

# REPORT ON THE REVIEW OF THE OCCUPATIONAL HEALTH AND AND SAFETY ACT 2000

MAY 2006

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## PART A – EXECUTIVE SUMMARY AND RECOMMENDED AMENDMENTS

### CHAPTER 1 - EXECUTIVE SUMMARY

#### *1.1 The OHS Act and Objects*

The rate of work related injury and fatality in New South Wales has reduced to the lowest levels recorded in more than 18 years.

The NSW Government is committed to continuous safety improvement in all workplaces and to working in partnership with industry and the community to promote a culture that places the highest value on workplace health and safety.

The commencement of the *Occupational Health and Safety Act 2000* (the OHS Act) on 1 September 2001 marked a significant modernisation of New South Wales occupational health and safety legislation. A key objective in modernising the New South Wales framework was to afford employers in all industries greater freedom to decide for themselves how health and safety risks should be controlled so long as the safety objectives can be achieved.

The OHS Act and its supporting regulation were developed to ensure that all industries and all types of work are covered by comprehensive legislation, which is easy to access and understand. It emphasises a systematic approach to the management of occupational health and safety in the workplace and elaborates on two important elements of a systematic approach: risk management and consultation.

Section 3 of the OHS Act describes the Act's objects:

- to secure and promote the health, safety and welfare of people at work,
- to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,
- to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,
- to provide for consultation and co-operation between employers and employees in achieving the objects of this Act,
- to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,
- to develop and promote community awareness of occupational health and safety issues,
- to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,
- to deal with the impact of particular classes or types of dangerous goods and plant at, and beyond, places of work.

WorkCover and the Department of Primary Industries (DPI) are the regulators of the OHS Act: WorkCover generally and the DPI specifically for mining.

## **1.2 Review of the OHS Act**

Included in the OHS Act (section 142) is a requirement for the Minister responsible to review the ongoing validity of the Act's policy objects and relevant terms as soon as is possible, five years after the Act's assent.

Accordingly, on 16 June 2005, the Hon John Della Bosca MLC, Minister for Commerce, announced the commencement of the review of the OHS Act.

The review was conducted by WorkCover at the direction of the Minister for Commerce and involved:

- convening of a tripartite OHS Act Reference Group to oversee and provide high-level input to the methods and direction of the Act review,
- the release of the *Review of the Occupational Health and Safety Act 2000 Discussion Paper* from 28 June 2005 until 19 August 2005 and five supplemental Issue Papers released for public comment from 22 December 2005 until 10 February 2006 (Discussion Paper, Issue Papers and public submissions are accessible at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)),
- conduct of public information sessions and issue-based consultative workshops within metropolitan and regional New South Wales,
- information briefings for the eleven WorkCover Industry Reference Groups, the Workers Compensation and Workplace Occupational Health and Safety Advisory Council and WorkCover Board,
- media advertisements and other awareness raising activities,
- preparation of this *Report of the Review of the Occupational Health and Safety Act 2000*, including recommendations for the consideration of the Minister.

## **1.3 Review Outcomes**

### OHS Act Objects

Part B Chapter 5 refers.

Comments received generally indicated that there are no fundamental concerns with the OHS Act objects, and that they remain valid. However, public comment suggested a number of ways to clarify the objects. In particular, clarification was requested as to WorkCover's role and function, the practicality of risk elimination in the workplace and the role of employees and employee representatives in contributing to a healthy and safe workplace.

## General Duties

Chapter 6 refers.

Public comment indicated strong support for the OHS Act's general duty framework as well as recognition that this model has been adopted by all Australian jurisdictions and so provides for the best basis for national uniformity of workplace health and safety legislation. No alternative legislative models received significant public support.

There was however, significant comment suggesting improvements to specific 'general duties' particularly in relation to the clarification of the intent of these duties and their practical relationship to the risk management provisions in the *Occupational Health and Safety Regulation 2001* (the OHS Regulation). Conversely, many stakeholders were supportive of the status quo and did not see a need for clarification or support a change.

## Role of the Regulator

Chapter 7 refers.

The Review raised a significant amount of public comment about the role of WorkCover and suggested a number of ways in which WorkCover might more effectively function. Stakeholders indicated a particular preference for WorkCover to provide practical information and advice and further that a duty holder's efforts to implement this advice be taken into consideration in future interactions with the regulator.

## Enforcement Framework

Chapter 8 refers.

Public comment regarding the OHS Act's enforcement framework raised issues regarding the role of WorkCover in providing an appropriate balance between advisory services and enforcement. Some submissions favoured a greater emphasis on advice while others sought a stricter enforcement approach. Some of the issues raised included dispute resolution procedures with respect to authorised employees' representatives, the ability for employees' representatives to issue 'notices' in a similar manner to 'provisional improvement notices' issued by occupational health and safety representatives in some Australian jurisdictions and the introduction of enforceable undertakings.

Overall comment was mixed with respect to support for, or opposition to, the current regime.

## Other Matters

Chapter 9 refers.

The Legislative Council *Inquiry into Serious Injury and Death in the Workplace, 2004* and the Independent Commission against Corruption have made recommendations in relation to suggested changes to the OHS Act and regulations.

Several of the recommendations are intended to address outstanding matters from these Inquiries, including the creation of two new offences under the OHS Act relating to false representations and gain by deception.

#### ***1.4 Recommendations***

WorkCover has recommended a number of amendments to occupational health and safety legislation to address the issues raised in public submissions. These are listed in Chapter 2. Also described are a range of non-regulatory actions recommended by WorkCover to support the legislative amendments and improve the operation of the OHS Act.

Issues raised in public submissions and WorkCover's corresponding recommendations are described in detail in Chapters 5-8 of this report.

## CHAPTER 2 - RECOMMENDATIONS

The OHS Act Review sought comment on whether the OHS Act objects remain valid and whether the objects omit any important principles.

The Review determined that there are no fundamental concerns with the OHS Act objects, and that they remain valid. Public comment suggested a number of ways to clarify the Act's objects, duty provisions and enforcement framework.

