

Submission to the National OHS Review

Professor Richard Johnstone,¹ Ms Liz Bluff² and Professor Michael Quinlan³

Introduction and overview

Thank you for the opportunity to make a submission to the National OHS Review. This is obviously a vitally important moment in the development of OHS regulation in Australia. We understand that it is crucial that the Review Panel come up with a Model OHS Act that ensures that no worker is worse off than they would have been under their previous OHS statute, and that the model Act takes new approaches where research and experience suggest that such developments are sound in principle and achievable in practice.

All of the OHS statutes are based on the so called 'Robens model'. While parts of the Robens model are still relevant, other parts of the model were based on assumptions which are no longer valid (and may not have been sound at the time the model was developed). We also note that while there are many common principles in the various Australian OHS statutes, when they are examined in detail (as one of us has done on at least two occasions), there are significant variations amongst the statutes, and it is very difficult to find any provisions in any of the Australian OHS statutes which are identical to the corresponding provisions in the other OHS statutes.

In some instances, it may be appropriate for the model Act simply to adopt a provision currently found in one of the Australian OHS statutes. There will be many other instances where the OHS Review Panel will have to craft a new provision – either based on broad principles which can be induced from current provisions, or by starting from scratch. Obviously this will need to be done in a way that sits comfortably with current judicial, practitioner and academic interpretations of what the relevant provisions in the current statutes means. We urge the Panel to be innovative and to develop principles, rather than simply reproduce current provisions which do not quite serve the purpose they have been drafted for. Crucially we note that in interpreting the provisions developed by the Panel, the courts must apply the normal rules of statutory interpretation and must construe the provision 'so as to give the fullest relief which the fair meaning of its language will allow' (Isaacs J in *Bull v Attorney General* (NSW) (1913) 17 CLR 735, endorsed in *Waugh v Kippen* (1986) 160 CLR 156 at 163).

In this submission we do not attempt to address all of the questions raised by the OHS Review Panel's Discussion Paper. Instead we address ***only those issues that we have examined in our own research*** – either empirically, through legal interpretation, through comparative analysis or in our more theoretical work – and in relation to which we think we have a significant contribution to make based on that research and our expertise. Wherever possible we will reference the work (our own and others) upon which our submission is based. We hope that we have provided an independent and rigorous set of proposals, and we are more than willing to discuss them further with the Panel.

In the next part of our submission we provide a summary of our proposals. We then outline the broad principles that we think should underpin the Model OHS Act. The bulk of the submission is devoted to an explanation of our proposals and the basis upon which we have made them.

¹ Socio-Legal Research Centre, Griffith Law School, Griffith University

² OSHREG Pty Ltd and PhD candidate, Griffith Law School, Griffith University

³ School of Organisation and Management, University of New South Wales and Work and Health Research Team, Health Sciences, University of Sydney

Principles Underpinning OHS Legislation and How They Might be Expressed in the Model OHS Act.

We begin with a broad set of principles that we think should shape the provisions of a Model OHS Act, and indicate how these principles might be implemented in the model Act.

Principles	How might be expressed in legislation
<p>Evidence: OHS standards development, and enforcement policy and practice are evidence-informed.</p> <p>Principle: Where there is insufficient evidence on an issue, proposed provisions are based on well-researched principle.</p> <p>Stakeholder experience: OHS standards development, and enforcement policy and practice facilitate cooperation, consultation and exchange of information between stakeholders.</p>	<p>All provisions of the Model OHS Act should be based on evidence and/or soundly researched principle</p>
<p>Regulatory standards are:</p> <ul style="list-style-type: none"> • transparent, using words with well-defined and universally accepted meanings; • accessible and applicable to concrete situations without excessive difficulty or effort; and • congruent with underlying policy objectives so that the substantive content produces the desired behaviour. <p>The Model OHS Act is 'self contained' and easy to interpret.</p>	<p>Standards in the Model OHS Act, regulations and codes should use language, concepts and technical terms familiar to managers and workers.</p> <p>They should be easy to apply to specific situations.</p> <p>They should articulate with and be consistent with the overall objective of ensuring that OHS risks are removed or mitigated.</p> <p>Objectives and methods to achieve the objectives should ensure that interpretation of the Act is framed and shaped by a robust best practice OHS approach, which ensures worker involvement.</p> <p>All key principles must be contained in the Act.</p>
<p>Scope: secure occupational health, safety and welfare (OHSW) (embracing physiological and psychosocial aspects).</p>	<p>Statement in Objects of the Model OHS Act.</p> <p>Definition of occupational health, safety and welfare.</p> <p>Regulation making power to reflect wide range of sources of harm.</p> <p><u>Example:</u> OHSA(Vic) s2.</p>
<p>Coverage: protection for all persons at work (both employees and other workers); and others who could be placed at risk by the conduct of an undertaking – whether they be at the workplace or remote from the workplace.</p> <p>Includes coverage of <u>particular goods and plant</u> (whether in workplaces or the community).</p> <p>Includes coverage of <u>particular industries</u>, eg mining and petroleum industries.</p>	<p>Statement in Objects of the Model OHS Acts and/or Application.</p> <p>Definition of workers embracing all persons performing work even if they are not in an 'employment relationship'; definitions of plant and substances embrace non-workplace use re high risk plant and dangerous goods.</p> <p>Duties in model Act reflect coverage (eg not confined to employees).</p> <p><u>Example:</u> WHSA(Qld) s 28.</p>

Principles	How might be expressed in legislation
<p>Persons in control are responsible: all ‘persons’ (organisations or individuals) with real control and influence over the conduct of undertakings are responsible for eliminating or minimising risks arising from the conduct of those undertakings. Responsibility may be shared between different persons with responsibility, to the extent of their control. Responsibilities overlap such that each party with responsibility must comply regardless of other’s compliance. Rather than trying to ensure that only one person has responsibility in any one situation, the Model OHS Act aims to ensure that all persons whose business activities affect OHS do all that is reasonably practicable to abate the hazard, and co-ordinate their preventive efforts with all other relevant duty holders.</p>	<p>Statement in Objects of Model OHS Act</p> <p>May need definition to clarify ‘control and influence’, although our preference would be for the model Act not to use the word ‘control’ in this context, but rather to use risk management principles (particularly the reasonable practicability of implementing control measures) as the measure of ‘control’ and ‘influence’.</p> <p>Reflected in duties in model Act. <u>Example - range of duty holders:</u> WHSA(Qld) ss 23(1)&(2), 24(3) 25 & 28.</p> <p><u>Example - responsibility of senior officers:</u> OHS(Vic) ss 144 & 145.</p> <p>Responsibilities of duty holders should include co-ordination of their activities and preventive efforts with other duty holders involved in the same operation.</p>
<p>Building organisational capacity for effective OHS compliance: enable positive, proactive and systematic preventive effort to establish organisational capacity for continuous improvement in OHSW standards at work (as distinct from ad hoc responses or reactive approaches when something goes wrong). (NB: this is not advocating a complex ‘systems approach’ for SMEs and large corporations alike but finding ways to encourage ongoing, proactive efforts in organisations, tailored to their needs).</p>	<p>Statement in Objects of Model OHS Act and in broad principles governing the interpretation of the Act.</p> <p>Reflected in principles (systematic processes) for implementing general duties in Act.</p> <p>Reflected in provisions relating to risk management (in Act, regulations and code).</p>
<p>OHS knowledge and capacity: organisations and individuals to have (or have access to) knowledge and capacity commensurate with responsibility and risks.</p>	<p>Reflected in principles for implementing general duties in Model OHS Act; or</p> <p>Specific provisions in model Act. <u>Example:</u> WHSA(Qld) ss 91-98.</p>
<p>Worker participation: a coherent framework to enable and support worker participation and representation on OHS issues.</p>	<p>Statement in Objects of Model OHS Act.</p> <p>Reflected in principles for implementing general duties in model Act.</p> <p>All types of workers to be included in the process.</p> <p>Specific provisions in regulation or code.</p>
<p>Life cycle approach: risks eliminated or controlled in the planning, design/development, manufacture/construction, implementation, installation, ongoing use/operation etc through to decommissioning/disposal of workplaces, work equipment, materials and systems of work.</p>	<p>Statement in Objects of Model OHS Act.</p> <p>Reflected in principles for implementing general duties in model Act.</p> <p>Reflected in provisions relating to risk management (in Act, regulations and codes).</p> <p><u>Example:</u> OHSWA(SA) ss 23A & 24 re upstream duties (NB all Acts could do better).</p>

Principles	How might be expressed in legislation
<p>Comprehensive attention to OHSW risks: identification of hazards, and eliminating or minimising risks arising from the conduct of undertakings, including risks associated with workplaces, work equipment, substances and materials and systems of work.</p>	<p>Reflected in provisions relating to risk management (in Act, regulations and codes).</p>
<p>Safe place approach: priority is given to eliminating or minimising risks at the source rather than relying on safe behaviour (safe person approach)</p>	<p>Reflected in provisions relating to risk management (in Act, regulations and codes).</p> <p><u>Example:</u> WHS(Qld) code of practice on risk management.</p> <p><u>Example:</u> The Risk Management Process that we suggest to guide compliance with the general duties in this submission.</p>
<p>Level of protection: highest level of protection against OHSW risks that is reasonably practicable.</p>	<p>Reflected in principles for implementing general duties in Model OHS Act.</p> <p><u>Example:</u> OHSA(Vic) s 4</p> <p><u>Example:</u> Reflected in provisions relating to risk management (in Act, regulation and code), eg WHSA(Qld) ss 26, 27 & 27A</p> <p><u>Example:</u> The Risk Management Process we suggest to guide compliance with the general duties in this submission.</p>
<p>Community support: developing and promoting community awareness of and support for OHS (<i>recognizing the role of 'non-state' regulators and civil society</i>).</p>	<p>Statement in Objects of Model OHS Act.</p> <p>Reflected in functions of OHS regulator in Act.</p>
<p>Consequences for contraventions of the Act: effective sanctions for failure to meet OHS responsibilities (deterrence, punishment and remediation) which encourage prevention, are proportionate to risk exposure (rather than consequences) & take account of organizational resources.</p>	<p>Object to reflect responsive regulation.</p> <p>Provisions in Model OHS Act.</p> <p>There is scope to consider: a comprehensive set of measures; how existing measures (eg notices) are framed for maximum benefit; whether there are new measures to encourage preventive effort.</p> <p>Contrast WHSA(Qld),s 24 (consequence-based) with OHSA(NSW) s 12 (not consequence-based).</p>
<p>Sanctions must not be 'incident focused'</p> <p>Sanctions in the Act must be consistent with the 'inchoate' nature (that is, not requiring any injury or death) of the OHS offence and the requirement in the legislation to take a practical, systematic risk management approach.</p>	<p>Object of the Model OHS Act to prevent risk.</p> <p>Reporting requirements include exposures of workers to high risk.</p> <p>Powers given to inspectors to inspect compliance with the Act – not just to inspect/investigate 'incidents'.</p> <p>Sanctions include corporate probation.</p>

CHAPTER 1: LEGISLATIVE APPROACH

1.1 Regulatory Structure

In our statement of principles, we argue that good regulatory standards must be (see Diver, 1983):

- transparent, using words with well-defined and universally accepted meanings, or at least using language, concepts and technical terms familiar to managers and workers;
- accessible and applicable to concrete situations without excessive difficulty or effort; and
- congruent with underlying policy objectives so that the substantive content produces the desired behaviour - that OHS risks are removed or mitigated.

We agree with the Queensland submission that one of the criticisms levelled at the general duties is that they are difficult to understand and to apply (because of the qualification of ‘reasonable practicability’ of measures, which requires a ‘balancing’ of quite different elements – risk, feasible measures and cost – without outlining the process to be followed in that balancing act, and the relative importance of each element - particularly cost). At the same time we note that the courts have interpreted the ‘principle-based’ general duties as having a substantial process-based content – namely systematic OHS management (OHSM). The cases interpreting the employer’s general duty indicate that the employer should not just be responding to demonstrated risks but should have a system of searching for and identifying all possible risks, and instituting reasonable and appropriate measures (these decisions are described in Bluff and Johnstone, 2005). Effectively the case law shows that the general duties require duty holders to engage in systematic OHSM.

Our most important submission, which we will develop later, is that the national Model OHS Act should provide general duties which are couched as risk management process standards. Risk management process standards are both more *transparent* and *accessible* than general duties (as they are traditionally framed in the OHS statutes), and are potentially more *congruent* with the underlying policy objective of OHS regulation. If the regulator wants duty holders to adopt systematic OHSM, then this should be clearly specified in the general duties. Section 27A of the Queensland Act provides one possible model that we will develop and modify later in our submission.

The general duties so framed should be underpinned by performance standards in regulations where it is possible to specify a clear performance outcome, target or goal. Risk management requirements should be specified where no target is possible but where evidence suggests that a risk management process will be effective and with specification standards where a clear, proven and cost effective control is available. In short, we support the approach advocated by Bluff and Gunningham (2004: 12-42). In complying with the general duties in the Act (expressed as risk management process standards), if there are detailed regulations applicable, the duty holder must implement those detailed provisions. Alternatively, if a code of practice is applicable, the duty holder should follow the provisions outlined in the code or implement other control measures that provide at least the same level of protection.

There should be provision for industry codes of practice to be developed in a tripartite process so that regulatory provisions can be particularised for the industry. The principal point of industry codes should be to make the contents of the general duties, regulations and codes even more transparent and accessible for people working in the industry.

1.2 Title, Objects and Principles

As we stated in our general principles, the model OHS statute needs to be ‘self-contained’ and easy to interpret. Objectives and methods to achieve the objectives should ensure that interpretation of the Act is framed and shaped by a robust best practice OHS approach, which ensures worker involvement in OHS.

We argue later that the reach of the Model OHS Act should not be confined to workplaces. We support the Queensland position that the title of the model Act should be the *Work Health and Safety Act*.

The Act should include clear objects (and objectives), and should follow the Victorian approach of setting out principles to guide the interpretation of the Act. Those set out in the Victorian Act provide a good starting point for the development of these principles.

CHAPTER 2: SCOPE AND APPLICATION

2.1 Industry Sectors

In principle, we submit that all Australian business operators, regardless of size and industry, and all workers, should be governed by the same general duties, defences, worker participation and inspection and enforcement provisions. This is a Robens principle that we think still has great merit and relevance. But, consistent with the findings of the Victorian Maxwell Report (2004: 71-88) and the Queensland Submission to this Panel, we recognise that specific industries have special regulatory requirements – including specific safety management systems, a safety case, and/or accreditation. We do not, however, believe consider that industry-specific legislation is needed to accommodate the unique requirements of particular industry sectors. Industry specific requirements can be addressed through industry specific regulations as, for example, is done for major hazards facilities. These industry specific requirements, like the Model OHS Act, should be formulated nationally and adopted consistently by each jurisdiction.

We are also firmly of the view that the current self-insurance arrangements under the Comcare scheme should not enable corporations insuring under the Comcare Scheme to escape their State or Territory OHS statutes. With state adoption of a national Model OHS Act, self-insurers under Comcare, and their contractors and sub-contractors, should all be covered by the State Acts, to ensure that only one inspectorate has inspection and enforcement jurisdiction in a particular workplace.

2.2 The Public, Workplaces and Non-workplaces

It is our firm submission that the Model National OHS Act should impose a duty on all persons conducting a business or undertaking to ensure that they follow risk management processes to ensure that *no person is exposed to risk* from the conduct of the business or undertaking. Our view is that the touchstone should be prevention of exposure to risk arising from the conduct of the undertaking – regardless of whether the person placed at risk by the duty holder is at the workplace or away from it, and regardless of whether the person exposed to risk is working or not working.

The Robens Report recommended that the OHS statute protect the public – both the ‘internal public’ (shoppers in a shopping centre, students in a university) and the ‘external public’ (persons passing by the workplace). There is no reason to abandon this principle. If the duties are to be limited by reasonable practicability (or, as we argue, a clearly articulated risk management process), there is no reason to limit the duty to persons at the workplace (cf the current NSW approach) or near the workplace (cf the Commonwealth and ACT approaches). For further discussion of this, see Johnstone (1999 and 2006). Any other approach would involve unjustified differential treatment of persons exposed to risks, and to artificial line drawing. This issue should simply be whether persons are exposed to risks, and if they are, whether there is a control measure (the cost of which is not grossly disproportionate to the risk being addressed) that can be adopted to prevent or at least minimise the risk. We are confident that this will not impose undue burdens or responsibilities upon business organisations.

The protection of members of the public is best achieved by a broad duty ‘to others’ – which we will discuss at length in chapter 3.

2.3 Changing Work Organisation and Relationships, and Emerging Hazards and Risks

Work Organisation

From the 1930s Australian labour regulation, including OHS regulation, has been constructed around a paradigm that assumed permanent, full-time employment in a single entity employer and labour law as the regulator of employment relationships, with the contract of employment as the pivot (see Bennett

1994, 171-183; and Collins 1990). Apart from the general duties of employers and self-employed person to persons other than employees (discussed later in this section, and in Chapter 3), the OHS statutes have also largely been built on this paradigm. However, over the past 25 years there has been a significant growth of patterns of work that fall outside this paradigm including the following (not mutually exclusive) arrangements:

- casual (or temporary) workers, engaged on a short term (usually hourly or daily) where each period of work is a distinct period of service and there no continuity of service or expectation of permanent employment;
- short-term fixed contract workers engaged under contracts of less than 12 months' duration;
- labour hire or leased workers, supplied by labour hire firms or agencies to work for client employers on a temporary basis – usually there is no contractual relationship between the worker and the client;
- own-account self-employed workers operating a business without employees and who supply labour services to clients;
- teleworking by workers at a location remote from the employer's premises (for example, at the worker's home, at alternating locations, or entirely mobile) using telecommunication technology such as on-line computer networks;
- part-time work, where the worker usually works fixed or variable hours less than a full-time worker (normally between 35 and 38 hours a week); and
- home-based work carried out at the workers home (including but not restricted to telework), rather than at the employer's premises – home-based workers might be employees or independent contractors, and some home-based workers might spend some of their working time working at the employer's premises.

In Australia and overseas, there has been a significant growth in these precarious and contingent forms of work in recent decades (see Campbell, 2008; Johnstone and Quinlan, 2006). The growth of flexible forms of employment is perhaps 'the most significant change affecting work globally over the past 20 years' (Quinlan, 2004a: 121). The growth of more flexible forms of employment has been well documented in the literature and explored in some detail in number of recent OHS reviews in Australia (ACT Occupational Health and Safety Council, 2005: 97; Crittall, 2001; Maxwell, 2004).

A now extensive body of international research has pointed to an association between these changing work arrangements with serious adverse OHS outcomes. This includes studies of the OHS effects of downsizing and job insecurity, direct and indirect-hire temporary work and subcontracting and home-based work (see for example Rebitzer, 1995). The growth and evolution of this evidence has been charted in a number of extensive meta-reviews of the research literature (Quinlan et al 2001; Bohle et al, 2001; Quinlan and Bohle, 2004 and 2008), has been the subject of editorials in a number of leading health and medical journals (Bartley, 2005), and has been cited by government inquiries or reviews in Australasia, Europe and North America (see for example, Fooks et al 2007).

