability. In my view this is a misnomer and potentially misleading, strict liability being invoked where the defence of honest and reasonable mistake in *Proudman v Dayman* (1941) 67 CLR 536 applies, as opposed to offences of absolute liability.

The United Kingdom legislation

- 7.2 The 1974 United Kingdom legislation is of central interest (*Health and Safety at Work etc. Act*). It provides in section 2 that it shall be the duty of every employer to conduct his undertaking so as to ensure 'so far as is reasonably practical' that employees are not exposed to risks to their health and safety. All of the other general duties are similarly qualified.

Other Australian States

7.3 Most Australian states have adopted a general duty qualified by reasonable practicability, save New South Wales and Queensland.

Include reasonably practicable in the general duty

7.4 It is arguable that bearing in mind the content of the defence in section 28, reasonable practicability is implied in the otherwise absolute general duties in the New South Wales legislation. Be that as it may, it would be more transparent and certain to have 'reasonably practicable' included in the statement of the general duty. This would make it quite plain and free from doubt or argument. It would be consistent with other Australian states except Queensland.

7.5

Recommendation 3

I agree with the recommendation made by the Review that 'so far as is reasonably practicable' be included in the statement of the general duty.

Codify 'reasonably practicable'

7.6 The Review recommended that what amounts to 'reasonably practicable' be codified to assist the understanding of the parties. This provision is to be found in a new proposed section 7A(2) of the Draft Bill. Guidance on what is

meant by the phrase has been provided by many authorities, notably the High Court decision of *Slivak v Lurgi (Australia) Pty Limited* (2001) 205 CLR 304.

7.7 The existence of the definition of ‘reasonably practicable’ seeks to codify the law and was included, as the Draft Bill states, ‘for the avoidance of doubt’. This approach certainly aids the transparency of the obligation under the general duty and assists prosecutor and defendant alike as to the nature of the obligation. It adds to the certainty of the meaning and content of the general duty. However, the defence in section 28(b) was omitted, WorkCover being of the opinion that it was included in the sub-paragraphs of section 7A(2). Several submissions were critical of this omission.

7.8

Recommendation 4

I agree with the Review that ‘reasonably practicable’ should be defined as per section 7A(2) of the Draft Bill, however for more abundant caution I believe that the defence of ‘no control’ in section 28(b) of the *Occupational Health and Safety Act* should be added to section 7A(2) and I so recommend.

The Maxwell Inquiry in Victoria supported ‘control’ being added to the list of practicability factors (paragraph 496).

Onus of proving ‘reasonably practicable’

7.9 None of this of course says anything to the issue of upon whom the onus of proof of ‘reasonably practicable’ should fall. Presently under section 28 of the

Occupational Health and Safety Act 2000, as in the 1983 Act, it falls upon the defendant on the civil standard of proof. This is consistent with the United Kingdom legislation, see section 40. A similar situation pertains in Queensland, although that legislation uses different terminology, viz, 'reasonable precautions'. In all of the other Australian states the onus of proving reasonable practicability falls on the prosecutor to establish beyond reasonable doubt. This is what the Review proposed when it omitted the defence under section 28.

Social welfare or regulatory offences

7.10 It is necessary to step back from the debate to examine how 'social welfare' type regulatory offences such as Occupational Health and Safety offences, have been dealt with in the past, and indeed the present. Quite frequently the onus of proving defences peculiarly within the knowledge of the defendant is placed upon that party on the civil standard of proof – the balance of probabilities. There is nothing unique or unusual about this. Modern examples abound in consumer protection and environmental law as well as many other statutory offences. It is not seen as inherently unfair. The objective is the protection of the public. Indeed, the High Court in *He Kaw Teh v R* (1985) 157 CLR 523 at 595 (Dawson J) stated that such a reversal of onus has been accepted as a valid and necessary part of laws dealing with industrial safety.

Davies Case in England

7.11 Indeed, in one case before the Court of Appeal in England (*Davies v Health & Safety Executive* [2002] EWCA Crim 2949) it was unsuccessfully argued that the reverse burden of proof was incompatible with the presumption of innocence contained in the *European Convention on Human Rights*. The Court held that ‘reasonable practicability’ was not an essential ingredient in the offence, which would have to be proved by the prosecution. It described the duty as a qualified one.

7.12 The Court made the point that the legislation is regulatory rather than prescriptive and saw this distinction as important. The objective of regulatory legislation was to protect the public from the potentially adverse affects of otherwise lawful activity. It gave examples of employees, consumers, and motorists, to name a few. Regulatory legislation involved a shift of emphasis from protection of individual interests to the protection of the public and societal interests. The Court explained that regulatory legislation is generally directed to prevention of future harm through enforcement of minimum standards. It was different from ‘true crime’ and involved a lesser degree of culpability.

7.13 The judgment continued:

*“If the false advertiser, the corporate polluter and the manufacturer of noxious goods are to be effectively controlled it is necessary to require them to show on the balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is **nothing unfair about imposing that onus**; indeed it is essential for the protection of our vulnerable society.”* [my emphasis added]

7.14 The Court of Appeal also made the point that the offence was not concerned with the defendant's state of mind, which was irrelevant.

7.15 The Court further said that the facts giving the defendant a section 40 defence will be within his knowledge and should not prove difficult to prove.

7.16 The Court of Appeal concluded that the reversal of the burden of proof in section 40 of the United Kingdom Act was justified, necessary and proportionate. It took into account the fact that duty holders chose to engage in the activity for gain and are in charge of it. They must be taken to have accepted the regulatory controls that go with it. It was neither unjustifiable nor unfair to ask the duty holder in control of the risk to show that it was not reasonably practical to be more aware than he did to avoid it.

7.17 The Court said that to hold otherwise might mean that in some complex and serious cases enforcement might become impossible. The reverse legal burden of proof in section 40 was compatible with the Human Rights Convention.

The Industry Commission Report 1995

7.18 In 1995 the Industry Commission published its report *Work, Health and Safety An Inquiry into occupational health and safety*. The Commission said that the way in which the 'reasonably practicable' test is expressed in legislation had led to duty holders not having a clear view of their legal responsibilities.

Jurisdictions, other than New South Wales and Queensland, having the 'reasonably practicable' qualification to the general statement of the person's duty has meant that too much onus has been placed on the prosecution.

7.19 The Report stated that it is more efficient if it is the duty holder's responsibility to prove that the measures they took were reasonable and practicable (page 50). It added (page 55) that a duty holder could be expected to know more about the costs and benefits of the alternatives open to him than anyone else. The prosecutor would still have to establish that a breach occurred (beyond reasonable doubt). It was only after the prosecution had established a breach that the duty holder would have to show that it was not reasonably practicable for him to have done more. In short, the Industry Commission Report favoured the New South Wales model.

The Panel of Review 1997

7.20 The onus was placed upon the defendant to prove the defence of reasonable practicality in the 1983 *Occupational Health and Safety Act* so it was obviously felt at that time to be appropriate by the framers of the legislation. An opportunity for review of the situation came with the Upper House Inquiry in 1997-1998 and the appointment of a Panel of Review of the Act in 1997 under the chairmanship of Professor McCallum.

7.21 The Final Report of the Panel of Review referred to the argument that the legislation placed an impossible burden on the employer. The Panel, however, noted that the prosecution had to establish beyond reasonable

doubt that the risk arose out of the employer's acts or omissions and that the causal nexus existed. It said that the reversal of the onus of proof was not exceptional in legislative terms where the legislation imposes an absolute duty. It was supported by the Robens' approach of moving away from the prescriptive to the regulatory. It was seen as appropriate for a defendant to be aware of technological matters, work practices and skills within the workplace to determine what is 'reasonably practicable' rather than expect a government body to determine these matters.

7.22 The approach of the Panel was endorsed by the Report of the Standing Committee on Law and Justice of the Legislative Council in 1998.

7.23 While the 2000 Act revised the 1983 legislation in many respects and modernised the statute, the general duties and the defence of reasonably practicable was left largely unchanged.

7.24 In 2004 advice was sought by WorkCover from Professor McCallum and three other experts on Workplace Death and a number of other questions on the legislation. No question was asked about the defence of reasonable practicability. It seems that at this time it was not seen as a controversial issue.

The Maxwell Report in Victoria

7.25 However, in March 2004 the Maxwell report on an *Occupational Health and Safety Act* Review of the Victorian legislation was published. The report

endorsed the general duty framework noting that the duties were qualified by the words 'so far as is practicable'. It recommended that the Act be amended by using the phrase 'reasonably practicable' and the factors to be taken into account in determining what is reasonably practicable be clearly set out and defined.

7.26 Maxwell noted (Ch33) the differing approach between Victoria and New South Wales on the onus of proof of the matter of reasonable practicability. He said that the Victorian position should be maintained. It was a fundamental principle of the Criminal Law that the prosecution should bear the onus of proving all of the elements of an offence.

7.27 This is undoubtedly correct however it takes no account of the fact that we are not here concerned with real or traditional mainstream criminal law. On the contrary we are dealing with statutory and regulatory offences, which, with one exception, are not punishable by imprisonment. That exception is for repeat individual offenders under section 12(c) of the *Occupational Health and Safety Act*. I believe that the term of imprisonment should be omitted from the provision.

Recommendation 5

Section 12(c) of the *Occupational Health and Safety Act* provides for a maximum penalty of 2 years imprisonment for a repeat offender who is an individual. No-one has ever been sentenced to imprisonment under the provision. For consistency with regulatory offences I recommend that the term of imprisonment be deleted from section 12(c) of the Act.

Reversal of onus not unique in regulatory offences

7.29 As mentioned earlier it is not at all unusual for regulatory or remedial offences in a variety of 'social welfare' areas (including occupational health and safety) to have a reversal of the onus of proof of some defences. There is indeed nothing unique about the New South Wales position. Further, there is nothing inherently unfair in the practice, see the recent judgment of the England Court of Appeal in *Davies case*. I would adopt their Lordships' reasoning as applicable to the New South Wales position. There is no question of a breach of the Common Law, human rights legislation or international law.

Duty holder well placed to prove

7.30 I have little doubt that placing the onus of proving reasonable practicality on the prosecution beyond reasonable doubt will impose a burden on the prosecution which it will often be difficult to surmount. This is because much of the material and knowledge of what is or is not reasonably practicable in the circumstances will reside with the defendant. I reject the view that the

prosecution is well placed to prove reasonable practicability. On the contrary, the defining of what is meant by 'reasonably practicable' (which is a positive thing) includes sub-paragraphs (a) and (d) of section 7A(2) which specifically refer to matters peculiarly within the knowledge of the duty holder and not the prosecutor.

7.31 Section 7A(2)(a) provides what the person concerned knows, or ought reasonably to know, about the hazards giving rise to the risk concerned. Subparagraph (d) provides what the person concerned knows, or ought reasonably to know, about the ways of eliminating or reducing the risk. Moreover, as the High Court said in *Chugg v Pacific Dunlop* (1990) 170 CLR 249, matters of cost and suitability of ways of mitigating a hazard lay particularly within the knowledge of defendants (see section 7A(2)(e) and (f)).

7.32 The Review recommended that the general duties apply so far as is reasonably practicable in place of the existing defences under section 28 of the Act similar to the Victorian *Occupational Health and Safety Act* 2004. It gave no reasons why this important indeed fundamental change should be made or how this would affect the prosecution's burden of proof. In its Discussion Paper (June 2005) the Review had stated that the underlying philosophy of the onus being placed on the defence is that the duty holder is best placed to understand the circumstances of their workplace and to determine what is a reasonably practical risk control.

Harmonisation?

7.33 It may be assumed that a greater uniformity of occupational health and safety laws around the Commonwealth might be seen as a reason for change. However, uniformity must not be an end in itself.

Conclusion

7.34 The provision in section 28 and its predecessor in the 1983 Act have now been in operation for 24 years and by and large, in my estimation, can be seen as working reasonably well. There is no persuasive argument for change.

7.35

Recommendation 6

I would restate the general duties so as to include 'so far as is reasonably practicable' and define that term for the avoidance of doubt, but adopt the United Kingdom model, unchanged in 33 years, that the onus of proving 'reasonably practicable', whenever it qualifies a general duty, should fall on the defendant on the balance of probabilities.

7.36 Properly understood there is no inherent unfairness in that onus.

Chapter 8: Directors' and officers' duties – Section 26

8.1 One issue which created a deal of controversy in the Inquiry, highlighted by opposing submissions, is the liability of directors and officers of a corporation where an offence has been established against their company.

8.2 The present section 26 of the Act provides as follows:

“Offences by corporations—liability of directors and managers

- (1) *If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:*
 - (a) *he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or*
 - (b) *he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.*
- (2) *A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.*
- (3) *Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence against the provision is actually committed.*
- (4) *In the case of a corporation that is a local council, a member of the council (in his or her capacity as such a member) is not to be regarded as a director or person concerned in the management of the council for the purposes of this section.”*

8.3 The Review proposed that this be replaced by an entirely new provision based upon that of the Victorian *Occupational Health and Safety Act 2004*.

8.4 The Draft Bill suggested the following provision:

“Liability of officers of corporations

- (1) *If:*
- (a) *a corporation contravenes a provision of this Act or the regulations, and*
 - (b) *a contravention of the provision is an offence, and*
 - (c) *the contravention by the corporation is attributable to an officer of the corporation failing to take reasonable care, the officer is guilty of an offence.*
Maximum penalty: the same maximum penalty that is applicable to contraventions of the provision by individuals.
- (2) *In determining whether a contravention by a corporation is attributable to an officer of the corporation failing to take reasonable care, regard must be had to the following:*
- (a) *what the officer knew about the matter concerned,*
 - (b) *the extent of the officer’s ability to make, or participate in the making of, decisions that affect the corporation in relation to the matter concerned,*
 - (c) *whether the contravention by the corporation is also attributable to an act or omission of any other person,*
 - (d) *any other relevant matter.*
- (3) *An officer of a corporation who is a volunteer is not liable to be prosecuted under this section for anything done or omitted to be done by the officer as a volunteer.*
- (4) *An officer of a corporation may be proceeded against and convicted of an offence under subsection (1) whether or not the corporation has been proceeded against or has been convicted of an offence in relation to the contravention.*
- (5) *Nothing in this section affects any liability imposed on a corporation for a contravention of the provision concerned.*
- (6) *In this section:*

contravene means *contravene by act or omission.*

corporation means *any body corporate (including a body corporate representing the Crown).*

officer of a corporation has the same meaning as it has in section 9 of the Corporations Act 2001 of the Commonwealth. For that purpose, section 9 applies as if a reference to a corporation were a reference to a corporation within the meaning of this section.

volunteer means *a person who is acting on a voluntary basis, regardless of whether the person receives out-of-pocket expenses."*

- 8.5 The issues debated by the submissions to the Review and to my Inquiry included how to define an officer of a corporation, it being suggested that 'persons concerned in the management' contained an element of uncertainty. Also, whether the liability of an officer should be dependent upon some degree or level of culpability in the offence by the corporation or subject to the defences (the onus of which was on the defendant) to establish that he or she was not in a position to influence the conduct of the company or used all due diligence to prevent the contravention.

Definition of Officer

- 8.6 As to the first issue the reference to the definition of officer in section 9 of the *Corporations Act 2001* (Commonwealth) includes:

"Directors and secretaries and persons who make, or participate in the making of, decisions that affect the whole or a substantial part of the business of the corporation. It also includes persons who have the capacity to affect significantly the corporations' financial standing and persons in accordance with whose instructions or wishes the directors of the corporation are accustomed to act."

- 8.7 Judicial interpretation of the existing provision in New South Wales and also Victoria suggested that an 'officer' was not confined to the central

management of the company. For example, mine managers had been held to be officers under the provision.

Powercoal

8.8 In *Morrison v Powercoal Pty Limited and Anor* [2004] NSWIRComm 297 the New South Wales Industrial Commission in Court Session held that a mine manager was a person concerned in the management of the corporation. He was the mine manager and had the highest level of supervisory control over all matters at the colliery and ultimate supervisory control over all occupational health and safety matters there.

8.9 Powercoal sought to invoke the supervisory jurisdiction of the Court of Appeal, *Powercoal Pty Limited v Industrial Relations Court of New South Wales* [2005] NSWCA 345 (10 October 2005). The Chief Justice delivered a judgment with the concurrence of Mason P and Handley J A.

8.10 Justice Spigelman said in paragraph 98:

“The formulation ‘management of a corporation’ is not a term of art. It takes its meaning from its surroundings. The context of the Corporations Act provision is substantially different to the scope, purpose and object of the OH&S Act. It is most unlikely that cases on the Corporations Act sections would be of any significance for present purposes. Insofar as they do have significance they are against the conclusion which the Claimant would seek to have the Court draw.”

8.11 His Honour referred to the objects of the *Occupational Health and Safety Act* 1983 and said:

“116 The objects of the Act, and the general nature of the duties imposed by the Act, suggest that Parliament did not intend to give the language of s50(1) a narrow, let alone a technical, meaning. The purposive approach to interpretation required at common law, and now by s33 of the Interpretation Act 1987, suggests that the words “management of the corporation” should not be read down so as to apply only to central management.”

8.12 No error of law by the Industrial Commission Full Bench had been demonstrated.

The Gretley Appeal

8.13 The Full Bench of the Industrial Court returned to the issue of the scope of the phrase ‘concerned in the management’ in the Gretley appeal, *Newcastle Wallsend Coal Company Pty Limited v McMartin* [2006] NSWIR Comm 339 (5 December 2006). The trial judge had held that the overall mine manager, a former mine manager and a mine surveyor were all ‘concerned in the management’ and thus caught by the section.

8.14 The Full Bench noted that the construction of the phrase ‘concerned in the management’ had been settled in the intervening decisions of *Powercoal*, especially in the Court of Appeal. It was clear that the overall mine manager fell within the description. There was more doubt over the position of the previous mine manager. He was found to be an officer in relation to one of the corporate defendants but not the other corporate defendant. However, the Court ultimately dismissed the charge against this officer because of all of the circumstances.

8.15 As to the mine surveyor, he was not a person concerned in the management of either company. His role was not managerial but more akin to an advisor or consultant to mine management in relation to surveying. He did not participate in management meetings and his conviction was accordingly overturned.

Corporations Law Unhelpful

8.16 In my estimation it would be wrong to adopt the definition of officer in Corporations Law to assist in occupational health and safety. As Spigelman CJ said, it has no real relevance to the subject matter given the objects and nature of the duties in the occupational health and safety legislation. The provision (section 50 in the 1983 Act is in the same terms as section 26 of the 2000 legislation) should not be given a narrow construction. It was not confined to central management of the corporation.

8.17 Application of the Corporations Law definition of 'officer' will almost certainly narrow the provision and exclude many officers or managers who have central duties and responsibilities with regard to occupational health and safety. For example, it is likely that a mine manager would be excluded especially where the company owned or operated more than one mine.

8.18 It is of interest to note that the Maxwell Inquiry did not recommend that the Corporations Law definition be included in the Victorian legislation but believed that the definition of 'concerned in the management' should be retained.

‘Concerned in the management’ now settled

8.19 In my view there is now little uncertainty as to the meaning of ‘concerned in the management’ and the term is more appropriate to occupational health and safety than the reference to officer in the Commonwealth Corporations Law. It is a phrase which is frequently used in legislation and usually not difficult to construe in the light of the relevant facts. Assistance can be provided to stakeholders by advice from WorkCover and also WorkCover’s Prosecution Guidelines.

8.20

Recommendation 7

I recommend that ‘concerned in the management’ in section 26 of the *Occupational Health and Safety Act* remain in the provision since its meaning is now settled.

The question of culpability

8.21 As to the issue of culpability, there is support in the submissions for the provision contained in the Draft Bill, which provides that the contravention by the corporation is attributable to an officer failing to take reasonable care. Some guidance is then provided by sub-section (2) as the meaning of ‘failing to take reasonable care’.