### **2.1 Recommended Amendment to Occupational Health and Safety Legislation**

WorkCover has recommended several amendments to occupational health and safety and related legislation to address the issues raised in public submissions. The recommended amendments involve:

1. referring, in the OHS Act, to the functions of WorkCover under the *Workplace Injury Management and Workers Compensation Act 1998* and amending those functions to clearly articulate WorkCover's occupational health and safety prevention, advisory, assistance and educational functions,
2. clarifying that all persons at a place of work have an active role in contributing to a healthy and safe workplace,
3. providing that an employee must take reasonable care for their own health and safety while at work,
4. clarifying that the general duties apply 'so far as is reasonably practicable' in place of the existing defences under section 28 of the OHS Act (similar to the Victorian *Occupational Health and Safety Act 2004*),
5. clarifying that 'ensuring' health and safety means eliminating risks to health and safety so far as is reasonably practicable and if it is not reasonably practicable to eliminate, to reduce the risks to the lowest level that is reasonably practicable,
6. explaining the meaning of 'reasonably practicable' as involving consideration of several factors (similar to section 20 of the Victorian *Occupational Health and Safety Act 2004*),
7. providing a duty for the health, safety and welfare of clothing outworkers and a duty to consult with clothing outworkers on health and safety issues. These duties should apply to clothing outworkers engaged by the employer and any employees of the clothing outworker. These duties should be qualified to apply only to those matters over which the employer has control or would have control if not for any agreement purporting to limit that control,
8. providing clothing outworkers with the same responsibilities as other types of employee (section 20), including an obligation to take reasonable care for their own safety and the safety of others in the workplace, and providing that clothing outworkers have access to employee protections (section 23), which prevent the unlawful dismissal or other victimisation of an employee for doing things allowed under the OHS Act, for example making a complaint about safety,
9. providing a definition of 'clothing outworker', based on the definition under the *Industrial Relations Act 1996*. This definition defines a clothing outworker as any person who performs, outside a factory, any work in the clothing trades or

- the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail,
10. clarifying that the common areas of strata titled residential premises are excluded from the provisions relating to controllers of work premises,
  11. replacing the existing section 26 directors' and managers' duties with a new duty for 'officers' of corporations, similar to the duty under Victorian occupational health and safety legislation,
  12. providing a mechanism for WorkCover and DPI to resolve disputes about consultation arrangements,
  13. clarifying WorkCover and DPI's power to provide compliance advice (both oral and written) to persons who have a duty or obligation under the OHS Act or regulations,
  14. requiring that copies of any compliance advice or notices issued by WorkCover and DPI be provided to an appropriate employee at the workplace,
  15. allowing WorkCover and DPI to issue guidelines on the interpretation of the OHS Act and regulations,
  16. introducing enforceable undertakings to the compliance regime contained in the OHS Act, as an alternative to prosecution for breaches of the OHS Act, with the exception of a breach of the section 32A offence for reckless conduct causing death. The exception is recommended on the basis of the seriousness of that offence,
  17. extending the powers available to authorised employee representatives to include an authority to enter a workplace to discuss matters related to occupational health and safety with workers, similar to provisions in the *Queensland Workplace Health and Safety and other Acts Amendment Bill 2006*,
  18. providing for the determination of disputes regarding an authorised employee representative's right of access to a workplace to be referred to the Industrial Relations Commission in cases where the authorised representative has requested the assistance of a WorkCover or DPI inspector under section 83 and access is still denied by the employer or their representative,
  19. providing an employee affected by a breach of section 23 with a reinstatement remedy similar to that available under section 213 of the *Industrial Relations Act 1996*,
  20. allowing the exchange of information between WorkCover, DPI and occupational health and safety regulatory agencies from other Australian jurisdictions,
  21. amending the OHS Act to provide for OHS Committee Chairpersons and OHS Representatives, who are appropriately trained and authorised, to issue a safety recommendation notice where the representative believes on reasonable grounds that an employer has contravened a provision of the legislation,
  22. amending the *Industrial Relations Act 1996* to allow for an interlocutory decision in occupational health and safety proceedings to be the subject of appeal in the same way as other criminal proceedings. Specifically, the right to appeal against interlocutory decisions should be limited in similar terms to section 5F of the *Criminal Appeal Act 1912*, to allow an appeal only where the Full Bench

gives leave or where the judicial member certifies that the judgment or order is a proper one for determination on appeal,

23. amending *the Industrial Relations Act 1996* to remove the right of appeal against an acquittal of an offence under the OHS Act,
24. amending the *Crimes (Sentencing Procedure) Act 1999* to ensure that the family of a person killed by reckless conduct at a workplace (offence under section 32A of the OHS Act) will be able to tender a victim impact statement to the Industrial Court, bringing victim impact statement arrangements for section 32A into line with those currently in place for general duty offences under the OHS Act involving a fatality or actual physical bodily harm,
25. amending section 106(1) of the OHS Act to provide that the authority to prosecute is to be instituted by WorkCover or DPI rather than an inspector,
26. amending section 62(1)(c) of the OHS Act to provide clarification of inspectors' investigation functions in relation to permitting the recording of oral evidence given during interviews by means of audio, video or other recording device,
27. amending section 62(1)(c) of the OHS Act to remove doubt that giving evidence orally includes providing answers to questions properly asked by the inspector, which is implicit but not explicitly stated in the provision,
28. allowing for the provision of advice on the status of fine repayments to the next of kin of a person who has died as a result of the commission of an offence under the OHS Act, if requested,
29. creating two new offences relating to knowingly false representations and gain by deception.

## **2.2 Recommended Non-Legislative Strategies**

Non-legislative strategies recommended by WorkCover to support the amendments and improve the operation of the OHS Act are:

- research and evaluation into the suitability of introducing an enhanced occupational health and safety penalty notice system, including the possible use of increased penalty notice fines, as an alternative to prosecution, for certain contraventions of the OHS Act.
- guidance on WorkCover's role and functions and OHS Act objects,
- guidance for shared or multiple duty holders which would include advice on dealing with potential conflicts with other legislation,
- guidance on good practice consultation with third parties,
- guidance on the rights and responsibilities of persons at a place of work,
- guidance on 'reasonably practicable',
- guidance on clothing outworker obligations under the OHS Act,
- guidance on the rights and responsibilities of persons at a place of work,
- guidance for directors and managers,
- guidance to clarify and provide an overview of the range of WorkCover's occupational health and safety prevention functions,
- guidance on enforceable undertakings,
- guidance on the arrangements for the inter-jurisdictional sharing of information,

- guidance on safety recommendation notices,
- guidance on enforcement measures,
- guidance on recording of oral evidence,
- establishing administrative arrangements for the timely sharing of serious incident and fatality information between WorkCover and the New South Wales WorkCover Scheme agents and self-insurers,
- updating WorkCover's *Compliance Policy and Prosecution Guidelines*.

## **PART B – OVERVIEW OF THE OHS ACT REVIEW**

### **CHAPTER 3 – BACKGROUND**

#### ***3.1 Purpose of the Review***

The OHS Act Review provides a timely opportunity to reflect on the effectiveness of the *Occupational Health and Safety Act 2000* (the OHS Act) to achieve the objective of securing and promoting the health, safety and welfare of people at work.

The OHS Act has been in place for almost five years, during which there have been significant social and economic changes. The workplace is rapidly changing with new technologies, economic reform, globalisation of economies and changes to the composition of the workforce. Many more people are working for themselves or working from home. The workforce is ageing and the skill base and risk profiles of industry are changing to reflect new demands. There is also an increasing use of non-traditional work arrangements such as outworkers, contractors and franchisees.

Community perceptions and expectations have also changed, with society becoming more aware of workplace risks and consequently having increased expectations of stringent health and safety standards. The use of technical concepts such as 'risk assessment' that were hardly known a decade ago are now part of every day conversations.

The OHS Act Review, in accordance with the terms of reference, aims to ensure that New South Wales remains at the forefront of workplace health and safety.