There is also a growing body of research pointing to how these work arrangements have weakened or bypassed existing OHS and workers' compensation regulatory regimes – and responses to this (Lippel, 2005; Rawling, 2007). Again, this includes studies of the effects of downsizing and organisational restructuring (Quinlan, 2007), subcontracting and home-based work (Bernstein et al, 2001; Johnstone et al 2001; Nossar et al, 2004; James et al 2007; Quinlan and Bohle, 2008), labour hire/agency workers (Johnstone and Quinlan, 2006) and direct-hire temporary workers (Aronsson, 1999; Quinlan 2004). Several studies have examined the impact of workplace changes on specific mechanisms or provisions within OHS legislation, such as requirements for worker involvement via workplace OHS committees and health and employee safety representatives (Johnstone, Quinlan and Walters, 2005). There is also research into effective limitations on the rights and entitlements of foreign-born workers, especially temporary/guestworkers and illegal/undocumented immigrants who tend to be concentrated in contingent jobs (Guthrie and Quinlan, 2005). A small body of research has examined the impact of

these changes on workers' compensation regimes (Quinlan and Mayhew, 1999; Quinlan, 2004). Again this research has been widely cited by government reports, reviews and inquiries (Maxwell, 2004; Saltzman and Belzer, 2007). Governments have also commissioned specific inquiries into these areas or have made it a critical element or term of reference in more general inquiries into OHS (*New South Wales Labour Hire Task Force*, 2001; Quinlan, 2001, 2003; Wran and McLelland, 2005: *Industrial Relations Victoria* 2005)

There are multiple and mutually reinforcing explanations for the detrimental impact that contingent and precarious work has on the OHS and well being of workers engaged in those arrangements (see Quinlan, Mayhew and Bohle, 2001a and 2001b and Quinlan 2004, 122-124). For example, the very same competitive pressures that induce firms to engage contingent or precarious work arrangements also encourage underbidding on contracts, cheaper or inadequately maintained equipment, reductions in staff levels, faster production, longer work hours and other forms of corner-cutting on OHS. These work arrangements, especially when they introduce third parties and/or create multi-employer worksites lead to fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck-passing', and inadequate specific job knowledge (including knowledge about OHS) among workers moving from job to job (see Quinlan, Mayhew and Bohle 2001a and 2001b; Quinlan 2004, Mayhew, Quinlan and Bennett 1996, Johnstone, 2004a, 116-117). As organizations outsource tasks, they diminish in size and increasingly become small or medium sized firms – with the attendant difficulties in complying with OHS requirements (see Lamm and Walters 2004, and Walters 2001 and 2002). Further, as discussed above, OHS regulation has been slow to adjust to these changing work patterns. It is this latter point, in particular, that is relevant to our submission and to the National OHS Review. In our view, the Model OHS Act needs to ensure that to these increasingly diverse working relationships are covered by the general duties, so that the Model OHS Act affords equal protection to all types of workers, regardless of the nature of their working relationship. There should be no incentive to firms to organise their labour arrangements so as to reduce their responsibility for OHS. The guiding principle, set out in the *R v Associated Octel Co Ltd [1996] 4 All ER 846*, is that an employer is free to decide labour arrangements but is under a duty to exercise control over the activity and to ensure that it is done without exposing non-employees to risks. A person running a business or undertaking (see our submission in section 3.3 below) should be required to follow the same risk management processes in relation to all persons whose health and safety might be put at risk by the operations of the business or undertaking (see our submission in section 3.3 below).

As we will argue in more detail in chapter 3, ensuring that all kinds of workers are protected by the general duty is best achieved by following the Queensland approach in section 28 of the WHSA 1995 which imposes an obligation on a person who conducts a business or an undertaking to ensure the workplace health and safety of each of the person's workers and any other persons is not affected by the conduct of the person's business or undertaking: that is, these people must not be exposed to risks to their health and safety. The Victorian OHSA, in sections 23 and 24 substantially achieves the same protective reach, but imposes the duty on 'employers' and 'self-employed persons'.

Emerging Hazards and Risks

In relation to *emerging hazards and risks*, within the risk management framework the Model OHS Act should specify that a duty holder has an obligation to search for and identify *all* hazards, and to assess *all* risks arising from those hazards, and to eliminate or minimise the exposure of workers and others to those risks, regardless of whether the risks be traditional physical and chemical risks, psycho-social risks or risks associated with the organisation of work. We agree with the Queensland Submission that there is no need to make special reference to new or emerging hazards - fatigue, workload, bullying, stress, and communicable diseases – as they are comprehensively covered by the general obligation of a person conducting a business or undertaking to eliminate or minimise exposure to risks to health and safety.

CHAPTER 3: DUTIES OF CARE – WHO OWES THEM AND TO WHOM?

3.1 The Current Approach

As we argued in section 2.3 above, in the past, the dominant twentieth century labour regulatory paradigm assumed a single employer with full-time, permanent employees, each of whom is employed under a contract of employment. The post-Robens OHS legislation was unusual in that in addition to protecting ‘employees’, it also protected members of the public and persons who were not employees (see sections 2.2 and 2.3 above, Johnstone 1999, 2004a, 250-270 and Johnstone 2006). The Australian OHS statutes, particularly the 1985 and 2004 Victorian Act and the 1995 Queensland Act, could also be interpreted as imposing overlapping and mutually reinforcing duties on more than one employer. That is, they imposed duties on an employer which engaged contractors, on those contractors, and on their sub-contractors (in their capacity as ‘employers’ or ‘self-employed persons’) etc. In each case the duty was owed to all persons in the contractual chain below the duty holder, and to all other persons affected by the conduct of the undertaking (for more detail, see Johnstone 1999; 2006, 622-628 and Johnstone and Wilson 2006a and 2006b).

The current approach is also for duties to be owed by principal contractors (expressly in Queensland, and by virtue of the duty to ‘others’ in other OHS statutes, persons in control of workplaces (occupiers), designers, manufacturers, suppliers and importers of plant; manufacturers, suppliers and importers of substances, and on ‘employees’/‘workers’.

As Quinlan and Johnstone, in their submission to the Maxwell Review of the Victorian OHS Act (Quinlan and Johnstone, 2003), noted:

[o]ne of the real strengths of the current duties arrangement is that by specifying a range of duty holders they can accommodate complex and shifting work arrangements and indicate the need for responsible actions by all relevant parties. This is not to say that the level of responsibility should be identical.

It is our submission that this approach to duty holders and the person to whom they owe duties should be retained in the Model OHS Act, and that the model Act should include the best versions of each of these duties. In some cases the best versions should be further strengthened. We also submit that the model Act should continue the approach found in the current OHS statutes of overlapping and mutually reinforcing duties, and should, in addition, impose a duty on each business or undertaking to co-ordinate its risk management processes with other operators owing duties to the same workers or members of the public.

3.2 Control

The Robens Report stated that as ‘... a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control.’ (Robens, 1972, 51). This is a far from controversial maxim, and it applies not only to employers, but to all duty holders. Indeed, it is difficult to see what point might be served by requiring a duty holder to take measures to prevent illness and injury that were beyond its control, other than making it clear that duty holders should not undertake activities that cannot be undertaken in a way that ensures the health and safety of all persons involved. In the Robens model this principle has been operationalised through the qualification imposed on all OHS general duties in the OHS statutes – that the duty holder is only required to take measures that are ‘reasonably practicable’ (for a detailed discussion of what is meant by ‘reasonably practicable’, see Bluff and Johnstone 2005). The relationship between ‘reasonable practicability and control is clearly explained in the House of Lords decision in *R v Associated Octel Co Ltd* [1996] 4 All ER 846

The question of control may be very relevant to what is reasonably practicable. In most cases the employer/principal has no control of how a competent or expert contractor does the work. It is one of the reasons why he employs such a person – that he has the skill and expertise, including the knowledge of appropriate safety precautions, which he himself may not have. He may be entitled to rely on the contractor to see that the work is carried out safely, both so far as the contractor's workmen are concerned and others including his own employees or members of the public; and he cannot be expected to supervise them to see that they are applying the necessary safety precautions. It may not be reasonably practicable for him to do other than rely on the independent contractor.

The *Octel* case also clearly stated the non-delegability of the general duties. The Court held that if work conducted by a contractor falls within the conduct of an employer or self-employed person's undertaking, the employer or self-employed person is, under section 3 of the UK *Health and Safety etc at Work Act 1974* (which is virtually identical to section 23 of the Victorian Act), under a duty to exercise control over the activity, and to ensure that it is done without exposing non-employees to risk. Lord Hoffman (at 850-851) held that the provision imposes:

a duty upon the employer [or self-employed person] himself. That duty is defined by reference to a certain kind of activity, namely, the conduct by the employer [or self-employed person] of his undertaking. It is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it. ... [A] person conducting his own undertaking is free to decide how he will do so. Section 3 [of the UK Act] requires the employer to [conduct his undertaking] in a way which, subject to all reasonable practicability, does not create risks to people's health and safety. If, therefore, the employer engages an independent contractor to do work which forms part of the employer's undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. ... The employer must take reasonably practical steps to avoid risks to the contractor's servants which arise, not merely from the physical state of the premises ... but also from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work.

Our submission is that the current approach be retained, but strengthened in the Model OHS Act, by retaining the reasonably practicable qualification to all general duties, but ensuring that it easier to operationalise by recasting the qualification as a risk management process (see chapter 4). The model Act should also codify the current judicial interpretation that the general duties are non-delegable. It would defeat the central purpose of OHS regulation for duty holders to be able to contract out of the their statutory obligations.

We strongly submit that the Model OHS Act should not explicitly introduce the notion of 'control' into the general duty provisions. This would not only introduce an additional element to 'reasonably practicable', but it would risk the notion of control in this context being narrowly interpreted by the courts, with the result that the reach of the general duties would be considerably weakened. There is a significant risk of this occurring. The word 'control' appears in the OHS statutes in a number of contexts – including an a element in determining whether a contractor can be deemed to be an employee (in the Commonwealth, Victorian, South Australian, West Australian and Tasmanian OHS Acts – see Johnstone 2006, 621-2); as a defence to a prosecution under a general duty provision (in New South Wales and Queensland); in section 14 of the Commonwealth Act (is a workplace controlled by a contractor for construction and maintenance purposes?), and as an element in the definition of an occupier of a workplace. In each of these contexts, 'control' has a different meaning and a complex case law, and the chances are good that definitions and interpretations from one type of control might infiltrate and distort the meaning given to control in other contexts.

3.3 The primary general duty – persons conducting a business or undertaking to workers and others.

All of the current Australian OHS statutes impose a duty on employers in relation to their ‘workers’ (Queensland and the Northern Territory) or ‘employees’ (the other statutes). They also all impose a duty on employers and (with the exception of the Commonwealth) on ‘self-employed persons’ who are not employees (or workers) (for details, see Johnstone 1999, 2004a chapters 4 and 250-270, and 2006). Clearly the Model OHS Act should retain these duties – the only issue is the approach that should be adopted. As we argued in section 2.3 above, the Model OHS Act needs to ensure that the increasingly diverse working relationships noted in section 3.2 are covered by the general duties, so that the Model OHS Act affords equal protection to all types of workers, regardless of the nature of their working relationship, and to the public (see section 2.2 above). There should be no incentive to firms to organise their labour arrangements so as to reduce their responsibility for OHS. A detailed analysis of the operation of the duty to ‘others’ suggests that the most comprehensive coverage is afforded by section 28 of the Queensland Act, followed by sections 23 and 24 of the Victorian Act. Although the wording of these provisions differ, in essence they ensure that persons who are not workers/employees ‘are not exposed’ to risks to OHS arising from ‘the conduct of the undertaking’. This level of protection is not clear in the other OHS jurisdictions, where there are significant gaps in statutory protection, particularly in relation to dependent or semi-dependent workers who are not technically ‘employees’, and volunteers working at remote workplaces, including their homes and vehicles. For details see Johnstone 2006, 622-628; and also Johnstone 1999. If this approach is taken, there is no need to include a provision which deems independent contractors and their employees etc to be ‘employees’ for the purposes of the employer’s general duty (see the Commonwealth, Victorian, South Australian, West Australian and Tasmanian OHS Acts, and Johnstone 2006, 621-2).

How should the duty (based on the Queensland and Victorian approach) be framed? The two crucial issues are, first, whether the duty is imposed upon employers and self-employed persons (the Victorian approach) or upon ‘persons who conduct a business or undertaking’; and second, whether ‘others’ be defined by reference to ‘employees’ or ‘workers’ (and if the latter, how ‘workers’ should be defined).

Employer or ‘person conducting a business or undertaking’

The advantage of imposing the duty on the ‘employer’ and ‘self-employed person’ is that this is the approach taken in most of the current OHS statutes. The disadvantage is that it requires a decision as to whether a person is an ‘employer’ or a ‘self-employed person’ (which may require analysis of complex arrangements), and it requires all working relationships to be forced into two quite old fashioned categories. For example, is each party in a joint venture an ‘employer’ or ‘self-employed person’? Is a contractor an ‘employer’, or a self-employed person? and so on.

We submit that a far more modern and sensible approach is taken in the Queensland Act, where the duty (in section 28) is simply imposed on ‘a person who conducts a business or an undertaking’. The disadvantage of this is that there may be early complications in interpreting ‘business’ and ‘undertaking’ in this context – although this has not been a problem in Queensland. In any event, the case law on whether a person is an ‘employer’ or ‘employee’ is notoriously complex. The benefits of imposing the duty on a ‘person who conducts a business or undertaking’ are that it signals that the duty is comprehensive and flexible in its approach; and that it removes an artificial step in the application of the duty. In short, it is both more transparent and accessible and applicable than the approach taken in the other OHS statutes.

Employee or worker

We consider that it also makes more sense to express the duty as one owed to ‘workers’ rather than to ‘employees’. Here the major considerations are, first, the ease of interpreting whether a person is an

‘employee’ or a worker’, and, second, how broadly ‘worker’ should be defined. As noted above, the definition of ‘employee’ is difficult to apply in many situations. Further, as we noted in section 2.3, changes in working relationships and the broad principle that all workers should be equally protected by the OHS statutes suggests that not only should ‘workers’ be protected, but that ‘worker’ should be broadly defined.

The new Northern Territory Act takes a broad approach and defines a ‘worker’ to include ‘any person who works in a person’s business or undertaking’ as an employee, apprentice, contractor or sub-contractor (or their employee), employee of a labour hire company, volunteer or in any other capacity’. We submit that there is great merit in adopting the Northern Territory approach. This would send a very clear policy signal that all types of workers are to receive the protection of the OHS statutes. It would also greatly facilitate a more inclusive approach to workplace arrangements (see chapter 5).

We note that there is another policy issue which affects whether the primary duty is owed to an ‘employee’ or to a ‘worker’, and this is whether a more detailed general duty should be owed to ‘employees’ as opposed to other types of workers. This is effectively the position under the OHS statutes in all Australian jurisdictions other than Queensland and the Northern Territory. Each of the employers’ general duties to employees further elaborates the content of the duty (see for example, section 22 of the Victorian Act, and such elaboration is generally not to be found in the duty to persons who are not employees (or ‘others’) which will protect also other workers and members of the public.

This is a policy issue, and we argue that a broader definition of worker will ensure that all kinds of workers are properly protected, so that the duty to ‘others’ picks up persons whose work relationships somehow eludes the broad definition of worker, and members of the public.

Examples of how this duty applies to the various categories of workers should be provided in the Act and/or detailed examples in guidance material. The examples should cover contractor/subcontractor chains, franchising, consignments, labour hire, home-based work and the other working relationships detailed in 2.3 of the discussion paper.

Elements of the duty of persons conducting a business or undertaking

The Act should provide, in the section following the statement of the general duty on the person conducting a business or undertaking, details of that duty. We are in favour of provisions elucidating the content of the general duty to workers (instruction, supervision, training, etc) along the lines of the provisions the European Union OHS Framework Directive, and in the current employer’s general duty to employees – except that they should be owed by persons who conduct a business or undertaking and be owed to workers broadly defined. The details of the duty should enable the duty holder to institutionalise systematic OHS management. Crucially, though, we submit that these elaborated duties should include a duty to consult workers (see chapter 5), a duty to conduct risk management processes (see chapter 4) and a duty to co-ordinate risk management processes with all other persons who are conducting businesses or undertakings which are part of the duty holders business or undertaking. In other words, just as a person will coordinate other business activities with other contractors at a distribution warehouse or construction site, so that person should be required to include co-ordination of risk management processes.

In short, it is our submission that after the statement of the general duty imposed on a person who conducts a business or undertaking, there should be a separate section which sets out required elements of that duty. The elements should include:

- Appointment of competent persons to carry out OHS activities
- Consultation with workers and their representatives
- Elimination or minimisation of risks by:
 - Identification of foreseeable health and safety hazards; and

- Implementation of regulations or approved codes of practice; or
- Assessment of risks and control by safe place controls (elimination, substitution, isolation, engineering or organisational controls) supplemented (but not replaced) by safe person measures (administrative controls and personal protective equipment).
- Co-ordinating risk management functions with other duty holders whose activities affect the person's undertaking
 - Development and implementation of safe systems of work and safe work procedures
 - Provision of instruction and training
 - Monitoring injuries and adverse health effects
 - Reporting and investigating hazards and incidents, and taking corrective action to prevent recurrences
 - Arrangements for first aid
 - Arrangements for emergency response
 - Documentation of action taken with regard to each of the above

In order to avoid issues of duplicity arising when a prosecution is initiated for a contravention of a general duty (see Johnstone 2004a, 196-203), provisions similar to sections 31 of the New South Wales OHS Act and section 164(2) of the Queensland Act should be included in the Model OHS Act.

3.4 The Upstream Duty Holders

The model OHS Act should clearly establish obligations for various activities which affect OHS across the life cycle of certain items and materials. The rationale for this approach is two fold. There is a national OHS policy commitment to safe design (NOHSC, 2002, 9). This reflects the principle that risks can be most effectively eliminated or minimised, so that items or materials are inherently safe(r), early in the life cycle when decisions are made about structure, materials, components/ingredients and how the item is produced. Second, all those with real control and influence over the generation of hazards and risks should bear responsibility for eliminating or minimising risks, so far as reasonably practicable (Bluff and Gunningham, 2004, 14-15). As the present general duties for upstream duty holders do not constitute a coherent, comprehensive or consistent approach we propose drafting new upstream duties. We have identified a series of issues for consideration in drafting these new duties, as follows. This discussion also addresses Questions 33 to 36 in the Issues Paper.

Which items or materials?

Core items or materials are substances, structures and plant which should be defined broadly (as in the current OHS Acts), and including components or fittings of these. The duty should apply in relation to work-related use of these items or materials. A common approach in current legislation is to apply the duties to an item or material that the duty holder knows, or ought reasonably to know, is for use at work or, in the case of structures, as a workplace (whether or not it is used exclusively for this).