The Panel of Review report

- 8.22 The Final Report of the Panel of Review of the 1983 legislation in February 1997 examined section 50 of the Act (in similar terms to section 26).
- 8.23 The Panel had some concern that there was no guidance on what was meant by the term 'a person concerned in the management'. Lack of clarity was seen as a source of uncertainty. The Panel recommended that the phrase needed to be clarified. (However, that did not happen with the 2000 Act, the provision remaining the same). The Panel report was prior to the *Powercoal* decision in the Court of Appeal.
- 8.24 The Panel also believed that the section was not adequate to capture modern corporate structures. It suggested that consideration be given to a new provision aimed at middle management but creating an obligation to the standard of 'reasonable care.' This also did not occur and, as mentioned, the provision in section 26 is in similar terms to section 50 of the previous Act.

Workplace death advice on section 26

- 8.25 The Workplace Death Advice given to WorkCover in 2004 by Professor McCallum and three other experts also examined section 26 and considered that it should be replaced by a new provision. The advice noted that the purpose of the provision was to ensure that officers who are involved in a corporation's illegal acts or omissions are not shielded from responsibility by the corporate legal structure.

- 8.26 The advice recommended that a completely new provision replace section 26. This would include a Code of Practice, which would have statutory force. The principles which should inform this new approach included that the conviction of officers without fault is unacceptable and that corporate personnel should be accountable where personal fault exists.
- 8.27 A draft new provision was included in the Advice. It retained the phrase 'each person concerned in the management of the corporation'. It provided a defence where the officer acted in accordance with the Code of Practice, took all reasonable precautions to prevent the contravention by the company or that no act or omission by the officer contributed to the contravention by the company.
- 8.28 So far as I am aware no progress has been made with the formulation of a Code of Practice as recommended, see the Discussion Paper of WorkCover (June 2005).

The CAMAC Report

- 8.29 Recently (September 2006) the Corporation and Markets Advisory Committee (CAMAC) published a report *Personal Liability for Corporate Fault*. Its approach, as a general principle, was that individuals should not be penalised for misconduct by a company except where it was shown that they personally assisted or been privy to that misconduct. CAMAC was critical of the reversal of the onus of proof in such provisions in some states including New South

Wales. The report said that the prosecution should be required to establish an element of personal fault.

8.30 The CAMAC recommended model retained the phrase 'or was otherwise concerned in the management' but stated that the prosecution must prove that the officer 'knew that, or was reckless or negligent as to whether, the contravening conduct [by the corporation] would occur'. It would be a defence that the officer took all reasonable steps to prevent the contravening conduct.

Gunningham's view

8.31 Recently Professor Neil Gunningham, the Director of the National Research Centre for Occupational Health and Safety Regulation at the Australian National University, wrote a paper '*Prosecution for Occupational Health and Safety Offences: Deterrent or Disincentive*'.

8.32 In examining the position of an officer of the company where the Corporation's contravention was proved, Gunningham posed the question, how can a balance be achieved between the use of deterrence and the use of other non-coercive strategies? None of the mining states (New South Wales, Queensland and Western Australia) had in his opinion managed to steer a middle course between those two extremes.

8.33 Gunningham argued that prosecution may be counter-productive if misused, especially where there was a low level of culpability in the defendant. He posed the question, what degree of culpability should merit prosecution?

8.34 In passing Gunningham noted his opinion that the onus of proof in relation to 'reasonable practicality' should remain on the defendant, as in the United Kingdom. The reverse onus of proof was in that case defensible and appropriate. This supports my conclusion to be found in Chapter 7 earlier in this report.

8.35 In Gunningham's assessment of director or officer liability the line of culpability should be drawn at the point of gross negligence, i.e. the criminal standard of negligence. This could be provided in Prosecution Guidelines. However, other considerations should also be weighed in the balance to decide whether or not to prosecute the officer. These were the degree of risk and the defendant's past occupational health and safety performance. This, he believed, would achieve a balanced approach. [I should interpolate that these notions are included in WorkCover's Prosecution Guidelines].

The Review proposal of taking reasonable care

8.36 The Review proposal for section 26 involves the notion of the defendant officer failing to take reasonable care. This introduces a degree of culpability into the section which would be informed by the list of considerations in subsection (2).

Conclusion

8.37 In my opinion there is much in the article by Gunningham that makes sense. Introducing the notion of the contravention by the corporation being

attributable to an officer failing to take reasonable care introduces a sufficient degree of culpability into the provision. I am also of the view that when it comes to officer liability, the onus of proof should not be reversed and it should be for the prosecution to establish beyond reasonable doubt that the contravention by the corporation was attributable to the defendant officer failing to take reasonable care. The list of considerations of an officer failing to take reasonable care in subsection (2) should help bring some certainty to the provision.

8.38

Recommendation 8

I agree with the Review recommendation that section 26 should provide that the contravention by the corporation was attributable to the defendant officer failing to take reasonable care.

8.39 Furthermore, the element of certainty could be enhanced by WorkCover providing guidance on the interpretation of the provision and amplification of the Prosecution Guidelines as to the circumstances when prosecution of an officer would be contemplated. I make these recommendations later in this report.

Exemption for Councillors?

8.40 Another issue should be mentioned. Section 26(4) of the Act presently contains an exemption for local government council members.

8.41

Recommendation 9

The Review omitted the exemption for Councillors in section 26 of its Draft Bill. Given the radically changed provision proposed in the Draft Bill I think this was the correct conclusion.

8.42 The deeming provision and the reversal of onus have been omitted and the notion of personal culpability has been introduced in the proposed new provision.

Exemption for Volunteers?

8.43 Finally, the Draft Bill included an exemption for volunteer officers. For the reasons given in Chapter 9 – Volunteers, I do not agree that they should be absolved from potential liability under section 26 of the Act.

Chapter 9: Providing greater clarification for duty holders

(a) Clothing Outworkers

- 9.1 The Review sought public comment on the coverage under the *Occupational Health and Safety Act* of outsourced or contract work.
- 9.2 Although few public comments on this issue were received by the Review, a number of submissions advocated the expansion of the general duty provisions to include outworkers, particularly home based clothing outworkers.
- 9.3 In response to these suggestions the Review released an Issues Paper on *Clothing Outworkers* seeking comment on:
- Whether clothing outworkers should be specifically covered under the *Occupational Health and Safety Act*;
 - The legislative model that would produce the best outcomes;
 - What health and safety obligations should be considered; and
 - Whether there would be any implications for any existing occupational health and safety provisions under the *Industrial Relations (Ethical Clothing Trades) Act 2001*.

Safety Summit recommendations

- 9.4 The Review noted in its Report and the Issues Paper that the issue of coverage of outworkers was raised at the 2002 and 2005 NSW Government

Workplace Safety Summits conducted in association with the NSW Labor Council and employer groups. The Safety Summits recommended:

“Review of the adequacy of the current legislative provisions, including incentives and controls, to ensure that parties who outsource or contract work in the course of the employer’s specific trade or business, such work does not result in the lowering of OHS standards in the Industry.” (Recommendation 97, 2002)

“Amend[ing] the Occupational Health and Safety Act (section 8.2 and section 9) to remove ‘employer workplace’ restrictions regarding outworkers.” (2005)

Submissions to the Issues Paper

- 9.5 The Review Report indicates that only a small number of responses were received to the Clothing Outworkers Issues Paper. The Review notes that strong support was received from Unions for specific coverage of clothing outworkers with employer support mixed with either opposition or support qualified with the need to recognise an employer’s limited level of control when workers are not located at the employer’s place of work.

Recommendations of the Review

- 9.6 The Review recommended a number of amendments to the Act to address concerns regarding clothing outworkers. The Review recommended:

“providing a duty for the health, safety and welfare of clothing outworkers and a duty to consult with clothing outworkers on health and safety issues. These duties should apply to clothing outworkers engaged by the employer and any employees of the clothing outworker. These duties should be qualified to apply only to those matters over which the employer has control or would have control if not for any agreement purporting to limit that control”. (Recommendation 7)

- 9.7 The Review further recommended:

“providing clothing outworkers with the same responsibilities as other types of employee[s] (section 20), including an obligation to take reasonable care for their own safety and the safety of others in the workplace, and providing that clothing outworkers have access to employee protections (section 23), which prevent the unlawful dismissal or other victimisation of an employee for doing things allowed under the OHS Act, for example making a complaint about safety.” (Recommendation 8)

- 9.8 The Review Report also recommended that the *Occupational Health and Safety Act* define clothing outworker:

“providing a definition of ‘clothing outworker’, based on the definition under the Industrial Relations Act 1996. This definition defines clothing outworker as any person who performs, outside a factory, any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupiers of a factory or a trader who sells clothing by wholesale or retail.” (Recommendation 9)

New provisions

- 9.9 The Draft Bill gives effect to the Review’s recommendations by introducing a new section 27A which provides:

“27A Clothing Outworkers – applied duties

- (1) *This section applies for the purposes of:*
- (a) *section 8 (Duties of employers), and*
 - (b) *Part 2, Division 2 (Duty to consult), and*
 - (c) *Section 20 (Duties of employees) and section 23 (Unlawful dismissal or other victimisation of employee), and*
 - (d) *Any other provisions of this Act prescribed by the regulations.*
- (2) *If the regulations so require:*

- (a) *a reference to an employee includes a reference to a clothing outworker engaged by an employer and any employees of the clothing outworker, and*
 - (b) *the duties of an employer extend to a clothing outworker engaged by the employer, and any employees of the outworker, but only in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.*
- (3) *A provision of this Act that applies in relation to a clothing outworker or employer because of this section applies with such modifications as are prescribed by the regulations.*
- (4) *In this section:*
- clothing outworker** *means a person described in clause 1(f) of Schedule 1 to the Industrial Relations Act 1996 as an employee.*
- employer** *means a persons described in clause 1(f) of Schedule 1 of the Industrial Relations Act 1996 as an employer.”*

Submissions to my Inquiry

9.10 Only a small number of responses were provided to my Inquiry which addressed this issue, however these responses were generally supportive of the proposals recommended by the Review. Strong support for the proposal was received from various union organisations. Some suggested that the obligations should not be limited to clothing outworkers but should extend generally to all outworkers.

Victorian Maxwell Inquiry

9.11 In the Victorian Inquiry Maxwell considered the issue of whether the scope of the Victorian *Occupational Health and Safety Act 1985* should be expanded to cover outworkers. Maxwell stated:

“..it has been suggested that a definition of “worker” should be introduced into the Act. Such a term could accommodate the whole range of different workplace relationships in the new economy – including contractors, casual workers, outworkers and labour hire workers...

In my view, this amendment should be made.” (paragraphs 588-589).

Johnstone’s view

9.12 The Review referred in its Issues Paper to the views of Johnstone expressed in his paper *Regulating Occupational Health and Safety in a Changing Labour Market* (2005) which support the concerns expressed by public submissions that the general duties do not adequately cover outworkers (page 3).

9.13 Johnstone notes:

*“[The] bifurcation of labour regulation has been exacerbated with the increased use of self-employed contractors and sub-contractors who do not enjoy the benefits of minimum wages and maximum hours of work and other conditions. For example, in areas such as construction, **home-based clothing production** and road transport the absence of minimum standards and the consequent competition for work has undermined the OHS of workers in the industry, by increasing the hours worked, and undermining compliance with OHS and workers’ compensation provisions.”* [emphasis added]

Clothing Outworkers under the Industrial Relations Act

9.14 The *Industrial Relations Act* applies to ‘employees’, including persons who are deemed to be employees under Schedule 1 of the Act. Schedule 1 includes a range of persons operating outside traditional employment relationships, including outworkers in clothing trades (clause 1(f)). Specific categories of

workers have been included in Schedule 1 as 'deemed employees' on a case-by-case approach.

9.15 Clause 1(f) of Schedule 1 defines clothing outworkers in the following way:

“Outworkers in clothing trades

Any person (not being the occupier of a factory) who performs outside a factory any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail. (In such a case, the occupier or trader is taken to be the employer.)”

9.16 It is this definition of outworker that the Review has recommended be adopted for the purposes of the proposed duties in relation to clothing outworkers.

Conclusion

9.17 I would recommend that the proposed duties in relation to clothing outworkers be adopted and should be limited to clothing outworkers as suggested by the Review. In my view, the need for specific coverage of clothing outworkers under the *Occupational Health and Safety Act* has been identified and has a great deal of public support. This is reflected by the inclusion of clothing outworkers as a category of deemed employee under the *Industrial Relations Act*. It is not clear that a general extension of the coverage of the general duties under the *Occupational Health and Safety Act* to other categories of outworkers is currently justified or widely supported.

Recommendation 10

I recommend the application of the following provisions to clothing outworkers:

- **the duty upon employers under section 8;**
- **the duty upon employees under section 20;**
- **the prohibition against unlawful dismissal or victimisation under section 23; and**
- **the duty to consult with clothing outworkers**

be adopted by inserting the proposed section 27A of the Draft Bill into the *Occupational Health and Safety Act* in accordance with the recommendations of the Review.

(b) Volunteers

Exemption for volunteers under section 26?

9.19 The Review's recommendations in relation to the liability imposed on directors and managers under section 26 of the *Occupational Health and Safety Act* included a recommendation to exclude from the proposed definition of "officer", persons acting in a voluntary capacity.

9.20 The proposed exclusion in section 26(3) of the Draft Bill provides:

"An officer of a corporation who is a volunteer is not liable to be prosecuted under this section for anything done or omitted to be done by the officer as a volunteer".

9.21 The Review report did not make clear why this exemption had been adopted. It may be the case that the reasoning of the Maxwell Report in relation to directors and managers' liability was adopted or uniformity with the Victorian provision (section 144) was seen as desirable.

9.22 In the Victorian Inquiry Maxwell considered the issue by noting the following:

"In my view the officer provision should exempt a volunteer officer – defined as an officer "who acts as such without any fee, gain or reward or the expectation of any fee, gain or reward". I am mindful that if such a provision is not included, the prospect of criminal liability may discourage persons from undertaking voluntary officer provisions and, in particular, positions of great public benefit." (paragraph 778).

9.23 It should be noted however that Maxwell proposed a positive duty be imposed on officer holders as opposed to the liability contemplated by section 26 of the

Occupational Health and Safety Act. In my view, the reasoning that volunteers should be exempted from liability has more force when considering the imposition of a positive duty on volunteers.

Competing submissions

9.24 Public comment to my Inquiry on this issue was divided. Some considered the exemption could lead to arrangements to avoid liability. For example, company board members might agree to serve voluntarily on the board of one company but be paid by another company. Opponents suggested that if someone is prepared to be involved in the making of management decisions that will have an impact on safety, they should not be exempted from the legal responsibilities that flow from such decisions.

9.25 Supporters, particularly community groups, argued that such an exemption is necessary for entities which rely on 'true' volunteers who do not receive financial benefits and to make these people personally liable for occupational health and safety breaches would make it extremely difficult to attract people to these positions.

Conclusion

9.26 On balance, I lean towards the argument that persons who are prepared to involve themselves in decision-making affecting occupational health and safety issues should be accountable for their actions. The Review's recommendations to reformulate the duty to reverse the onus of proof and place it on the prosecution, as well as requiring a degree of culpability by the

director or manager should go some way to alleviating concerns held by those who are acting in director or management positions on a voluntary basis.

9.27

Recommendation 11

I recommend that no exemption be included in section 26 of the *Occupational Health and Safety Act* for persons acting as a director or manager in a voluntary capacity.

(c) Controllers of work premises

Duty on controllers

- 9.28 The Review sought public comment on the scope of the duties relating to controllers of work premises. The *Occupational Health and Safety Act* imposes duties on persons who have control of premises used by people at a place of work to ensure that the premises are safe and without risks to health (s10(1)). The duty only applies if the premises are controlled in the course of a trade, business or other undertaking (whether for profit or not) of the person (s10(3)(d)).
- 9.29 Controllers of premises includes persons who have only limited control of the premises (in which case the duty applies only to the matters over which the person has control), and persons who have, under any contract or lease, an obligation to maintain or repair the premises (in which case the duty only applies to the matters covered by the contract or lease) (s10(4)). Premises occupied only as a private dwelling are exempted.
- 9.30 Section 8 of the Act requires employers to ensure the health, safety and welfare of all the employees of the employer while the employees are at work. The phrase 'at work' extends to third party premises where the employer's employees are performing work. An employer is also required to ensure that premises controlled by the employer where the employees work are safe (s8(1)(a)).

9.31 Comments received by the Review indicated that there was a general lack of understanding concerning who is caught by the obligations on ‘controllers’ of work premises and how these obligations are to be discharged, particularly when responsibilities are shared or work is undertaken in non-work premises such as domestic homes or public spaces.

Issues Paper

9.32 In response to these submissions, the Review published an Issues Paper on *Controllers of Work Premises*. The Paper sought further comment on the obligations of controllers of work premises and posed questions concerning:

- whether the health and safety obligations of employers in relation to employees working at domestic premises over which the employer may have limited control should be more clearly recognised;
- whether it is necessary to clarify the extent to which an employer should control occupational health and safety risks away from work premises and in the public domain; and
- the appropriateness of the exemption relating to common property of strata titled residential premises.

Review’s recommendations concerning work carried on outside an employer’s premises

9.33 The Review did not accept suggestions that the general duty on employers under section 8 of the *Occupational Health and Safety Act* to ensure the

health and safety of their employees should be relaxed in circumstances where work undertaken is not at the employer's work premises.

9.34 The Review considered that its recommendation to qualify the general duties, with the concept of 'reasonably practicable', would help to clarify that the employers' responsibilities are limited by the level of control that the employer is able to exercise over work undertaken in locations away from the employer's premises, including domestic premises.

9.35 The Review Report considered its recommendation for guidance on the meaning of 'reasonably practicable' would further assist employers to understand how to discharge their obligations in circumstances where employees are performing work away from the employer's work premises.

Review's recommendations concerning the concept of 'proportionate liability'

9.36 Some of the public submissions responding to the Issues Paper supported the introduction of the concept of 'proportionate liability' where multiple parties have duties in relation to a particular work premises. The Review did not support this suggestion. It noted that the courts are able to consider the role a party played in an event and apportion liability accordingly. The Review stated that it did not consider it necessary to introduce the concept of proportionate liability as the *Occupational Health and Safety Act* relies on the principle of persons retaining responsibility for shared matters and discharging those responsibilities in a coordinated way.

9.37 The Review recommended that guidance by WorkCover is needed to explain how shared or multiple duty holders should discharge their obligations.

Submissions to the Inquiry

9.38 Submissions to my Inquiry raised similar concerns regarding the existence of overlapping responsibilities at particular worksites and the need for clear delineation of responsibilities. Concern was expressed by labour hire companies in relation to the practical limitations they have over employees working offsite. Some concern was expressed about the duplication of effort involved where multiple duty holders have overlapping obligations.

Recognition of control

9.39 In the Victorian Inquiry Maxwell considered the issue of overlapping duties and referred to a submission made by Professors Quinlan and Johnstone to his review:

“One of the real strengths of the current general duty arrangement is that by specifying a range of duty holders they can accommodate complex and shifting work arrangements and indicate the need for responsible actions by all relevant parties. This is not to say that the level of responsibility should be identical. The principles of assigning the degree of responsibility in terms of practicality (which includes the extent to which that duty holder exercises control – see the High Court decision in Slivak v Lurgi) are well understood.” (paragraph 498)

9.40 Although, Professors Quinlan and Johnstone were referring to the general duty provisions in the Victorian *Occupational Health and Safety Act 1985*, the same argument can be made about the NSW *Occupational Health and Safety Act*. Amendments which attempt to delineate responsibility to take account of

specific types of work arrangements would undermine the current ability of the general duties to deal with complex and changing work arrangements.