#### ***3.2 Terms of Reference***

In accordance with section 142 of the OHS Act, the Minister is to review the Act to determine whether:

- the policy objects of the OHS Act remain valid, and
- the terms of the OHS Act remain appropriate for securing those objects.

Upon completion of the review a report on the outcome of the review is to be tabled in Parliament.

### 3.3 Work Related Injury and Disease Trends

Work related injury and fatality rates have been declining for several years in New South Wales and during 2004/2005 reached the lowest levels recorded in more than 18 years. This decline is encouraging and reflects the efforts of employers, employees, suppliers and Government to improve health and safety in New South Wales.

Figure A includes all cases of injury or disease for which workers compensation was payable (employment injuries) and which resulted in an employee being unfit for their normal duties for five or more days (major injuries). In 2004/05, the incidence rate (number per 1,000 employees) for such injuries was 18.4, which is the lowest rate occurring in New South Wales since the current recording arrangements commenced in 1987.

**Figure A: Major Employment Injuries  
Number and Incidence: 1991 to 2003**

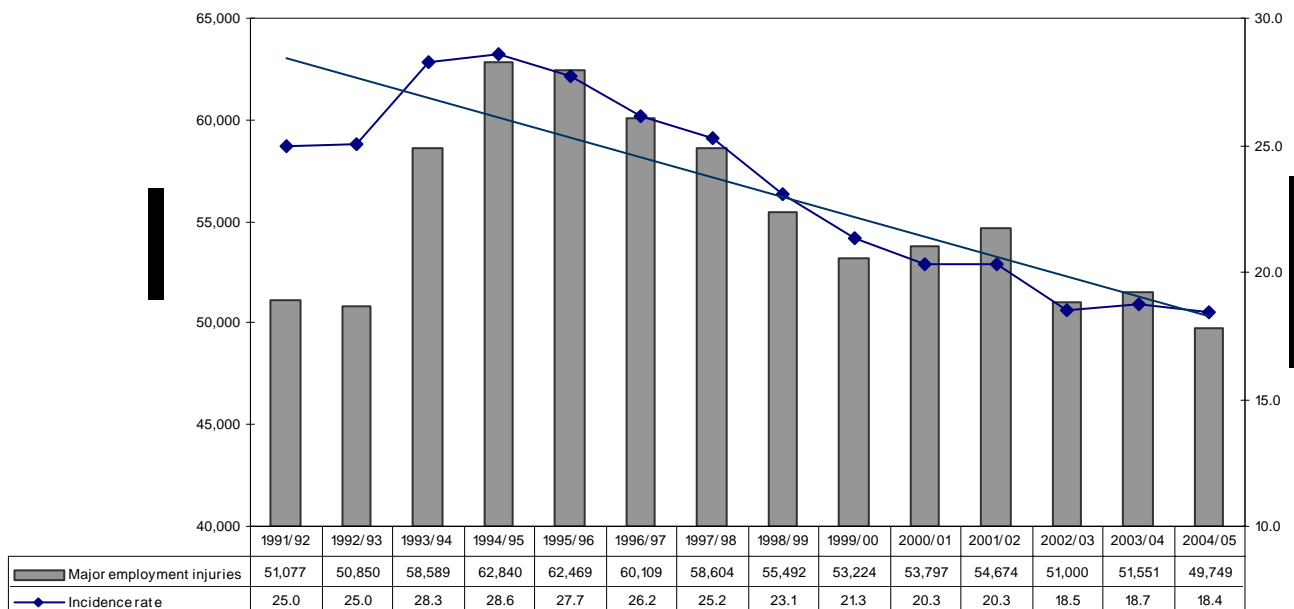


Figure B includes all fatal employment injuries for which compensation was payable between 1991/92 and 2004/05. In 2004/05, the incidence of employment related fatality (number of fatalities per 100,000 workers) reached the lowest level recorded since the current reporting arrangements commenced in 1987.

Figure B also shows the number of fatal employment injuries resulting from occupational disease (diseases contracted or aggravated in the course of employment). In 2004/05, the incidence of occupational disease fatality also fell to the lowest level recorded since commencement of the current reporting arrangements in 1987.

**Figure B: Employment related Fatalities  
Number and Incidence: 1991 to 2003**

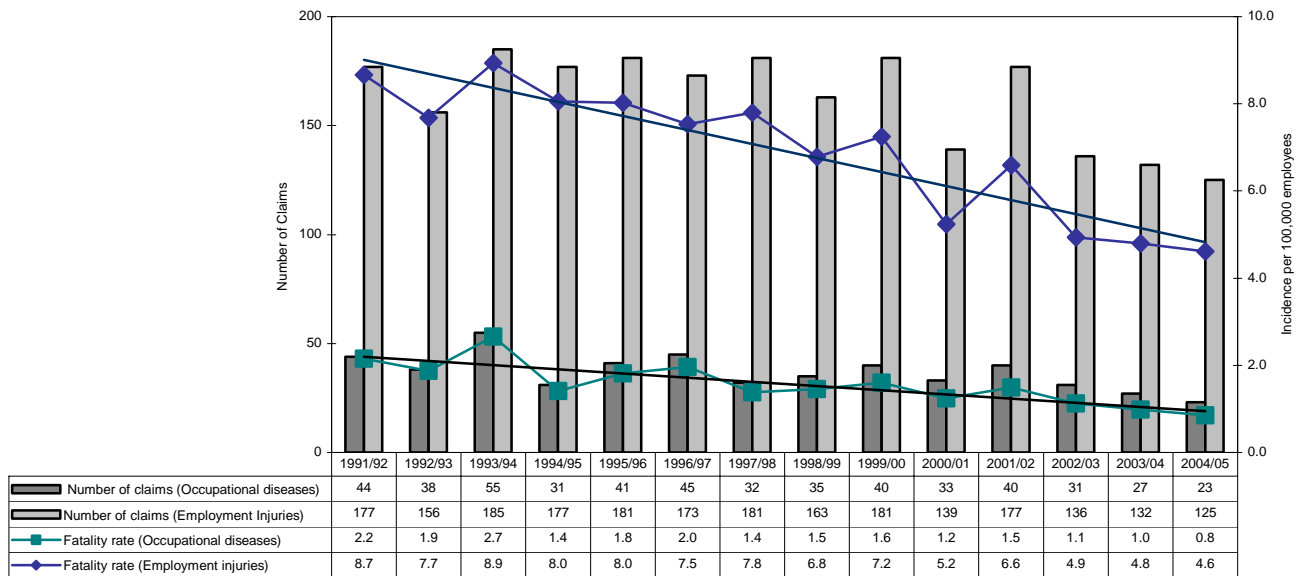


Figure C describes injuries sustained by employees while they were at work (either on duty or during a work break) (workplace injuries) and which resulted in the employee being unfit for their normal duties for five or more days (major injuries). In 2004/05, the incidence rate for major workplace injuries was 13.4 per 1,000 employees. This is the lowest incidence rate experienced in New South Wales since the current recording arrangements commenced in 1987.