We note that previous discussion papers also proposed upstream duties in relation to the design and development of systems of work such as franchising systems. (See for example, NRCOHSR 2002). We suggest that these types of systems are better addressed through the primary general duty of persons conducting a business or undertaking to employees and others. Our reasoning is that the design and development of systems is intrinsically concerned with the relationships between businesses or undertakings and others performing work contributing to that business or undertaking, as with franchisors and franchisees.

Who should have a duty?

There are some core duty holders under the current OHS statutes, with the duty holders varying according to the item of material. For plant these are persons responsible for or contributing to the design, manufacture, import, supply, installation or erection of plant. For structures, core duty holders are persons responsible for or contributing to the design of a structure and its construction. For substances core duty holders are persons responsible for or contributing to the manufacture, import or supply of a substance.

Other persons who may influence OHS early in the life cycle of an item or material are procurers of plant and substances and clients for structures who may specify requirements or constraints. We suggest this aspect should be addressed through the responsibilities of persons conducting a business or undertaking (section 3.3 above), and especially in risk management section 4.4 below).

Single duties or differentiated responsibilities

Some of the current OHS Acts have the same duty for upstream duty holders for the particular item or material. For example, the NSW Act has the same duty for persons who design, manufacture, supply, install and erect plant (OHSA (NSW) section 11) but other Acts have distinct duties for different duty holders or combinations of duty holders (see for example OHSA (Vic) sections 27 and 29-31). We submit that separate duties for different upstream duty holders makes for unnecessarily complex legislation and is out of step with the way these items and materials are produced.

Design, manufacture and supply of workplace items and materials, like many other business undertakings, often involves supply chains with intermeshing roles played by different participants. For example, an end product manufacturer of plant may be involved in its design, manufacture, supply and installation in workplaces with inputs from the firm's own employees, and external suppliers of components and services. Similarly, a building developer may oversee the design and management of a construction project, with inputs from external designers and a series of contractors in the construction phase. While some participants in the supply chain for a particular item or material may have more opportunity and capacity to influence OHS outcomes, this variation is relative to particular business arrangements. A designer who is an employee may have little real influence over key design decisions made by his/her employer, while a distributor who sells under a brand name may specify design/manufacture criteria to those producing brand name items.

As a result, distinctions between different duty holders on the basis of function only are arbitrary. We propose that the over-riding principle should be to ensure that action is taken by each person contributing to the design, manufacture/construction, supply (and so on) of a particular item or material to eliminate or minimise risks, so far as is reasonably practicable (operationalised as a risk management process).

Different jurisdictions and overseas

Duty holders may operate in different Australian jurisdictions and also overseas. Also, particular items or materials may have contributions from persons (individuals or corporate entities) based in different Australian jurisdictions or overseas. We submit that breaches should be pursued with the duty holder responsible if that duty holder is *within Australia*. Only if the duty holder is overseas will it be necessary to hold another person (in Australia) responsible. Our reasoning is as follows.

Underlying the national safe design priority and objectives of OHS legislation is the notion that items and materials should be made safer at the source. In principle, breaches involving unsafe design or manufacture/construction should be pursued with the duty holder responsible. This would mean, for example, taking action with a designer/manufacture even if they are in another jurisdiction, rather than focusing on a supplier who happens to be within the jurisdiction. To achieve this would require either

improved cooperation between OHS inspectorates, or a willingness by individual inspectorates to pursue matters interstate when necessary.

With regard to the latter, the OHS inspectorates can initiate legal proceedings against duty holders in other jurisdictions, as a series of prosecutions in the past decade indicate.⁴ There is also wider case law establishing that jurisdictional problems can be overcome where not all elements of a crime take place within a state or territory. There is, however, reluctance and there are practical and cost factors impeding cross-border enforcement. There is a need for a coordinated and cooperative approach to enforcement of the upstream duties, Australia wide.

If those responsible for design or manufacture/construction are *outside Australia* there is no alternative but to impose the obligation upon the person importing the item or material into Australia. We propose that the term “importer” is defined as a person who brings an item or material into Australia, and that the importer takes on the duty of the designer/manufacturer if the latter are overseas. However, we would argue that the definition of importer should not encompass a person who brings an item or material from into one state/territory from another Australian jurisdiction as this wider definition (used in some of the current OHS Acts) has the effect of transferring responsibility to the procurer or a third party supplier if the goods are traded across jurisdictional borders. As we said above, if the OHS problem originates in design or manufacture/construction those responsible should be held accountable to provide a stimulus for safe design.

Supply

The principle that all those with control and influence over the generation of hazards and risks should bear responsibility for eliminating or minimising risks, so far as reasonably practicable, suggests that a duty of care should be owed every time an item changes hands, whether permanently (wholesale, retail, second hand and gratis) or temporarily (by loan or hire). We suggest that only two limitations are required. The first is that the item or material is supplied for use at work. The second is that the duties of suppliers should not apply to a person merely because that person supplies an item or material (plant or substance) in the course of the business of financing the acquisition of the item or material by a customer from another person. Such a provision is included in some of the current OHS Acts.

Elements of the upstream duties

In section 3.3 above we argued that the proposed general duty of persons conducting a business or undertaking, to workers and others, should require the duty holder to eliminate or minimise risks so far as is reasonably practicable, with the latter operationalised as a risk management process. We submit that the same approach should be applied to the upstream duties. The approach is further elaborated in chapter 4.

In addition to the risk management process there are other elements of the upstream duties which are important to preserve. These are testing and examination, and provision of information. We propose that the upstream duties incorporate these requirements in provisions sufficiently broad to embrace a range of testing and types of information provision, respectively. The type and scope of testing and examination, and information provision, for different items and materials can be elaborated in

⁴ For prosecutions involving defendants in other states see *Victorian WorkCover Authority v Hydrapak Pty Ltd*, Werribee Magistrate’s Court, Unreported case, 24 October 2001; *Victorian WorkCover Authority v Tornado Pumps and Sprayers Pty Ltd*, Bendigo Magistrates Court, Unreported case, May 2006; *WorkSafe Western Australia v Viticulture Technologies (Aust) Pty Ltd*, Court of Petty Sessions Albany, Unreported case, 15 May 2003; *WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Ltd* [2001] NSWIRComm 50; *Inspector Ruth Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 298; *Inspector Ruth Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 423; *Lyco Industries Pty Ltd v Inspector Ruth Buggy (WorkCover Authority of New South Wales)* [2006] NSWIRComm 396.

regulations or approved codes of practice, as is already done for hazardous substances. We discuss testing, examination and information provision further in chapter 4.

In short, it is our submission that after the statement of the duty imposed on a person who designs, manufactures/constructs, supplies, imports, installs, erects (as for the relevant item or material) to eliminate or minimise risks to health and safety, there should be a separate section which sets out required elements of that duty. The elements should include:

- Elimination or minimisation of risks by:
 - Identification of foreseeable health and safety hazards, in different aspects of use across the life cycle of the plant/substance/structure; and
 - Implementation of regulations or approved codes of practice; or
 - Assessment of risks and control by safe place controls (elimination, substitution, isolation, engineering or organisational controls) supplemented (but not replaced) by safe person measures (information in various forms – labels, warning signs, data sheets, manuals, training).
 - Co-ordinating risk management functions with other duty holders for the plant, structure or substance (eg designers to coordinate with those manufacturing, constructing)
- Testing or examination
- Provision of information
- Documentation of action taken with regard to each of the above

3.5 Duty Holder Support

There is empirical evidence that a strong predictor of success in addressing OHS and positively improving OHS performance is whether an organisation has assistance from personnel who are competent and trained in OHS (Hale and Hovden, 1998, 147-148; Nytrö, Saksvik and Torvatn, 1998, 299). Research into self-regulation more generally has also identified the pivotal role played by ‘self-regulation personnel’. These are the professionals who lead and support self-regulation in organisations, whether this is in OHS, trade practices or other areas of business regulation (Parker, 2002, 53-55). We submit that Australian workplaces need to have sufficient OHS knowledge and capability to be able to fulfill their legal responsibilities and to effectively protect OHS. We refer to this provision of OHS know-how and expertise as OHS support.

Australian legislative provisions are currently piecemeal with regard to OHS support (see Bluff 2005 and 2006 for reviews of provisions). In summary, they either involve provision for an ‘occupational health service’, typically in large organisations, with functions which may include prevention as well as first aid and injury management. (See first aid codes in the Commonwealth, Queensland, South Australia, and Western Australia). A second approach requires employers to obtain or access information from an authoritative source, or to employ or engage a person(s) who is suitably qualified in OHS to provide advice about OHS. (See for example OHSR (NSW) r 16 and OHSA (Vic) s 22(2)(b)).

In section 3.3 above we proposed that part of the general duty of a person conducting a business or undertaking is to appoint competent persons to carry out OHS activities. We further propose that the need for OHS support be addressed in the Model OHS Act by provisions based on the Queensland Act (WHS Act (Qld) sections 91-98). This Act requires an employer to appoint a person who holds a prescribed qualification as a workplace health and safety officer (WHSO) for any prescribed workplace. A similar obligation applies to the appointment of a WHSO by the principal contractor for construction workplaces. The functions of WHSOs are: to advise on the overall state of OHS; to conduct inspections to identify any hazards and unsafe or unsatisfactory OHS conditions and practices, and report to the employer or principal contractor on these; to establish appropriate OHS educational programs; to investigate, or assist the investigation of, all workplace incidents; to help inspectors in the performance of their duties; to report any workplace incident or immediate risk to the employer or

principal contractor; and any other function prescribed by regulation. WHSOs also have rights to be provided with information, to be included in any interview with a worker about an OHS issue, to be consulted about changes at the workplace, to be assisted in seeking advice on issues affecting OHS, to perform the WHSO functions in normal working hours, to have access to resources to fulfil the WHSO functions. The Queensland regulations prescribe the industries in which WHSOs must be appointed which include all major industry groupings (WHSR (Qld), regulation 30).

Finally, we submit that the Model OHS Act should make it clear that WHSOs attract no legal liability for their actions or inactions. They are responsible to senior management.

CHAPTER 4: 'REASONABLY PRACTICABLE' AND RISK MANAGEMENT

4.1 Concept of 'Reasonably Practicable'

The general duties in the Australian OHS Acts, and in the UK *Health and Safety at Work etc Act 1974*, are absolute duties, qualified by the 'reasonable practicability' of measures. Some OHS statutes (most notably Victoria, but also Western Australia and the Northern Territory) set out the elements of reasonable practicability but do so as a number of factors to be balanced, not as a process to be followed by the duty holder. In effect, the general duties resemble the common law duties of care, and the standard of care required of duty holders strongly resembles the common law negligence standard (for a detailed analysis of 'reasonably practicable', see Bluff and Johnstone, 2005, and Johnstone, 2004a, 207-226).

There is now a well developed case law on the meaning of 'reasonable practicability' (Bluff and Johnstone, 2005, 204-212), and some good guidance material on how the expression should be operationalised (see WorkSafe Victoria 2007).

'Reasonably practicable' was definitively defined by Asquith LJ in *Edwards v National Coal Board* [1949] 1 KB 704 at 712

'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them — the risk being insignificant in relation to the sacrifice — the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident.

It is an 'objective' test – it is not what the duty holder knew about the risk and measures to respond to the risk, but rather what a reasonable person in the position of the duty holder would have known and done in response to the risk. What is involved in the 'reasonably practicable' calculus is well summarised by the New South Wales Industrial Relations Commission in *WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182 at paras 87 and 88, where the Commission stated that it involves

the balancing of the nature, likelihood and gravity of the risk to safety occasioning the offences with the costs, difficulty and trouble necessary to avert the risk. At the one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to be in existence. ... Similarly, if the happening of an event is not reasonably foreseeable then it will not generally be reasonable to make provision against that event ...

At the other end of the scale, there will be cases ... in which known or obvious risks to safety exist. In these circumstances, the defendant will not have established a defence [of reasonably practicable] where it was reasonably practicable to have complied with the Act by ensuring that persons were not exposed to those risks. This may be the case because no measures were reasonably available or because measures which were available were not reasonably practicable. ... [T]he assessment of the reasonable practicability of those steps requires a balancing of the quantum of the risk with the sacrifice (in money, time and trouble) in adopting the measures necessary to avert the risk. In my view, where there is a known risk which entails the potential for serious injury to persons in the workplace, the defendant will generally have to demonstrate that the costs, difficulty or trouble occasioned by the measures significantly outweigh the risk.

With the exceptions of the New South Wales *Occupational Health and Safety Act 2000* and Queensland WHSA, in the event of a prosecution for a contravention of the general duties, the Australian OHS statutes place the onus of proving all elements of a general duties offence on the prosecutor. In the UK *Health and Safety at Work Act 1974* (see section 40), and in the New South Wales OHS Act (section 28 and in the Queensland Act (section 37) the onus of proving that measures were not reasonably

practicable lies with the defendant. This approach is supported by the Industry Commission which, in its Report *Work, Health and Safety* (Industry Commission, 1995, at 55-56), concluded that it:

considers it is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.

Queensland has an absolute duty, but provides the duty holder with defences (section 37): that the duty holder has complied with a relevant regulation, code of practice or, in the absence of relevant regulations/code, has taken reasonable precautions and exercised proper diligence (that is, has taken measure which are 'reasonably practicable') to prevent the contravention.

The other Australian OHS statutes generally provide that compliance with a regulation is compliance with an overlapping general duty; and either that compliance with a code of practice is evidence of compliance with an overlapping general duty; or that if a duty holder does not comply with a relevant code of practice the duty holder must show that they implemented an equivalent or better standard.

4.2 Risk Management

Curiously, the OHS statutes in all jurisdictions apart from Queensland make no reference to risk management principles, and give no guidance as to the relationship between 'reasonably practicable' and risk management. Both the 'reasonably practicable' and risk management processes appear to require duty holders to identify and weigh up risks and possible control measures, but it is far from clear from a simple reading of the OHS statutes exactly what the relationship between these two processes is. This apparent disjunction between 'reasonably practicable' and risk management principles reflects the distinct origins of each. The 'reasonably practicable' calculus emerged as a crucial qualification to the general duty provisions in Anglo-Australian OHS legislation which emerged from the 1970s in response to the Robens Report, while the central place of risk management principles in OHS regulation emerged in the 'next wave' of the OHS regulatory debate beginning in the 1980s – and these risk management principles were placed in the regulations and codes of practice made under the OHS Acts (see Bluff and Johnstone 2005).

It is our strong view that a Model OHS Act must integrate the reasonably practicable qualification with the risk management process. This particular aspect of our submission is strongly supported by the Queensland government's submission.

4.3 Integrating the Reasonably Practicable Calculus and the Risk Management Process

The reasonable practicability calculus strongly resembles the risk management process (see the detailed analysis in Bluff and Johnstone 2005) and indeed, as we have noted earlier in this submission, the cases interpreting the employer's general duty indicate that the employer should not just be responding to demonstrated risks but should have a system of searching for and identifying all possible risks, and instituting reasonable and appropriate measures (for details, see Bluff and Johnstone 2005, 212-219).

Effectively the general duties require duty holders to engage in systematic OHS management (Bluff and Johnstone, 2005, 212-219). Yet only the Queensland Act and to some extent the Commonwealth Act *explicitly* include a requirement for a duty holder to implement a risk management process in complying with the general duties. For example, section 27A of the Queensland Act provides that 'to manage exposure to risks' in the workplace, a duty holder 'must identify hazards, assess risks that may result because of the hazards', must work through a hierarchy of controls to choose and implement appropriate controls (section 27A sets out a hierarchy of hazard controls), and must monitor and review the control measures. This is reinforced by a code of practice, the *Risk Management Code of Practice 2007*. All of the OHS regulations and codes of practice made under the Commonwealth, State

and Territory OHS Acts institutionalise risk management approaches to addressing hazards (see Bluff and Johnstone, 2005, 220-237).

After examining relevant case law and closely scrutinising the OHS statutes, regulations and codes of practice, Bluff and Johnstone (2005, 237) concluded that ‘the risk management provisions incorporated in Australian OHS legislation, while clearly having features in common with the general duties and (reasonably) practicable, also have some important differences in approach.’ Bluff and Johnstone (2005, 237) noted that:

for the casual reader of the statutory general duties or risk management provisions, the relationship between the two concepts would be far from clear. In our view there is a need to make the relationship between (reasonably) practicable and risk management explicit This requires review of the way that both the general duties and the risk management provisions are framed.

There is, understandably, considerable confusion as to the relationship between the general duties and ‘reasonable practicability’, on the one hand, and risk management principles on the other. The Model OHS Act should *explicitly* require duty holders to undertake systematic OHS management in order to comply with their general duty obligations, and the Act should outline the approach to be taken in a way that integrates the concept of ‘reasonably practicable’ into the process, and also shows how duty holders should use the provisions in regulations and codes of relevance to the issue being addressed in order to comply with the general duty.

Drawing on Bluff and Johnstone analysis (2005, 237-239), the recent decisions of the courts interpreting the general duties as requiring systematic OHS management (especially decisions in the New South Wales Industrial Relation Commission), the architecture of the current Queensland Act (especially sections 26, 27, 27A and 37), and the WorkSafe Victoria (2007) guidelines on interpreting ‘reasonable practicably’, we submit that new provisions be inserted into the Model OHS Act to capture the essence of (reasonably) practicable, but that the rather ambiguous concept of reasonably practicable is no longer included as a qualification of the duties. Rather, the Act should recast the general duties (as qualified by the notion of ‘reasonably practicable’) as risk management principles which are to be applied as a means of complying with all of the duties of care, apart from the duty owed by workers. In summary, to facilitate compliance with the general duties, the Model OHS Act should integrate the notion of reasonable practicability with the risk management process, and also integrate these two with regulations and codes of practice.

4.4 The Proposed Model

In our proposed model the general duties (as proposed in chapter 3) in the Model OHS Act would be followed by a provision which sets out a risk management process to guide compliance with the general duty provisions. The risk management provision would begin by requiring duty holders to identify all reasonably foreseeable hazards or risks that might arise from the conduct of their business or undertaking. As Bluff and Johnstone (2005, 238) argue:

a full risk management process would then only need to be applied in relation to hazards and risks for which there are not more specific standards. If a regulation or code of practice has been made about the way to eliminate or minimise exposure to a particular hazard or risk, these would be implemented directly as the means of complying with the relevant duty of care, rather than applying risk management principles.

We envisage that regulations would incorporate performance outcomes and targets, whenever possible, to provide some direction about the standard of care required. (This is consistent with National OHS Standards Framework, ASCC 2007). If there are no specific provisions in regulations or codes of practice which apply to particular hazards or risks, the Model OHS Act should require duty holders to implement risk management principles which would involve (Bluff and Johnstone, 2005, 238):

- (a) assessing the risk (that is, the likelihood of the risk eventuating and the degree of harm if it did eventuate) to health, safety or welfare of workers and other persons (see above for our submission in relation to the scope of the general duties) arising from each hazard, as the basis for determining the measures necessary to eliminate or minimise risks;
- (b) determining risk control measures, and giving preference to measures that eliminate or minimise risk at source, by redesign, substitution, isolation, engineering or organisational means;
- (c) using safe work practices, administrative procedures, or personal protective clothing and equipment to supplement the risk control measures determined in (b);
- (d) implementing the relevant risk control measures unless the cost, time and trouble of doing so would be *grossly disproportionate* to the risk as assessed; and
- (e) maintaining, monitoring and reviewing risk control measures to ensure their effectiveness.