9.41 Maxwell recommended that the issues regarding overlapping duties could be best dealt with by explicitly recognising the concept of control in the list of practicability factors. His view was that:

*“Once the concept of control is explicitly addressed, the practicability qualification will be able to moderate overlapping duties to take into account modern work arrangements.”
(paragraph 498)*

9.42 In my view this is correct. The consideration of the degree of control a duty holder has in particular circumstances enables the courts to assign responsibility appropriately where there are multiple duty holders. Arguably, the concept of ‘reasonably practicable’ includes considerations of control.

9.43 Nevertheless, I agree with Maxwell’s view that there should be explicit recognition of control as a factor to be taken into account in determining what is reasonably practicable, see my earlier discussion in Chapter 7.

9.44 The Review’s recommendation for the provision of guidance by WorkCover will assist duty holders to understand how to discharge their obligations under the *Occupational Health and Safety Act*.

Recommendation 12

I agree with the Review's recommendation that no change should be made to the *Occupational Health and Safety Act* to delineate responsibility in circumstances where multiple duty holders have overlapping duties.

My recommendation for 'control' to be listed as a factor in determining what is reasonably practicable will make it clear that duty holders' obligations are limited by the extent to which they exercise control.

I agree with the Review's recommendation to issue guidance material on how obligations are to be discharged where there are multiple duty holders.

Proposed amendment to exempt common areas of residential strata schemes from section 10

- 9.46 The Review recommended clarifying that the common areas of strata titled residential premises be excluded from the provisions relating to controllers of work premises.
- 9.47 An Order providing for an exemption from the duties on controllers of premises from clauses 33 to 44 of the *Occupational Health and Safety Regulation* is in place for common areas of strata title residential premises.
- 9.48 According to the Review Report, the exemption was made to address concerns that section 10(3)(b) of the *Occupational Health and Safety Act* does not extend to the common property of strata titled residential premises. Section 10(3)(b) provides that the duty on persons in control of premises does

not apply to premises occupied only as a private dwelling or to plant or substances used in any such premises.

9.49 The Review Report states that the exemption applies to the common property of residential strata schemes that are comprised only of residential units or are a mix of residential and commercial units, in which case the exemption applies to that part of the common property that is used exclusively by the occupants of the residential units. This exemption is set to expire in November of 2007.

9.50 Public comment to the Review was generally supportive of the amendment of the *Occupational Health and Safety Act* to reflect the Order. However, it noted that three submissions advocated that the provisions should apply to controllers of all premises regardless of nature of the premises. Others suggested to the Review that the exemption should be extended to include the common property in all strata arrangements and public spaces, such as roads and beaches.

9.51 Public submissions to my Inquiry did not offer significant comment on this issue. I would support the amendment to exempt common property of strata titled residential properties and the reasons for the exemption expressed by the Review.

9.52

Recommendation 13

I recommend that section 10(3)(b) of the *Occupational Health and Safety Act* be amended in the manner recommended by the Review to exempt common areas of strata title residential premises.

Chapter 10: Providing more help for duty holders

Introduction

- 10.1 The Review received significant public comment about the role of WorkCover and suggestions for changes to improve the effectiveness of WorkCover's activities. These suggestions were primarily concerned with increasing WorkCover's advisory and assistance activities as opposed to its enforcement activities.
- 10.2 The Review responded to these concerns by recommending:
- Clarification of WorkCover's and Department of Primary Industries' power to provide compliance advice (both orally and in writing) to persons who have duties or obligations under the *Occupational Health and Safety Act* or *Regulation* and requiring copies of written advice to be provided to an appropriate employee; and
 - that WorkCover and Department of Primary Industries (in relation to mines) be able to issue guidelines on the interpretation of the *Occupational Health and Safety Act* and *Regulation* to assist duty holders to understand and meet their obligations.
- 10.3 The Review considered that the recommendations concerning WorkCover's functions would assist in addressing these concerns (discussed earlier in Chapter 6 of this report).

10.4 Recommendations were also made by the Review in relation to the role of codes of practice, the duty to consult, the resolution of consultation disputes by WorkCover inspectors and the need for guidance material on a range of issues. As these issues similarly concern providing more help and assistance to duty holders I propose to deal with them together with the recommendations mentioned above.

(a) Workcover compliance advice

New compliance advice power

10.5 The Review recommended the insertion of new provisions in the *Occupational Health and Safety Act* providing for WorkCover to issue compliance advice. The new provisions are similar to the proposed provisions concerning guidelines.

10.6 Division 3 of the Draft Bill provides:

“46E Purpose of compliance advice

The purpose of compliance advice is to provide practical guidance to specific employers and others who have duties under this Act or the regulations about complying with those duties.

46F Compliance advice

- (1) WorkCover may give advice to a person who has a duty under this Act or the regulations about complying with that duty.*
- (2) WorkCover’s power under this section to give compliance advice may also be exercised by an inspector or, if WorkCover authorises any other person to exercise the power, that other person.*
- (3) If compliance advice is given to a person under this section in written form, a copy of the advice must also be given to an OHS committee or OHS representative representing employees affected by the advice.*

46G Use of compliance advice and liability

- (1) Compliance advice given by WorkCover is not admissible in evidence in any proceedings for an offence against this Act or the regulations.*
- (2) Compliance advice given by WorkCover does not give rise to:*
 - (a) any liability of, or other claim against, WorkCover, or*

- (b) *any right, expectation, duty or obligation that would not otherwise be conferred or imposed on a person, or*
 - (c) *any defence that would not otherwise be available to that person.*
- (3) *An inspector, or any other person exercising WorkCover's power to give compliance advice, is not liable for any thing done or omitted to be done in good faith."*

10.7 Submissions to my Inquiry were strongly supportive of the proposal to give WorkCover and Department of Primary Industries with respect to mines, a power to give compliance advice. Comments were made regarding the admissibility of compliance advice with some support for their admissibility. Others suggested that the following of compliance advice should discharge the duty holder's obligation or constitute a defence. Some concern was expressed about the resourcing of inspectors, the diversion of inspectors from enforcement duties and the perceived conflict facing inspectors having advisory and enforcement roles.

10.8 In my opinion, there is a strong argument that WorkCover should provide advice, through its inspectorate, to duty holders on how to comply with their obligations under the Act. In Victoria Maxwell was supportive of inspectors providing compliance advice:

"..the case for inspectors playing a stronger advisory role is nevertheless a compelling one.

By giving advice or guidance on the spot – in whatever form – an inspector is uniquely able to promote compliance. Just as importantly, the inspector's readiness to give advice will reinforce the positive attitude of the employer, who has, by seeking advice, demonstrated its desire to comply as soon as possible.

Not only is advice conducive to prompt compliance, but it establishes relationships between [the Regulator] and duty-holders founded on the common purpose of achieving compliance.”
(paragraphs 1230, 1231 and 1233)

10.9 The Maxwell Report referred to concerns that ‘spoon feeding’ employers would lead to a culture of depending on the regulator and discourage employers from developing their own skills, resources and systems. However, Maxwell considered that these arguments did not outweigh the clear advantages of inspectors giving compliance advice. I agree with this conclusion. As Maxwell says, advice is conducive of prompt compliance and helps to create a relationship between inspector and duty holder of a common purpose to achieve compliance.

Advice has no legal status or consequence

10.10 The issue of whether compliance advice should have legal status or consequences was one which generated significant comment from employers and employer groups to the Review and to my Inquiry. The primary concern was to ensure that any compliance advice given by WorkCover inspectors could be relied upon to support a defence to a prosecution for a breach of the Act by its admission into evidence or should constitute a complete discharge of a duty or defence to a breach of a duty under the Act.

10.11 I do not accept these submissions. Providing for compliance advice to be used in evidence regarding whether a person is guilty of an offence is not appropriate and will significantly deter inspectors from utilising an important compliance tool. Nor is it appropriate that complying with advice from an

inspector should constitute a defence to a breach of the Act. This is not the intention of advice. Compliance advice is a tool to help duty holders understand how to implement their obligations. It should not be a substitute for duty holders taking independent steps to satisfy themselves that they have discharged their obligations.

10.12 Maxwell considered the status of compliance advice and determined that such advice should have no legal status. He said:

“The Act must make it clear that an inspector’s advice has no legal force and no legal consequence of any kind. Three distinct points must be made:

First, for a dutyholder to follow a course of action suggested by an inspector does not guarantee that the dutyholder has complied with the Act. Secondly, the dutyholder’s failure to follow the inspector’s advice is irrelevant to any question of non-compliance with the Act.

Thirdly, the provision of advice or guidance by an inspector should create no right of action against the inspector personally.”
(paragraphs 1235-1237)

Conclusion

10.13 I agree with the points made by Maxwell. I understand that inspectors currently provide compliance advice without relying on any specific power in the Act. Indeed it is not necessary that a specific legislative power be given to undertake these activities.

10.14 Nonetheless, in my opinion an explicit power would make it plain that provision of compliance advice is a function of WorkCover and would encourage WorkCover and its inspectors to provide advice of a compliance nature. This power should also clearly state that the advice has no status or

consequences and is not admissible into evidence regarding whether a breach of the Act has occurred. Compliance advice could however be a consideration in relation to sentencing and the amount of penalty if it is deemed relevant.

10.15 I agree with the recommendation of the Review that the following of compliance advice should not constitute the discharge of an obligation or give rise to an additional defence.

10.16

Recommendation 14

I recommend that the *Occupational Health and Safety Act* be amended to insert new provisions for the provision of compliance advice by WorkCover inspectors in the form recommended by the Review.

(b) Guidelines by WorkCover

New Guideline making power

10.17 The Review recommended that the *Occupational Health and Safety Act* be amended to give WorkCover and the Department of Primary Industries a specific power to issue guidelines on the interpretation of the *Occupational Health and Safety Act* and the *Regulation*.

10.18 The Draft Bill provides:

“46A Purpose of guidelines

The purpose of a guideline is to provide practical guidance to employers and others who have duties under this Act or the regulations about complying with those duties.

46B Guidelines

- (1) WorkCover may, in accordance with this Division, make guidelines on the way in which:*
 - (a) a provision of this Act or the regulations would, in WorkCover’s opinion, apply to a class of persons or to a set of circumstances, or*
 - (b) a discretion of WorkCover under a provision of this Act or the regulations would be exercised.*
- (2) If WorkCover proposes to make guidelines, it must:*
 - (a) publish a notice of the proposed guidelines in the Gazette and on WorkCover’s internet website, and*
 - (b) include in the notice a statement that written submissions or comments on the proposed guidelines may be made to WorkCover by a specified date, and*
 - (c) provide a copy of the notice to the Workers Compensation and Workplace Occupational Health and Safety Council (or the Mine Safety Advisory Council if in*

*connection with the application of this section to a mine),
and*

- (d) give a copy of the proposed guidelines to each person who requests it before that specified date.*
- (3) After considering any submissions and comments received by WorkCover by the specified date, WorkCover may make the guidelines (with or without modifications) by causing them to be published in the Gazette as guidelines under this Division.*

46C Amendment or revocation of guidelines

Guidelines made under this Division may be amended or revoked by publishing notice of the amendment or revocation, providing copies of the notice and considering any comments or submissions with respect to the notice in accordance with the procedures in section 46B for the making [of] guidelines.

46D Use of guidelines and liability

- (1) Guidelines made by WorkCover are not admissible in evidence in any proceedings for an offence against this Act or the regulations.*
- (2) Guidelines made by WorkCover do not give rise to:
 - (a) any liability of, or other claim against, WorkCover, or*
 - (b) any right, expectation, duty or obligation that would not otherwise be conferred or imposed on a person, or*
 - (c) any defence that would not otherwise be available to that person.”**

10.19 With a few exceptions, public submissions to my Inquiry were strongly supportive of the need for WorkCover to provide more guidance to duty holders on complying with their obligations under the *Occupational Health and Safety Act* and the *Regulation*.

10.20 Submissions from unions suggested that they should be consulted as part of the process of developing guidelines. The proposed consultation provisions which provide for all interested parties to make submissions on any proposed guidelines would address these concerns.

10.21 Some concerns were expressed that guidelines should be admissible in proceedings for a breach of the Act or Regulation or constitute a defence. In my opinion, it is not appropriate for compliance with a guideline to constitute an additional defence. The qualification of the general duty provisions on the basis of what is reasonably practicable, and the onus on the defendant to prove what was reasonably practical to comply with the duty, will enable the defendant to bring evidence regarding what was reasonably practicable in the circumstances. I do not consider it appropriate to introduce a further defence that the person complied with a guideline.

10.22 In my opinion, guidelines should not be used in evidence regarding a breach of a duty under the Act. The Draft Bill provides for guidelines on WorkCover's opinion on how a provision of the Act or Regulation would apply to a class of persons or circumstances and how WorkCover would exercise a discretion under a provision of the Act or Regulation. The regulator's views on the interpretation of various provisions set out in guidelines are a mechanism for assisting a duty holder to comply. It is not intended to be authoritative. It is the role of the court to interpret the legislation and apply it to the particular circumstances. It is however something that may appropriately be considered in sentencing.

10.23

Recommendation 15

I recommend that the *Occupational Health and Safety Act* be amended to insert new provisions which permit WorkCover to issue Guidelines be adopted in the form recommended by the Review.

(c) Guidance for duty holders

10.24 The Review made a number of non-legislative recommendations, the majority of which concerned the issuance of various guidance materials by WorkCover. This is distinct from the process of formal Guidelines proposed in the Draft Bill, see earlier comments. Public submissions to the Review were strongly supportive of the need for guidance material on a number of different topics. Submissions to my Inquiry were also strongly supportive of the need for guidance on a range of diverse issues.

10.25 The objective of such guidance for duty holders is to support the amendments and improve the operation of the *Occupational Health and Safety Act*. Guidance advice by WorkCover will assist duty holders to understand how the *Occupational Health and Safety Act* applies to them, the extent of their responsibilities and how they might be fulfilled.

Recommendation 16

I endorse the recommendations of the Review that WorkCover provide guidance on the following topics:

- **the role and functions of WorkCover and the OHS Act objects;**
- **shared and multiple duty holders;**
- **consultation with third parties;**
- **the rights and responsibilities of persons at work;**
- **the meaning of ‘reasonably practicable’;**
- **obligations concerning clothing outworkers;**
- **directors and managers;**
- **WorkCover’s OHS prevention functions;**
- **enforceable undertakings;**
- **arrangements for inter-jurisdictional sharing of information;**
- **safety recommendation notices;**
- **enforcement measures; and**
- **recording of oral evidence.**

(d) Codes of Practice

10.27 The *Occupational Health and Safety Act* provides for industry Codes of Practice in Part 4. The Act provides that the purpose of these Codes of Practice is to provide practical guidance to employers and others who have duties under Part 2 (General Duties) with respect to occupational health, safety and welfare.

10.28 The Act currently provides a process for making codes (sections 41– 42); approval by the Minister (section 43) and publication in the Government Gazette (section 44). Relevant codes may be admitted into proceedings in respect of any matter which the prosecution must prove and a person's failure to follow a code is evidence of the matter to be established (section 46). The Act also provides that a person is not liable to any civil or criminal proceedings for failing to observe a code (section 46(2)).

10.29 The Review sought specific comment on issues relating to Codes of Practice in the health and safety framework, particularly in regard to the role of Codes of Practice in demonstrating compliance with obligations.

Issues Paper

10.30 The Review found that the public submissions were concerned about the use of codes to demonstrate compliance, the status of codes, the content of codes and the processes for consultation and development of codes. In response, the Review issued the Issues Paper – *The Role of Codes of Practice in the*

Occupational Health and Safety Framework for public comment. The Issues Paper posed specific questions regarding:

- The use of codes – in proceedings and to demonstrate compliance;
- The status of codes – that is, whether complying with codes should be mandatory or voluntary; and
- The development and consultation processes for codes of practice, including where those processes should be legislated.

Public submissions to the Review

10.31 The Review found that there was general support for the role of codes of practice in providing practical guidance and specific advice on compliance with the *Occupational Health and Safety Act* and *Regulation*. It also found that there was general support for codes remaining non-mandatory, however there was mixed support for codes being used in evidence. The Review also found some support for compliance with codes discharging occupational health and safety obligations.

10.32 There was general support for tripartite arrangements for consultation on codes and mixed support regarding the legislating of these arrangements. The Review stated that there was support for the regular review of codes of practice, with 3 to 5 years suggested as appropriate, and some suggestions for a mandatory review process.

No changes recommended

10.33 The Review did not recommend any changes to the current provisions dealing with codes of practice.

10.34 The Review considered that the introduction of the concept of 'reasonably practicable' into the general duty provisions, combined with the removal of the defences in section 28 would address the issues raised regarding the status of codes. The Review was of the view that as codes of practice are designed to provide practical advice on what is considered to be a reasonably practicable approach, the code would be able to be used to demonstrate that a duty holder has or has not discharged their obligation.

10.35 The Review Report further found that it did not consider it necessary or appropriate to amend the Act to provide an additional defence for compliance with a code. The Review noted that WorkCover intends to keep codes of practice up to date and that they are developed in consultation with stakeholders and industry.

Public submissions to the Inquiry

10.36 The submissions to my Inquiry were generally supportive of codes of practice and the recommendation to maintain them in the current form in the Act. Some suggested that codes should be mandatory, unless the duty holder could demonstrate a safer approach. Some considered that codes should be subject to agreement by industry and others suggested that codes should be

simplified. Some expressed the view that compliance with a code should be a defence to a prosecution.

Conclusion

10.37 In my view, in light of the recommendations I have made regarding the general duties, I do not support the creation of an additional defence to the general duties on the basis of compliance with a code. The qualification of the general duties, on the basis of what is reasonably practicable, will enable duty holders to bring evidence of what actions they have taken to comply with their obligations, including compliance with any relevant codes of practice. I do not consider it necessary to introduce codes of practice as a defence in itself.

10.38 I agree with the Review's recommendation for codes to remain non-mandatory. The Act is intended to provide flexibility to duty holders about the ways in which they discharge their obligations. Non-mandatory codes allow duty holders the flexibility of adopting other mechanisms to meet their obligations under the Act.

10.39 The current consultation arrangements are in my opinion adequate. Section 42 provides for WorkCover to consult with such persons or organisations as it considers appropriate and with such persons or organisations as the Minister directs. WorkCover is also required to consider all submissions before making a recommendation to the Minister about a code. In my opinion, the Act provides a process for consultation regarding codes of practice which

should include relevant persons and organisations. I do not consider it appropriate that codes should be subject to industry approval.

10.40

Recommendation 17

I agree with the Review's recommendation not to amend the provisions of the *Occupational Health and Safety Act* relating to Codes of Practice.

(e) Consultation

10.41 The Review sought comment on issues relating to the scope and effectiveness of consultation obligations and whether the obligations enabled sufficient flexibility.

10.42 The *Occupational Health and Safety Act* imposes a duty upon employers to consult with their employees to enable the employees to contribute to the making of decisions affecting their health, safety and welfare at work (s13). Consultation must include the sharing of information about occupational health, safety and welfare with employees, giving employees the opportunity to express their views and to contribute to the resolution of occupational health and safety issues and the taking into account of these views by employers (s14).

10.43 Sections 16 and 17 of the *Occupational Health and Safety Act* deal with how the duty upon employers to consult with their employees in section 13 is to be undertaken in practice. Section 16 provides for consultation to be undertaken using occupational health and safety committees; occupational health and safety representatives; or other arrangements agreed by the employer and employees. Section 17 gives further details regarding the establishment of consultation arrangements contemplated under section 16.

10.44 The Review found that there was general support for the existing consultation provisions, but a range of suggested improvements was made relating to

consultation with third parties, specific requirements to consult directly with employees affected by a particular hazard, clarity around the process for resolving issues regarding the consultation process, increased flexibility, restrictions on the use of 'other agreed arrangements', roving employee representatives and training issues.