**Figure C: Major Injuries at the Workplace  
Number and Incidence: 1991 to 2003**

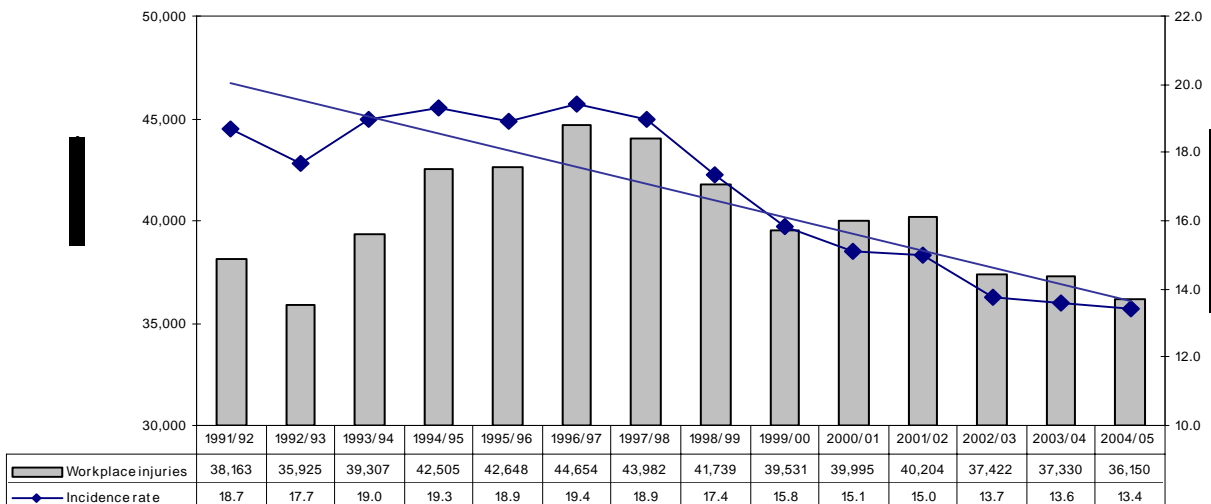
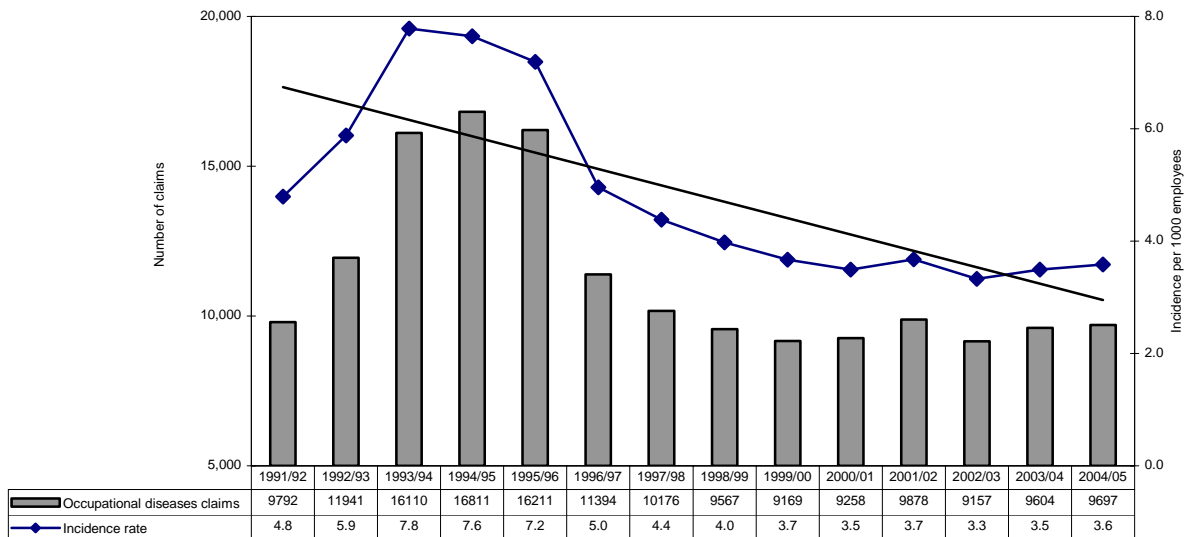


Figure D describes diseases contracted or aggravated by an employee because of their work (occupational diseases) and which resulted in the employee being unfit for their normal duties for five or more days (major injuries). In 2004/05, the incidence of such diseases (per 1,000 workers) was 3.6.

**Figure D: Workplace Illness  
Number and Incidence: 1991 to 2003**



### **3.4 Legislative Environment**

In 2001 the NSW Government commenced the OHS Act and the *Occupational Health and Safety Regulation 2001* (OHS Regulation). These laws replaced the *Occupational Health and Safety Act 1983* (OHS Act 1983), the *Construction Safety Act 1912*, Part 3 of the *Factories, Shops and Industries Act 1962*, and regulations made under these Acts. Together, the OHS Act and OHS Regulation replaced three Acts and 37 Regulations, representing a significant consolidation and modernisation of occupational health and safety legislation in New South Wales.

The approach to occupational health and safety management, introduced with the new OHS Act and Regulation in 2001, is reflective of a trend occurring across Australia and other industrialised countries, away from ad hoc prescriptive standards to a consolidated performance-based approach to occupational health and safety. In line with the new approach, WorkCover adopted a nationally uniform legislative approach of replacing the majority of prescriptive provisions with a consultation and risk management approach, and expressing more clearly the occupational health and safety obligations for each workplace in the State.

From 1996 -1998 the Legislative Council Standing Committee on Law and Justice conducted an Inquiry into Workplace Safety. The *Standing Committee on Law and Justice Final Report on Workplace Safety* recommended a comprehensive overhaul of the Act and these recommendations are reflected in the current OHS Act. The Inquiry was informed by the recommendations of the Panel of Review chaired by Professor Ronald C McCallum.

The recommendations of the Review Panel Report included that:

- the objects of the Act should be redrafted,
- plain English should be employed and a logical reordering of the provisions occur for ease of reference,
- the defences available to an employer should not be widened;
- penalty levels should be reviewed,
- that criminal law with its admitted difficulties remains the most appropriate model for occupational health and safety prosecutions,
- hearing of matters arising from the Act should remain with the Chief Industrial Magistrate and the Industrial Relations Commission in Court Session,
- greater publicity should be given to prosecutions, and,
- perhaps most significantly, a broad duty on employers and employees to consult through appropriate mechanisms should apply in all workplaces in New South Wales.

These recommendations were adopted in the current OHS Act and Regulation, with the most significant changes being the introduction of new objects and provisions relating to risk management and consultation between employers and employees.