The Model OHS Act should clearly state that the requirements relating to risk management should be implemented in consultation with relevant workers, in order to fully understand risks and determine effective and suitable control measures. It should also specify that a life cycle approach to risk management should be adopted in which hazard identification, risk assessment and implementation or modifications of risk control measures are undertaken (Bluff and Johnstone, 2005, 238):

- (a) periodically in the ongoing operations of the business or undertaking;
- (b) in the planning, design, manufacture, procurement, construction and modification of work premises, plant, substances or materials for use at work;
- (c) before changes to work practices and systems of work are introduced;
- (d) prior to the shut down, decommissioning, dismantling or demolition of premises or plant;
- (e) when new or additional information becomes available from an authoritative source; and
- (f) when a hazardous exposure or incident, injury or illness, or adverse result of work environment monitoring or health surveillance indicate that risk control measures are inadequate.

Further guidance to assist duty holders carry out effective systematic OHS management should be set out in a code of practice and in other guidance material, which should (Bluff and Johnstone 2005, 238-239):

- address the development of the necessary knowledge, skills and experience for OHS risk management within organisations or the need to engage OHS specialists to lead and support this process.
- explain how different methods can be used, in different life cycle phases, to identify all reasonably foreseeable hazards; and should emphasise that the key purpose of risk assessment is to understand the nature of risks in order to make well informed decisions about suitable risk control measures; and
- provide guidance about the application of the ‘gross disproportion test’, and how the factors of cost, time and trouble are taken into account in determining risk control measures.

The guidance would also address good practice and common pitfalls in risk management. These include the need for a rigorous process of information gathering with input from those working with or near the hazard about their concerns and when devising new control measures. Hazard/risk indicators and monitoring should be used to prompt reassessment of risks when controls are inadequate. There is a need for a clear focus on eliminating or minimising OHS risks - not risk estimation at the expense of risk control or transferring risk to manage the business risks/costs rather than sources of harm. Attention to a wide range of risks is also needed, including those arising in the organisation of work (restructuring, downsizing, hours of work, flexible work relationships). (For further discussion of good practice and pitfalls see Gadd, Keeley and Balmforth (2003)).

In summary, as Bluff and Johnstone (2005, 239) argue:

duty holders would be guided to comply with their statutory duties of care by applying a problem solving approach which encourages proactive, systematic and comprehensive attention to all foreseeable hazards and risks. The approach would be flexible rather than formulaic, would emphasise the elimination and

control of risks rather than the ranking of risks, and would seek out opportunities to design or change work, work processes, equipment, substances and other aspects of the work environment to make them inherently safer and ensure that they meet human needs.

If a prosecution is brought against a duty holder for failing to comply with a general duty, the duty holder should be able to draw on the following defences, which place the onus of proof on the duty holder (on the balance of probabilities). We suggest that the defences be that:

- the duty holder fully complied with a regulation which addressed the risk and which specified a risk assessment process, a hierarchy of control and an evaluation process which were at least equivalent to the risk management processes set out in the Act;
- if there was no relevant regulation, that duty holder fully complied with a code of practice which addressed the risk and which specified a risk assessment process, a hierarchy of control and an evaluation process which were at least equivalent to the risk management processes set out in the Act;
- if there is no relevant regulation or code, and the duty holder is seeking to comply with the risk management process outlined in the Act, that ‘the time, trouble or cost’ of implementing the possible control measures to mitigate or remove the risks was grossly disproportionate to the risk as assessed. That is, the duty holder must prove on the balance of probabilities that it attempted to implement the hierarchy of control and it was not possible to implement any of the possible control measures because the time, trouble or cost of doing so was disproportionate to the risk as assessed.

In submitting that the burden of proving the defences set out above should be on the duty holder, we argue that this is consistent with the recommendation of the Industry Commission in 1995 (see above), and with the UK *Health and Safety at Work Act 1974*, the New South Wales Act and the Queensland Act. The prosecutor has to prove all other elements of the offence. The duty holder, who is required under the Act to follow a systematic approach to OHS management, is in the best position to explain why the time, trouble or cost of control measures in the hierarchy of control was grossly disproportionate to the risk as assessed. Placing the onus of the duty holder will ensure that the duty holder document the considerations that lead to the duty holder’s conclusions.

We also suggest that the Model OHS Act follow the approach to the reverse onus of proof adopted by the UK *Health and Safety at Work Act 1974* by setting out the general duty provisions so that they are qualified by the reasonable practicability of control measures (see section 2 of the *Health and Safety at Work Act 1974*, and section 21 of the Victorian OHS Act), then setting out the risk management provisions outlined above, then set out the defences as outlined above, and finally include a provision similar to section 40 of the *Health and Safety at Work Act 1974* which confirms that the onus of proving that (i) it attempted to implement the hierarchy of control and (ii) it was not possible to implement any of the possible control measures because the time, trouble or cost of doing so was disproportionate to the risk as assessed lies with the defendant.

The Model OHS Act should also provide that these are the only defences available to duty holders in relation to the general duties.

It is our submission that couching the general duties in the way we have outlined above will be more transparent and accessible than is the case with the general duties as currently formulated, and more congruent with the underlying policy objective of OHS regulation. It will also ensure that the Model OHS Act is self-contained, in the sense that all the relevant principles required for compliance are set out in the Act.

4.5 Application of the Proposed Model to the Upstream Duties

As discussed in section 3.4, we propose that an equivalent approach be applied to the upstream duties. These duty holders would similarly be required to eliminate or minimise risks so far as is reasonably practicable, operationalised as a risk management process. They would achieve this by identifying all reasonably foreseeable hazards that might arise across the life cycle of the plant, structure or substance. They would apply any relevant regulation or approved code of practice or, in lieu of these, the risk management process. Consideration of hazards and risks that may arise in *different aspects of use* of plant, structures and substances, across their life cycle, would be an integral part of the model for the upstream duties. Duty holders would also need to consider *intended and unintended use* of the item or material.

With regard to unintended use, most of the current OHS Acts allow that upstream duty holders need only ensure that plant, substances and structures (in some of the Acts) are safe and without risks to health ‘when properly used’ or ‘used for a purpose for which they were designed/manufactured/supplied’. This approach conflicts with safe design principles and the human factors/ergonomics literature. The latter emphasise that poor design as well as production pressures, fatigue, blockages and breakdown (of plant), and other factors can force human errors, inappropriate behaviours or other situations placing workers at risk. A safe design approach requires that items and materials are inherently safe, so far as reasonably practicable, rather than relying on end users to avoid risks and work error free with unsafe items or materials. We submit that the expressions ‘when properly used’ or ‘when used for a purpose for which they were designed/manufactured/supplied’ should not be part of the upstream duties as they conflict with safe design principles and recent case law.⁵

Testing and examination

An important part of ensuring that certain items and materials are safe and without risks to health (so far as reasonably practicable) is testing and examination. The present OHS Acts require such testing for plant and substances in most (but not all jurisdictions). Duty holders are required to conduct or arrange testing and examination as necessary to comply with the general duty, or the equivalent purpose of discovering and eliminating or minimising risks. (For example, see OHSA (Vic) sections 27(1), 29(1); OHSWA (SA) section 24(1)(c); OHSA (Cth) section 18(1)(b) We submit that a requirement to conduct testing and examination to discover and eliminate or minimise risks should be an integral element of the risk management process. Each duty holder should be required to take steps to conduct testing or examination, or satisfy himself/herself that another duty holder in the supply chain has taken the required action to comply.

The general duty requirement for testing and examination needs to be broad enough to embrace a range of testing. The type and scope of testing for different items and materials can be addressed in regulations or approved codes of practice. This is already done for hazardous substances through the national model standard. Very little direction is currently provided about the required testing and examination for plant or substances, and what exists tends to focus on structural or mechanical aspects of safety rather than ergonomics/human factors to understand the intended and unintended ways people will interact with the plant during operation and different aspects of use. These aspects should be addressed in the relevant regulations and codes.

⁵ See *WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Ltd* [2001] NSWIRComm 50; *WorkSafe Western Australia v Viticulture Technologies (Aust) Pty Ltd*, Court of Petty Sessions Albany, Unreported case, 15 May 2003; and see also *Inspector Batty v Vehicle Inspection Systems ty Ltd* [2004] NSWIRComm 19; *National Hire Pty Ltd v Howard* [2003] NSWIRComm 144; *Inspector Wilkie v Batequip Pty Ltd (formerly Bateman Equipment Pty Limited) T/as Ditch Witch Australia* [2003] NSWIRComm 111; *Inspector Ruth Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 298; *Inspector Ruth Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 423; *Lyco Industries Pty Ltd v Inspector Ruth Buggy (WorkCover Authority of New South Wales)* [2006] NSWIRComm 396.

Provision of information for end use

We propose that the general duty needs to incorporate a requirement to ensure the availability, in connection with end use, of adequate information. The requirement should be broad enough to embrace a range of information items and formats. Each upstream duty holder should be required to take steps to ensure the information is produced and available to others to whom they supply the material or item (or its design), or satisfy himself/herself that information produced by another duty holder in the supply chain complies and can be passed on. For example, for plant or structures the designer would begin the process, producing the required information as far as it is known to them and pass this on to those the design is provided to. Suppliers/agents should be able to access information compiled by the designer/manufacturer/project manager but if this is incomplete or not available, a supplier would need to provide the required information.

The type and scope of information to be provided, for different items and materials, can be addressed in regulations and/or approved codes of practice (as is already done for hazardous substances in the codes for labeling and MSDS). The current requirements for information provision for plant are quite varied (in Acts and regulations) but, in aggregate, they provide a useful basis for defining the information items for plant and structures (in regulations or codes). They cover intended use, restrictions or prohibitions on use; hazards/risks and control measures incorporated/required; conditions and systems of work to ensure the item is safe in different aspects of use (installation, maintenance, cleaning and so on); testing and examination conducted, required and competency for this; and emergency response procedures. Regulations or codes could also tailor information for special cases such as summary information to be provided by firms leasing or hiring plant or structures (rather than detailed information manuals).

CHAPTER 5: CONSULTATION, PARTICIPATION AND REPRESENTATION

The need to promote worker involvement in OHS is accepted at international level (see International Labour Organisation *Convention Concerning Occupational Safety and Health and the Working Environment*, No 155 of 1981), and has strong ethical (workers bear the burden of failure to manage risks at work) and practical foundations. In particular, there is a growing body of evidence on the positive benefits of worker participation in OHS (for a summary see Walters and Frick 2000). This evidence comes from many countries, including those where participatory mechanisms are not mandated by legislation. Further, evidence suggests participatory mechanisms with higher levels of worker involvement are superior to those where involvement is more circumscribed.

A number of studies (see Johnstone, Quinlan and Walters 2005, from which the following paragraphs are drawn) have identified a relationship between objective indicators of OHS performance (such as injury rates or hazard exposures) in workplaces where structures of worker representation are in place (union presence, joint safety committees or worker/union safety representatives) (Walters and Nichols 2006). For example, a US study by Fuller and Suruda (2000), found that deaths from hydrogen sulphide poisoning were more frequent in non-unionised workplaces than unionised ones in the United States (see also Dedobbeleir et al, 1990, and Grunberg, 1983). A study of OHS committees in public sector workplaces in New Jersey found that committees with more worker involvement reported fewer illnesses and injuries (Eaton and Nocerino, 2000, 265). A Norwegian study found that improvement in sickness absence was greatest where firms had adopted a participatory approach and where trade union representatives were active (Anderson, 1994). In the UK a series of studies based on British Workplace Industrial Relations Survey (WIRS later WERS) data have linked – though the strength of the association has varied - lower injury rates to workplaces with joint arrangements (especially where trade unions were involved) or found higher rates where management fails to consult over OHS (Reilly et al 1995; Nichols et al 1995, 50-55; Litwin 2000; and Robinson and Smallman, 2000). In Canada, Lewchuck et al (1996) found that the presence of joint health and safety committees was associated with reduced lost-time injuries (see also Havlovic and McShane, 1997; Shannon 1992; and Shannon et al 1996). Overviews of Canadian research, Shannon et al (1997) suggested that ‘empowerment of the workforce’ (including the presence of unions and shop stewards, union support for joint health and safety committees and general worker participation in decision-making) was one of a number of organisational factors consistently related to lower injury rates.

Despite their diversity in terms of methods and other details, taken collectively these studies support the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation.

Another group of studies, again undertaken in a range of countries, provides more indirect evidence of the effect of worker representation on OHS management practices. Generally, these studies found participatory workplace arrangements led to improved OHS management practices and compliance with regulatory standards (see Kochan et al 1977 for the USA; Beaumont et al 1982 for the UK; Bryce and Manga, 1985 for Canada; Cassou and Pissaro 1988 on France; Assennato and Navarra 1980 on Italy). For example, recent studies in the UK indicate that (trained) representatives stimulate and participate in workplace OHS management structures and procedures, tackle new OHS issues and ‘get things done’ to improve OHS arrangements (Walters et al 2001). Similarly, an Irish study of the construction industry (McDonald and Hyrmak 2002) found that ‘the variable with the strongest relationship with safety compliance is the presence or absence of a safety representative’. A number of Australian studies have also found a positive relationship between worker representation and improved OHS management arrangements, concluding the introduction of health and safety representatives (HSRs) led to major changes in attitude (Biggins et al 1991, Biggins and Phillips 1991a and b; Gaines and Biggins 1992; Biggins and Holland 1995; and Warren-Langford et al 1993).

Much of the research described above failed to consider the implications of changing work arrangements on the coverage and effectiveness of participatory structures. In Sweden, a system of regional safety representatives to cover smaller workplaces has been found to lead to greater levels of OHS awareness and activity (Frick and Walters 1998). Similar positive results for small firms have been found in other countries (Norway, Italy and Spain) where less formalised arrangements apply (Walters 2001 and 2002). Nonetheless, with some exceptions, the principle mechanisms establishing worker participation under OHS statutes in Australia and other industrialised countries – namely HSRs and HSCs - take little or no account of changing work arrangements. Rather, they presume an identifiable and relatively stable group of employees located together or in very regular contact, and working for a single employer. New work patterns can break this nexus or weaken it to the point where it would be extremely difficult for these mechanisms to be used effectively.

There are also strong ‘tripartist’ arguments for worker participation. We define tripartism in this context as the process where relevant third parties become a fully empowered ‘third player’ in the OHS regulatory process (see Ayres and Braithwaite 1992). Tripartism is a way of ensuring that both duty holders and the regulator are accountable, and provide one means of ensuring that the relationship between regulator and duty holder is scrutinised. Ayres and Braithwaite (1992, 57-59) argue that:

Tripartism is defined as a regulatory policy that fosters the participation of PIGs [public interest groups] in the regulatory process in three ways. First, it grants the PIG and all its members access to all information that is available to the regulator. Second, it gives the PIG a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the PIG the same standing to sue or prosecute under the regulatory statute as the regulator.

...

... The simplest arena to understand how tripartite regulation would work is with occupational health and safety. In a unionised workplace, elected health and safety representatives would have the same rights to accompany the inspector to in the workplace as the company safety officer. They would have the right to sit in on and ask questions at any exit conference at the end of the inspection and at any subsequent conference. They would receive copies of the inspection report and of any subsequent correspondence between the parties. If they perceived an unwarranted failure to prosecute, to shut down a machine or to take any other enforcement action, they would have the same standing as the government inspector to pursue that enforcement action.

We submit that this combination of evidence, moral principle and regulatory theory provides very good grounds for strong provisions enabling workers fully to participate in OHS within a particular business or undertaking.

The UK Robens Report recommended that every employer should have a statutory duty to consult employees on OHS (Robens, 1972, 22). Australian OHS regulation has been significantly influenced by the UK Robens model of HSRs and health and safety committees (HSCs), in providing inspection, information and consultation rights in relation to OHS. In some aspects some of the Australian OHS statutes have gone further than Robens and have adopted Scandinavian approaches to OHS regulation. For example, the OHS statutes of the Commonwealth, Victoria, South Australia, Western Australia, Tasmania and the ACT give the HSR the power to issue a ‘provisional improvement notices’ (PINs, called ‘default notices’ in South Australia, ‘written directions’ in Tasmania, and a ‘notice of safety hazard’ in the Northern Territory), requiring the contravention to be rectified within a specified period. The OHS statutes of the Commonwealth, Victoria, South Australia and ACT do not just empower HSRs with the right to issue a PIN for a contravention of the OHS legislation, but go further to give HSRs the power to direct that work causing an ‘immediate risk’ to the OHS of any person cease. This power is generally included as part of a process for HSRs to consult with employers (and in some statutes, with the HSC and an OHS inspector) to resolve an OHS issue. Some of the Australian statutes have taken other approaches to institutionalising ‘tripartist’ approaches in their OHS statutes – most notably in relation to rights of entry vested on union officials to investigate (and in New South Wales to prosecute) contraventions of OHS statutes duties by employers.

5.1 Health and Safety representatives and health and safety committees

Provisions for health and safety representatives and committees are now well established in all of the Australian jurisdictions (including in the new Northern Territory Act). We consider it to be uncontroversial that the Model OHS Act should include provisions enabling employees, HSRs or employers to initiate the establishment of a health and safety committee, with the kinds of functions which are outlined in all of the Australian OHS statutes. The six key issues facing the Panel are in relation to HSRs, and include: (i) whether there should be a general duty on an employer (or, if our submission is accepted, a person conducting a business or undertaking) to consult with workers in relation to all OHS issues; (ii) how ‘consultation’ should be defined; (iii) who should the person conducting a business or undertaking be required to consult; (iv) the processes by which HSRs should be elected; (v) the consultation, inspection, information and other rights, powers and function to be given to HSRs; and (vi) whether HSRs have enforcement powers.

(i) Duty to consult

It is our submission that a person conducting a business or undertaking should have a general duty to consult with all workers (defined broadly – see section 3.3 above) involved in the business or undertaking to enable workers to contribute to the making of decisions affecting their OHS. This would mean that even if workers did not trigger the provisions for the election of HSRs, the employer would still need to consult with workers over all decisions affecting their OHS. It should be an offence attracting a significant penalty for a person conducting a business or undertaking to contravene this duty.

(ii) Definition of ‘consult’

Walters and Nichols (2006) argue that worker consultation is most effective when:

- Workers are informed by their employers/managers about OHS matters in a timely manner;
- The information provided is adequate; and
- This process allows workers and/or their representatives an opportunity to digest, understand and respond to the information.

Consistent with these views, the Maxwell Report (2004) suggested that consultation involves:

- sharing with the workers information about the matter on which the employer is required to consult;
- giving the employees a reasonable opportunity to express their views about the matter; and
- taking in account those views.

The New South Wales OHS Act (section 14) defines consultation as the sharing of relevant OHS information; giving employees opportunities to express their views and to contribute to the resolution of OHS issues; and the employer valuing and taking into account these views.

We support these definitions of consultation.