10.45 Unions expressed concern that they are often unable to resolve outstanding issues in negotiations about consultation arrangements at a particular workplace. Unions suggested that the Industrial Court be empowered to resolve disputes about occupational health and safety issues regarding consultation arrangements.

Proposed amendments

10.46 The Review recommended providing a duty to consult with clothing outworkers (dealt with separately in this report in Chapter 9), that the *Occupational Health and Safety Act* be amended to provide a mechanism for WorkCover and the Department of Primary Industries to resolve disputes about consultation arrangements and the qualification of the duty to consult on the basis of what is reasonably practicable.

'Reasonably practicable'

10.47 The Draft Bill provides for section 15 (When consultation is required) to be amended by the insertion of a new subsection (2) which provides:

"This Division requires consultation in a particular case only so far as it is reasonably practicable in the circumstances of that case."

10.48 This amendment appears to have been made because of the proposal by the Review to delete the defences available under section 28 of the *Occupational Health and Safety Act*. Instead of an employer being able to argue a defence that it wasn't reasonably practicable to consult, the duty to consult will only apply so far as is reasonably practicable in the circumstances.

10.49 Some concern was expressed that this amendment, in combination with the proposed definition of 'reasonably practicable', would enable employers to argue that consultation wasn't undertaken due to the cost or other considerations.

10.50 In my view, this amendment preserves the current position that the duty to consult, like the general duties, is on the basis of what is reasonably practicable.

10.51

Recommendation 18

I recommend that the requirement upon an employer to consult with employees be qualified to apply so far as is reasonably practicable in the circumstances by amending section 15(2) of the *Occupational Health and Safety Act* as proposed by the Review.

Consultation disputes

10.52 The Draft Bill inserts a new section 17A which provides:

“17A Determination by inspector of unresolved matters concerning consultation arrangements

- (1) *This section applies to negotiations between employers and employees (or to persons who act on their behalf) with respect to consultation arrangements under sections 16 and 17.*
- (2) *Any of the parties to the negotiations may, if agreement is not reached within a reasonable time, ask WorkCover to arrange for an inspector to determine any matter concerning consultation arrangements that is unresolved.*
- (3) *An inspector who determines an unresolved matter must give written notice of the determination to the parties and the parties must give effect to the determination.*
- (4) *The negotiations to which this section applies and any determinations of unresolved matters by an inspector are to have regard to the diversity of the employees and their work (including any particular matters prescribed by regulations) so as to ensure that the consultation arrangements provide effective representation for relevant workgroups.*

This subsection does not require the establishment of separate workgroups for different categories of employees, places of work or other matters referred to in the regulations.

Note. *See clause 23 of the Occupational Health and Safety Regulation 2001 for particulars required to be taken into account under this subsection.*

- (5) *A determination of an inspector under this section is subject to review by WorkCover and appeal to an Industrial Magistrate, and for that purpose sections 96 and 97 apply in respect of any such determination as if it were the issue of a notice under Part 6.”*

10.53 A person is able to seek a review by WorkCover of the inspector’s decision (s96) and a further review by an Industrial Magistrate (s97).

10.54 This issue did not generate a large amount of public comment to my Inquiry.

Most were generally supportive of the current consultation arrangements and

the ability for inspectors to resolve disputes regarding consultation arrangements. Some suggested that WorkCover should not be involved in the process at all and that the parties should be able to go straight to the courts for resolution. Others suggested that the Industrial Court should be the venue for hearing these disputes rather than Industrial Magistrates.

10.55 In my view, the additional assistance from inspectors will help employers and employees to resolve disputes that may arise in respect of the consultation arrangements at a particular workplace. The proposal will also give parties dissatisfied with an inspector's decision the ability to seek a review from WorkCover and if still dissatisfied, from an Industrial Magistrate. Given the nature of the disputes I do not consider it appropriate for such disputes to go straight to an Industrial Magistrate without WorkCover's involvement. Further, I consider it appropriate that an Industrial Magistrate is the final arbiter on these matters.

10.56

Recommendation 19

I agree with the Review's recommendation that no substantive changes are required to the consultation provisions, except for a new mechanism to resolve disputes regarding consultation arrangements. I recommend the adoption of the new section 17A of the *Occupational Health and Safety Act*, as recommended by the Review.

Chapter 11: More compliance and enforcement options

(a) Enforceable Undertakings

What are enforceable undertakings?

- 11.1 Enforceable Undertakings are an Australian invention pioneered by the Australian Competition and Consumer Commission in 1993 in the *Trade Practices Act 1974 (Cth)* (section 87B). Its popularity, as the Review observed, has resulted in its adoption in many Occupational Health and Safety jurisdictions around Australia.
- 11.2 An enforceable undertaking is a binding commitment by a duty holder to take preventative action to correct or prevent breaches of occupational health and safety legislation which will benefit the workplace, industry and community.
- 11.3 As the Review stated, the remedy is an alternative to criminal proceedings and can provide a timely 'restorative justice' approach which engages employers and other duty holders to achieve systematic solutions that correct or prevent breaches and their underlying causes. Enforceable undertakings can be a departure from a traditional punitive approach of prosecution for a one-off event which is unlikely to be repeated and provide a responsive and timely sanction.

Strong support for enforceable undertakings

- 11.4 The General Purpose Standing Committee No. 1 of the New South Wales Parliament supported the introduction of enforceable undertakings in its 2004 report on *Serious injury and death in the workplace*.
- 11.5 The Review noted that there was strong stakeholder support for the adoption of enforceable undertakings as part of an overall enforcement strategy.
- 11.6 The majority of submissions to my Inquiry also strongly supported enforceable undertakings. However, some unions were concerned that they would be overly used as an alternative to prosecution. Unions were also concerned that the Review recommended that enforceable undertakings may only be agreed to between the regulator and the duty holder as in the Victorian and Queensland Occupational Health and Safety legislation.

A note of caution

- 11.7 Johnstone (2004) is supportive of enforceable undertakings but sounds some warnings. For example, they should not be seen as a soft option and should not be used when there are strong reasons for preferring a deterrent sanction unless the regulator is confident that the firm is remorseful and induced to take radical action as a result of the incident. To this end Johnstone recommends that enforceable undertakings be consistently used and not over-utilised. They should be open to public scrutiny, entered into voluntarily and should require a comprehensive systematic approach to occupational health and safety management. Further, Johnstone emphasises that

enforceable undertakings must be monitored and audited by the regulator and be strongly enforced if contravened.

Guidelines for administration of enforceable undertakings

11.8 The Review suggested detailed guidelines for the administration of enforceable undertakings. These are set out at pages 52-54 of the Review Report. These are important and should go a long way to satisfy the concerns expressed in some submissions. They bear many similarities to the Queensland system of enforceable undertakings.

11.9

Recommendation 20

The Review recommended that enforceable undertakings not be entertained for an offence under section 32A of the *Occupational Health and Safety Act* given its gravity. I agree with this exemption.

The proposals in the Draft Bill

11.10 The Draft Bill presented with the Review Report proposed a new Division 5 in Part 6 of the Act. Section 103A provides for the circumstances where WorkCover may accept a written undertaking by a person to remedy a contravention of the Act. The undertaking may only be withdrawn with the consent of WorkCover. If the undertaking is contravened WorkCover may withdraw the undertaking (section 103B) or take enforcement action in the Industrial Court as if it were an order of the Court (section 103D). The Court

may order the person concerned to comply with the undertaking or make such order as it considers appropriate to remedy the contravention of the undertaking. In addition, WorkCover may take proceedings in the Court for the contravention of the undertaking as if it were an order of the Court.

11.11 Section 103C provides that proceedings for an offence cannot be instituted or continued where an undertaking has been accepted unless it has been withdrawn or contravened.

11.12 These draft provisions seem to me to be appropriate.

WorkCover's Prosecution Guidelines

11.13 The Review also suggested detailed arrangements for administering enforceable undertakings which could be included in WorkCover's *Compliance Policy and Prosecution Guidelines* or as a separate Guideline advice issued by the regulator. Importantly, these include:

- That an undertaking must be voluntary.
- That in considering whether or not an undertaking is suitable in the circumstances WorkCover should consider:
 - the gravity of the alleged contravention and the potential risks involved.
 - the prospect of a quick resolution.
 - co-operation and remorse of the duty holder.
 - senior management commitment.
 - consultation with workers.

- previous compliance history.
- capacity to fulfill the undertaking.
- WorkCover should accept or reject the undertaking based on:
 - an acknowledgement of the contravention.
 - the circumstances of the contravention.
 - demonstration that an undertaking will rectify the consequences of the conduct and deliver tangible benefits to workers' health and safety.
 - arrangements for communicating the details of the enforceable undertaking to workers and the public.
 - arrangements for third party monitoring and auditing and reporting results to the regulator.
- The regulator should **not** accept an undertaking if:
 - the duty holder denies culpability.
 - it relates to a breach of section 32A.
 - it places obligations on third parties.
 - it purports to limit the regulator's discretion.
 - it contains confidentially or non-disclosure provisions.
- The enforceable undertaking should be filed in the Court within seven days of acceptance and have the same status as a Court order.
- A register of enforceable undertakings be maintained on the WorkCover and Department of Primary Industries website.
- An enforceable undertaking should only be varied or withdrawn with the agreement of the regulator.

- The regulator or a third party auditor should audit the undertaking for compliance. If non-compliance is detected, the regulator may take enforcement action.

Conclusion

11.14 All of the above administrative arrangements for enforceable undertakings provide a suitable regime provided that they are included in the *Occupational Health and Safety Act or Regulation*, as well as in guidance documents issued by WorkCover. This is an important safeguard and should satisfy the legitimate concerns that the new remedy of enforceable undertakings will not be abused or used when it is inappropriate to do so.

11.15 Enforceable undertakings can provide an attractive additional enforcement option which, if appropriately used, has the capacity to greatly benefit workplace health and safety.

11.16

Recommendation 21

Subject to the administrative criteria recommended by the Review, which should be included in the *Occupational Health and Safety Act or Regulation*, I support the Review Report on the introduction of enforceable undertakings.

(b) Safety Recommendation Notices

The Review consideration of provisional improvement notices

11.17 The Review considered the issue of notices by authorised employees' representatives following some submissions that supported the issue of 'provisional improvement notices' issued by occupational health and safety representatives in some other Australian jurisdictions.

11.18 The Review did not recommend giving authorised employees' representatives the power to issue notices such as a penalty notice, and I assume from what is not said, notices such as prohibition notices.

11.19 The Review recommended that New South Wales adopt the concept of 'provisional improvement notices' already in place in many other jurisdictions. It noted the experience of those jurisdictions as an effective means of resolving health and safety issues at a local level and avoiding the need to escalate the dispute.

11.20 The Review therefore recommended that Occupational Health and Safety Committee Chairpersons and Occupational Health and Safety representatives, who are appropriately trained and authorised, be empowered to issue what it termed a 'safety recommendation notice' where they believe on reasonable grounds that a person has contravened the legislation.

Content of Safety Recommendation Notice

11.21 The Review recommended that a safety recommendation notice should include recommendations about measures to be taken to remedy the situation. Such a notice should only be issued after consultation with the employer and that a reasonable opportunity to consider and remedy the matter had been given.

11.22 A safety recommendation notice should be required to:

- be in a form approved by WorkCover.
- state the belief on which the notice is based and the grounds for that belief.
- specify the provision of the legislation considered to be contravened.
- include information about the duty holders' right to seek a review.
- specify a date before which the person is to remedy the contravention.

Employer may request review of notice by inspector

11.23 An employer may request an inspector to review a safety recommendation notice within seven days of its issue and the notice should be stayed in the meantime. The inspector is to affirm or withdraw the notice by giving written notice to the parties. Where the inspector affirms the notice he or she should issue an improvement or prohibition notice.

11.24 If the inspector withdraws a safety recommendation notice he or she must advise the parties and set out the basis for the decision.

11.25 The issue or withdrawal of a safety recommendation notice should not affect any proceedings for an offence nor should it prevent an inspector from performing any of his or her functions or powers that may be required in the circumstances.

Right of appeal on withdrawal of safety recommendation notice

11.26 The Review recommended a right of appeal against an inspector's decision to withdraw a safety recommendation notice. This would be by means of a review by WorkCover of the inspector's determination to withdraw a safety recommendation notice. An applicant dissatisfied with a decision by WorkCover to confirm the inspector's withdrawal of the notice may appeal to a Local Court constituted by an Industrial Magistrate.

11.27 Some union submissions suggested that the appeal should be directly to the Industrial Court. I do not agree with this given the level of decision-making.

Training modules to be developed

11.28 To support the proposal the Review recommended that WorkCover should develop training modules for people who would be authorised to issue safety recommendation notices. WorkCover should issue a person with authority to issue the notices upon advice from an accredited trainer that the person had successfully completed the training course.

11.29 The Review recommended that penalties should apply for the misuse of safety recommendation notices. Further, WorkCover should develop the provision of guidance and training materials on the arrangements for safety recommendation notices.

Submissions favourable to safety recommendation notices

11.30 The Draft Bill proposed to create a new Part 6A on safety recommendation notices which would provide a legislative code for such notices.

11.31 There have been some submissions following the tabling of the Review and to my Inquiry to the effect that the proposed provisions were overly complex and heavy handed. Subject to this criticism submissions were mainly favourable to the creation of the new notice (safety recommendation notice) able to be issued by Occupational Health and Safety Committee Chairs or Occupational Health and Safety representatives.

11.32 I think that it is best that all of the provisions governing the issue of safety recommendation notices and their processing be set out in the legislation, including offences for misuse.

Conclusion

11.33

Recommendation 22

Subject to the provision of suitable training and accreditation of Occupational Health and Safety representatives to be empowered by the *Occupational Health and Safety Act* to issue safety recommendation notices, I believe that the power to issue such safety recommendation notices recommended by the Review should provide a useful tool in the enforcement strategy, especially at an early point of time at a local level.

11.34 The experience from other Australian jurisdictions supports this. It is a worthwhile addition to the enforcement pyramid.

(c) Penalty Notices

What are penalty notices?

11.35 Penalty notices are sometimes called infringement notices or on-the-spot fines. They enable the enforcement of lesser offences in a quick, easy and inexpensive process and without resort to costly court action (Johnstone 2004). Penalty notices have been generally considered an effective preventive measure by inspectors and most industry respondents (Gunningham, Sinclair and Burritt, 1998). It seems that they can also have a deterrent effect.

11.36 Penalty notices are currently dealt with by section 108 of the *Occupational Health and Safety Act* and the *Regulation*.

Concerns with penalty notices

11.37 There are, however, some concerns with infringement notices. For example, lack of court appraisal and associated court procedure may undermine principles of due process. Innocent people may be induced to pay on-the-spot fines to avoid the inconvenience and cost of contested court proceedings. Gunningham and Johnstone have also queried the suitability of a penalty notice as a response to a criminal offence. This may, it is argued, remove a significant deterrent effect of the scrutiny of a court hearing.

11.38 Johnstone recommends that penalty notices should be reserved for non-complex, minor offences where the breach is clearly defined and the facts

easily verifiable. While there was room for an increase in the size of penalties, the level of penalty should not exceed 20% of the maximum penalty which a court could impose, see *Australian Law Reform Commission*, Discussion Paper 65 (2002).

An enhanced system of penalty notices?

11.39 The Review identified an enhanced system of penalty notices as potentially increasing the effectiveness of occupational health and safety by:

- increasing inspectors' capacity to take account of the individual circumstances of the situation.
- increasing inspectors' capacity to adopt an enforcement approach that reflects the level of risk, degree of control and extent of culpability.
- providing a more immediate response to offences than prosecution.
- providing a faster resolution of compliance action to allow a duty holder to focus on prevention activities.
- providing a more cost effective remedy than prosecution.
- freeing up WorkCover to concentrate on the prosecution of serious offences.
- increasing the time that inspectors are able to spend in providing assistance, information and advice on compliance.

The Review recommendation

11.40 The Review recommended that detailed consideration be given to the development of an enhanced system of penalty notices. Submissions to the

Review and to my Inquiry have been generally favourable to this recommendation.

Further consideration necessary

11.41 In particular, any further consideration should focus on the types of contraventions which should be included in an enhanced regime of penalty notices and the level of penalties which should be assigned so as to act as an effective deterrent.

11.42 As the Review stated, consideration should be given to the need to ensure that there are appropriate checks and balances to ensure that any heightened and widened jurisdiction for penalty notices is applied in a consistent and transparent fashion.

11.43

Recommendation 23

If the recommendation for detailed consideration for expansion of penalty notices is acted upon, as I recommend it should, it will enhance the enforcement options available in the compliance pyramid along with the addition of enforceable undertakings and safety recommendation notices.

Chapter 12: Rights and obligations of employees

(a) Duties of employees

The existing provisions regarding employees' duties

- 12.1 Section 20(1) of the *Occupational Health and Safety Act* provides that an employee must take reasonable care for the health and safety of people who are at his or her place of work and may be affected by the employee's acts or omissions.
- 12.2 Subsection(2) of section 20 provides a duty on an employee to co-operate with the employer to enable compliance with the Act.
- 12.3 Nowhere in the Act is there an explicit duty placed upon an employee to take care for his or her own health and safety.

Employee duty to take care for own health and safety explicit?

- 12.4 The Review noted that some submissions suggested that the Act should contain an explicit statement of the obligation of employees to take reasonable care for their own health and safety, as in most other Australian Occupational Health and Safety jurisdictions.
- 12.5 Also noted by the Review were suggestions that employees should have an active role in contributing to workplace health and safety.

12.6 Some unions were opposed to these proposals because of a fear that they might place too much emphasis on the conduct of the employee rather than the employer or controller of the workplace.

12.7 It is self-evident that employees should have a duty to take reasonable care for their own health and safety at work. So much is probably implicit in the legislation as it stands. It makes sense to me that it should be made explicit as it is in other Australian jurisdictions.

12.8 Taking reasonable care for one's own safety seems to be an appropriate standard of care for an employee given his or her position and lack of control.

The Review recommendation

12.9 The Review recommended that subsection(3) be added to section 20 to the effect that an employee must take reasonable care for his or her own health and safety at work.

12.10 The Draft Bill also contains guidance on 'reasonable care' in subsection(4) which states that regard must be had to what the employee knew about the circumstances.

12.11 The Draft Bill also amends subsection (2) to insert the word 'reasonably' before 'necessary'. This adds nothing to what is probably implied into the provision.

12.12

Recommendation 24

I agree with the recommendation by the Review that the *Occupational Health and Safety Act* be amended so that an employee must take reasonable care for her/his own health and safety at work, and also with the proposed new object (b1) to encourage all participants – employers, employees and others with duties to take an active role to protect themselves and other people at work against risks to health and safety.

12.13 The Review also suggested that WorkCover develop a guidance document on the rights and responsibilities of persons at work. I concur with this recommendation.

(b) Reinstatement of employees unlawfully dismissed

12.14 The Review recommended amendments to the *Occupational Health and Safety Act 2000* and the *Industrial Relations Act 1996* to allow for the reinstatement of an employee found to be unlawfully dismissed under section 23 of the *Occupational Health and Safety Act*.

12.15 This recommendation was acted upon by the Parliament by Act No. 97 of 2006 which included a new section 23A in the *Occupational Health and Safety Act* and amended the *Industrial Relations Act*.

12.16 In the circumstances there is little point in my examining the recommendation since it has been overtaken by legislative action.

(c) Powers of entry for employee representatives

Current powers of entry for employee representatives

12.17 Authorised employee representatives are currently vested with the power to enter a workplace for the purpose of investigating a suspected breach of the *Occupational Health and Safety Act (s77)*. This power may only be exercised where the representative has reason to believe the workplace is one where members of that organisation, or persons who are eligible members, work.

Recommended amendment

12.18 Submissions to the Review expressed a need for greater certainty and a means of resolving disputes in situations where an authorised employee representative may have been unlawfully obstructed from entering a workplace.