### The Occupational Health and Safety Amendment (Dangerous Goods) Regulation 2005 and Explosives Act 2003

The *Occupational Health and Safety Amendment (Dangerous Goods) Act 2003* and the *Explosives Act 2003* form a new regulatory framework for dangerous goods in New South Wales by allowing for the regulation of dangerous goods whether or not at a place of work. The framework applies to all quantities of dangerous goods at a workplace and to quantities over prescribed levels for non-workplaces.

The new regulatory framework adopts the *National Standard for the Storage and Handling of Dangerous Goods*. The National Standard provides the framework within which Commonwealth, State and Territory regulatory authorities can achieve a nationally consistent regulatory regime for the storage and handling of dangerous goods.

The new provisions commenced on 1 September 2005 at which time the *Dangerous Goods Act 1975* and *Dangerous Goods (General) Regulation 1999* were repealed.

### Occupational Health and Safety Amendment (Workplace Deaths) Act 2005

The recent public debate about the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* identified substantial stakeholder concerns about the general duty framework in New South Wales legislation.

In 2003, following community concern about tragic deaths involving young, inexperienced workers and the suitability of the penalties applicable to the small number of rogue employers who disregard basic safety laws, the Government commissioned a panel of eminent legal experts to advise on enhancements to the legislation as they relate to workplace fatalities.

Following an extensive consultation process, the *Workplace Deaths Act 2005* introduced new offences and increased penalties for reckless conduct causing death in a workplace under s32A of the OHS Act.

The maximum penalty for a contravention of s32A is \$110,000 for individuals and/or up to 5 years imprisonment, and \$1.65m for corporations. The offence was based broadly on a new offence contained in the Victorian *Occupational Health and Safety Act 2004*.

The proposals for a new offence for workplace fatalities provoked a strong response from some stakeholders and generated a broader public debate about the OHS Act in relation to:

- perceptions that the strict liability of the general duties unfairly punish employers whose culpability may be minimal and that the existing defences in the Act may be inadequate to protect such employers,
- perceptions that New South Wales occupational health and safety legislation may be harder to comply with than that of other jurisdictions,

- perceptions that WorkCover's and the Courts' approach to what is 'reasonably practicable' in relation to risk elimination and control may be unachievable and impracticable,
- perceptions that employers may be unfairly targeted under the OHS Act and that more enforcement activity should be directed at employees,
- perceptions that WorkCover took a 'soft' approach to incidents in which workers were injured or killed,
- support for education and assistance activities rather than prosecutions to promote compliance,
- the suitability of the Industrial Relations Commission in Court Session (now the Industrial Court), as a specialist industrial forum, for determining occupational health and safety prosecutions,
- the right to appeal against an acquittal in occupational health and safety matters,
- the ability of a secretary of an industrial organisation of employees to bring a prosecution under the OHS Act and a perceived potential conflict of interest.

While not all of these perceptions are based on fact, similar views are still held among some employers and smaller employer groups and were widely raised in the more recent round of public consultation on the review of OHS Act.

Ultimately, many stakeholder organisations, including Australian Business Limited, the Australian Industry Group and the NSW State Chamber of Commerce and unions, were supportive of the introduction of the new offence. Supporters of the new offence cited the need to ensure that those who recklessly and flagrantly breached health and safety requirements should be brought to account and the penalties should be appropriate for the circumstances.

### **3.5 Injury and Illness Reduction Targets**

The NSW Government endorsed the *National OHS Strategy 2002-2012* in May 2002. The Strategy is a landmark development signifying the commitment of all Australian governments, as well as the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions, to work cooperatively on national priorities for improving occupational health and safety and to achieve minimum national targets for reducing the incidence of workplace deaths and injuries, the national targets (using a baseline year of 2001-02) are:

- to sustain a significant, continual reduction in the incidence of work-related fatalities with a reduction of at least 20% by 30 June 2012 (with a reduction of 10% being achieved by 30 June 2007), and
- to reduce the incidence of workplace injury by at least 40% by 30 June 2012 (with a reduction of 20% being achieved by 30 June 2007).

The targets were also adopted by WorkCover's New South Wales industry partners in August 2005 at the New South Wales Workplace Safety Summit 2005.

Workplace Safety Summits, held in 2002 and 2005, gathered key union, employer and government stakeholders to jointly discuss occupational health and safety issues and determine priority areas for further action.

### **3.6 Safety Summit 2002**

In July 2002, the NSW Government convened the inaugural New South Wales Workplace Safety Summit 2002 in association with the NSW Labor Council and employer groups. The Summit provided a forum for the corporate sector, unions, government, small business and local communities to develop solutions to health and safety issues. More than 200 delegates participated.

The Government identified five areas of focus, which form the framework for the Government's strategies to achieve safer workplaces from the Summit. These areas included:

- understanding hazards and risks,
- strengthening workplace safety accountability,
- promoting new solutions,
- making our communities safer,
- designing safer workplaces.

These five focus areas identified 132 recommendations designed to improve the performance of occupational health and safety in New South Wales. In partnership with industry, the Government aims to achieve the national targets for reductions in the incident of workplace fatalities and injuries by 2012. The Government committed to providing support to industry associations, unions and the community to achieve these targets.

### **3.7 Safety Summit 2005**

More recently, over 250 people met at the 2005 New South Wales Workplace Safety Summit in Orange over 25 and 26 August 2005. The Summit provided industry leaders and experts in the field of occupational health and safety with the opportunity to:

- review and discuss information about significant areas of safety risk,
- identify and prioritise safety issues,
- develop strategies for addressing priority issues,
- agree on goals, targets, benchmarks and guiding principles to support prevention strategies.

Emerging from the Safety Summit 2005 was *The New South Wales Workplace Health and Safety Strategy 2005-2008*, which reflected the collective advice of industry experts, occupational health and safety professionals, senior members of industry, employee representatives and the government on how persons with influence over workplace safety can reduce the human and economic cost of work-related injury and disease through effective and efficient action. The strategy

supports but does not override occupational health and safety legislation, although it has influenced the review of the OHS Act.

Summit delegates developed a suite of principles to guide the development of workplace safety activities. These principles have also indirectly influenced the OHS Act Review. The principles are set out below:

- duties of care to workers and third parties should be shared by everyone whose actions could affect their health and safety at work,
- a comprehensive and systematic approach to occupational health and safety risk management should be an integral part of normal business operations,
- action to eliminate or control safety risks should focus on the source of those risks, be that with designers, manufacturers, suppliers, or in the workplace,
- effective injury prevention requires:
  - the cooperation and commitment of all workplace parties to involvement in consultation on workplace health and safety,
  - all workplace parties to accept responsibility for identifying occupational health and safety risks,
  - workplace parties to have sufficient occupational health and safety skills to allow them to participate in consultations and identify hazards,
- preventative initiatives should be evaluated and information shared,
- evidence on any solutions for workplace safety risks should be shared,
- workplace health and safety interventions should target hazards, injuries, industries or occupations where the risk, incidence or severity of injury is significantly high (and consequently the most significant improvements may be realised).