(iii) Who should the person conducting a business or undertaking be required to consult

All workers to whom a general duty is owed by the employer (person conducting a business or undertaking) (see section 3.3 above) should have the right to be consulted. In most of the Australian OHS statutes (with the exception of Queensland and the Northern Territory) only ‘employees’ of an ‘employer’ at the employer’s workplace can participate in the processes to establish work groups and elect HSRs (see Johnstone, Quinlan and Walters, 2005, 102-103). There are provisions in the Victorian, Western Australian, New South Wales, and ACT OHS Acts which attempt to include workers who are not ‘employees’ in the participation process.

For example, extensive provisions aimed at including independent contractors in the process are to be found in the Victorian Act, where section 44(1)(e) provides that in negotiating designated work groups (DWGs) the employer and employees can negotiate whether a HSR is authorised to represent independent contractors ‘engaged’ by the employer and their employees. It is likely that this provision will be very broadly interpreted to include sub-contractors, sub-sub-contractors and parties further down the contractual chain (see Creighton and Rozen 2007, 233). In addition, Part 7, Division 2 provides for the negotiation of DWGs covering more than one employer. Section 47 provides that DWGs may be established which comprise employees of an employer in one or more workplaces, and employees of one or more other employers at one or more workplaces. For example, where an employer engages a principal contractor to construct a new plant at the employer’s workplace, and the principal contractor both employs its own employees and engages contractors (which in turn employ their own employees and engage sub-contractors), all the employees and all of the employers can negotiate a DWG for the construction process. Section 52 makes it clear that these multi-employer negotiations for a DWG have no effect on other arrangements for DWGs made by the original employer with the employer’s pre-existing employees at the workplace.

Similarly, the Western Australian Act provides that a scheme to elect HSRs may include provision for the election of one or more HSRs for one or more workplaces, and may provide that a contractor, and a person employed by a contractor be treated as employees of the person who engages the contractor (see section 30B).

A different approach is taken in the *Occupational Health and Safety Regulation 2001* (NSW), where clause 23(2) specifies that the factors to be taken account of in setting up a work group include the pattern of work of employees, including the representation of part-time, seasonal or short term employees; the geographic location where employees work, including the representation of employees in dispersed locations such as transport work or working from home; and the interaction of the employees with the employees of other employers (including contractors, and labour hire). Further, the New South Wales *OHS Consultation Code of Practice 2001*, at 2.4.2 outlines ways a host employer or principal contractor can facilitate consultation in an array of different scenarios where workers are provided by a labour hire firm, contractors or multiple sub-contractors. Examples cited include the provision of meeting space, communication assistance (such as telephone and email access for HSRs), inclusion in OHS consultation and reporting systems, and inter-firm consultation about how to create the most effective lines of communication and consultation (see further Johnstone, Quinlan and Walters 2005).

Finally, under section 39 of the ACT Act principal contractors in construction can request the Commissioner to declare that the provisions in the Act relating to the negotiation of work groups, the selection of, and the powers, of HSRs and HSCs apply in relation to the sub-contractor’s employees.

The Victorian, Western Australian and ACT provisions seem extraordinarily complicated, and we are aware of little evidence that they have been effective in including workers other than employees in the process. It is our submission that a much simpler process is to enable ‘workers’ and all other persons engaged in work for the business or undertaking to be involved in the process, and to define ‘workers’ extremely broadly, following the Northern Territory definition discussed in section 3.3 above. Guidance material should then advise how the process can be made as inclusive as possible (see the New South Wales provisions above).

(iv) How Should HSRs be elected?

The two stage process of negotiating work groups and then electing HSRs seems well established in the Australian OHS statutes, and should be included in the Model OHS Act. The provisions in most of the statutes, however, seem to be overly legalistic and they should be streamlined and simplified in the Model Act. Given the evidence that trade union support significantly improves the effectiveness of OHS consultation processes, we submit that the Model Act should make explicit the important roles of

unions in both stages of the process. And given that HSRs are elected to represent workers, employers should be required to support and encourage the process of election, but should play no role in the election process.

(v) The consultation, inspection, information and other rights, powers and function to be given to HSRs

Once elected, under the current Australian OHS statutes, HSRs have a wide range of powers generally to be exercised in relation to the work group only, and with correlative duties imposed upon employers. Most of the powers and functions of Australian HSRs are similar to those vested in HSRs under the UK *Health and Safety at Work Act 1974*, and include:

- the right to inspect the workplace;
- the right to be consulted where workplace changes affect OHS;
- the right to be present, with the consent of the employee, at interviews between an employee and employer/inspector;
- the right to accompany an inspector on an inspection (or at least to be told of the presence of an inspector at the workplace);
- the right to information affecting the OHS of employees;
- OHS training and facilities;
- time off work to perform HSR functions;
- the right to assistance from OHS experts (but not in the Queensland, Tasmanian, Western Australian or ACT OHS statutes); and
- the right to investigate complaints about OHS-related issues.

It is our submission that all of these rights and powers (and the correlative duties upon persons conducting a business or undertaking) should be included in the Model OHS Act. We are of the view that the provisions in the Victorian Act would provide the best starting point for the Panel to develop the provisions governing the rights, powers and function to be given to HSRs. It is also our submission that these processes for negotiating work groups and electing HSRs should not include any restrictions on the sizes of businesses or undertakings that can participate, as such restrictions work against small business (see Johnstone, Quinlan and Walters, 2005, 104 and 109).

(vi) Should HSRs have enforcement powers?

As noted above, a majority of the current Australian OHS statutes vest a HSR with the power to issue a provisional improvement notice (or some equivalent). Recognising that there may be occasions when considerations of profitability and OHS are in conflict, and following the tripartist arguments outlined above, we submit that the Model OHS Act should vest HSRs with the right to issue a provisional improvement notice where the HSR detects a contravention of the Act. Again, the starting point for developing this provision should be the Victorian provisions. The provisions should require the HSR to send a copy of the notice to the OHS inspectorate, and should also require the HSR to report a contravention of the notice to the inspectorate.

For the same reasons we submit that the Model OHS Act should give HSRs the right to direct that work to cease if it causes an immediate risk to the health and safety of any person. Once again we favour the Victorian model, which like most of the other provisions in the other Australian statutes vesting such a right, includes the right in a general process of resolving OHS issues.

We further submit that the Model OHS Act should codify the individual common law right to refuse to do dangerous work. As we argued in section 1.1, the model Act should, as far as is possible, be self-contained, so that such an important right should be included in the Act. Further, the common law right is vague, and a clear statement of the right of an individual to refuse dangerous work should be

included in the Act. Workers would exercise the individual right in circumstances where the HSR was not present, or while the HSR goes through the procedures leading up to the exercise of the HSR's right to stop dangerous work.

The person conducting a business or undertaking should, of course, be able to summon an inspector to help resolve the issues leading to the provisional improvement notice or the work cessation order, or to have the notice or order reviewed.

5.2 Participation in Small Workplaces: Roving Safety Representatives

As Johnstone, Quinlan and Walters (2005, 110-112) argue, research into ways of promoting OHS in small enterprises points to the benefits of legislative measures for roving or regional health and safety representatives that are organised by trade unions. Such arrangements currently exist in Sweden, Norway and Italy, and have been under discussion in other EU countries like the UK (Frick and Walters 1998; and Walters 2002).

In Sweden legislative provisions for regional health and safety representatives (RSRs) have applied across all economic sectors since the *Work Environment Act* 1974. They provide for the appointment of RSRs to represent workers in firms with less than 50 workers where there is at least one trade union member. The RSRs have rights of access to such workplaces and similar rights to investigation and inspection to those held by ordinary health and safety representatives in Sweden. The mandated RSRs tasks are threefold:

- to act as itinerant representatives who inspect and investigate OHS conditions in small enterprises, and request changes they consider necessary to achieve improvements in the working environment;
- to promote employee participation in OHS, including the recruitment, training and support of in-house health and safety representatives;
- to activate local OHS work, within the overall framework for systematic management of the working environment in small enterprises.

The scheme was originally funded from a worker protection contribution paid by employers, although in recent years this has proved inadequate and the shortfall has been met by trade unions. The scheme has been generally regarded as a success, attracting considerable international interest and serving as a model for policy initiatives in other countries.

In Norway similar arrangements have been in place since 1981. However, the Norwegian arrangements only apply to the construction industry and regional representatives only operate in workplaces without local representatives.

In Italy measures allowing trade unions to appoint territorial representatives were included in reforms of legislation on worker representation in OHS which came into force in 1997. For enterprises operating in the same industrial district and employing less than 15 workers, territorial representatives may be nominated or elected according to procedures for trade union representation determined by collective agreement. The effect of this is that in sectors like construction, crafts, and hospitality — especially in northern Italian regions — agreements between employers and unions provide detailed arrangements for the operation of legislative provisions. A further support for the system provided under Italian legislation is a national network of '*ente bilaterale*'. These joint trade union/employer bodies act to support initiatives on representation in OHS, and are also intended as the first point of reference in cases of dispute over rights to representation, information and training.

The essential legislative requirement in all these systems is giving workers in small enterprises rights to representation and access to HSRs from outside their workplaces. Beyond this, the resourcing of schemes, selection of representatives and their functions and support vary from country to country (as

does whether this is achieved through legislation or voluntary agreements). British proposals in 2003 to extend representational rights to employees who are not employed by the same employer as their representative offers a way forward that could apply to both multi-employer worksites and to workers in small enterprises (Health and Safety Commission (HSC) 2003).

We suggest that the Panel explore the possibility of developing provisions for regional safety representatives, with the kinds of functions given to such representatives in the Swedish system. At the very least, the issue of small workplaces should be addressed through the union entry provisions.

5.3 Union Right of Entry

The evidence seems clear that HSRs are not to be found in the majority of workplaces, which has led to concern amongst some policy makers, and a heightened interest in other approaches to ensure that workers interests in OHS are protected. In Victoria, for example, the *Maxwell Report* (Maxwell 2004, para 991) stated that: ‘consultation and participation are essential to the achievement of good health and safety outcomes’ and that ‘widespread lack of representation of workers’ health and safety interests represents a major failure’ of the 1985 Victorian OHS Act. Maxwell was concerned that processes to enable HSRs to be elected in most workplaces ‘will take quite some time’ (para 995), and ‘in the meantime, the Act should include an alternative mechanism for worker representation: the ‘conferral of a right of entry on authorised representatives of unions ... for the purposes of investigating any suspected breach of the OHS legislation’ (para 1018). In other words, in the absence of adequate ‘internal’ provisions for worker representation and participation, the OHS statute should enable union officials to investigate suspected contraventions of the OHS statute.

The first Australian OHS statute to include union entry powers was the *Occupational Health and Safety Act* 1983 (NSW) (sections 31AG-AP), and these provisions were retained in the OHSA(NSW) in 2000. Sections 76-85 of the OHSA (NSW) give an ‘authorised representative’ (an officer authorised under Part 7 of Chapter 5 of the *Industrial Relations Act 1996*) of an ‘industrial organisation’ (that is, a trade union) limited powers to investigate ‘for the purpose of investigating any suspected contravention of the occupational health and safety legislation’. While the union representative can enter the premises without notice, she or he must notify the occupier of the premises as soon as is reasonably practicable. The authorised representative must produce the authority provided by the Industrial Registrar when required to do so by the occupier of the premises. The powers include making searches and inspections, and taking photographs and making video and audio recordings, requiring the occupier of the premises being investigated to provide assistance and facilities reasonably necessary to carry out the investigation, and requiring the production of any documents at the premises that directly affect or deal with the OHS of persons working at those premises, for inspection. In *Jim Pearson Transport v Transport Workers’ Union* [2007] AIRC 559 the Australian Industrial Relations Commission held that these powers required an employer to answer relevant questions, as well as producing documents. The authorised representative may request assistance from an inspector. The New South Wales Act also empowers the secretary of a trade union registered in NSW to commence proceedings for a contravention (section 106). To date, about a dozen union prosecutions have been conducted under the New South Wales OHS legislation.

In the last few years, similar provisions have been included in the Victorian, Queensland, ACT and the Northern Territory OHS Acts, although the details of the provisions (method of appointment, procedures upon entry, powers after entry etc) vary from statute to statute. The Victorian, Queensland, and ACT provisions require an authorised representative to have completed approved training, while the Northern Territory Act requires the representative to have appropriate qualifications and experience. These Acts, however, do not give union officials any enforcement powers. Further, the federal *Workplace Relations Act* 1996 (section 756) provides that union officials having a right of entry under a state OHS Act can only exercise these powers if they also hold a permit under Part 15 of the *Workplace Relations Act*.

We submit that there are very good reasons for including union right of entry powers in the Model OHS Act. They include the fact that currently a majority of the Australian OHS statutes (including the statutes of the three most populous states) include such provisions; the tripartite argument outlined above; and the view articulated by the Maxwell Report (above).

The model Act should ensure that the exercise of the right of entry is not hindered by an overly technical approach to particularising the alleged contravention which is to be investigated (see *Appeal by Australian Municipal, Administrative, Clerical and Services Union* (C2007/3800), AIRC, Full Bench, 8 February 2008, which held that employers can refuse the union representatives entry to a workplace if the representative cannot provide unambiguous proof of the existence of reasonable grounds for suspecting a breach of the OHS Act.

If a union representative detects a contravention, the representative can inform an OHS inspector, a HSR (if there is one), or trigger industrial relations dispute resolution processes. The logic of tripartism (see above) also suggests that the union representative should have enforcement rights similar to those vested in the OHS inspectorate: the right to issue provisional improvement notices, to direct that work causing an immediate threat to health and safety cease, to issue infringement notices, and to initiate prosecutions.

5.4 Protection from Discrimination and Victimisation

All of the worker participation provisions discussed above will come to nought unless the Model OHS Act contains a very strong set of provisions prohibiting discrimination against any person on the grounds that that person raised or engaged in OHS issues, carried out an OHS function or exercised a right under the OHS Act. While we do not oppose the model Act providing workers with civil processes to enforce their right not to be the subject of discrimination, the model Act must be enforceable by the inspectorate exercising all of its powers, including prosecution. In a prosecution, once discrimination or victimisation has been proved, the onus should be on the alleged discriminator to show on the balance of probabilities that another reason (other than involvement in OHS activities) was the *dominant* reason for the discrimination. The maximum penalty for conviction for such discrimination or victimisation should be the maximum available under the Act.

CHAPTER 6: REGULATOR FUNCTIONS, POWERS AND ACCOUNTABILITY

The Model OHS Act should also set out the basic functions and powers of the regulator, to include administering the Act; inspecting workplaces and enforcing the Act; monitoring OHS standards; making recommendations and providing advice on the Act, regulations and codes of practice to the relevant Minister; advising persons conducting a business or undertaking, workers and others on their rights and obligations under the Act; developing guidance material and interpretive documents to guide compliance with the Act; fostering cooperative and consultative relationships between persons conducting a business or undertaking, workers and others; promoting education and training in OHS; promoting public awareness in OHS; initiating, conducting, encouraging and funding OHS research; collecting and publishing OHS data; reporting in detail on its inspection and enforcement activities; and conducting evaluation research into its programs and sharing that research with the other Australian OHS regulators. Crucially the Model OHS Act should require the regulator to ensure that its policies, procedures and programs (including those pertaining to recruitment, training, organisation, inspection, and enforcement) are consistent with those of other OHS regulators. The Model OHS Act should also require regular meetings of inspectorates to discuss common approaches.

It is our submission that the inspection powers set out in the New South Wales and Victorian Acts are appropriate, and that the Model OHS Act should be drawn from those provisions. Given that the entire emphasis of the OHS standards we discussed in chapters 3 and 4 are focused on requiring systematic approaches to OHS management, one absolutely crucial point is that the inspection powers should be primarily focused on inspecting whether organisations are taking a rigorous systematic approach to OHS management – the inspection powers should be broadly focused on monitoring compliance with the standards in the model Act, and in the regulations made under the OHS Acts, and not focused on inspecting ‘incidents’, or gathering information or evidence in relation to ‘incidents’. The model Act should ensure greater emphasis on proactive inspection, with targeted programs developed at national, state, and regional levels.

Regarding the question ‘how should the Model OHS Act provide for the appointment, qualifications, powers and functions of inspectors?’ we would make the following observations, drawn from Johnstone and Quinlan’s recent empirical research into OHS inspectorates in four states. In practice, the question of inspection powers cannot be divorced from some attention to the appointment, qualifications, training, powers and functions of inspectors who must implement these laws. Over the past decade inspectorates have experimented with a range of different recruitment and qualification-based selection strategies, including efforts to improve the gender balance amongst inspectors. The lessons learned from this process are not simple but can be summarised as follows. There has been an increased tendency to move away from trade background except where this sort of training and related industry experience is demonstrably valuable (notably in areas like construction, mining and to a lesser extent transport). A background or role in OHS (such as a management or HSR position) is increasingly valued. Industry experience is still seen as valuable in traditional areas (such as manufacturing and those just mentioned) as are the obtaining of specific vocational qualifications where appropriate (such as a forklift truck license). At the same time, there has been an increasing emphasis on tertiary qualifications (degrees and diplomas), especially those directly related to OHS (either at the recruitment stage or encouraging inspectors to pursue these after appointment). In inspectorates achieving a critical ‘mass’ (such as Victoria, Queensland, New South Wales and Western Australia) there is also recognition of the value of the appointment of some inspectors with specialist training (in engineering, ergonomics, occupational hygiene and the like) to deal with high hazard workplaces and provide specialised advice to other inspectors. In terms of induction/training, most state inspectorates have moved to offering a dedicated in-house training program of between three and six months duration for new inspectors (including fieldwork to test knowledge). These programs include not simply training in legislation and investigation but a range of other areas including OHS and interpersonal skills (communication and negotiation). In general, inspectors (including those appointed

prior to these changes) are very supportive of these new training regimes and our own observations during workplace visits indicate that inspectors make good use of these skills. Further, the organisation of inspectors into broad industry teams in many jurisdictions appears to facilitate the development of knowledge amongst less-experienced inspectors.

Drawing these observations together we would make a number of points. To be effective, the new Model OHS Act needs to recognise that the wide array of hazards and broad-ranging duties under modern OHS legislation require inspectors to have good background knowledge of OHS and the capacity to make often complicated discretionary judgements. This knowledge applies not only in deciding when and what action needs to be taken but how to make this intervention most effective. A related issue in this regard is the provision of advice as to potential remedies when issuing an improvement notice (the Victorian jurisdiction has recently addressed this issue and we commend this approach). In terms of selection the criteria identified above should be recognised. In our view OHS knowledge and work experience are critical selection criteria and based on our observations we would not endorse recruitment that heavily draws on law enforcement agencies (notably the police) unless applicants can also meet this criteria. With regard to training we believe a number of state jurisdictions (such as Victoria and Western Australia) provide models, as does their support for ongoing tertiary studies in OHS by inspectors. It should be noted that smaller jurisdictions may lack the resources to develop their own training programs.