12.19 The Review recommended providing for the determination of disputes regarding an authorised employee representative's right of access to be referred to the Industrial Relations Commission in circumstances where the authorised representative has requested the assistance of a WorkCover or Department of Primary Industries inspector under section 83 of the *Occupational Health and Safety Act* and access is still denied.

12.20 The Review also recommended that authorised employee representatives who enter premises must not deliberately hinder or obstruct the occupier of the premises or persons at the premises.

12.21 The Draft Bill provides for the insertion of a new section 77(2) to be inserted into the *Occupational Health and Safety Act* which provides:

“Any dispute about the entitlement of an authorised representative to enter any premises under this section may, if WorkCover is unable to resolve the dispute, be referred to the Industrial Relations Commission by any party to the dispute. The Commission may make such order as it considers appropriate for the resolution of the dispute in accordance with the rights and obligations of the parties under this section.”

12.22 The Draft Bill also provides for a new section 83A to be inserted into the *Occupational Health and Safety Act* which provides:

“An authorised representative who enters premises under this Division must not deliberately hinder or obstruct the occupier of the premises or the persons at the premises during their working time.”

Submissions to the Inquiry

12.23 This issue did not generate a significant amount of comment. Those that expressed a view were supportive of the proposal to allow disputes regarding authorised representatives' right of access to a workplace to investigate a suspected breach to be referred to WorkCover and the Industrial Relations Commission. Some expressed the view that disputes should be able to be resolved in the Industrial Relations Commission in the first instance, without reference to WorkCover.

12.24 Some submittees objected to the inclusion of the offence provision arguing that it would make the use of the power more difficult.

Resolution of access disputes by WorkCover and the Industrial Relations Commission desirable

12.25 In my opinion, a method of resolving disputes regarding access by an authorised employee representative is desirable. I agree with the Review's recommendation that WorkCover should be involved in the resolution of these disputes prior to the Industrial Relations Commission.

12.26 I also agree with the Review's recommendation that an offence provision which is limited to obstructing or hindering persons at the workplace is appropriate.

12.27

Recommendation 25

I recommend that disputes regarding authorised employees' representatives entering workplaces to investigate suspected breaches of the *Occupational Health and Safety Act* be referred to WorkCover and the Industrial Relations Commission for resolution by amending section 77 of the Act in the manner suggested by the Review.

12.28

Recommendation 26

I recommend that the Review's recommendation for an offence provision for misuse of an authorised employee representative's power of entry be introduced by a new provision section 83A of the *Occupational Health and Safety Act*.

New power of entry to discuss occupational health and safety matters

12.29 The Review recommended extending the powers of authorised employee representatives to include a power to enter a workplace to discuss matters related to occupational health and safety with workers, similar to provisions in the Queensland *Workplace Health and Safety and other Acts Amendment Bill 2006*. I note that the Queensland Bill was assented to, without amendments to the provisions in question, on 17 May 2006.

12.30 The Review proposed that this power to enter to discuss occupational health and safety issues, be limited to:

- workplaces where eligible members of the union work;
- workers who wish to take part in the discussions;
- discussions on work breaks; and
- in circumstances where 24 hours written notice of entry including reasons for entry has been provided to the occupier of the place of work.

Supporting recommendations

12.31 The Review also recommended that:

- the new section 83A, misuse of powers by an authorised employee representative, also apply to the power of entry to discuss occupational health and safety matters; and

- the power of the Industrial Registrar under section 299(4) of the *Industrial Relations Act* 1996 to revoke an authority be extended to a contravention of subsection (1) by the authorised representative or to any other improper action of the authorised representative in exercising a power under the *Occupational Health and Safety Act*.

12.32 These recommendations by the Review were made in response to public comments regarding the consultation arrangements under the Act, and in particular, suggestions by unions that workers would benefit from authorised union officials being able to enter workplaces to provide advice and discuss occupational health and safety issues with workers while at work. The Review suggested that these proposals would assist current consultation arrangements, increase employee awareness of workplace safety and encourage all workplace parties to take an active role in workplace safety.

Competing submissions

12.33 Public submissions to my Inquiry were divided on the issue of authorised employee representatives being granted the power to enter workplaces to discuss occupational health and safety issues. Unions were strongly supportive of a right for employee representatives to enter workplaces to discuss occupational health and safety matters, but objected to authorised employee representatives being subject to an offence for misuse of this power. Employers and employer groups expressed concern that this power may be used for broader industrial purposes rather than occupational health and safety purposes.

Conclusion

12.34 In my view, a power for authorised employee representatives to enter workplaces to discuss occupational health and safety issues is a positive step which will assist in the resolution of occupational health and safety issues at the workplace level.

12.35 I consider that the Review's recommendation that it be an offence to obstruct or hinder the occupier or persons at the premises goes part of the way to address the concerns expressed that the power may be misused. It does not completely address concerns expressed by employers that this power may be used for industrial purposes. However, in my opinion, the power of the Industrial Registrar under section 83A(2) to revoke an authority for a breach of section 83A or any other improper purposes is an appropriate and sufficient remedy. Furthermore, there is little evidence that the current power of authorised representatives to enter in relation to suspected breaches of the *Occupational Health and Safety Act* has been misused with few applications to the Industrial Registrar to revoke authorities.

12.36

Recommendation 27

I recommend that the proposal to introduce a power for authorised employee representatives to enter workplaces to discuss occupational health and safety matters be adopted in the manner recommended by the Review by the insertion of a new Division 3A into the *Occupational Health and Safety Act*.

Chapter 13: Improvements for investigations and prosecutions

(a) Investigation powers

Introduction

13.1 The Review recommended the following amendments to the investigation powers of WorkCover and its inspectors:

- Amending section 62(1)(c) of the *Occupational Health and Safety Act* to remove doubt that giving evidence orally includes providing answers to questions properly asked by the inspector, which is implicit but not explicitly stated in the provision;
- Amending the *Occupational Health and Safety Act* to provide clarification of inspectors' investigation functions in relation to permitting the recording of oral evidence given during interviews by means of audio, video or other recording device;
- Issuing guidance on the recording of evidence;
- Allowing the exchange of information between WorkCover, Department of Primary Industries and occupational health and safety regulatory agencies from other Australian jurisdictions.

(i) Duty to answer questions

13.2 The Review recommended the amendment of section 62(1)(c) of the *Occupational Health and Safety Act* to remove doubt that giving evidence orally includes answering questions properly asked by an inspector, which is implicit but not explicitly stated in the provision.

13.3 Section 62 of the *Occupational Health and Safety Act* gives authorised inspectors various powers to obtain information, documents and evidence in relation to suspected contraventions of the Act. Section 62(1)(c) provides that an inspector may require a person who the inspector has reason to believe is capable of giving information, producing documents or giving evidence in relation to a possible contravention:

“(c) to appear before an inspector at a time and place specified in the notice and give either orally or in writing any such evidence and produce any such documents.”

13.4 The amendment to section 62(1)(c) proposed by the Draft Bill is the insertion of the words “by answering questions or otherwise furnishing information” in brackets after the word “orally”.

13.5 The Review proposed this amendment in response to concerns expressed by the inspectorate of WorkCover and Department of Primary Industries that clarification was required in relation to their powers.

13.6 This issue generated very little public comment with no firm opposition expressed. In my opinion, the amendment does no more than merely clarify what is implicit in section 62 of the *Occupational Health and Safety Act* that giving evidence orally includes responding to questions put by inspectors.

13.7

Recommendation 28

I support the Review's recommendation to amend section 62(1)(c) of the *Occupational Health and Safety Act* in the manner suggested.

(ii) Recording of oral evidence

13.8 The Review recommended an amendment to section 62 of the *Occupational Health and Safety Act* to provide clarification of inspectors' investigation functions in relation to permitting the recording of oral evidence during interviews by means of audio, video or other recording device.

13.9 The Draft Bill provides for the insertion of a new subsection 2A which provides:

“(2A) An inspector may record oral evidence given by a person under this section (by means of an audio, video or other recording). The consent of the person is not required if the person is informed beforehand that the evidence will be recorded.”

13.10 The Review made this recommendation in response to concerns expressed by inspectors of WorkCover and Department of Primary Industries that legal practitioners were on occasion advising defendants in prosecution matters to not allow the taping of interviews. Inspectors were concerned that this unnecessarily lengthened interviews, as evidence must be transcribed while the interview is in progress. The Review also recommended that guidance be issued by WorkCover.

13.11 This recommendation did not generate a great deal of public comment. Those that did comment were divided on the issue, with concern expressed about how recordings would be used in practice and a perception that recording interviews may be unfair.

13.12 In my view, the recording of interviews should be permissible but subject to strict protocols about when and how it is used. The recording of interviews is actually fairer since it reduces arguments about what was said orally. Guidance which sets out the circumstances in which recordings will be used and the procedures to be followed is needed and may alleviate some of the concerns expressed.

13.13

Recommendation 29

I support the recommendation for the recording of interviews and the insertion of section 62(2A) into the *Occupational Health and Safety Act* as recommended by the Review and the provision of Guidance by WorkCover.

(b) Disclosure of information

Proposed 'mutual recognition' of inspectors

13.14 The Review sought comment on the desirability of introducing a system for the mutual recognition of health and safety inspectors from other jurisdictions. The Review Report found that public comment on the desirability of recognition of safety inspectorates between jurisdictions was divided.

13.15 Opposition to the proposal centred on the lack of legislative uniformity amongst the jurisdictions, inconsistency and lack of expertise of inspectors. Support for the proposal generally considered the suggestion to be a positive method of enhancing cross-boarder issues, although it was perceived that practical problems could arise.

13.16 The Review Report states that the intention of the proposal was not to permit interstate inspectors to carry out the functions of NSW inspectors, but rather was intended to assist WorkCover to investigate incidents or activities in other jurisdictions that related to NSW investigations.

13.17 The Review sought further public comment on the proposal to allow the disclosure of information by WorkCover to other occupational health and safety jurisdictions in Australia and released an Issues Paper, *Recognition between Safety Inspectorates*.

13.18 The Issues Paper indicates that the purpose of the proposal is to facilitate cross-border and cross-jurisdictional cooperation and suggests that the proposal may involve merely facilitating the exchange of information or allowing for the temporary appointment of inspectors from other jurisdictions under the NSW *Occupational Health and Safety Act* similar to arrangements under section 384 of the *Industrial Relations Act 1996*.

Public comment on the Issues Paper

13.19 The Review found that public comment in response to the Issues Paper was generally supportive of the desirability of a recognition scheme for safety inspectorates, provided that the role of inspectors from other jurisdictions is limited to one of providing support and assistance.

Recommended amendment for disclosure of information

13.20 The Review recommended allowing the exchange of information between WorkCover, Department of Primary Industries and other occupational health and safety regulatory agencies from other Australian jurisdictions.

13.21 The Draft Bill provides:

“136B Disclosure of information by WorkCover

- (1) *WorkCover may communicate any matter which comes to its knowledge in the exercise of its functions under this Act:*
 - (a) *to an officer or authority engaged in administering or executing a law of New South Wales, of the Commonwealth or of another State or a Territory relating to occupational health and safety; and*
 - (b) *to any other public officer or authority (of this or any other jurisdiction) prescribed by the regulations.*

(2) *In this section:*

this Act *includes the Occupational Health and Safety Act 1983.*"

Public submissions to the Inquiry

13.22 Very few submissions to my Inquiry expressed a view on this issue. It may be the case that the opposition expressed to the Review concerned arrangements seeking to allow some form of 'recognition' of inspectors across jurisdictions and the inherent problems that this may raise.

13.23 The recommended disclosure provision in the Draft Bill facilitates the exchange of information between jurisdictions, specifically allowing WorkCover to disclose information to other occupational health and safety regulators in Australian jurisdictions. This does not appear to have generated significant opposition, although some employer groups remained concerned that the disclosure of information wouldn't work due to differing legislative regimes or would taint other jurisdictions with WorkCover's perceived aggressive enforcement action.

Disclosure of information desirable

13.24 In my view, a provision of this nature is highly desirable and would enable the timely sharing of relevant information with other jurisdictions on a wide range of matters.

13.25 It is of no consequence that the legislative regimes are not uniform, as it is still a matter for the individual regulators to determine whether any information provided evidences a breach in their jurisdiction. In any event the legislation in other jurisdictions is similar in its structure and thrust to the New South Wales Act.

13.26

Recommendation 30

I recommend that the provisions suggested by the Review for disclosure of information by WorkCover to other jurisdictions be adopted by the insertion of section 136B in the *Occupational Health and Safety Act* .

(c) Prosecutions

(i) Union right to prosecute

The Review position

13.27 One issue which was consistently raised by employers was the union right to prosecute for breach of the *Occupational Health and Safety Act* under section 106 of the Act. The Review had recommended no change be made to this right. Unions have had the right to prosecute since 1943, 60 odd years ago. Only in recent years has the opposition to this right become vociferous.

13.28 Some employer submissions maintained that only the State should be the prosecutor. However, there is nothing unusual about prosecutions by entities other than the Crown. For example, New South Wales Environmental legislation allows prosecution for offences by individuals with the leave of the court. Local government councils are also permitted to prosecute and are entitled to a moiety of the fine.

Safeguards

10.29 Union prosecutions are relatively few in number and are subject to the supervision of the Court. In other words, if a prosecution is improperly instituted (i.e. without reasonable cause) or maintained or conducted in an improper manner, the Court can take appropriate action to dismiss and order the union to pay the costs of the proceedings. The Court can be critical of the union if it has acted improperly or in bad faith in a prosecution.

Conclusion

13.30 Despite its very long history the right to prosecute does not appear to have been abused by unions.

13.31

Recommendation 31

I agree with the Review and am unpersuaded that any change should be made to the union right to prosecute for breach of the *Occupational Health and Safety Act 2000* pursuant to section 106.

13.32 The position of a defendant to a union prosecution will be further strengthened by the provision of an appeal to the Court of Criminal Appeal from a Full Bench of the Industrial Court as I elsewhere recommend.

(ii) Authority to prosecute

13.33 Proceedings for offences against the *Occupational Health and Safety Act* or *Regulation*, other than offences against section 32A (reckless conduct causing death at a workplace) may be instituted with the written consent of a Minister of the Crown, with the written consent of an officer prescribed by regulation, by an inspector, or in certain circumstances by the secretary of an industrial organisation of employees (s106).

13.34 Proceedings for offences against section 32A of the *Occupational Health and Safety Act* may be instituted with the written consent of a Minister of the Crown or an inspector (s32B).

13.35 The Review recommended amending section 106 and section 32B of the *Occupational Health and Safety Act* to provide that the authority to institute proceedings be vested in WorkCover or Department of Primary Industries rather than by an inspector. The Review considered this necessary to address concerns associated with an inspector's retirement or resignation and to reinforce that the decision to institute a prosecution is that of the regulator, rather than an individual inspector.

13.36 The Review Report recommended that the practice of commencing proceedings in the name of the regulator as well as the inspector's name, to be cited in brackets be continued.

13.37 This issue is one which did not generate concern or submissions. In my opinion, it is appropriate that prosecutions for offences against the *Occupational Health and Safety Act* be instigated in the name of the regulator. I would agree with the Review's comments that it is appropriate and correctly reflects the fact that decisions to prosecute are made by the regulator based on the application of its prosecution policy. I have no objection to the inclusion of the inspector's name.

13.38

Recommendation 32

I agree with the Review's recommendation for amendments to sections 106 and 32B of the *Occupational Health and Safety Act* to provide that proceedings must be instituted by WorkCover or the Department of Primary Industries rather than by an inspector.

(iii) Compliance Policy and Prosecution Guidelines

13.39 In March 2004 WorkCover issued *Compliance Policy and Prosecution Guidelines*. This is a detailed document dealing with the regulator's general policy considerations relating to compliance with the *Occupational Health and Safety Act* and other legislation administered by WorkCover. It contains detailed Prosecution Guidelines which are publicly available. The concept is very useful and provides guidance for duty-holders and others.

13.40 The Review recommended that the Guidelines be updated as a non-legislative strategy in light of the extensive recommendations made for amendment of the *Occupational Health and Safety Act* and related legislation.

13.41 It is self-evident that if the changes recommended by the Review and my Inquiry are implemented by amendments to the legislation, then revision of the *Compliance Policy and Prosecution Guidelines* will be necessary. While some of these matters can be dealt with by formal guidance by WorkCover on interpretation of the legislation and by non-legislative guidance documents issued by WorkCover, revision of the Prosecution Guidelines will be necessary and desirable.

13.42

Recommendation 33

I recommend that the *Compliance Policy and Prosecution Guidelines* of WorkCover be revised and updated following any legislative implementation of the recommendations of the Review and of my Inquiry.

(iv) Workplace deaths offence, section 32A

13.43 The Review did not examine sections 32A and 32B relating to reckless conduct causing death at a workplace except incidentally. The Review did however recommend that the *Crimes (Sentencing Procedure) Act 1999* be amended (section 27) to include the provision of Victim Impacts Statements with respect to a breach of section 32A of the *Occupational Health and Safety Act 2000*. This had been an omission.

13.44

Recommendation 34

I agree with the Review's proposed amendment to the *Crimes (Sentencing Procedure) Act 1999* to include the provision of Victim Impact Statements with respect to a breach of section 32A of the *Occupational Health and Safety Act*.

13.45 Apart from this, I have decided not to examine this provision (sections 32A and 32B) for a number of reasons. First, because the offence has only been included in the Act for a relatively short time (June 2005). Second, so far as I am aware there has been no prosecution launched as yet. Third, the New South Wales Law Reform Commission is due to examine the provision within 3 years of commencement.

13.46 I am also cognizant that the provision was barely touched upon in submissions to my Inquiry or to the Review.

13.47 Elsewhere in this report I have recommended that there be a right of appeal to the Court of Criminal Appeal for miscarriage of justice from a Full Bench of the Industrial Court. For consistency, notwithstanding the reference to the Law Reform Commission, this should also apply to section 32A, thus expanding the right of appeal to the Court of Criminal Appeal already within the section.

(v) New fraud offences

The ICAC Inquiry

13.48 The Review sought public comment on the creation of two new ‘fraud’ offences for knowingly false representations and gains by deception. These offences were proposed by the Review in light of recent fraudulent activities involving licensing under the *Occupational Health and Safety Regulation* exposed by two Independent Commission Against Corruption (“ICAC”) investigations and WorkCover’s own investigations into licensing fraud.

13.49 The Review refers to the Report by ICAC in 2004 on safety certification and training in the NSW construction industry, which revealed corrupt conduct by accredited assessors and trainers. Accredited assessors and trainers are authorised by WorkCover under the *Occupational Health and Safety Regulation* to carry out training and assessments of competency of persons applying for certificates (licences) issued under the Regulation. As a result of its investigation ICAC recommended that an offence of issuing a false statement of training be created under the *Occupational Health and Safety Regulation* (recommendation 12 of ICAC Report).

13.50 The Review also referred to investigations by WorkCover and ICAC which identified instances of persons falsely holding themselves out as being accredited trainers under the *Occupational Health and Safety Regulation* and issuing statements of training to workers. WorkCover was unable to take

action against the persons involved because they were not authorised under the Occupational Health and Safety legislation.

13.51 In light of ICAC's recommendation and the recent investigations by WorkCover and ICAC (in two separate inquiries) into licensing fraud, the Review considered that there is a gap in the current legislation, which does not contain any deterrents for fraudulent activities. The Review recommended the introduction of general fraud offences into the Act. These new offences are included at section 136A of the Draft Bill.

13.52 The first offence provides for a person, who by deception, obtains, or attempts to obtain, for himself or herself (or any other person) any financial advantage in connection with any authority conferred by or under the Act, where the person did not have that authority or has reason to believe that the person (or other person) did not have that authority.

13.53 Deception is defined to mean "*any deception, by words or conduct, as to fact or law, including the making of a statement or the procurement of a document that is false or misleading.*" A penalty of 500 penalty units or imprisonment of 2 years or both applies.