### ***3.8 Investigation into Regulation in New South Wales and Improving Efficiency***

The NSW Government has expressed its strong commitment to the New South Wales economy being vibrant, flexible and dynamic. It aims to achieve this by encouraging investment and job growth maintaining an economy that is diverse, mature and strong and cutting red tape wherever possible to assist industry achieve regulatory objectives in ways that are transparent, simple and minimise compliance costs and business uncertainty.

The Government is also committed to reducing occupational injury and illness rates to ensure that all workers return home safely to their families at the end of the working day.

New South Wales occupational health and safety legislation has been the subject of extensive reviews and reforms over the last 10 years, directed at, among other things, eliminating unnecessary regulation.

Recently, the Government has asked the Independent Pricing and Remuneration Tribunal (IPART) to review existing regulation in New South Wales and make

recommendations to improve the efficiency of Government regulation. IPART is to provide its final report to the Premier by 30 June 2006. In addition to the IPART review, the Government has established a taskforce to conduct a review of the cost of compliance for small business.

The commencement of the current OHS Act and Regulation in 2001 represented a major reform from inflexible, prescriptive and complex legislation to a modern performance-based legislative framework.

## CHAPTER 4 – THE REVIEW PROCESS

On 16 June 2005, the Hon John Della Bosca MLC, Minister for Commerce, announced the commencement of the review of the OHS Act, in accordance with the requirements of section 142 of that Act, to determine whether its objects remain valid and whether the provisions of the Act remain appropriate for securing those objects.

WorkCover administers the OHS Act with the exception of its application to mines, which are administered by the Department of Primary Industries (DPI). The OHS Act's operation with respect to mines falls within the portfolio of the Minister for Primary Industries, the Hon Ian Macdonald MLC.

Section 142 of the OHS Act requires that this report, the *Report on the Review of the Occupational Health and Safety Act 2000*, be tabled in Parliament by 26 June 2006.

### 4.1 Methodology

The consultation and communication strategy was designed to be as inclusive and interactive as possible to ensure that the views of all stakeholders were considered in the review process.

The key groups targeted for consultation purposes were:

- employers and self-employed persons,
- employees and employee representatives,
- persons at places of work,
- controllers of work premises,
- suppliers, designers and manufacturers.

Consultation was facilitated using the following mechanisms:

- deliberation on processes and issues through the OHS Act Reference Group,
- release of the *Review of the Occupational Health and Safety Act 2000 Discussion Paper* for public comment from 28 June 2005 until 19 August 2005,
- ten public information sessions around the State,
- seven issue-based consultative workshops in metropolitan and regional New South Wales,
- additional information sessions on request from peak employer and union organisations,
- information briefings for the eleven Industry Reference Groups, the Workers Compensation and Workplace Occupational Health and Safety Advisory Council and WorkCover Board,

- additional public comment sought on five Issue Papers covering: outworkers; recognition between safety inspectorates; offences for fraudulent activities; the role of codes of practice in the occupational health and safety framework; and controllers of work premises. The five Issue Papers were released for public comment from 22 December 2005 until 10 February 2006.

Awareness raising about the Review of the OHS Act was facilitated through the following mechanisms.

- WorkCover's website,
- media advertisements regarding call for public submissions,
- media releases at key points in the review process,
- stakeholder information networks.

The public consultation and communication activities described below were initiated to create awareness about the Review and to provide the community with the opportunity to contribute to the Review.

#### **4.2 OHS Act Reference Group**

The Minister for Commerce convened the OHS Act Reference Group comprising two peak employer representatives, two peak employee representatives and an independent chair to oversee the review process.

The members of the OHS Act Reference Group were:

- Chair: Mr Greg McCarthy, Chairperson of the WorkCover Board and Workers Compensation and Workplace OHS Council (the Advisory Council),
- employer representatives:
  - Greg Pattison, General Manager, Workplace Solutions, Australian Business Limited/State Chamber of Commerce (NSW),
  - Mark Goodsell, Director - NSW, Australian Industry Group,
- employee representatives:
  - Mark Lennon, Assistant Secretary, Unions NSW,
  - Mary Yaager, OHS and Worker's Compensation Coordinator, Unions NSW.

The Terms of Reference of the OHS Act Reference Group were to provide high-level input to the methods and direction of the Act review by:

- contributing to the framing of the review processes and consultative arrangements through the provision of comment and feedback,
- identifying issues that need to be considered as part of the OHS Act review,
- representing the collective views and opinions of members constituents,
- providing a forum for the exchange and deliberation of ideas and issues arising from the OHS Act review process.

### **4.3 Discussion Paper and Five Issue Papers**

The *Review of the Occupational Health and Safety Act 2000 Discussion Paper* was released on 28 June 2005 with interested persons and groups invited to submit comments by 19 August 2005. However, a number of organisations sought and received extensions up until 2 September 2005. Late submissions were received as recently as 26 October 2005.

There was a substantial amount of public comment in response to the Discussion Paper about the OHS Act's objects, general duty framework, role of WorkCover and enforcement approaches. Some of the specific issues raised in the Discussion Paper did not however elicit a significant response, or the responses indicated that there might have been some misunderstanding about a suggested proposal. Consequently, further comment was sought through a second public comment process on a range of issues described in five Issue Papers:

- Clothing Outworkers,
- Recognition between Safety Inspectorates,
- Offences for Fraudulent Activities,
- The Role of Codes of Practice in the Occupational Health and Safety Framework,
- Controllers of Work Premises.

The closing date for submissions on the Issue Papers was 10 February 2006, however submissions were received until 7 March 2006.

Submissions were placed on the WorkCover website ([www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)) with the author's permission.

### **4.4 Public Information Sessions**

General information sessions were held at the locations and dates set out in the table below. More than 760 people attended, representing a cross section of employers, self-employed persons and workers. Over 80% of attendees providing feedback gave the sessions a rating of good to excellent.

<b>Location</b>	<b>Date</b>
1. Wollongong	4 July 05
2. Wagga Wagga	5 July 05
3. Batemans Bay	6 July 05
4. Sydney, CBD	11 July 05
5. Sydney, Parramatta	12 July 05
6. Newcastle	14 July 05
7. Armidale	20 July 05
8. Tamworth	21 July 05
9. Orange	22 July 05
10. Coffs Harbour	26 July 05

#### **4.5 Targeted Issue-based Workshops**

Seven issue-based workshops were held in the July-August 2005 period at the locations and dates listed in the table below. The issue-based workshops were designed to consider particular issues relating to small and medium businesses; rural and regional businesses; suppliers and controllers; public sector organisations; non-traditional working arrangements and large businesses.

<b>Theme</b>	<b>Location and Date</b>
1. Non-traditional working arrangements	Parramatta (28 July 05)
2. Suppliers of plant or substances and controllers of work premises	Newcastle (3 Aug 05)
3. Public sector agencies	Sydney (4 Aug 05)
4. Small and medium enterprises (regional forum)	Wagga (9 Aug 05)
5. Small and medium enterprises	Sydney (12 Aug 05)
6. Large scale enterprises	Sydney (18 August 05)
7. Rural and regional enterprises	Armidale (19 Aug 05)

Twyford Consulting independently facilitated the workshops with 104 participants attending.