It is crucial that the OHS regulator be fully accountable for its functions and activities. The Model OHS Act should require inspectorates to make all of their activities as transparent as possible. This includes making public their inspection, and enforcement procedures, policies and guidelines (which will have the welcome by-product of improving general deterrence). It also means requiring inspectorates to publish detailed annual reports on all of their inspection and enforcement activities, for example the number of inspections, whether they are reactive or proactive, the types of inspection programs implemented, the number of notices (and the industries and hazards that they addressed), to enable public scrutiny of all accepted enforceable undertakings; and providing summaries of all prosecutions. All enforcement decisions should be subject to internal and then external review.

As we argued in chapter 5, 'tripartism' is one approach to making the regulator more accountable. Worker representatives should be armed with enforcement powers very similar to those provided to the regulator, as a means to promoting accountability under the Act.

On no account should the advisory and enforcement activities of inspectorates be separated. Such a separation would be disastrous for OHS enforcement, and make it impossible to implement principles of responsive enforcement (see chapter 7), because it would mean that individual inspectors could not work their way up and down the hierarchy of enforcement sanctions.

CHAPTER 7: ENFORCEMENT

State enforcement is crucial to ensuring that Australian workers are not exposed to OHS risks. Australian OHS enforcement in the past has been mired in the old debate: is the best way to maximise compliance with OHS standards to *advise and persuade* duty holders to comply with standards *or punish* them for not doing so (the ‘deterrence strategy’)? Historically, since the earliest Australian colonial OHS statutes the *advise and persuade* model became the dominant model, institutionalising what Carson has perceptively labeled the ‘ambiguity’ and ‘conventionalisation’ of OHS crime (see Johnstone, 2004a, 34-45). We agree with the current approach amongst regulatory theorists to adopt a judicious mix of the two, through responsive regulation and interactive enforcement and compliance using a hierarchy of enforcement sanctions (this is discussed in detail in Gunningham and Johnstone, chapters 4, 6 and 7, and also in Johnstone 2004b). For this reason we submit that the Model OHS Act’s approach to enforcement (including prosecution – chapter 8) should be governed by the principles of responsive enforcement, and by the fact that the standards in the Model OHS Act, and in regulations and codes made under the OHS Acts, primarily require duty holders to undertake systematic OHS management.

7.1 Responsive Enforcement of Standards requiring Systematic OHS management

In ‘responsive enforcement’ regulators ‘should be responsive to the conduct of those they seek to regulate’, or more particularly, ‘to how effectively citizens or corporations are regulating themselves’ before ‘deciding on whether to escalate intervention’ (Braithwaite, 2002, 29. See also Ayres and Braithwaite, 1992, chapter 2). Indeed, responsive enforcement, using an interactive and graduated enforcement response, has been developed because of the limitations of both the ‘advise and persuade’ approach and the deterrence approach. As Braithwaite (2002, 32) notes, it ‘covers the weakness of one with the strengths’ of the other. Responsive enforcement gives OHS regulators a framework to react appropriately and effectively to the ‘motivational diversity’ demonstrated by firms faced with OHS regulatory requirements and outlined in the previous section. The principles of responsive enforcement are supported both by ‘a rational choice analysis of what works in securing compliance with regulatory laws and some sociological analyses that reject the assumptions of the rational choice model’.

In using an enforcement hierarchy, the challenge is to develop enforcement strategies that punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily. As Braithwaite (1993, 63) argues, regulatory institutions ‘should be designed to nurture rather than destroy civic virtue in the business community ... [and] shift to a hard headed approach when virtue fails, as it often will.’ The regulator cannot assume that *all* duty holders will comply voluntarily, although many will, and for various motivations. Some duty holders will need mild enforcement action to spur them on to improve OHS. Others will not comply unless strong enforcement action is taken against them, or at least threatened. For this reason, credible enforcement must include a significant deterrence component, but this must be targeted to offenders and circumstances where ‘advice and persuasion’ have failed, and where deterrence is likely to be most effective. Strong enforcement measures are also required against the irrational and the incompetent.

An interactive and graduated enforcement response employs advisory and persuasive measures at the bottom, mild, administrative sanctions (improvement and prohibition notices, on-the-spot fines and enforceable undertakings) in the middle, and punitive sanctions (prosecution) at the top. Regulators should start at the bottom of the pyramid assuming that business is willing to comply voluntarily. Where, however, this assumption is shown to be ill-founded regulators should escalate up the enforcement pyramid to increasingly deterrence-orientated strategies, and, if necessary, ‘an incapacitative response’ (Braithwaite, 1993, 88). A graduated enforcement response, as Ayres and Braithwaite (1992, 39) observe, does not rely on ‘passive deterrence, that is deterrent credibility shaped by the potency of the sanctions waiting to be used.’ Rather it relies on a ‘more dynamic modelling of deterrence as an unfolding process’, hence the importance of active escalation.

Further, we note that the current Australian OHS statutes and regulations depend primarily on process standards (risk management processes) (see section 1.1 above), and consequently, enforcement measures must be consistent with promoting systematic OHS management, rather than focusing on incidents which have already occurred. (For a strong critique of the tendency of OHS enforcement to focus too heavily on incidents that have occurred, see Johnstone (2003a and b)).

Accordingly, we submit that **the enforcement provisions in the Model OHS Act be drafted to enable and facilitate responsive enforcement of OHS standards which require duty holders to adopt systematic OHS management.**

7.2 Structuring the Model OHS to Enable Responsive Enforcement

First, the Model OHS Act should structure the enforcement powers of inspectors in a way which models the hierarchy of sanctions – starting with ‘advisory and persuasive’ powers, then administrative sanctions (improvement, infringement and prohibition notices), enforceable undertakings, and prosecution (see Gunningham and Johnstone, 1999 chapter 4; Johnstone 2004b; and Gunningham 2007, chapters 5 and 6).

It is our submission that the Model OHS Act should include both infringement notices and enforceable undertakings (see below, for further discussion).

Second, to ensure that duty holders are induced to comply voluntarily with minimum escalation by inspectors up the hierarchy of sanctions, paradoxically the Model OHS Act should have very heavy penalties for successful prosecutions under the Act; should include sanctions other than fines; should provide more sentencing guidance to the courts than is currently the case under the Australian OHS statutes, and should include the equivalent of ‘industrial manslaughter’ provisions in the Act for fatalities (and serious injuries) caused by gross negligence. These issues will be addressed in chapter 8.

7.3 Infringement Notices and Enforceable Undertakings

The two sanctions that are not to be found in all of the Australian OHS statutes are infringement notices and enforceable undertakings. Our submission is that both be included in the Model OHS Act, crucially because the taller the hierarchy of sanctions, the more effective responsive enforcement is likely to be.

Infringement notices (on-the-spot fines) enable enforcement of lesser offences in a quick, easy and inexpensive process without costly court action or the need to prove the elements of an offence (ALRC, 2002, 395-8; Bluff and Johnstone, 2003). The studies on the deterrent effect OSHA citations (summarised in Johnstone 2004b) support the use of infringement notices in Australian OHS enforcement. This is bolstered by the only Australian empirical study of OHS infringement notices (Gunningham, Sinclair and Burrill, 1998), which suggested that infringement notices were perceived as an effective means of ‘getting the safety message across’; that when issued they were treated as a significant ‘blot on the record’ which spurred preventive activities; and that, in some larger companies, infringement notices issued was an indicator for judging the safety performance of site/line managers.

While these arguments provide a positive rationale for the use of infringement notices, there are some legal concerns that the lack of court appraisal and associated court procedure may undermine principles of due process and fairness; and that innocent people may be induced to pay on-the-spot fines to avoid the inconvenience and cost of contesting proceedings. There is also concern that the procedures for the use of infringement notices may be diverse, inconsistent and essentially pragmatic (ALRC, 2002, 398-404; Fox, 1995a and b), although these problems would be reduced by the adoption of a transparent decision-making framework. Other criticisms focus on the suitability of an infringement notice as a response to a criminal offence (Gunningham and Johnstone, 1999, 257). First, infringement notices are

subject to the standard criticisms of fines (see below). Second, infringement notices, by circumventing criminal processes in the courts, remove a significant deterrent effect of the scrutiny and social stigma of a court hearing. Third, the ‘ambiguity’ of OHS crime (which we discuss briefly above) may be exacerbated by the use of sanctions like infringement notices, particularly where they impose low penalties for relatively serious offences (see Carson and Johnstone, 1989).

Consequently, infringement notices should be reserved for non-complex, minor offences where the breach is clearly defined in law, the facts are easily verified, the evidence is non-controversial, and the offences have a direct bearing on risk control (see Bluff and Johnstone, 2003; ALRC, 2002, 418). For example, infringement notices might be issued when exposure to noise exceeds exposure standards, portable electrical equipment is not RCD protected, and machines are not guarded. Together with improvement and prohibition notices and prosecution, they can be used to rectify individual hazards, and to attract management attention (see above), while improvement notices and enforceable undertakings can be used to require the implementation of systematic OHS management. To ensure progress towards systematic OHSM and the abatement of individual hazards, infringement notices should rarely be used on their own.

Enforceable Undertakings in some of the Australian OHS statutes are modelled on enforceable undertakings in the areas of corporate and security law, trade practices and consumer protection. At their most basic level, enforceable undertakings are promises enforceable in court. They are ‘offered’ by an OHS duty holder, and operate as an agreement between the duty holder and an OHS regulator, in which the duty holder undertakes to do or refrain from doing certain activities. The agreement effectively serves as a substitution for, or augmentation of, alternative regulatory enforcement such as civil, administrative or even criminal action. If contravened, the undertaking is enforceable in court, and the relevant OHS statutes generally provide for additional penalties for such contraventions of the undertaking. This process allows for innovative, flexible and efficient solutions to breaches (Longo, 2002), and introduces restorative justice to regulation – empowering the person regulated as well as the regulator (Parker 2004).

Queensland was the first Australian jurisdiction to introduce enforceable undertakings for OHS offences. The capacity to impose such undertakings has now been included in Tasmanian and Victorian legislation, but not, to date, in New South Wales, although a 2006 review of the OHS Act 2000 recommended its inclusion (WorkCover NSW 2006, 52). In a modified and limited form, this concept has been introduced under amendments made to the Western Australian *Mines Safety and Inspection Act 1994* (section 101C; see further Pt 9 Div 2). Courts are now able to make an order allowing an offender to pay a monetary penalty or enter into an undertaking with the State Mining Engineer to take action such as fixing up the problem, publicising their wrongdoing or engaging in some broader OHS initiative.

Enforceable undertakings are less adversarial than prosecution, and they promote organisational reforms in that they also enable regulators to tailor the response to the particular circumstances and management capacities of the regulated enterprise. They can, for example, focus on defects in OHS management systems and structures and how these might be overcome (for instance, a requirement to implement systematic OHS management, with implementation subjected to third party audit). There is evidence that enforceable undertakings are quicker and more cost effective than court proceedings, yet still capable of being enforced and transparent (ALRC 2002, Ch 16). According to Parker's research (2003, 8–9) in the context of trade practices, they provide regulators with:

...more innovative, expansive and preventive remedies than are available through court orders. They can both attract management attention, and then can capitalise on that by requiring the company to appoint appropriate staff and implement a compliance program to meet particular standards and by requiring ongoing attention to audits and reports. This will, however, only be done if enforceable undertakings require independent review or audit of compliance with the undertakings.

Although enforceable undertakings can be found within the legislation governing various state and federal OHS regulatory agencies, Queensland appears to have been the only jurisdiction in which enforceable undertakings have been regularly used since their introduction in 2002. In Queensland, there is no evidence to suggest that enforceable undertakings have been adopted by employers as a 'soft option' in lieu of prosecution and penalties. Over the five year to mid 2008, there have been only 105 applications for enforceable undertakings. Leaving aside the enforceable undertakings which are currently under consideration, 51 per cent of enforceable undertakings have been accepted by WHSQ. Some 29 per cent of applications were rejected and 21 per cent were withdrawn.

In those cases where an enforceable undertaking was accepted, the average value of the undertaking (\$178,000) was five times greater than the average value of the court penalty (\$34,000). In some cases, the value of the undertaking was in excess of 30 times greater than the available maximum penalty. The largest sum for an enforceable undertaking was \$1.5 million.

The Model OHS Act should ensure that OHS regulators are properly accountable for their use of undertakings. The regulatory literature and the Queensland experience with enforceable undertakings suggests that for undertakings to be effective enforcement measures, the regulator should issue publicly available guidelines indicating when enforceable undertakings will be accepted. The guidelines should specify that the regulator will not accept an undertaking if the alleged offender denies liability, and if the alleged offender's record suggests an undertaking will not be sufficient to deter it from future contraventions. Other key factors include the history of previous complaints and enforcement action against the company, prospects for rapid resolution of the issue, and the apparent good faith of the alleged offender.

Importantly, enforceable undertakings should not be seen as a 'soft option', and not available when there are strong reasons for preferring a deterrent or retributive sanction (for example, where there are fatalities or serious injuries). In serious matters enforceable undertakings might be used for 'supplementary remedies' that cannot be obtained through a court order, and might be used 'as a form of banning advisers and directors without the need for formal administrative action' (Parker, 2003a: 6). In our view, enforceable undertakings should not be an alternative to prosecution where contraventions have posed very significant risks to workers and/or members of the public or have resulted in fatalities or very serious injury or ill-health. It should be open to a duty holder to propose an undertaking at any stage after a contravention has been investigated – we see no strong reason for confining undertakings to situations where prosecution proceedings have been initiated.

Enforceable undertakings should be consistently used, not over-utilised, open to public scrutiny (for example, via the regulator's website), entered into voluntarily and should require comprehensive systematic approaches to OHSM. OHS regulators must have specialist in-house staff to oversee the implementation of enforceable undertakings, and must develop auditing criteria, oversee the appointment of, and ensure the independence and quality of work of, auditors, and strongly enforce contraventions of undertakings. The giving of an enforceable undertaking should not result in an admission of fault or liability (see Johnstone and King, 2007).

To be effective enforcement mechanisms, there needs to be public confidence in the process of accepting or rejecting applications for undertakings, and enforceable undertakings need to be monitored and enforced. Accountability is central to the successful operation of enforceable undertakings, and operates at two key stages (Parker 2004, 241-243): in decision-making; and in performance (monitoring).

Formal accountability is of particular concern at two stages. The first is the decision stage where an undertaking is accepted or rejected. These decisions should be transparent and consistent. They should be subject to judicial review, as is the case for enforceable undertakings in OHS in Australian jurisdictions. There should also be informal and deliberative accountability, in the sense that all affected

parties must be identified and involved in the decision-making process: for example, representatives of employer associations, trade unions and the regulator should be involved in the decision to accept or reject an undertaking, and any workers affected by the contravention which led to the undertaking, should be consulted. There should be public scrutiny of regulatory discretion: for example, accepted undertakings should be available for public scrutiny (on the OHS regulator's website). A public register is essential for the public accountability of enforceable undertakings. It also assists other duty holders to work out how to craft their own proposed undertakings.

The second stage is the performance (or compliance) stage. Here it is crucial that the OHS regulator should be able to enforce compliance with the undertaking, as is the case in all of the OHS statutes with undertakings. Accountability at the compliance stage is more than the legal capacity to enforce an undertaking: undertakings must be monitored, and where compliance with the terms of the undertaking is inadequate, the undertaking must be enforced.

In his recommendation that the United Kingdom government introduce enforceable undertakings as an enforcement option, Macrory (2005, 68) pointed to a number of practical issues involved in their introduction, including increased monitoring responsibilities.

Enforceable Undertakings would require an increased monitoring role for the regulator, as it will be involved in following up EUs to ensure that the conditions are carried through.

Monitoring compliance with enforceable undertakings is central to the credibility of undertakings as an enforcement option. Parker (2004) specifies that regulators require both capacity and commitment to rigorous monitoring standards in order for enforceable undertakings to operate successfully and credibly. Her key recommendations for effective monitoring of enforceable undertakings include:

1. That monitoring is conducted centrally within the regulator, rather than by the officer who investigated the original contravention that led to the enforceable undertaking.
2. That the regulator should publish clear policy and guidance on:
 - a) the required qualifications of auditors;
 - b) issues of conflict of interest, such as whether the auditor can have previous involvement with a company; the requirement that there be different auditors monitoring compliance with specific requirements (for example that a specific type of OHS management system be implemented), and periodic monitoring of compliance with the terms of the undertaking generally;
 - c) requirements of a compliance program audit, how compliance with an enforceable undertaking is to be assessed, requirements for the frequency and content of compliance audit reports; and how the regulator is to monitor the reports of third party auditors;
3. That effective monitoring of each enforceable undertaking requires the regulator to have continuing and responsive engagement with both the auditor (s), and with the firm that has entered into the undertaking.
4. That, in addition to relying on third party audits, the regulator undertake a final audit of compliance with the terms of the undertaking at the completion of each undertaking.

The little empirical work that has been carried out on enforceable undertakings, including Johnstone and King's (2007) Queensland OHS study, suggests that the weakest point in processes for implementing enforceable undertakings is auditing and monitoring firm's compliance with the terms of the undertaking they have entered into. To date, no obligation holder has been prosecuted for non-compliance with an enforceable undertaking under an OHS statute, and under-enforcement is a characteristic of other regulatory regimes.

Finally, we suggest that as enforceable undertakings are available as a sanction in the Model OHS Act, logically a court that has convicted duty holder of an offence should be able to make orders which are similar to the contents of most enforceable undertakings. In chapter 8 we therefore argue that, in addition to imposing fines, courts should be able to make corporate probation orders, and/or orders that convicted defendants engage in OHS projects.

7.4 Enforcement of the upstream duties

In principle the same enforcement mechanisms may be used with upstream duty holders as for persons responsible for businesses and undertakings. However, it is important that nothing in the expression of provisions relating to particular mechanisms inhibits their use with designers, manufacturers and other upstream duty holders. In particular, administrative notices – prohibition, improvement and infringement notices – need to be able to be issued to these duty holders. To this end, inspectors must be able to issue these notices to ‘the person’ responsible for a perceived breach rather than to ‘the employer’ as is currently the case in some jurisdictions. The infringement notice provisions of legislation also need to include matters relevant to the upstream duty holders.

Further there is a need for inspectorates to be able to prohibit or otherwise restrict the supply of items or materials which may endanger health or safety. In some circumstances prohibition notices may be used for this purpose but this is not always possible. A criterion for issuing a prohibition notice is that there is an activity that poses an immediate threat to health and safety. If, for example, hazardous plant is in a warehouse but is not yet supplied or in use, it does not constitute an immediate threat. We suggest consideration is given to a mechanism that can be used with upstream duty holders. For example, the Queensland Act imposes an obligation on a designer, manufacturer and supplier of plant to take the action the chief executive reasonably requires to prevent the use of unsafe plant anywhere (see for example WHSA (Qld) sections 32(2), 32A(2) 32B(3)). Similarly, in the European Union the safeguard clause of the Machinery Safety Directive enables a member state to initiate an administrative procedure to withdraw machinery, to prohibit or otherwise restrict marketing of the machinery if it may endanger safety (EU, 2006, Article 7). The action may apply to an individual machine or a series of machines if the hazard is inherent in the design.