13.54 The second proposed offence involves a person holding him or herself out as having an accreditation, licence or other authorisation conferred by the Act where the person does not have that authorisation and is aware of that fact. A penalty of 70 penalty units applies.

13.55 Public submissions to the Review were supportive of introducing offences for fraudulent activities. Some reservations were expressed that the offences should not capture honest mistakes and should be limited to circumstances where the person knew they were making a false representation or receiving a gain by deception.

The Issues Paper

13.56 The Review sought further comment through the release of the Issues Paper *Offences for Fraudulent Activities*. The paper sought specific public comment on the introduction of fraud offences, whether the offences should be limited to licences and authorisations under the Act and Regulation or be more generally cast, whether the offences should include an element of knowledge or intent, and the level of penalties.

13.57 After consideration of further submissions made in response to the paper, the Review found that public comment was supportive of introducing new offences for fraudulent activities. However, support was divided on the scope of the offences. Some supported a general offence model rather than a more limited offence which would restrict offences to fraudulent activities relating to licences and authorisations under the *Occupational Health and Safety Act and Regulation*. The Review found that there was strong support for the inclusion of a qualification that the person knew or had reason to know that they were not eligible to receive the financial advantage. Some support also existed for the offence to apply to any gain, not just financial gain.

13.58 The Review found that public comment on the proposed level of penalty supported penalty levels that would reflect the penalties that apply under the *Crimes Act 1900*, as opposed to the penalties that apply to similar offences under the *Workplace Injury Management and Workers Compensation Act 1998* to reflect the seriousness of the offences.

13.59 The Review also found that there was public support for inclusion of provision for the recovery of monies and other capital obtained by deception. This was not however included in the Draft Bill for reasons which are not discussed in the Review Report.

13.60 The proposed offences were drafted in the Bill with regard to concerns expressed by interested parties that the offences should take account of what the person knew or whether the person had reason to believe that they were not eligible to receive the financial gain.

13.61 Despite public support for penalties reflective of similar crimes under the *Crimes Act*, the penalties proposed in the Draft Bill are more reflective of the penalties imposed for fraud on the workers compensation scheme (see section 235A of the *Workplace Injury Management and Workers Compensation Act 1998*).

Conclusion

13.62 The introduction of the proposed offences did not generate a significant amount of comment to my Inquiry, however those that addressed the issue were generally supportive of the proposal. Some were concerned to ensure that persons are afforded a fair process and some considered that the offences should be further qualified by the inclusion of the word “wilful”.

13.63 In my opinion, the drafting of the offences in such a way as to require the prosecution to prove intentional conduct by the offender is appropriate. I do not consider it necessary to introduce a further qualification into the offences by introducing the concept of “wilful”.

13.64 I consider that the adoption of penalties consistent with the provisions relating to workers compensation fraud are appropriate for these offences. The penalties available under the *Crimes Act* for similar offences involving fraud by deception are substantially higher. Although there was public support for this to the Review, I do not consider it appropriate in the context of the *Occupational Health and Safety Act* to introduce penalties for fraudulent activities that are higher than the penalties imposed for breaches of the substantive duties.

13.65

Recommendation 35

I support the Review’s recommendation for the inclusion of new offences relating to fraudulent activities contained in section 136A of the Draft Bill.

Chapter 14: The Courts and Appeals

(a) The Courts

(i) The Courts and occupational health and safety jurisdiction

The present position

- 14.1 The Review noted that an occupational health and safety prosecution may be dealt with before a Local Court or the Industrial Court of New South Wales (formerly the Industrial Relations Commission in Court Session) or by the Chief Industrial Magistrate or other Industrial Magistrate under section 382 of the *Industrial Relations Act* 1996. Occupational health and safety prosecutions commenced in the Local Court in Sydney, Newcastle and Wollongong are generally heard by the Chief Industrial Magistrate. In regional areas the local magistrate hears occupational health and safety prosecutions as part of the general list. There is a right of appeal from the Local Court (and Chief Industrial Magistrate) to the Industrial Court.

The 1987 amendment giving jurisdiction to the Industrial Relations Commission

- 14.2 The Industrial Court (or more accurately its predecessor) was granted jurisdiction to hear occupational health and safety matters arising under the *Occupational Health and Safety Act* 1983 by an amendment to that Act in 1987. Previously jurisdiction resided with the Supreme Court of New South Wales in its summary jurisdiction. Defendants could then appeal to the Court of Criminal Appeal.

The Advice on workplace death etc. 2004

- 14.3 An *Advice in relation to workplace death, occupational health and safety legislation and other matters* was prepared for WorkCover by a panel of experts headed by Professor McCallum, Dean of the Faculty of Law at Sydney University in June 2004. It answered a number of questions. One was which Court should hear occupational health and safety matters?
- 14.4 The Panel dealt with the circumstances in which the legislation enacted the 1987 amendment to the *Occupational Health and Safety Act 1983* which granted jurisdiction to the Industrial Court and removed the jurisdiction of the Supreme Court.

They said:

“The first prosecution in the summary jurisdiction of the Supreme Court of which we are aware concerned the State Rail Authority of NSW. A case was stated for the opinion of the Court of Criminal Appeal that in May 1986 handed down its decision in Collins v State Rail Authority of NSW. Proceedings were brought against the State Rail Authority of NSW after an electrical contractor had been electrocuted at State Rail premises. It was argued that as an occupier of non-domestic premises, the Authority had breached section 17 of the 1983 Act by failing to take care of the safety and health of the electrical contractors on the premises. In answering the stated case, the Court of Criminal Appeal held that as the authority had delegated powers to managers to develop and implement safety and health policies for the premises, the Authority was not liable. In brief, the Court of Criminal Appeal came to this view by relying upon the well-known but now somewhat dated decision of the House of Lords in Tesco Supermarkets Ltd v Nattrass. It is our understanding that the acquittal of the State Rail Authority of NSW in this matter was a surprise to various interest groups and even to the general public of NSW.”

14.5 By the amending Act in 1987 jurisdiction to hear the more serious offences was given to the Industrial Commission that was a superior court of record. Single judges of the Court were given summary jurisdiction to try serious offences sitting alone without a jury in the same manner that single judges of the Supreme Court tried serious offences in their summary jurisdiction. There was no question of a jury trial.

14.6 The second reading speech recorded that the Commission had a particular expertise in dealing with workplace issues and that occupational health and safety was a familiar area for the Commission, since it dealt with appeals from the Chief Industrial Magistrate and other magistrates in occupational health and safety matters.

Confirmation of jurisdiction of Industrial Relations Commission

14.7 The position was confirmed by the *Industrial Relations Act* 1991 and again, by the *Industrial Relations Act* 1996, jurisdiction to summarily try serious offences was given to the Industrial Relations Commission in Court Session, which was also a superior court of record with equivalent status to the Supreme Court and the Land and Environment Court.

The Occupational Health and Safety Act 2000

14.8 The position was again confirmed by the passing of the *Occupational Health and Safety Act* 2000 whereby proceedings under the Act were to be dealt with by a Local Court magistrate and the Industrial Relations Commission in Court Session. Appeals by leave were permitted from a Local Court or Chief

Industrial Magistrate to the Full Bench of the Commission in Court Session. Appeals were also available from first instance decisions of single members of the Industrial Relations Commission in Court Session to Full Benches.

- 14.9 This is an appeal against conviction and sentence and is an appeal as of right. When a Full Bench has handed down its decision, no appeal lies to the Court of Criminal Appeal or to the Court of Appeal. Accordingly, once the jurisdiction to hear serious offences was transferred from the Supreme Court to the Industrial Relations Commission in Court Session in 1987, defendants lost their right to appeal to the Court of Criminal Appeal and consequently the right to seek leave to appeal to the High Court of Australia.

Employer submissions

- 14.10 The venue for occupational health and safety prosecutions was a hot topic for the Review. Employer associations were for the most part opposed to the Industrial Court hearing such prosecutions. They wanted the jurisdiction for serious offences moved to the District Court or to the Supreme Court. Equally vociferous was the response of the unions being protective of the jurisdiction of the Industrial Court. These submissions have been echoed by submissions to my Inquiry.

Panel of Review Report 1997

- 14.11 The issue had also been examined in 1997 by the *Final Report of the Panel of Review* of the 1983 Act. It concluded that the Panel did not accept the proposition that jurisdiction should be placed within the mainstream criminal

judicial system. This was because of the ‘experience and expertise of the judicial members of the Commission’ (page 109). As I have said, the position was confirmed in the *Occupational Health and Safety Act 2000*.

The Workplace death advice report again

14.12 Reverting to the 2004 Workplace death report. The experts concluded that it made little sense to shift serious offences that have involved a fatality to the District or Supreme Court. They believed that all prosecutions for serious offences should be heard in the Industrial Relations Commission in Court Session.

The Report said:

“From our knowledge of the manner in which the Industrial Relations Commission in Court Session and its predecessor commissions have dealt with first instance prosecutions of serious offences, we see no warrant in shifting these serious offence matters either to the District Court or to the Supreme Court. In our view, the expertise of the Industrial Commission in Court Session judges over industrial relations and occupational health and safety matters outweighs the expertise the judges of the District and Supreme Courts have in general criminal law matters. Furthermore, offences under the Occupational Health and Safety Act 2000 involve issues relating to work practices, the safety of equipment, the liability of corporate employers etc. In our view, these issues are cogent reasons why the trying of serious occupational health and safety offences should remain with the Industrial Relations Commission in Court Session.”

Build-up of expertise over 20 years

14.13 The New South Wales Industrial Court and its predecessor Commissions have now had 20 years to administer and mould the law relating to occupational health and safety. In that time there has been a considerable

build-up of expertise of the intricacies and nuances of occupational health and safety law. Employer dissatisfaction is mainly in relation to results which contain in their eyes, a perception of bias given the high incidence of convictions. In many instances their real complaint is the perceived nature of the absolute duties and the absence of appeal rights to the Court of Criminal Appeal and the ultimate possibility of approaching the High Court. If these issues were remedied it is possible that there would be less hostility from employers to the Industrial Court's jurisdiction in occupational health and safety matters.

14.14 In my opinion there is little or no cogent evidence which supports the criticism of the Industrial Court as the venue for occupational health and safety proceedings. This is the more so given the recommendations made elsewhere in my report.

The Review recommendation and my conclusion

14.15 The expertise of 20 years in the Industrial Court dealing with occupational health and safety proceedings outweighs the general expertise in mainstream criminal law of the District and Supreme Courts. Occupational health and safety law is very specialised and the generalist courts do not have that experience and expertise. I recommend that the jurisdiction for serious occupational health and safety proceedings remain with the Industrial Court of New South Wales.

14.16

Recommendation 36

The Review did not recommend that the jurisdiction of the Industrial Court be moved to the Supreme Court and I agree with its conclusion.

(ii) Guideline Judgments

What are Guideline judgments?

14.17 Section 125 of the *Occupational Health and Safety Act 2000* provides that, on the application of the Attorney-General, the Full Bench of the Industrial Court may give a guideline judgment. A guideline judgment may give sentencing guidelines for the industrial magistrates, local court magistrates and judges at first instance in the Industrial Court for an offence or class of offences under the Act.

14.18 Sentencing guideline judgments in the Court of Criminal Appeal have been of considerable assistance in enhancing uniformity of sentencing principles and penalties by the courts.

14.19 Although this was not a topic expressly dealt with by the Review it was mentioned in some submissions. The reason why the Review did not refer to guideline judgments is that the provisions are already contained in the *Occupational Health and Safety Act 2000*, see Division 4 of Part 7.

No guideline judgments to date

14.20 To date there have been no guideline judgments in the Full Bench of the Industrial Court. This is because no such proceedings have been initiated by the Attorney-General.

14.21 The General Purpose Standing Committee No. 1 of the NSW Parliament in its 2004 Report on *Serious injury and death in the workplace* recommended that the Minister apply to the Attorney-General for a guideline judgment under section 125. Although coming to no specific conclusion, the *Workplace death and other matters advice* discussed the Crown Advocate's advice concerning the need for a guideline judgment on the level of penalties for occupational health and safety offences.

Conclusion

14.22 In my opinion there is significant merit in the Full Bench of the Industrial Court giving a guideline judgment on the sentencing of offenders for breach of the general duties in the Act. Such a guideline judgment would make for a greater consistency in sentencing by the Courts.

14.23

Recommendation 37

I recommend that the Attorney-General consider the appropriateness of making an application for a guideline judgment under section 125 of the *Occupational Health and Safety Act* to the Full Bench of the Industrial Court with respect to the sentencing of offenders for breach of the general duties in the Act.

(b) Appeals

(i) Interlocutory appeals

No interlocutory appeal rights

14.24 The powers and procedures of the Industrial Court are contained in the *Industrial Relations Act* 1996. Part 7 of the *Industrial Relations Act* sets out the Industrial Court's powers and procedures regarding appeals and references.

14.25 Section 196 of the *Industrial Relations Act* sets out the Industrial Court's powers with respect to appeals and references by members of the Court in its criminal jurisdiction. This provision provides for the *Criminal Appeal Act* 1912 to apply to members of the Industrial Court in the same way as it applies to a reference or appeal to the Court of Criminal Appeal in respect of criminal proceedings taken before a judge of the Supreme Court in its summary jurisdiction.

14.26 As the *Criminal Appeal Act* provides only for appeals against interlocutory judgments or orders in respect of proceedings in the Supreme Court on indictment, not summary proceedings, it follows that there is no right to appeal an interlocutory judgment or order of a member of the Industrial Court to the Full Bench (see section 5F(1)(a) of the *Criminal Appeal Act*).

Recommended amendment

14.27 The Review recommended amending the *Industrial Relations Act* to allow for an interlocutory decision in occupational health and safety proceedings to be subject of appeal in the same way as other criminal proceedings. Specifically, it recommended that the right of appeal against interlocutory decisions on similar terms to section 5F of the *Criminal Appeal Act* which permits an appeal only where the Full Bench gives leave or where the judicial member certifies that the judgment or order is a proper one for determination on appeal.

14.28 The Review recommended the amendment of section 196 of the *Industrial Relations Act* by inserting a new subsection 2A which provides:

“In addition, section 5F of the Criminal Appeal Act 1912 applies to any such appeal against an interlocutory judgment or order in the same way as it applies to an appeal to the Court of Criminal Appeal in respect of proceedings for the prosecution of offenders on indictment in the Supreme Court.”

Concern expressed by the Industrial Court

14.29 This recommendation was made to address concerns expressed by the Full Bench of the Industrial Relations Commission (now Industrial Court) in *Rodney Morrison (WorkCover NSW) v Bradley Dean Murray* [2005] NSWIRComm 142 [at paragraph 90] that there existed no right to appeal an interlocutory judgment of a member to the Full Bench.

14.30 The Review did not comment on whether there was public support for this proposal, presumably because the issue did not generate any real public comment.

14.31 Few submissions to my Inquiry addressed this issue. Those that did were supportive of introducing an interlocutory appeal right from a member to the Full Bench of the Industrial Court.

14.32

Recommendation 38

I agree with the Review's recommendation to introduce a right to appeal an interlocutory decision of a member of the Industrial Court to the Full Bench.

(ii) Appeals against acquittals

Appeals against acquittals unusual

14.33 Appeals against acquittals are unusual because they place a defendant in jeopardy of being convicted after the defendant has been acquitted in earlier proceedings (*Advice on workplace death and other matters* (2004)). At common law there is no right in the Crown (prosecutor) to appeal an acquittal. By section 197A of the *Industrial Relations Act* 1996 parliament expressly provided for appeals against acquittals.

The Review recommendation

14.34 The Review noted that the right to appeal against acquittals was relatively unique to occupational health and safety prosecutions and was rarely used. WorkCover statistics appear to confirm this. The Review Report recommended amending the *Industrial Relations Act* 1996 to remove the right to appeal against the acquittal of an offence under the *Occupational Health and Safety Act*.

Competing submissions

14.35 Submissions to the Review and to this Inquiry included complaints about double jeopardy by employer representatives. On the other hand, unions and some other submissions argued for the retention of the appeal because of its ability to correct errors by Local Courts (and industrial magistrates) and single judges at first instance in the Industrial Court. Examples were provided when this had occurred.

14.36 McCallum and Hall (2004) thought that if appeals against acquittals were to be retained, there should be an automatic right of appeal from the Full Bench of the Industrial Court to the Court of Criminal Appeal.

Conclusion

14.37 On balance I lean towards the arguments that it unfairly places an acquitted defendant in jeopardy of having that acquittal overturned and replaced by a conviction from which there is presently no avenue of appeal. The removal of the power to appeal an acquittal under section 197A of the *Industrial Relations Act* involves a consequential deletion of section 32B(4) of the *Occupational Health and Safety Act*.

14.38

Recommendation 39

While the issue is not free from argument I favour the recommendation of the Review to remove the power of appeal against acquittals in section 197A of the *Industrial Relations Act* 1996.

14.39 This will also necessitate a minor amendment to section 32B(4) of the *Occupational Health and Safety Act* to omit the subsection as recommended by the Review.

(iii) Appeals to the Court of Criminal Appeal

Appeal to Court of Criminal Appeal lost in 1987

14.40 As referred to earlier in this report defendants lost the right to appeal to the Court of Criminal Appeal in 1987 when the jurisdiction to hear occupational health and safety prosecutions was removed from the Supreme Court and given to the Industrial Relations Commission in Court Session. Once an appeal is heard by the Full Bench of the Industrial Court, no appeal lies to the Court of Criminal Appeal and consequently a right to seek leave to appeal to the High Court of Australia.

The Workplace death etc. Advice 2004

14.41 This issue was examined by the *Workplace death and other matters* advice to WorkCover in 2004. The experts panel split as to the answer to this question, Professor McCallum and Mr Hall QC (now Justice Hall) believing that there should be a form of appeal available to a defendant and Messrs Hatcher and Searle taking a different view.

14.42 McCallum and Hall considered various options. One was that defendants who are convicted by first instance decisions of judges of the Court should have the capacity to appeal directly to the Court of Criminal Appeal as in the Land and Environment Court. However, the experts concluded that this would have the significant disadvantage of disabling Full Benches of the

Industrial Court from developing the law on occupational health and safety because they would be effectively by-passed.

14.43 The experts then considered a second alternative to give defendants the power to appeal from Full Benches of the Industrial Court to the Court of Criminal Appeal. The authors however took the view that appeals to Full Benches would be rendered of little weight if defendants could appeal to the Court of Criminal Appeal.

Preferred appeal right of McCallum and Hall

14.44 McCallum and Hall then considered the option of appeals from Full Benches of the Industrial Court to the Court of Criminal Appeal confined to miscarriages of justice. They said that if appeals were by leave and confined to the ground that an appeal lay where it could be proved in all the circumstances that there was a miscarriage of justice (section 6 of the *Criminal Appeal Act* 1912), this would ensure that defendants could obtain redress when errors of law had been committed by single judges or Full Benches. It was the view of the experts that such a right of appeal would not denude appeals from single judges at first instance to Full Benches of the Industrial Court.

14.45 As I said, the other two members of the panel disagreed with this recommendation concluding that the existing appeal structure within the Industrial Court was satisfactory.

My conclusion – restore appeal right

- 14.46 I favour the opinion of McCallum and Hall. The fact is that the right of appeal to the Court of Criminal Appeal in occupational health and safety matters was lost in 1987 when jurisdiction was transferred from the Supreme Court to the Industrial Relations Commission in Court Session. I think that it should be restored.
- 14.47 There is no reason to my mind why Full Benches of the Industrial Court should not be accountable to the Court of Criminal Appeal (with the possibility of obtaining special leave to appeal to the High Court). There will be the opportunity for correction of errors of law and the rectification of miscarriages of justice much the same as appeals from the Land and Environment Court in its criminal jurisdiction.
- 14.48 The precedent for an appeal to the Court of Criminal Appeal from a sentence of imprisonment imposed on an individual for reckless conduct causing death in the workplace (section 32A) has already been established in the legislation by the 2005 amendment.
- 14.49 The Review did not expressly comment on whether there should be an appeal to the Court of Criminal Appeal from the Industrial Court. It may be that it could be implied that the Review considered such an appeal as unnecessary.