Unions NSW raised a concern about the ability of workers to attend the half-day workshops resulting in a low level of employee representation. Two additional meetings were subsequently held with Unions NSW and its affiliates to ensure that workers concerns were identified and recorded. A total of 22 people attended the two meetings representing 11 Union groups.

#### **4.6 OHS Act Review – Challenges and Opportunities**

The OHS Act is structured in eight parts covering:

- the preliminary provisions including the objects (Part 1);
- general duties relating to health and safety and welfare at work (Part 2);
- regulation and industry codes of practice making powers (Parts 3 & 4); and
- the enforcement and miscellaneous provisions (Parts 5 – 8).

The review resulted in a substantial amount of public comment in relation to each of these parts.

This report describes the public comment received and the corresponding legislative and non-legislative action recommended by WorkCover in response.

- Chapter 5 of this report deals with the preliminary provisions of the OHS Act including the objects,
- Chapter 6 of this report deals with duties relating to health and safety and welfare at work,

- Chapter 7 of this report deals with regulation and industry codes of practice making powers,
- Chapter 8 of this report deals with the enforcement and miscellaneous provisions.

The Review has also afforded the opportunity to consider the alignment of New South Wales provisions with those of other jurisdictions, where this will enhance the New South Wales occupational health and safety framework.

In view of this, several of the amendments recommended by WorkCover are modelled on the provisions of other jurisdictions so as to promote the alignment of OHS legislation between the jurisdictions, where appropriate.

A list of all organisations and individuals who provided submissions responding to the Discussion Paper or the five Issue Papers is provided at Appendix A.

## **PART C – PUBLIC COMMENT AND CORRESPONDING RECOMMENDATIONS**

### **CHAPTER 5 - OHS ACT OBJECTS**

The OHS Act Review sought comment on whether the OHS Act objects remain valid and whether the objects omit any important principles.

Section 3 of the OHS Act describes the objects of the Act as follows:

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

#### *Public Comment*

Public comment generally indicated that the current policy objects were valid.

A number of submissions did however suggest additional objects or changes to an existing object to clarify its intent or to emphasise a particular value.

The main themes that emerged included suggestions to:

- articulate WorkCover's role and functions,
- reflect non-traditional working arrangements in the objects,
- clarify that risk management follows a hierarchy of risk control,
- clarify that all persons at a place of work have an active role in contributing to a healthy and safe workplace,
- clarify terms such as 'secure', 'protect', 'consultation' and 'co-operation'.

## *Recommendations*

The public comments suggest that there are no fundamental issues of concern with the OHS Act objects and that they remain valid.

This may be because the objects of the OHS Act were significantly modernised in 2000 as a result of recommendations of the Legislative Council Standing Committee on Law and Justice Inquiry into Workplace Safety and largely reflect the recommendations of the *Final Report of Panel of Review* (February 1997). The Panel of Review comprised members of employer and union organisations, health and safety experts and was chaired by Ronald C. McCallum, Professor of Industrial Law, University of Sydney.

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

WorkCover recommends a range of legislative and non-legislative actions to address these issues.

The recommended legislative amendments are:

- amending the functions of WorkCover under the *Workplace Injury Management and Workers Compensation Act 1998* to clearly articulate WorkCover's OHS prevention, advisory, assistance and educational functions,
- to refer, in the OHS Act, to the functions of WorkCover under the *Workplace Injury Management and Workers Compensation Act 1998*,
- clarifying that risk management involves firstly risk elimination and if this is not reasonably practicable then risks should be reduced to the lowest level that is reasonably practicable,
- clarifying that all persons at a place of work should be encouraged to take an active role in protecting themselves and others against risks to health or safety in the workplace.

The specific non-legislative strategies recommended are the development of guidance:

- about WorkCover's role and functions,
- for shared or multiple duty holders which should include advice on dealing with potential conflicts with other legislation,
- on the rights and responsibilities of persons at a place of work.

## CHAPTER 6 - THE GENERAL DUTY FRAMEWORK

### 6.1 General Duty Development and Framework

General duties are a key feature of the New South Wales OHS legislative framework and that of other Australian jurisdictions.

The OHS Act general duties are derived from Commissioner Williams' *Report of the Commission of Inquiry into Occupational Health and Safety* dated 3 June 1981 which recommended sweeping legislative changes to New South Wales health and safety legislation.

These changes were based largely on the United Kingdom's 'Robens style' occupational health and safety legislation. The 1972 United Kingdom *Report of the Committee on Health and Safety at Work* by Lord Robens recommended the innovative general duty framework for persons with workplace health and safety responsibilities.

*We believe that the general principles of safety responsibility and safe working should be embodied in a statutory declaration, which would set all of the detailed statutory and other provisions in clear perspective. (Robens, 1972, p.41)*

The general duty approach has been adopted by all Australian State and Territory jurisdictions and the Commonwealth and is reflected in all National Occupational Health and Safety Standards. The approach is also internationally consistent with the International Labour Organisation (ILO) *Occupational Health and Safety Convention 155*, to which Australia is a signatory nation.

The OHS Act has occupational health and safety general duties for:

- employers,
- self-employed persons,
- controllers of work premises, plant or substances,
- designers, manufacturers and suppliers of plant and substances.

The OHS Act has related duties for:

- employees,
- persons at a place of work.

The OHS Act has derived liability duties for:

- directors and managers of corporations.

The general duties under the OHS Act are as follows.

## **8 Duties of employers**

### **(1) Employees**

An employer must ensure the health, safety and welfare at work of all the employees of the employer.

That duty extends (without limitation) to the following:

- (a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,
- (b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,
- (c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,
- (d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,
- (e) providing adequate facilities for the welfare of the employees at work.

### **(2) Others at workplace**

An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

## **9 Duties of self-employed persons**

A self-employed person must ensure that people (other than the employees of the person) are not exposed to risks to their health or safety arising from the conduct of the person's undertaking while they are at the person's place of work.

## **10 Duties of controllers of work premises, plant or substances**

- (1) A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.
- (2) A person who has control of any plant or substance used by people at work must ensure that the plant or substance is safe and without risks to health when properly used.
- (3) The duties of a person under this section:
  - (a) do not apply to premises, plant or substances used only by employees of the person, and
  - (b) do not apply to premises occupied only as a private dwelling or to plant or substances used in any such premises, and
  - (c) extend to the means of access to or exit from a place of work, and
  - (d) apply only if the premises, plant or substances are controlled in the course of a trade, business or other undertaking (whether for profit or not) of the person.

- (4) In this section, a person who has control of premises, plant or substances includes:
- (a) a person who has only limited control of the premises, plant or substances (in which case any duty under this section applies only to the matters over which the person has control), and
  - (b) a person who has, under any contract or lease, an obligation to maintain or repair the premises, plant or substances (in which case any duty under this section applies only to the matters covered by the contract or lease).