Finally we also note that, as with other duty holders, enforceable undertakings have considerable potential. They may be used to secure commitment and action by upstream duty holders to develop capacity and arrangements to systematically manage OHS in design, manufacture/construction and supply activities.

CHAPTER 8: PROSECUTION

8.1 General Principles

We have already argued in chapter 7 that the enforcement provisions in the Model OHS Act be drafted to enable and facilitate responsive enforcement of OHS standards which require duty holders to adopt systematic OHS management. It is our submission in this chapter that the provisions for prosecution in the Model OHS Act should ensure that there is a ‘big stick’ at the top of the hierarchy of sanctions so as to enable the OHS inspectorates to negotiate compliance using administrative and informal sanctions in the shadow of these significant sanctions (for a full discussion of these issues, see Gunningham and Johnstone, 1999, chapter 6 and 7; Johnstone, 2004b and Gunningham 2007, chapter 8).

First, we are of the strong view that all the offences against the OHS statutes should be **criminal** offences. Not only that, but our submission is that the Model OHS Act must ensure that nothing in the Act undermines the ‘criminality’ of OHS offences. **We are very strongly opposed to ‘civil offences’ being included in the Model OHS Act.** The only exception we could contemplate would be giving trade union secretaries the power to bring civil proceedings for penalties for contraventions of the OHS Act (see chapter 5) – but this would only be as a compromise to ensure greater accountability on OHS regulators if there were to be significant opposition to trade union secretaries having the power to initiate criminal prosecutions. The overall principle that should guide the prosecution provisions in the Model OHS Act is that two things should be recognised and institutionalised: that OHS offences are ‘real crimes’, and that OHS offences are generally corporate crimes and that contraventions of the standards in general duties and regulations are usually inchoate offences (no injury need occur for their to be an offence) which involve a failure to introduce, implement and enforce a systematic approach to OHS management (for further discussion of this, see Johnstone 2003a, especially chapters 7 and 9 and Johnstone and Jones, 2006).

Consequently, second we submit that the venue for all OHS prosecutions should be in the general criminal courts, rather than in specialist industrial courts. Our reason for this is simple: OHS crime must be seen, as far as possible, as ‘real crime’, for prosecution to have the general deterrent impact necessary to maximise voluntary compliance with minimal resort to administrative and informal enforcement methods (see Ayres and Braithwaite, chapter 2, for a full discussion of this apparent paradox). The mainstream criminal courts (Magistrates Court and District/County Courts) should have specialist magistrates and judges with knowledge and experience of OHS issues. The Industry Commission (1995, Vol 1, 113-114, recommendation 14) agreed with this submission. Appeals should lie to courts further up the mainstream court hierarchy.

Third, as discussed in section 3.3, in order to avoid issues of duplicity arising when a prosecution is initiated for a contravention of a general duty (see Johnstone 2004, 196-203), provisions similar to sections 31 of the New South Wales OHS Act and section 164(2) of the Queensland Act should be included in the Model OHS Act.

Fourth, the Model OHS Act should specify that prosecution guidelines ensure that prosecutions do not just focus on fatalities, serious injuries and other incidents, but should emphasise ‘pure risk’ prosecutions (see Gunningham and Johnstone chapters 4 and 6) and avoid a ‘split pyramid’ (Gunningham and Johnstone 1999, 122-123) in which the regulator only operates at the bottom and middle of the enforcement hierarchy when there is no injury, and goes straight to the top when there is a serious injury. The prosecution guidelines should also ensure that regulators focus on upstream duty holders (designers, suppliers etc) and on protection of all workers (not just employees).

Fifth, the maximum penalty in the Act for successful prosecutions of the most serious offences (contraventions of the general duties, discrimination/victimisation of workers, repeat offences, and

contravening a prohibition notice) should be considerably larger than the current maxima – in the region of \$1.5 million. This is to ensure both the criminality of the offences in the OHS Act and the ‘big stick’ beneath which inspectors will maximise voluntary compliance.

Sixth, because of the well known criticisms of the fine as a sanction (namely, that it does not require duty holders to rectify compliance, or to improve systematic OHSM – see Gunningham and Johnstone, 1999, 256-259), the Model OHS Act should include the kinds of corporate sanctions which have been well debated in Australia for the past few decades. These sanctions will signal to OHS duty holders that where they fail to introduce appropriate OHS management systems, courts will order them to do so. Consequently, a number of new sanctions might be introduced into OHS statutes, if they have not already been enacted. These sanctions (discussed in great detail in Gunningham and Johnstone, 1999, 262-277, and see also ALRC, 1987 and New South Wales Law Reform Commission, 2001) should include:

- an order requiring the defendant to take *remedial measures* (already included in the Commonwealth, New South Wales and the ACT Acts) or to undertake training (already included in the South Australian Act);
- *court-ordered adverse publicity* (already introduced in New South Wales, Victoria, South Australia and the ACT) which enables a court to require the details of the contravention and the outcome of the prosecution to be publicised through the media to enhance general deterrence, and to affect non-financial values of the organization.
- *supervisory orders and corporate probation*, which include:
 - ⇒ internal discipline orders requiring the organization to investigate the contravention, discipline those responsible, and return a compliance report to the court;
 - ⇒ organizational reform orders (weak versions of which have been introduced in Victoria and Western Australia), which require organizations to report regularly to the court on its efforts to develop a compliance program and to reform its OHS management system; and
 - ⇒ punitive injunctions, where the court requires the organization to introduce a specific OHS management system.
- *community service orders* (already introduced in New South Wales, Victoria, and South Australia) which require the duty holder to carry out an OHS-related project using organization’s resources, involving top management, during normal business hours;
- and *dissolution*, where the most egregious offenders are required to cease their activities until their OHS management systems are reformed, or wound up permanently if the court decides that they are incorrigible.

Seventh, the level of penalty imposed by the courts should be determined by the culpability of the defendant – determined by the degree to which the defendant falls short of the level of care expected of the defendants, and not by the consequences of the contravention. This means that the approach taken by the Queensland Act should NOT be adopted in the Model OHS Act. In the Queensland Act the maximum penalties depend on the actual harm resulting: for example, a maximum of \$187,500 for corporations for contraventions not resulting in death or grievous bodily harm etc; \$281,250 ‘exposure to a substance likely to cause death or grievous bodily harm’ and contraventions causing ‘bodily harm’; \$375,000 for contraventions causing ‘death or grievous bodily harm’; and \$750,000 for contraventions causing ‘multiple deaths’.

Eighth, not only should there be greater publicity of prosecution outcomes to maximise the deterrent effects of prosecution, but OHS duty holders should also be aware *in advance* of the likely approach that will be taken to their contraventions by the OHS agency and the courts. In other words, the operation of the enforcement hierarchy, and the role of prosecution within it, must be *transparent* through publicly available prosecution guidelines. Transparent and well structured sentencing guidelines might outline the appropriate range of sanctions for OHS offences, guide the courts in their choice of sanction, indicate factors to be ignored, to be considered in mitigation (for example a proven compliance

program, and/or OHSM system, a regular process of self-reporting of contraventions and so on) and in aggravation (a poor OHS record, proven top management involvement in the offence; lack of co-operation in investigation and so on). See further Gunningham and Johnstone, 1999, 277-291. Including clear sentencing principles in the model Act will promote consistency in sentencing. Guidance in sentencing is also required to ensure that courts are not influenced by the various 'isolation techniques' used to transform and individualise OHS offences during the sentencing process – for a full discussion of these isolation techniques, and their consequences, see Johnstone (2003a chapters 7 and 9; 2003b, 2004a, 457-459; and 2004b, 175).

Ninth, to enable greater consistency in sentencing outcomes, the Model OHS Act should require the establishment of a database of all sentencing decisions.

Finally, given the justifiable public concern for fatalities arising from gross negligence, the Model OHS Act should contain an offence of industrial manslaughter (gross negligence or recklessness leading to death), similar to section 32A of the New South Wales OHS Act which provides that it is an offence for a person who owes a general duty to another person to engage in conduct in a manner which is reckless as to the danger of death or serious injury and which causes the death of another person at a workplace. See Hall and Johnstone (2005) for a detailed examination of the issue of industrial manslaughter.

8.2 Liability of Corporate Officers

Most of the Australian OHS statutes make provision for individual directors, managers or officers of a corporation to be prosecuted in certain circumstances for offences committed by the corporation. For example, section 26 of the *Occupational Health and Safety Act 2000* (NSW) (OHS Act (NSW)) provides that:

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each individual 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 manager 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.

A second approach to corporate officer liability is found in section 55 (1) OSHA (WA) (see also section 37 of the *Health and Safety etc at Work Act 1974* (UK)) which provides that:

Where an offence against the Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any wilful neglect on the part of any director, manager, secretary or officer of the body corporate, that person is also guilty of that offence.

This approach was also found in the 1985 Victorian Act, but has been rejected for another model, which has its origins in the Maxwell Report. The Maxwell Report argued strongly that the liability of directors should not be a merely 'accessorial' one, 'treating them as accessories to the company's contravention'. While not adopting the provision recommended by the Maxwell Report, the 2004 Victorian Act has adopted the Report's recommendation that directors have a positive and personal duty to ensure that the company complies with OHS duties. Under section 144, the corporate officer will be liable if the corporate employer's contravention 'is attributable to an officer of the body corporate failing to take reasonable care' to prevent the contravention. This positive legislative duty overcomes any risk that a corporate officer might otherwise be regarded as in breach of the duty to 'act in the best interests of the company', when complying with the Act and acting in the interests of employees' health and safety. The Maxwell Report also recommended the adoption of the *Corporations Act* definition of 'officer', in order to ensure that every person concerned in company management can potentially be liable in respect of contraventions. Thus section 5 of the Victorian OHS Act picks up the definition of 'officer' in the *Corporations Act 2001* (Cth) as including

a person

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation's financial standing; or
- (iii) in accordance with whose instructions or wishes directors of the corporation are accustomed to act...

This definition is wide enough to include holding companies in corporate groups and probably also franchisors, as 'shadow officers', and is therefore a significant provision in terms of ensuring that those responsible for contraventions, will face liability and not escape under the principle of limited liability (for further analysis of this, see Johnstone and Wilson, 2006a and b).

This is a particularly important provision because it goes beyond merely imposing a positive duty upon individual company officers, and recasts the duties placed on corporate officers in a way that pushes responsibility for OHS up the corporate structure. It is possible that a corporation within a corporate group might be held liable as an 'officer' of another corporation within the group. This has the potential to overcome some of the difficulties that complex corporate group structures might raise for OHS regulation.

It is our submission that the Model OHS Act define 'officer' as it is defined in the *Corporations Act 2001* (Cth), to include:

a person

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation's financial standing; or
- (iii) in accordance with whose instructions or wishes directors of the corporation are accustomed to act...

When it comes to determining the liability of corporate officers, our preference is for the New South Wales/ Queensland model, but we can see great merit in the argument expressed in the Maxwell Report for a positive duty. We are strongly opposed to the other models of officer liability (Western Australia, South Australia etc).

CHAPTER 9: OTHER MATTERS IMPORTANT TO OHS

We wish to highlight the matter of the national agency to coordinate OHS. This is not a matter for the Model OHS Act since we understand the intention is that the model Act would be the basis for harmonising the Commonwealth, state and territory OHS statutes through its adoption in each jurisdiction. As such there would be nationally uniform statutes in each jurisdiction but not a national Act. Nonetheless, the reform of OHS regulations and codes of practice which we envisage will be needed to support the Model OHS Act, requires significant coordination and resources for standards development and research in areas of national interest.

As recognised in the 1980s with the establishment of NOHSC, a large and diverse economy and society like Australia needs a well-resourced national OHS authority to overview national developments and support the advancement of OHS nationally. We submit that there is a need to restore such an authority at the national level, rebuilding critical research capacity and strengthening support for external OHS research, including scholarships for postgraduate research in OHS. Research is not a silver bullet but it does provide evidence to inform policy and standards development as well evaluating interventions. Nationally focused OHS research activity can perform a number of important functions, notably:

- Scoping the nature and extent of OHS problems in the community, including different sub-sectors like agricultural/rural communities, mining and those predominantly concerned with the provision of services. While overseas research can provide guidance local research is needed to take account of particular features of the Australian community. There is also a need to benchmark outcomes.
- Exploratory research to identify and evaluate new or changing patterns of work-related hazards, physical, chemical and psychosocial (and the often complex interactions between them). As a developed country Australia must engage in a scholarly exchange with other countries in this regard.
- Applied research to develop new remedies to known problems and to critically evaluate existing interventions (such as OHS management systems, behaviour based safety, or the activities of inspectorates in relation to small business).
- Focused research to provide the basis for understanding and addressing industries with poor OHS records. In the USA NIOSH has initiated a major research program into the construction industry and a similar program is starting up in relation to transport, warehouse and utilities (including detailed research into truck driver health encompassing issues like obesity and ageing). Truck drivers in Australia seem to share many of the serious OHS issues that NIOSH is about to explore in the USA but we have no comparably resourced program.
- Provide evidence to inform policy debates and deliberations.
- Promote the development of OHS research activity and capacity more generally to enhance education/training and the state of knowledge and research in universities, employers and other organisations.

While there are other sources of OHS research they do not fill this gap. First, most state OHS, workers' compensation and related agencies (such as those responsible for mine safety) fund research and there is a growing level of cooperation between agencies in terms of sharing information in this regard. This activity is valuable. At the same time, each agency has a limited budget and much of this activity is concentrated – as one would expect – on applied research rather than scoping or basic research. Further, even with regard to applied research there is nothing comparable to a national agenda. Nor do agencies have much in the way of in-house research expertise to evaluate or sustain such efforts.

Second, the federal government has indirectly funded OHS research through its major mechanisms for funding research, namely the Australia Research Council (ARC) and the National Health and Medical Research Council (NHMRC), and through other bodies (like the National Transport Commission).

Research funding is also available from other bodies like the National Heart Foundation. These are all potentially valuable in terms of promoting OHS research and, indeed, these bodies have all funded OHS research projects in recent years. However, such outcomes are serendipitous in a way, being driven by a mixture of researcher interest and their ability to secure funding from competing sources. Interest led research is important. However, research targeting identified priorities is also required. Unlike areas like transport there is no dedicated research funding for OHS even given the substantial social and economic costs of the latter.

Third, universities provide facilities for their staff to pursue OHS related research and registers of researchers compiled by NOHSC from the late 1980s indicated that a significant number of university staff were interested in this area. On the other hand, such staff are often scattered across a range of disciplines (psychology, engineering, health and medical sciences, chemistry, management, law to name some) and academic units. Research and teaching units with a focus on OHS are relatively exceptional (such as safety sciences at the University of NSW or the program operated by the Curtin University) and, most disturbingly, have often been in decline or under threat over the past ten years. Australia is currently well endowed with high quality researchers in this field (well evidenced by publication and citation in international journals as well input into government reports and the like) but this cohort is ageing. PhD numbers (the basic qualification for a researcher) and current job prospects do not augur well that those retiring will be replaced.

In sum, Australia needs to facilitate OHS research to help it meet the challenges of the future. Our suggestion would be the re-establishment of a peer-reviewed research (and PhD scholarship) grant scheme administered by a suitably qualified panel appointed by the body that succeeds the Australian Safety and Compensation Commission (ASCC). The post-ASCC body should identify areas of priority for research in conjunction with the panel. The post-ASCC body also includes a cohort of competent researchers to conduct some projects, review incoming research from other countries, help evaluate grant applications and provide advice. Finally, program financial support should be provided to several dedicated centres of OHS research, selected on the basis of merit.

Conclusion

Once again, we thank the National OHS Review Panel for the opportunity to contribute to this process. We are more than happy to be contacted to discuss this submission in further detail.

Richard Johnstone
Liz Bluff
Michael Quinlan

References

- ACT Occupational Health and Safety Council (2005) *Occupational Health and Safety Act 1989: Scope and Structure Review. Final Report*, ACT Occupational Health and Safety Council, Canberra.
- ALRC (1987) *Sentencing Penalties*, Australian Law Reform Commission Discussion Paper No 30, AGPS, Canberra
- ALRC (2002) *Securing Compliance: Civil and Administrative Penalties in Australian Federal Legislation*, Australian Law Reform Discussion Paper 65, Commonwealth of Australia, Canberra.
- Anderson, L. (1994) *Sykefravaevsprosjektet 1991-1994*, Sintef IFIM, Oslo.
- ASCC (2007) *Elements of the National OHS Standards Framework in Australia*, Australian Safety and Compensation Council Media Release, 16 May 2007.
- Ayres I. and Braithwaite J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York.
- Aronsson, G. (1999) 'Contingent workers and health and safety', *Work, Employment and Society*, 13(3): 439-60.
- Assennato, G. and Navarro, V. (1980) 'Workers' participation and control in Italy: the case of occupational medicine', *International Journal of Health Services* 10: 2.
- Bartley, M. (2005) 'Job insecurity and its effect on health', *Journal of Epidemiology and Community Health*, 59: 718-719.
- Beaumont, P., Coyle, J., Leopold J. and T. Schuller (1982) *The Determinants of Effective Joint Health and Safety Committees*, Centre for Research into Industrial Democracy and Participation, University of Glasgow, (Report to ERSC);
- Bernstein, S., Lippel, K., & Lamarche, L. (2001) *Women and Homework: The Canadian Legislative Framework*, Status of Women Canada (www.swc-cfc.gc.ca/pubs/pubsalpha_e.html), Ottawa.
- Biggins, D., Phillips, M. and P. O'Sullivan (1991) 'Benefits of worker participation in health and safety', *Labour and Industry*, 4(1): 138-59
- Biggins, D. and Phillips, M. (1991a) 'A survey of health and safety representatives in Queensland Part 1: Activities, issues, information sources', *Journal of Occupational Health and Safety — Australia and New Zealand*, 7 (3): 195-202.
- Biggins, D and Phillips, M (1991b) A survey of health and safety representatives in Queensland Part 2: Comparison of representatives and shop stewards, *Journal of Occupational Health and Safety — Australia and New Zealand*, 7 (4): 281-286
- Biggins, D. and Holland, T. (1995) 'The training and effectiveness of health and safety representatives', in Eddington, I. (ed) *Towards Health and Safety at Work: Technical Papers of the Asia Pacific Conference on Occupational Health and Safety*, Brisbane.
- Blewett, V. (2001) *Working Together: A Review of the Effectiveness of the Health and Safety Representative and Workplace Health and Safety Committee System in South Australia*, WorkCover Corporation, Adelaide.
- Bluff, E. (2006) 'Improving the provision of OHS support in Australia', *Journal of Occupation Health and Safety, Australia and New Zealand*, 22(3): 227-236.
- Bluff, E. (2005) *The Missing Link – Regulating Occupational Health and Safety Support*, National Research Centre for OHS Regulation, Working Paper 35, National Research Centre for OHS Regulation, ANU, Canberra.
- Bluff, E. and Gunningham, N. (2004) 'Principle, process, performance or what?' in Bluff E., Gunningham N. and Johnstone R. (eds) *OHS Regulation for a Changing World of Work*, Federation Press, Annandale NSW, 12-42.
- Bluff, E., Gunningham, N. and Johnstone, R. (eds) (2004) *OHS Regulation for a Changing World of Work*, Federation Press, Annandale NSW.
- Bluff, E. and Johnstone, R. (2005) 'The relationship between "reasonably practicable" and risk management regulation', *Australian Journal of Labour Law*, 18: 197-239.
- Bluff, E. and Johnstone, R. (2003) 'Infringement notices: stimulus for prevention or trivialising offences?' *Journal of Occupational Health and Safety – Australia and New Zealand*, 19: 337-346.
- Boden, L.I., Hall, J.A., Levenstein, C. and Punnett, L. (1984) 'The impact of health and safety committees', *Journal of Occupational Medicine*, 26 (11): 829-834.