14.50

Recommendation 40

I am firmly of the opinion that there should be an avenue of appeal to the Court of Criminal Appeal from the Industrial Court Full Bench for dissatisfied defendants. I agree with McCallum and Hall that there should be a right of appeal limited to miscarriages of justice and I so recommend.

14.51 It is an appropriate form of appeal and should go a long way to satisfying critics of the system who complain about the Industrial Court not being subject to the supervisory jurisdiction of the Court of Criminal Appeal and therefore unaccountable. The new right of appeal should, for reasons of consistency, also apply to appeals from Full Benches of the Industrial Court under section 32A of the *Occupational Health and Safety Act*.

Chapter 15: Other issues

(a) Status of fine repayments to next of kin

Collection and enforcement of fines

- 15.1 The collection and enforcement of fines imposed by the courts for offences committed under the *Occupational Health and Safety Act* is carried out under the *Fines Act* 1996 by the State Debt Recovery Office, a body that forms part of the Office of State Revenue. It is not a function of WorkCover.

Recommended amendment

- 15.2 The Review recommended allowing for the provision of advice on the status of fine repayments to the next of kin of a person who has died as a result of the commission of an offence under the *Occupational Health and Safety Act*, if requested.
- 15.3 This recommendation was made in response to concerns expressed by the Legislative Council General Purpose Standing Committee's *Inquiry into Serious Injury and Death in the Workplace* in 2004. The Committee suggested that the non-payment of a fine relating to a breach of the occupational health and safety legislation could add to the suffering of the individual or a victim's family affected by an incident in which the family member died.

15.4 The Review stated that WorkCover considers the ability to advise the next of kin on the status of the payment of fines by a convicted party can, in some cases, be of benefit to grieving families.

15.5 Currently the *Fines Act* permits the State Debt Recovery Office to disclose information about unpaid fines to prosecuting authorities such as WorkCover (s117A). The Review proposed an amendment to section 117A of the *Fines Act* to provide that the State Debt Recovery Office may also disclose to WorkCover information about whether a fine for a breach of the *Occupational Health and Safety Act* where a person has died has been paid or is outstanding (in whole or in part). The proposed amendment would also allow WorkCover to disclose that information, on request, to the next of kin of the deceased.

Public submissions

15.6 The submissions to the Review suggested general support for informing families of the status of the recovery of fines, when requested. The Review received only one qualified support that suggested that the consent of the person fined should be given. Very few submissions to my Inquiry addressed this issue but no opposition was expressed to the proposal.

Conclusion

15.7 I recommend that the Review's recommendation be adopted on this issue. In my view, information regarding the payment of fines imposed for offences

under the *Occupational Health and Safety Act* should be made available to WorkCover and the next of kin of a deceased worker.

15.8

Recommendation 41

I support the proposed amendment to section 117A of the *Fines Act* 1996 to enable the State Debt Recovery Office to disclose fine information to WorkCover and, upon request, to the next of kin of deceased workers.

(b) Small business

Concerns of small business

15.9 Submissions to my Inquiry expressed concerns about the difficulty facing small businesses in complying with the *Occupational Health and Safety Act*. Particular concern was expressed about the regulatory burden of complying with the absolute duties under the *Occupational Health and Safety Act* in circumstances where small and medium sized firms lack the in-house expertise or resources to comply with the duties or are forced to expend money they can ill afford to engage specialist occupational health and safety advisors.

Consideration by the Review

15.10 This is an issue that was not directly raised by the Review in the consultation process nor was any specific measures recommended to address concerns of small and medium sized business. However, many of the recommendations made by the Review for compliance advice, guidelines, enforceable undertakings and guidance on various issues will go some of the way to address the concerns expressed by small businesses to my Inquiry regarding the difficulties they face with compliance.

15.11 Furthermore, the suggestion by the Review and my recommendations to qualify the general duty provisions and define what is meant by 'reasonably practicable' will also assist with concerns of small business that compliance is difficult to achieve.

Current measures to address small business concerns

15.12 In recognition of the compliance difficulties faced by small to medium sized businesses with limited resources a Business Advisory Unit was established within WorkCover in 2005 dedicated to assist small and medium sized businesses with occupational health and safety compliance and advice. The Business Advisory Unit provides advice and assistance to small and medium sized business on how to make their workplace safer. The unit also conducts seminars, demonstrations and workshops around New South Wales on occupational health and safety issues. In my view the Business Advisory Unit is providing much needed help to small and medium sized firms.

15.13 In February 2007, a \$12.5 million workplace safety package was announced by the Government to fund incentives and programs aimed at assisting small and medium sized business with occupational health and safety compliance.

The package involves:

- \$5 million program of \$500 rebates for small businesses who install safety equipment or make safety modifications to their workplace;
- a second WorkCover safety bus and three new safety trailers;
- 6 new business advisory officers to be located in regional areas around New South Wales;
- 1500 free safety workshops and seminars across the state over 3 years;
- A confirmation of advice service which provides specific advice from inspectors on compliance;

- Expansion of WorkCover's small business advisory groups across New South Wales;
- Expansion of the Industry Safety Solutions Program through which WorkCover, industry, unions and technical representatives develop practical solutions and guidance on safety issues;
- A case study and safety ambassador program in the construction, manufacturing, retail, transport and rural industries; and
- 'Good business is Safe Business Weeks' with events across New South Wales focusing on safety at work, including local workshops and one-on-one advice.

15.14 This expansion of WorkCover's assistance to small and medium sized businesses is welcome and to be applauded as a step in the right direction.

Conclusion

15.15 In my view, the proposed expansion of activities aimed at assisting small to medium sized businesses with compliance and the recommended amendments to the *Occupational Health and Safety Act* made by my Inquiry will go some of the way to address the concerns expressed to my Inquiry by small to medium sized businesses. In particular, the qualification of the general duties and the greater focus on advice and education through compliance advice, guidelines and guidance materials will greatly assist small to medium sized businesses to comply with the *Occupational Health and Safety Act*. The availability of enforceable undertakings would also be of assistance for small to medium sized businesses.

(c) Defence of reasonable excuse

New defence of 'reasonable excuse'

15.16 The Draft Bill proposes to qualify a number of offences in the *Occupational Health and Safety Act* by the defence of reasonable excuse. The Review Report makes no recommendation in relation to these changes, nor discusses the reasons for the proposed amendments in the Draft Bill.

15.17 The offences which the Draft Bill proposes to qualify by the words 'reasonable excuse' are:

- Section 21, persons not to interfere with or misuse things provided for health, safety and welfare;
- Section 71, power supporting the taking of things;
- Section 87, notification of incidents;
- Section 90, offence of failing to comply with an investigation notice;
- Section 102, exhibition of notices; and
- Section 136, offence of obstructing or intimidating inspectors and others exercising functions under the Act.

15.18 Given each of the offences listed above are different in nature I will deal with each separately.

Person not to interfere with or misuse things provided for health, safety and welfare

15.19 It is an offence under section 21 of the *Occupational Health and Safety Act* for a person to intentionally or recklessly interfere or misuse anything provided in the interest of health, safety and welfare under the Act.

15.20 The Draft Bill proposes to amend section 21 of the *Occupational Health and Safety Act* so that it reads:

*“A person must not, intentionally or recklessly, **and without reasonable excuse**, interfere with or misuse anything provided in the interests of health, safety and welfare under occupational health and safety legislation.”* (proposed amendment highlighted)

Submissions to my Inquiry

15.21 Although very few commented on this issue, those that did were generally opposed to the amendment. It was suggested that it did not make sense to do something ‘recklessly’ with a reasonable excuse. Others opposed the amendment on the basis that they were opposed to the deletion of the defences in section 28 generally.

Position in other States

15.22 Both Victoria and Queensland have similar duties on employees not to intentionally or recklessly interfere with or misuse something provided for workplace health and safety (see section 25 of the Victorian *Occupational Health and Safety Act 2004* and section 36 of the Queensland *Workplace Health and Safety Act 1995*). Neither of these provisions is qualified by the defence of ‘reasonable excuse’.

Conclusion

15.23 In my view, it is inappropriate to qualify an offence not to intentionally or recklessly interfere with something provided for health and safety with a defence of reasonable excuse. It is difficult to see how an intentional or reckless act of interference with a thing provided for health, safety or welfare could be excused by the defence of reasonable excuse.

15.24

Recommendation 42

I recommend that the offence in section 21 of the *Occupational Health and Safety Act* remain absolute and not be qualified by the defence of 'reasonable excuse'.

Powers supporting the taking of things

15.25 It is an offence under section 71 of the *Occupational Health and Safety Act* to tamper, or attempt to tamper, with a thing, or something restricting access to the thing, that an inspector has restricted access to without an inspector's approval.

15.26 The Draft Bill proposes to amend section 71 so that it reads:

"(1) Having taken a thing under section 60, an inspector may:

- (a) move the thing from the place where it was taken, or*
- (b) leave the thing at the place but take reasonable action to restrict access to it, or*

(c) *if the thing is plant—dismantle it.*

(2) *The following are examples of restricting access to a thing:*

(a) *sealing a thing and marking it to show access to it is restricted,*

(b) *sealing the entrance to a room where the thing is situated and marking it to show access to it is restricted.*

(3) *If an inspector restricts access to a thing taken, a person must not, **without reasonable excuse**, tamper, or attempt to tamper, with the thing or something restricting access to the thing without an inspector's approval." (proposed amendment highlighted)*

Submissions to my Inquiry

15.27 Very few submissions addressed this issue, however the few that did were opposed to the proposed amendment. Opponents questioned the basis for introducing a justification for non-compliance with an inspector's instructions and tampering with evidence.

Conclusion

15.28 Section 71 of the *Occupational Health and Safety Act* is concerned with an inspector taking steps to secure an item that was used in an offence against the Act or is evidence in relation to an offence. The offence in section 71(3) of the *Occupational Health and Safety Act* ensures that persons do not tamper or attempt to tamper with the thing or anything restricting access to the thing without the approval of an inspector. In my view, it is not appropriate to allow a defence of 'reasonable excuse' in relation to an offence of tampering or interfering with evidence.

15.29 I note that the offence in section 71(6) of the *Occupational Health and Safety Act* is qualified by the defence of reasonable excuse. This appears to indicate that at the time the provisions were enacted the offence in section 71(3) was considered more serious and therefore not subject to the qualification of 'reasonable excuse'. In the absence of any reasons given by the Review for this proposed change, or significant public comment, I would recommend that the provision remain absolute.

15.30

Recommendation 43

I recommend that the offence in section 71(3) of the *Occupational Health and Safety Act* remain absolute and not be qualified by the defence of 'reasonable excuse'.

Notification of incidents

15.31 Occupiers and employers have obligations under the *Occupational Health and Safety Act* to notify WorkCover of the occurrence of serious and other incidents prescribed by the regulations. The primary obligation to notify is set out in section 86 of the *Occupational Health and Safety Act*.

15.32 The Draft Bill proposes to amend section 86 of the *Occupational Health and Safety Act* so that it reads:

“(1) The occupier of any place of work must give WorkCover notice in accordance with this section of any of the following incidents, *(unless the occupier has a reasonable excuse for not doing so)*:

- (a) *any serious incident at the place of work (as referred to in section 87),*
- (b) *any incident occurring at or in relation to the place of work that the regulations declare to be an incident that is required to be notified to WorkCover.”* (proposed amendment highlighted)

Submissions to my Inquiry

15.33 Very few submissions commented on this issue. Those that commented were generally opposed to the changes on the basis that they could see no reason for failing to notify within the required timeframe.

Position in other States

15.34 The duty to notify the authority of incidents is not qualified in Victoria (see section 38 of the *Occupational Health and Safety Act 2004*). In Queensland, the duty is contained in the *Workplace Health and Safety Regulation 1997* and provides that a failure to notify is not an offence where the person had no knowledge of the incident and could not have reasonably been expected to have knowledge of the incident, or the person was incapacitated by the work caused illness or work injury and notifies as soon as reasonably practicable after they are no longer incapacitated.

Conclusion

15.35 In my view, there may be some legitimate circumstances where a person has a reason for failing to notify the authority of an incident that would qualify as a 'reasonable excuse'. However, the duty to notify is an important duty which alerts the authority to the occurrence of an incident. A failure to notify an

incident to the authority within the required time may have serious consequences, including impeding a proper investigation.

15.36 On balance I prefer the view that the duty remain an absolute one. Reasons for failing to notify which constitute a legitimate excuse for breaching the obligation is something that may be taken into account both in the exercise of prosecutorial discretion or a mitigating factor in imposing a sentence.

15.37

Recommendation 44

I recommend that the duty in section 86(1) of the *Occupational Health and Safety Act* remain an absolute duty and not qualified by the defence of 'reasonable excuse'.

Offence of failing to comply with investigation notice

15.38 An inspector who has entered premises in exercise of the inspector's power under Part 5 of the *Occupational Health and Safety Act* may issue an investigation notice to an occupier of premises, to stop plant or prevent disturbance of premises, if the inspector believes on reasonable grounds that it is necessary to issue the notice in order to facilitate the exercise of powers by the inspector (s89). Such notice may remain in force for a period not exceeding 7 days but may be renewed by issuing further notices.

15.39 It is an offence under section 90 of the *Occupational Health and Safety Act* to fail to stop the use, movement or interference with any plant, substance or

thing specified in the notice or to take measures to prevent the disturbance of any plant, substance or thing.

15.40 The Draft Bill proposes to amend section 90 of the *Occupational Health and Safety Act* so that it reads:

*“While an investigation notice is in force, the occupier of the premises must (**unless the occupier has a reasonable excuse for not doing so**):*

- (a) stop the use or movement of, or interference with, any plant, substance or thing that is specified in the notice, and*
- (b) take measures to prevent the disturbance of any plant, substance or thing that is specified in the notice, or any specified area in which it is located.”* (proposed amendment highlighted)

Submissions to my Inquiry

15.41 Very few submissions were concerned about this issue. However, the few that expressed a view were opposed to the amendment and suggested that consultation regarding the use, movement or interference with the plant or thing would be more appropriate.

Victorian position

15.42 In Victoria a failure to comply with a non-disturbance notice, which is similar to an investigation notice, is subject to the defence of ‘reasonable excuse’.

Conclusion

15.43 Investigation notices are one of three types of notices available to inspectors under Part 6 of the *Occupational Health and Safety Act*. The other two

notices, improvement (s91) and prohibition notices (s93) are both qualified by the defence of 'reasonable excuse'. In my view, it is appropriate for consistency that investigation notices are also qualified by the defence of reasonable excuse.

15.44

Recommendation 45

I agree with the Review's recommendation that the offence in section 90 of the *Occupational Health and Safety Act* of failing to comply with an investigation notice be qualified by the defence of 'reasonable excuse'.

Exhibition of notices

15.45 An inspector may require a copy of a notice issued, or a part of, or the substance of, a notice issued, to be exhibited at a workplace (s102(1)). It is an offence to destroy, damage or remove a notice required to be exhibited except with the approval of WorkCover or an inspector (s102(2)).

15.46 The Draft Bill proposes to amend section 102 of the *Occupational Health and Safety Act*, exhibition of notices, so that it reads:

“(1) An inspector may cause a notice containing a copy of or extract from a notice under this Part, or of the matter contained in the notice, to be exhibited at the place of work concerned in a manner approved by WorkCover.

*(2) A person must not, **without reasonable excuse**, destroy, damage or remove a notice so exhibited except with the approval of WorkCover or an inspector.”* (proposed amendment highlighted)

Submissions to my Inquiry

15.47 Very few submissions commented on this amendment but those that did were opposed to the amendment and supported the current position.

Victorian position

15.48 Under the Victorian *Occupational Health and Safety Act 2004* a person to whom a notice is issued must display a copy in a prominent place at or near the workplace, or part of the workplace, at which work is being performed that is affected by the notice. A failure to do so is an offence and is not subject to the defence of reasonable excuse (s115).

Conclusion

15.49 The requirement for a notice, or the substance of a notice, to be displayed in a workplace is clearly aimed at informing those at the workplace of the issues identified in the notice. Removing, damaging or interfering with such a notice impedes the communication of important workplace health, safety and welfare issues to those at the workplace. In my view, this offence should remain absolute and not be qualified by the defence of 'reasonable excuse'.

15.50

Recommendation 46

I recommend that the offence of destroying, damaging or removing a notice required to be exhibited under section 102 of the *Occupational Health and Safety Act* not be qualified by the defence of 'reasonable excuse'.

Offence of obstructing or intimidating inspectors and others exercising functions under the Act

15.51 Section 136 of the *Occupational Health and Safety Act* makes it an offence to obstruct or intimidate inspectors and others exercising functions under Act.

15.52 The Draft Bill proposes to amend section 136 of the *Occupational Health and Safety Act* so that it reads as follows:

“(1) A person must not, **without reasonable excuse**,

- (a) *obstruct, hinder or impede any authorised official in the exercise of the official’s functions under this Act, or*
- (b) *intimidate or threaten or attempt to intimidate any authorised official in the exercise of the official’s functions under this Act.”* (proposed amendment highlighted)

Submissions to my Inquiry

15.53 Only a small number of submissions addressed this issue. Those that did expressed opposition. Reasons for this opposition included that there is no reasonable excuse for intimidation, threats or obstruction of an authorised official and that it would make the job of inspectors more difficult. Opponents also referred to the fact that the offence must be proved beyond reasonable doubt.

Victorian position

15.54 Under the Victorian *Occupational Health and Safety Act 2004* the offence of intentionally obstructing or hindering an inspector in the performance of his or

her functions or exercise of powers is not qualified by the defence of 'reasonable excuse' (s125).

Conclusion

15.55 In my view, it is difficult to imagine circumstances that would constitute a reasonable excuse for threatening or intimidating an authorised officer. Furthermore, there would not appear to be many circumstances that would constitute a reasonable excuse for hindering or obstructing an authorised official, except perhaps some misunderstanding regarding their authority. For these reasons, it is my view that the offence should not be qualified by the defence of reasonable excuse.

15.56

Recommendation 47

I recommend that the offence under section 136 of the *Occupational Health and Safety Act* not be qualified by the defence of 'reasonable excuse'.

(d) Sharing of serious incident and fatality information

Review recommendation

15.57 The Review recommended the establishment of administrative arrangements for the timely sharing of serious incident and fatality information between WorkCover and NSW scheme agents and self-insurers.

Inquiry into Serious Injury and Death

15.58 The recommendation was made in response to Recommendation 34 of the Legislative Council General Purpose Standing Committee No 1 *Inquiry into Serious Injury and Death in the Workplace* 2004 which provides:

“That the Government amend the Occupational Health and Safety Act 2000 to require WorkCover to inform the relevant insurer when it becomes aware of a serious injury or fatality.”

15.59 The *Inquiry into Serious Injury and Death in the Workplace* Report indicates that recommendation 34 was made in response to concerns expressed by an insurer in relation to a particular incident involving a workplace fatality. WorkCover was immediately notified of the fatality under section 84 of the *Occupational Health and Safety Act*. The insurer was notified of the incident by WorkCover, in accordance with section 44 of the *Workplace Injury Management and Workers Compensation Act* 1998, two days after WorkCover received notification from the employer. The insurer argued that had it been notified early it would have had a better opportunity to take more proactive action in managing the claim than was possible in the circumstances (p164).

Notification of incidents under the Occupational Health and Safety Act and the Workplace Injury Management and Workers Compensation Act

15.60 Both the *Occupational Health and Safety Act* and the *Workplace Injury Management and Workers Compensation Act* contain provisions relating to notification of workplace injuries and deaths.