- Braithwaite J. (2002) *Restorative Justice and Responsive Regulation*, OUP, Oxford.
- Braithwaite J. (1993) 'Responsive business regulatory institutions', in: T Coady and C Sampford, C.J.C. (eds) *Business Ethics and the Law*, Federation Press, Sydney.
- Braithwaite J. (1985) *To Punish or Persuade: Enforcement of Coal Mine Safety*, State University of New York Press, Albany, United States.
- Bryce, G.K. and Manga, P. (1985) 'The effectiveness of health and safety committees', *Relations Industrielles*, 40 (2).
- Campbell I. (2008) 'Globalization and changes in employment conditions in Australia', in Lee S. and Eyraud F. (eds.), *Globalization, Flexibilization and Working Conditions in Asia and the Pacific*, Chandos and ILO.
- Cassou, B. and Pissaro, B (1988) 'Workers' participation in occupational health: the French experience,' *International Journal of Health Services* 18, 1.
- Creighton B. and Rozen, P. (2007) *Occupational Health and Safety Law in Victoria*, 3rd ed, Federation Press, Sydney.
- Crittall J. (2001) *Review of the Workplace Health and Safety Act 1995: Issues Paper*, Division of Workplace Health and Safety, Queensland Department of Industrial Relations, December.
- Dedobbeleer, N., Champagne F. and P.German, (1990) 'Safety performance among union and non-union workers in the construction industry', *Journal of Occupational Medicine*, 32(11): 1099-1103.
- Diver C. (1983) 'The optimal; precision of administrative rules', *Yale Law Journal*, 93: 65.
- Eaton, A. and Nocerino, T. (2000) 'The effectiveness of health and safety committees: results of a survey of public sector workplaces,' *Industrial Relations*, 39(2).
- EU (2006) *Directive 2006/42/EC of the European Parliament and of the Council on the approximation of the laws of the member states relating to machinery*, Official Journal 9/6/2006.
- Fooks, G., Bergman, D. and Rigby, B. (2007) *International Comparisons of (a) Techniques Used to Obtain Compliance with Health and Safety Law and Accountability for Administrative and Criminal Offences and (b) Sentences for Criminal Offences*, Prepared by Centre for Corporate Accountability for the Health and Safety Executive, RR607 Research Report, HSE Books, London.
- Frick, K. and Walters D.R. (1998) 'Worker representation on health and safety in small enterprises: Lessons from a Swedish approach,' *International Labour Review*, 137: 3.
- Fuller, D. and Suruda, A. (2000) 'Occupationally related hydrogen sulphide deaths in the United States from 1984 to 1994,' *Journal of Occupational and Environmental Medicine*, 42(9): 939-42.
- Gadd, S., Keeley, D. and Balmforth, H. (2003) *Good Practice and Pitfalls in Risk Assessment*, prepared by the Health and Safety Laboratory for the Health and Safety Executive, Sheffield, UK.
- Grunberg, L. (1983) 'The effects of the social relations of production on productivity and workers' safety', *International Journal of Health Services*, 13(4): 621-634.
- Gunningham, N. (2007) *Mine Safety: Law Regulation Policy*, Federation press, Sydney
- Gunningham, N., Sinclair, D. and Burritt, P. ((1998) *On-the-Spot Fines and the Prevention of Injury and Disease – the Experience of Australian Workplaces*, National Occupational Health and Safety Commission, Sydney.
- Gunningham, N., Johnstone, R. and Rozen, P. (1996) *Enforcement Measure for Occupational Health and Safety in New South Wales: Issues and Options*, WorkCover Authority of New South Wales, Sydney.
- Gunningham, N. and Johnstone, R. (1999) *Regulating Workplace Safety: System and Sanctions*, Oxford University Press, Oxford.
- Guthrie, R. and Quinlan, M. (2005) "The occupational health and safety rights and workers compensation entitlements of illegal immigrants: an emerging challenge", *Policy and Practice in Safety and Health*, 2005, 3(2): 69-89.
- Hall, A. and Johnstone, R. (2005) 'Exploring the recriminalising of OHS breaches in the context of industrial death,' *The Flinders Journal of Law Reform*, 8: 57-92.
- Hale, A. and Hovden, J. (1998) 'Management and culture: the third age of safety. A review of approaches to organisational aspects of safety, health and environment', in Feyer, A. and Williamson, A. (eds), *Occupational Injury. Risk Prevention and Intervention*, Taylor and Francis, London, 129 - 165.

- Havlovic, S. and McShane, S.L., (1997) *The Effectiveness of Joint Health and Safety Committees and Safety Training in Reducing Fatalities and Injuries in British Columbia Forest Product Mills*, Burnaby, Workers Compensation Board of British Columbia.
- Industrial Relations Victoria, (2005) *Report of Inquiry Owner Drivers and Forestry Contractors*, Department of Innovation, Industry and Regional Development, Melbourne.
- Industry Commission (1995) *Work, Health and Safety: An Inquiry into Occupational Health and Safety*, Report No. 47, AGPS, Canberra.
- Institute of Employment Rights (1999) *Regulating Health and Safety at Work: the Way Forward*, IER, London.
- James, P. Johnstone, R. Quinlan, M. and Walters, D. (2007) 'Regulating supply chains for safety and health', *Industrial Law Journal*, 2007, 36(2): 163-187.
- Johnstone, R. (2007) 'Are occupational health and safety crimes hostage to history?: An Australian perspective,' in Brannigan, A. and Pavlich, G. (eds), *Governance and Regulation in Social Life*, Cavendish-Routledge, London, 33-54.
- Johnstone, R. (2006) 'Regulating occupational health and safety in a changing labour market,' in Arup, C., Gahan, P., Howe, J., Johnstone, R., Mitchell, R. and O'Donnell, A. (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, 617-636.
- Johnstone R. (2004a) *Occupational Health and Safety Law and Policy*, 2nd ed, Thompson Law Book, Sydney.
- Johnstone, R. (2004b) 'Rethinking OHS enforcement' in Bluff, E., Gunningham, N. and Johnstone, R. (eds), *OHS Regulation for a Changing World of Work*, Federation Press, 146-178.
- Johnstone, R. (2003a) *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Monograph Series on Labour Law, The Federation Press, Sydney,
- Johnstone, R. (2003b) 'Safety, courts and crime: occupational health and safety prosecutions in the Magistrates' Courts,' *Policy and Practice in Health and Safety*, 1: 105-127.
- Johnstone, R. (2000) 'Occupational health and safety prosecutions in Victoria: an historical study,' *Australian Journal of Labour Law*, 13: 113-142.
- Johnstone, R. (1999) 'Paradigm crossed? The statutory occupational health and safety obligations of the business undertaking,' *Australian Journal of Labour Law*, 12: 73-112.
- Johnstone, R. and Jones, N. (2006) 'Constitutive regulation of the firm: OHS, dismissal, discrimination and sexual harassment,' in Arup, C., Gahan, P., Howe, J., Johnstone, R., Mitchell, R. and O'Donnell, A. (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 483-504.
- Johnstone, R. and King, M. (2007), *How do Enforceable Undertakings Work? An Exploration and Review of the Operation of Enforceable Undertakings as an Enforcement Strategy in Workplace Health and Safety Queensland*, Workplace Health and Safety Queensland, Brisbane.
- Johnstone, R. and Quinlan, M. (2006) 'The OHS regulatory challenges posed by agency workers: evidence from Australia,' *Employee Relations*, 28(3): 273-289.
- Johnstone, R., Quinlan, M. and Walters, D. (2005) 'Statutory occupational health and safety workplace arrangements for the modern labour market,' *Journal of Industrial Relations*, 47(1): 93-116.
- Johnstone, R., Quinlan, M. and Mayhew, C. (2001) 'Outsourcing risk? the regulation of occupational health and safety where subcontractors are employed,' *Comparative Labor Law and Policy Journal*, 22: 351-393.
- Johnstone, R. and Wilson, T, (2006a) 'Take me to your employer: the organisational reach of occupational health and safety regulation' *Australian Journal of Labour Law*, 19: 59-80.
- Johnstone, R. and Wilson, T, (2006b) 'OHS liability, corporate officers and corporate groups,' *The Journal of Occupational Health and Safety- Australia and New Zealand*, 22(3): 219-225.
- Lamm, F. and Walters, D. (2004) 'Regulating occupational health and safety in small workplaces,' in Bluff, E., Gunningham, N. and Johnstone, R. (eds), *OHS Regulation for a Changing World of Work*, Federation Press, 94-119.
- Litwin, A.S. (2000) *Trade Unions and Industrial Injury in Great Britain*, Discussion Paper 468, Centre for Economic performance, London school of Economics and political Science, London.

- Longo, J. (2002) 'Enforceable undertakings: quicker and more flexible regulatory responses', *Company Director*, 16: 28-29.
- Macrory R. (2005) *Regulatory Justice: Making Sanctions Effective*, Cabinet Office, London, 2006.
- Mayhew, C., and Quinlan, M. (1997) 'Subcontracting and occupational health and safety in residential building', *Industrial Relations Journal*, 28(3):192-205.
- Mayhew, C., Quinlan, M. and Bennett, L. (1997) *The Effects of Subcontracting/Outsourcing on Occupational Health and Safety*, Industrial Relations Research Monograph, The University of New South Wales, Sydney.
- Maxwell, C. (2004) *Occupational Health and Safety Act Review*, State of Victoria.
- McDonald, N. and Hyrmak, V. (2002) *Safety Behaviour in the Construction Sector*, HAS/HSE Northern Ireland.
- New South Wales Labour Hire Task Force (2001) *Final Report*, Department of Industrial Relations, Sydney.
- New South Wales Law Reform Commission (2001) *Sentencing: Corporate Offenders*, Issues Paper 20, Sydney.
- Nichols, T., Dennis, A. and Guy, W. (1995) 'Size of employment unit and industrial injury rates in British manufacturing industry: a secondary analysis of WIRS 1990 data,' *Industrial Relations Journal*, 26(1): 45-56.
- NOHSC (2002) *National OHS Strategy*, National Occupational Health and Safety Commission, Canberra.
- Nosser, I., Johnstone, R. and Quinlan, M. (2004) 'Regulating supply-chains to address the occupational health and safety problems associated with precarious employment: the case of home-based clothing workers in Australia,' *Australian Journal of Labour Law*, 17: 137-160.
- NRCOHSR (2002) *Towards a Regulatory Regime for Safe Design. A Review of Regulatory Approaches and Enforcement Strategies*, National Research Centre for OHS Regulation, The Australian National University, Canberra.
- Nytrö, K., Saksvik, P. and Torvatn, H. (1998) 'Organizational prerequisites for the implementation of systematic health, environment and safety work in enterprises', *Safety Science* 30: 297-307.
- Parker, C. (2002) *The Open Corporation – Effective Self Regulation and Democracy*, Cambridge University Press, Cambridge.
- Parker, C. (2003) 'Arm twisting, auditing and accountability: what regulators and compliance professionals should know about the use of enforceable undertakings', presentation to the Australian Compliance Institute, Melbourne, 28th May.
- Parker, C. (2004) 'Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings,' *Modern Law Review* , 67 (2): 209–246.
- Quinlan, M. and Johnstone, R. (2003) *Submission to Maxwell Review*. Access via VWA website: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/OHSAct_review.
- Quinlan, M. (2001) *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Motor Accidents Authority of New South Wales, Sydney.
- Quinlan, M. (2003) *Developing Strategies to Address OHS and Workers' Compensation Responsibilities Arising From Changing Employment Relationships*, Research Report to the WorkCover Authority of New South Wales, Sydney.
- Quinlan, M. (2004a) 'Flexible work and organisational arrangements', in Bluff, E., Gunningham, N. and Johnstone, R. (eds) *OHS Regulation for a Changing World of Work*, Annandale NSW, Federation Press, Sydney..
- Quinlan, M. (2004b) 'Regulatory responses to OHS problems posed by direct-hire temporary workers in Australia', *Journal of Occupational Health and Safety, Australia and New Zealand*, 20(3): 241-254.
- Quinlan, M. (2004c), 'Workers' compensation and the challenges posed by changing patterns of work: evidence from Australia', *Policy and Practice in Health and Safety*, 2(1): 25-52.
- Quinlan, M. (2007) 'Organisational restructuring/downsizing, ohs regulation and worker health and wellbeing', *International Journal of Law and Psychiatry*, 30(4-5): 385-399.
- Quinlan, M., and Mayhew, C. (1999) 'Precarious employment and workers' compensation', *International Journal of Law and Psychiatry*, 22(5&6): 491–520.

- Quinlan, M., Mayhew, C. and Bohle, P. (2001) 'The global expansion of precarious employment, work disorganisation, and consequences for occupational health: a review of recent research', *International Journal of Health Services*, 31(2): 335-414.
- Quinlan, M. and Bohle, P. (2004) 'Contingent work and safety,' in Barling, J. and Frone, M. (eds), *The Psychology of Workplace Safety*, American Psychological Association, Washington, 81-106.
- Quinlan, M. and Bohle, P. (2008) 'Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work', *International Journal of Health Services*, 38(3): 489-525.
- Rawling, M. (2007) 'The regulation of outwork and the federal takeover of labour law', *Australian Journal of Labour Law*, 20: 189-206.
- Rebitzer, J. (1995) 'Job safety and contract workers in the petrochemical industry', *Industrial Relations*, 34(1): 40-57.
- Reilly, B., Paci, P. and Holl, P. (1995) 'Unions, safety committees and workplace injuries', *British Journal of Industrial Relations*, 33: 273-88.
- Robens A. (Lord) (1972) *Report of the Committee on Safety and Health at Work, 1970-72*, HMSO, London, Cmnd 5034.
- Robinson, A. and Smallman. C. (2000) *The Healthy Workplace?* Research Papers in Management Studies WP 05/2000, Judge Institute of Management Studies, University of Cambridge, Cambridge.
- Saltzman, G. and Belzer, M., (2007) *Truck Driver Safety and Health: A Conference Report and Literature Review*, National Institute of Occupational Safety and Health, Cincinnati.
- Shannon, H, V. Walters, W. Lewchuck, J. Richardson, D. Verma, T. Haines and L. Moran (1992) *Health and Safety Approaches in the Workplace*. MacMaster University, Toronto.
- Shannon, H., Walters, V., Lewchuck, W., Richardson, J., Moran, D., Haines, T. and Verma, D. (1996) 'Workplace organisational correlates of lost time accident rates in manufacturing', *American Journal of Industrial Medicine*, 29: 258-68.
- Shannon, H., Mayr, J. and Haines, T. (1997) 'Overview of the relationship between organisational and workplace factors and injury rates', *Safety Science*, 26: 201-217.
- Shaw, A., Blewett, V., Gunningham, N., Johnstone, R. and Baker-Goldsmith, H. (2007) *Review of the NT Work Health Act and Mining Management Act*, Shaw Idea and New Horizon Consulting, 22 June.
- Swedish Government, "Budget Bill 2002": fact sheet on the Swedish Government's Budget Bill for 2002, presented to Parliament on 20 September 2001, retrieved June 30, 2008, from: http://www.forsvar.regeringen.se/pressinfo/pdf/BP2002_Fo_eng.pdf
- Toh, S. and Quinlan, M. (undated) 'Protecting a new class of guestworker: The occupational health and safety rights and entitlements of s457 visa holders in Australia', *International Journal of Manpower* forthcoming.
- Vanderkruk, R. (1999) 'Workplace health and safety officers: a Wueensland success story', *Journal of Occupation Health and Safety, Australia and New Zealand*, 15(6): 557-563.
- Walters, D. (2006) 'One step forward, two steps back: worker representation and health and safety in the United Kingdom', *International Journal of Health Services*, 36(1): 87-111.
- Walters, D. (2003) 'Sustaining participative approaches to occupational health and safety in small enterprises: the role of trade unions', *Safety Science Monitor*, 7(1).
- Walters, D. (ed), (2002) *Regulating Health and Safety Management in the European Union*, Peter Lang, Brussels.
- Walters, D. (2001) *Health and Safety in Small Enterprises: European Strategies for Managing Improvement*, Peter Lang, Brussels.
- Walters, D. (2000) 'Employee representation on health and safety and European Works Councils', *Industrial Relations Journal*, 31 (5): 416- 436.
- Walters D. (1996) 'Trade unions and the effectiveness of worker representation in health and safety in Britain', *International Journal of Health Services*, 26(4): 625-641.
- Walters, D. (2003) *The Legacy of Robens? Workplace Arrangements for Health and Safety at Work in the Twenty First Century*, Working Paper No 10, National Research Centre for Occupational Health and Safety Regulation, The Australian National University, Canberra.

- Walters, D. and Frick, K. (2000) 'Worker participation and the management of occupational health and safety: reinforcing or conflicting strategies,' in Frick, K., Jensen, P.L., Quinlan, M. and Wilthagen, T. (eds), *Systematic Occupational Health and Safety Management: Perspectives on an International Development*, Pergamon, Amsterdam.
- Walters, D., Kirby, P. and Daly, F. (2001) *The Impact of Trade Union Education and Training in Health and Safety on the Workplace Activity of Health and Safety Representatives*, Health and Safety Executive Contract Research Report, No 321/2001.
- Walters, D. and Nichols, T. (2006) 'Representation and consultation on health and safety in chemicals – an exploration of limits to the preferred model', *Employee Relations*, 28(3): 230- 254.
- Warren-Langford, P., Biggins D. and Phillips, M. (1993) 'Union participation in occupational health and safety in Western Australia', *Journal of Industrial Relations*, 35(4), 585-606
- WorkCover NSW (2006) *Report on the Review of the Occupational Health and Safety Act 2000*, Sydney.
- WorkSafe Victoria (2007) *How WorkSafe Applies the Law in Relation to Reasonably Practicable*, WorkSafe Position, Edition No. 1, WorkSafe Victoria, Melbourne.
- Wran, N. and McClelland, J., (2005) *NSW Mine Safety Review: Report to The Hon Kerry Hickey MP*, Minister for Mineral Resources, Sydney.
- Wright, M. (1998) *Factors Motivating Proactive Health and Safety Management*, Health and Safety Executive, Contract Research Report, London.
- Zwetsloot, G. (2000) 'Developments and debates on OHSM system standardisation and certification', in Frick, K., Jensen, P., Quinlan, M. and Wilthagen, T. (eds) *Systematic Occupational Health and Safety Management. Perspectives on an International Development*, Pergamon, Amsterdam, 391-412.