15.61 Section 86 of the *Occupational Health and Safety Act* relevantly provides:

“86 Notification of incidents

(1) *The occupier of any place of work must give WorkCover notice in accordance with this section of any of the following incidents:*

(a) *any serious incident at the place of work (as referred to in section 87),*

(b) *any incident occurring at or in relation to the place of work that the regulations declare to be an incident that is required to be notified to WorkCover.”*

15.62 The Regulation prescribes additional incidents that require notification under the *Occupational Health and Safety Act* (see clauses 341 and 344). Clearly, the purpose of this provision is to notify WorkCover of an incident so that an investigation can be commenced.

15.63 Section 44 of the *Workplace Injury Management and Workers Compensation Act* also requires an employer to notify either the insurer, or WorkCover, who is then required notify the other party. WorkCover is required to notify the insurer ‘as soon as practicable’ (s44(3A)).

15.64 The Review considered that the recommendation made by the Committee was more applicable to the workers compensation legislation where a requirement upon WorkCover to notify the insurer already exists.

Conclusion

15.65 In my view, the Review is correct in finding that the issue of injury notification by WorkCover to workers compensation insurers is one which falls within the ambit of the workers compensation legislation. I agree that any amendments, if considered necessary, would more appropriately be dealt with by amendment to the *Workplace Injury Management and Workers Compensation Act* rather than the *Occupational Health and Safety Act*.

15.66 Nonetheless the Review proposes to address the concerns expressed by the General Purpose Standing Committee by proposing the implementation of administrative arrangements for the timely sharing of information between insurers and WorkCover. I would support this recommendation.

15.67

Recommendation 48

I recommend that an administrative arrangement for the timely sharing of incident notification information between WorkCover and NSW workers compensation insurers be implemented.

(e) Mines – references to the Department of Primary Industries

15.68 The Draft Bill proposes minor amendments in relation to the application of certain provisions of the *Occupational Health and Safety Act* to the Department of Primary Industries (the DPI).

15.69 Section 133 of the *Occupational Health and Safety Act* provides that the regulations may provide that a reference in a provision of the Act to WorkCover, or an officer of WorkCover, in connection with the application of the provisions to a mine or coal workplace, is taken to include or be a reference to a specified government department or agency or an officer of a department or agency, exercising functions in relation to mines.

15.70 In accordance with section 133 of the *Occupational Health and Safety Act*, clause 358 of the *Occupational Health and Safety Regulation*, provides that certain references to WorkCover are taken to be a reference to DPI.

15.71 The Draft Bill proposes to amend section 133 of the *Occupational Health and Safety Act* and clause 358 of the *Occupational Health and Safety Regulation* to provide that references to WorkCover in the following sections of the Act are taken to be references to DPI in relation to mines and coal workplaces:

- Section 17A (Determination by inspector of unresolved matters concerning consultation arrangements),
- Section 32B(3) (Reasons for non-prosecution of offence),
- Part 4 (Industry codes of practice, guidelines and compliance advice),

- Section 106(c) (Authority to prosecute),
- Division 5 (Undertakings) of Part 6,
- Part 6A (Safety recommendation notices),
- Section 114 (Orders regarding costs and expenses of investigation),
- Section 136B (Disclosure of information by WorkCover),
- Section 77(2) [which relates to resolution of disputes regarding access to be referred to the Industrial Court of New South Wales].

15.72 The proposed amendment to section 133 of the *Occupational Health and Safety Act* is merely an amendment to the note to this provision to reflect the changes to clause 358 of the *Occupational Health and Safety Regulation*.

15.73 Although not specifically discussed by the Review it would appear that the purpose of these amendments is to allow DPI to exercise certain new powers proposed by the Draft Bill in relation to mines and coal workplaces, including for example enforceable undertakings and safety recommendation notices. The amendments also apply certain existing provisions of the *Occupational Health and Safety Act* to DPI in respect of mines and coal workplaces, for example, the requirement to provide reasons for not prosecuting an offence under section 32A (reckless conduct causing death at a workplace) and the ordering of costs and expenses of investigations.

15.74 I understand that DPI was consulted as part of the Review process carried out by WorkCover. Therefore, it would appear that DPI has had input into these proposed amendments and agrees with the recommended amendments. I

would agree that it is appropriate that the proposed provisions, as they relate to mines or coal workplaces, should be read as references to DPI rather than WorkCover.

15.75

Recommendation 49

I recommend that the proposed amendments to section 133 of the *Occupational Health and Safety Act* and clause 358 of the *Occupational Health and Safety Regulation* be made in the manner suggested by the Review.

List of Recommendations

Recommendation 1

I recommend that the objects in section 3 of the *Occupational Health and Safety Act* 2000 be amended in the manner suggested by the Review.

Recommendation 2

I recommend that the proposed amendments to the role and functions of WorkCover in the *Workplace Injury Management and Workers Compensation Act* 1998 be implemented in the manner suggested by the Review.

Recommendation 3

I agree with the recommendation made by the Review that 'so far as is reasonably practicable' be included in the statement of the general duty.

Recommendation 4

I agree with the Review that 'reasonably practicable' should be defined as per section 7A(2) of the Draft Bill, however for more abundant caution I believe that the defence of 'no control' in section 28(b) of the *Occupational Health and Safety Act* should be added to section 7A(2) and I so recommend.

Recommendation 5

Section 12(c) of the *Occupational Health and Safety Act* provides for a maximum penalty of 2 years imprisonment for a repeat offender who is an individual. No-one has ever been sentenced to imprisonment under the provision. For consistency with

regulatory offences I recommend that the term of imprisonment be deleted from section 12(c) of the Act.

Recommendation 6

I would restate the general duties so as to include 'so far as is reasonably practicable' and define that term for the avoidance of doubt, but adopt the United Kingdom model, unchanged in 33 years, that the onus of proving 'reasonably practicable', whenever it qualifies a general duty, should fall on the defendant on the balance of probabilities.

Recommendation 7

I recommend that 'concerned in the management' in section 26 of the *Occupational Health and Safety Act* remain in the provision since its meaning is now settled.

Recommendation 8

I agree with the Review recommendation that section 26 should provide that the contravention by the corporation was attributable to the defendant officer failing to take reasonable care.

Recommendation 9

The Review omitted the exemption for Councillors in section 26 of its Draft Bill. Given the radically changed provision proposed in the Draft Bill I think this was the correct conclusion.

Recommendation 10

I recommend the application of the following provisions to clothing outworkers:

- the duty upon employers under section 8;
- the duty upon employees under section 20;
- the prohibition against unlawful dismissal or victimisation under section 23;
- and
- the duty to consult with clothing outworkers

be adopted by inserting the proposed section 27A of the Draft Bill into the *Occupational Health and Safety Act* in accordance with the recommendations of the Review.

Recommendation 11

I recommend that no exemption be included in section 26 of the *Occupational Health and Safety Act* for persons acting as a director or manager in a voluntary capacity.

Recommendation 12

I agree with the Review's recommendation that no change should be made to the *Occupational Health and Safety Act* to delineate responsibility in circumstances where multiple duty holders have overlapping duties.

My recommendation for 'control' to be listed as a factor in determining what is reasonably practicable will make it clear that duty holders' obligations are limited by the extent to which they exercise control.

I agree with the Review's recommendation to issue guidance material on how obligations are to be discharged where there are multiple duty holders.

Recommendation 13

I recommend that section 10(3)(b) of the *Occupational Health and Safety Act* be amended in the manner recommended by the Review to exempt common areas of strata title residential premises.

Recommendation 14

I recommend that the *Occupational Health and Safety Act* be amended to insert new provisions for the provision of compliance advice by WorkCover inspectors in the form recommended by the Review.

Recommendation 15

I recommend that the *Occupational Health and Safety Act* be amended to insert new provisions which permit WorkCover to issue Guidelines be adopted in the form recommended by the Review.

Recommendation 16

I endorse the recommendations of the Review that WorkCover provide guidance on the following topics:

- the role and functions of WorkCover and the OHS Act objects;
- shared and multiple duty holders;
- consultation with third parties;
- the rights and responsibilities of persons at work;
- the meaning of 'reasonably practicable';

- obligations concerning clothing outworkers;
- directors and managers;
- WorkCover's OHS prevention functions;
- enforceable undertakings;
- arrangements for inter-jurisdictional sharing of information;
- safety recommendation notices;
- enforcement measures; and;
- recording of oral evidence.

Recommendation 17

I agree with the Review's recommendation not to amend the provisions of the *Occupational Health and Safety Act* relating to Codes of Practice.

Recommendation 18

I recommend that the requirement upon an employer to consult with employees be qualified to apply so far as is reasonably practicable in the circumstances by amending section 15(2) of the *Occupational Health and Safety Act* as proposed by the Review.

Recommendation 19

I agree with the Review's recommendation that no substantive changes are required to the consultation provisions, except for a new mechanism to resolve disputes regarding consultation arrangements. I recommend the adoption of the new section 17A of the *Occupational Health and Safety Act*, as recommended by the Review.

Recommendation 20

The Review recommended that enforceable undertakings not be entertained for an offence under section 32A of the *Occupational Health and Safety Act* given its gravity. I agree with this exemption.

Recommendation 21

Subject to the administrative criteria recommended by the Review, which should be included in the *Occupational Health and Safety Act* or *Regulation*, I support the Review Report on the introduction of enforceable undertakings.

Recommendation 22

Subject to the provision of suitable training and accreditation of Occupational Health and Safety representatives to be empowered by the *Occupational Health and Safety Act* to issue safety recommendation notices, I believe that the power to issue such safety recommendation notices recommended by the Review should provide a useful tool in the enforcement strategy, especially at an early point of time at a local level.

Recommendation 23

If the recommendation for detailed consideration for expansion of penalty notices is acted upon, as I recommend it should, it will enhance the enforcement options available in the compliance pyramid along with the addition of enforceable undertakings and safety recommendation notices.

Recommendation 24

I agree with the recommendation by the Review that the *Occupational Health and Safety Act* be amended so that an employee must take reasonable care for her/his own health and safety at work, and also with the proposed new object (b1) to encourage all participants – employers, employees and others with duties to take an active role to protect themselves and other people at work against risks to health and safety.

Recommendation 25

I recommend that disputes regarding authorised employees' representatives entering workplaces to investigate suspected breaches of the *Occupational Health and Safety Act* be referred to WorkCover and the Industrial Relations Commission for resolution by amending section 77 of the Act in the manner suggested by the Review.

Recommendation 26

I recommend that the Review's recommendation for an offence provision for misuse of an authorised employee representative's power of entry be introduced by a new provision section 83A of the *Occupational Health and Safety Act*.

Recommendation 27

I recommend that the proposal to introduce a power for authorised employee representatives to enter workplaces to discuss occupational health and safety matters be adopted in the manner recommended by the Review by the insertion of a new Division 3A into the *Occupational Health and Safety Act*.

Recommendation 28

I support the Review's recommendation to amend section 62(1)(c) of the *Occupational Health and Safety Act* in the manner suggested.

Recommendation 29

I support the recommendation for the recording of interviews and the insertion of section 62(2A) into the *Occupational Health and Safety Act* as recommended by the Review and the provision of Guidance by WorkCover.

Recommendation 30

I recommend that the provisions suggested by the Review for disclosure of information by WorkCover to other jurisdictions be adopted by the insertion of section 136B in the *Occupational Health and Safety Act*.

Recommendation 31

I agree with the Review and am unpersuaded that any change should be made to the union right to prosecute for breach of the *Occupational Health and Safety Act* 2000 pursuant to section 106.

Recommendation 32

I agree with the Review's recommendation for amendments to sections 106 and 32B of the *Occupational Health and Safety Act* to provide that proceedings must be instituted by WorkCover or the Department of Primary Industries rather than by an inspector.

Recommendation 33

I recommend that the *Compliance Policy and Prosecution Guidelines* of WorkCover be revised and updated following any legislative implementation of the recommendations of the Review and of my Inquiry.

Recommendation 34

I agree with the Review's proposed amendment to the *Crimes (Sentencing Procedure) Act* 1999 to include the provision of Victim Impact Statements with respect to a breach of section 32A of the *Occupational Health and Safety Act*.

Recommendation 35

I support the Review's recommendation for the inclusion of new offences relating to fraudulent activities contained in section 136A of the Draft Bill.

Recommendation 36

The Review did not recommend that the jurisdiction of the Industrial Court be moved to the Supreme Court and I agree with its conclusion.

Recommendation 37

I recommend that the Attorney-General consider the appropriateness of making an application for a guideline judgment under section 125 of the *Occupational Health and Safety Act* to the Full Bench of the Industrial Court with respect to the sentencing of offenders for breach of the general duties in the Act.

Recommendation 38

I agree with the Review's recommendation to introduce a right to appeal an interlocutory decision of a member of the Industrial Court to the Full Bench.

Recommendation 39

While the issue is not free from argument I favour the recommendation of the Review to remove the power of appeal against acquittals in section 197A of the *Industrial Relations Act 1996*.

Recommendation 40

I am firmly of the opinion that there should be an avenue of appeal to the Court of Criminal Appeal from the Industrial Court Full Bench for dissatisfied defendants. I agree with McCallum and Hall that there should be a right of appeal limited to miscarriages of justice and I so recommend.

Recommendation 41

I support the proposed amendment to section 117A of the *Fines Act 1996* to enable the State Debt Recovery Office to disclose fine information to WorkCover and, upon request, to the next of kin of deceased workers.

Recommendation 42

I recommend that the offence in section 21 of the *Occupational Health and Safety Act* remain absolute and not be qualified by the defence of 'reasonable excuse'.

Recommendation 43

I recommend that the offence in section 71(3) of the *Occupational Health and Safety Act* remain absolute and not be qualified by the defence of 'reasonable excuse'.

Recommendation 44

I recommend that the duty in section 86(1) of the *Occupational Health and Safety Act* remain an absolute duty and not qualified by the defence of 'reasonable excuse'.

Recommendation 45

I agree with the Review's recommendation that the offence in section 90 of the *Occupational Health and Safety Act* of failing to comply with an investigation notice be qualified by the defence of 'reasonable excuse'.

Recommendation 46

I recommend that the offence of destroying, damaging or removing a notice required to be exhibited under section 102 of the *Occupational Health and Safety Act* not be qualified by the defence of 'reasonable excuse'.

Recommendation 47

I recommend that the offence under section 136 of the *Occupational Health and Safety Act* not be qualified by the defence of 'reasonable excuse'.

Recommendation 48

I recommend that an administrative arrangement for the timely sharing of incident notification information between WorkCover and NSW workers compensation insurers be implemented.

Recommendation 49

I recommend that the proposed amendments to section 133 of the *Occupational Health and Safety Act* and clause 358 of the *Occupational Health and Safety Regulation* be made in the manner suggested by the Review.

Post Review Public Submissions

- Acohs Risk Strategies Limited
- Action on Smoking and Health Australia
- Aged Care Association Australia NSW
- Association of Consulting Engineers Australia
- Australian Bankers Association Inc
- Australian Business Limited/State Chamber
- Australian Finance Conference
- Australian Higher Education Industrial Association (AHEIA)
- Australian Industry Group (AIG)
- Australian Institute of Company Directors
- Australian Manufacturing Workers Union (AMWU)
- Australian Retailers' Association (ARA)
- Bloomfield Collieries Group
- Business Council of Australia
- The Cancer Council New South Wales
- Centennial Coal Company Limited
- Construction, Forestry, Mining, Energy and Utilities (CFMEU) Mining and Energy Division
- Corporate HR Solutions
- CSR Limited
- David Jones Limited
- Department of Education and Training
- Department of Primary Industries

- Employers First
- Energy Australia
- Foster, Neil (School of Law, the University of Newcastle)
- GE Commercial Finance
- Goodwin Kenny (Sales) Pty Ltd
- Gypsum Board Manufacturers of Australia (GBMA) Safety Committee
- Hopkins, Andrew
- Housing Industry Association Ltd (HIA)
- Illawarra Coal BHP Billiton
- Kentish, Nigel
- Kyogle Council
- The Law Society of New South Wales
- Leavy, Dan (WorkCover)
- Local Government Association of NSW; Shires Association of NSW
- Master Builders Association of New South Wales (MBA)
- Minister for Employment and Workplace Relations - Commonwealth
- Minister for Employment Protection – Western Australia
- Minister for Employment, Training and Industrial Relations and Minister for Sport - Queensland
- Minister for Justice and Workplace Relations – Tasmania
- Minister for Lands
- Minister for Primary Industries
- Minister for WorkCover – Victoria
- National Electrical and Communications Association (NECA)
- The New South Wales Bar Association

- New South Wales Minerals Council Ltd
- New South Wales Nurses' Association
- New South Wales Road Transport Association Inc
- O'Brien, Sean (physiotherapist)
- Perilya Broken Hill
- Plastics and Chemicals Industries Association (PACIA)
- Poole, Graeme
- Professor Ron McCallum AO
- Public Service Association of New South Wales (PSA)
- Recruitment & Consulting Services Association Ltd
- State Park Trust's Advisory Board
- Statewide Programs Team and Strategic Licensing Assessment and Management (WorkCover)
- TSG International
- Unions NSW
- Xstrata Coal NSW

Public Submissions to Inquiry

- Action on Smoking and Health (ASH) Australia
- Association of Consulting Engineers Australia
- The Association of Professional Engineers, Scientists and Managers Australia
- Australian Bankers' Association Inc.
- Australian Business Limited Incorporating the State Chamber of Commerce (NSW)
- Australian Hotels Association (NSW)
- Australian Institute of Company Directors
- The Australian Livestock & Property Agents Association Ltd (ALPA) and the Real Estate Employers Federation of NSW (REEF)
- Australian Manufacturing Workers' Union
- Australian Trucking Association
- BHP Billiton Illawarra Coal Holdings Pty Ltd
- BioSeptic Pty Limited
- Bus and Coach Association (NSW)
- The Cancer Council NSW
- Catholic Commission for Employment Relations
- CFMEU Mining & Energy Division
- Clark, John P
- Clubs NSW
- Coal & Allied Industries Ltd
- Construction Forestry Mining & Energy Union Construction & General Division
- Country Fresh Supermarkets P/L
- Country Women's Association of NSW

- CSR Limited
- Daly Smith Corporation (Aust) Pty Ltd
- Department of Ageing, Disability & Home Care
- Disability Council of NSW
- Electrical Trades Union of Australia (NSW Branch)
- Employers First
- Eris McCarthy Pty Limited
- Finance Sector Union of Australia
- Foster, Neil
- Ham, Bruce
- Housing Industry Association Limited
- Institute of Public Affairs Ltd
- Local Government Association of NSW and Shires Association of NSW
- Professor Ron McCallum
- Master Fish Merchants' Association of Australia
- Motor Traders Association of NSW
- McCurdy, Daphne
- NatRoad Limited
- New Horizons Enterprises Ltd
- New South Wales Commission for Children & Young People
- The New South Wales Council for Intellectual Disability
- New South Wales Minerals Council Ltd
- New South Wales Nurses' Association
- New South Wales Road Transport Association Inc.

- New South Wales Teachers Federation
- Non-Smokers Movement of Australia
- NSW/ACT Independent Education Union
- Police Association of New South Wales
- Property Council of Australia
- Public Service Association of New South Wales
- Recruitment and Consulting Services Association Ltd (NSW)
- Richards, Julian
- The Salvation Army Australia Eastern Territory
- Sims Group Australia Holdings Ltd
- Small Business Development Corporation of NSW
- Textile Clothing & Footwear Union of Australia (NSW Branch)
- Tortoise Technologies Pty Limited
- TSG International
- Unions NSW
- The Uniting Church in Australia – NSW Synod
- Welch, Alan
- Wilks, Wendy
- Wollongong City Council
- Xstrata Coal (NSW) Pty Ltd

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