#### **11 Duties of designers, manufacturers and suppliers of plant and substances for use at work**

- (1) A person who designs, manufactures or supplies any plant or substance for use by people at work must:
- (a) ensure that the plant or substance is safe and without risks to health when properly used, and
  - (b) provide, or arrange for the provision of, adequate information about the plant or substance to the persons to whom it is supplied to ensure its safe use.
- (2) The duties under this section:
- (a) apply only if the plant or substance is designed, manufactured or supplied in the course of a trade, business or other undertaking (whether for profit or not), and
  - (b) apply whether or not the plant or substance is exclusively designed, manufactured or supplied for use by people at work, and
  - (c) extend to the design, manufacture or supply of components for, or accessories to, any plant for use by people at work, and
  - (d) extend to the supply of the plant or substance by way of sale, transfer, lease or hire and whether as principal or agent, and
  - (e) extend to the supply of the plant or substance to a person for the purpose of supply to others, and
  - (f) do not apply to a person merely because the person supplies the plant or substance in the course of a business of financing the acquisition of the plant or substance by a customer from another person.
- (3) In this section, manufacture plant includes assemble, install or erect plant.

#### *Discussion*

The general duty framework has the great advantage of having one simple obligation for all workplaces and all hazards, so no matter whether you are responsible for a complex chemical manufacturing process at a major hazard facility or a slip and trip hazard at a florist, the obligation is applicable. How the obligation is discharged will be quite different for both examples and this is where stakeholders have the greatest difficulty with the general duty approach. "How much prevention is enough and what will an inspector expect from me when he or she visits my workplace?" were questions commonly put by employers during public comment.

The issue of how much prevention is enough leads to questions about how a duty holder ensures health and safety and what would satisfy an inspector or the courts.

The answer to these questions must be clearly articulated and understood if high levels of compliance are to be achieved, particularly among small to medium sized businesses. A clear understanding of how the general duties are to be discharged will also help avoid unnecessary or counterproductive risk control efforts.

## **6.2 Controllers of Work Premises and Outworkers**

### Public Comment

The OHS Act Review sought comment on:

- the scope of the general duties and whether these duties were appropriate for securing the OHS Act objects,
- the duties for controllers of work premises
- legislative provisions in relation to outsourcing or contract work.

### *Scope of the general duty framework*

Public comment indicated strong support for the scope of the general duty framework, with no significant public support for an alternate legislative model. There was also recognition that this model has been adopted in all jurisdictions providing the best basis for national uniformity of health and safety legislation.

There was however significant comment suggesting improvements to the general duty framework. The common themes to emerge from public comment were suggestions to:

- ensure consistent application of the general duties,
- cover persons who outsource work and others who have influence over the health and safety of people but are not their employer under the general duty provisions,
- expand coverage of non-traditional work arrangements such as contractors and non-employees,
- qualify general duties with 'reasonably practicable',
- expand coverage of students and volunteers,
- restrict coverage of work done at residential premises,
- provide more specific general duties for different industry sectors,
- clarify how multiple parties with joint responsibilities should discharge their obligations,
- provide more practical guidance on general duties.

One clear theme arising was the importance of ensuring that the OHS general duties encourage and assist the development of practical approaches to managing health and safety.

A number of submissions were also made in favour of expanding the scope of the general duties to include persons and things not currently covered by the OHS Act. These included all plant and substances (whether or not they are used in a place of work), designers of work premises, persons commissioning work premises and clothing outworkers.

A number of submissions and comments requested clarification of the perceived 'absolute nature' of the general duties. In particular, submissions raised concerns of uncertainty about the meaning of 'ensuring' health and safety in the general duties, with suggestions made for additional defences and the inclusion of the qualification of 'reasonably practicable' in the general duties. In addition, clarification was sought on a range of specific terms used in the Act. On the other hand, other submissions opposed any changes being made to the general duties.

The perceived 'absolute nature' of the general duties, coupled with a reverse onus of proof defence was a significant issue for employers and was cited as the most important difference between New South Wales OHS legislation and other jurisdictions.

To some stakeholders, the New South Wales OHS legislation appears to place greater emphasis on considering what is a 'reasonably practicable' defence once something has gone wrong rather than proactively considering 'reasonably practicable' risk controls as required in the risk management provisions of the OHS Regulation.

A common theme in several submissions was a perception there was a lack of recognition by the regulator and the courts of the duty holder's compliance efforts and what was reasonably practicable in the circumstances.

Some submissions asked for greater clarity regarding the intent of the general duties and the relationship between the general duties and the risk management provisions of the *OHS Regulation 2001*, and what this means in practical terms.

Conversely, many stakeholders were supportive of the status quo and did not seek clarification or change.

### *Outworkers*

The *Review of the Occupational Health and Safety Act 2000 Discussion Paper* sought comment on the current legislative provisions in relation to outsourcing or contract work. While there was not a great deal of comment on this issue, a number of submissions were received that advocated coverage under the general duties for outworkers, particularly home-based clothing outworkers.

In order to further explore matters relating to outworkers an Issue Paper on *Clothing Outworkers* was released for public comment. The Issue Paper sought further comment on whether there should be specific coverage for clothing outworkers under the OHS Act, including what type of legislative model would provide the best outcomes; what health and safety obligations should be considered and whether there would be any implications for any existing occupational health and safety provisions under the *Industrial Relations (Ethical Clothing Trades) Act 2001*.

The Issue Paper noted that the question of adequate coverage for outworkers had been raised at both the 2002 and 2005 Safety Summits with the following recommendation and priority issue being identified:

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

*Amend the OHS Act (Section 8.2 and Section 9) to remove 'employer workplace' restrictions regarding outworkers. (2005 Safety Summit)*

A small number of submissions were received in response to the Issue Paper on Clothing Outworkers. Union submissions strongly supported the proposal to include specific coverage for outworkers under the OHS Act. Support among employer submissions was mixed with either strong opposition to the proposal or support qualified with the need to recognise an employer's limited level of control in situations where workers are located at premises other than the employer's place of work.

Specific coverage for clothing outworkers is supported by a recent evaluation by the National Research Centre for OHS Regulation, *Regulating Occupational Health and Safety in a Changing Labour Market* (Johnstone, 2005). This paper identifies that the general duties do not adequately cover employer/principal relationships with outworkers and other dependent workers where work is conducted away from the employer's/principal's place of work.

There was some employer support for clarifying the role and responsibilities of an employer in situations where employees work at locations outside the employer's work premises, such as domestic premises, public areas or overseas assignments. Much of this support was qualified by the need for the legislative coverage to recognise the limitations on an employer's ability to control health and safety risks outside the work premises. Submissions from union groups generally expressed the view that the current provisions of section 8 of the OHS Act are adequate in ensuring the health and safety of employees at any site.

#### *Controllers of Work Premises*

An order providing an exemption from the duties of controllers of premises under clauses 33 – 44 of the OHS Regulation is currently in place for the common areas of strata title residential premises to ensure consistent equitable coverage for all domestic premises. The exemption was made due to a concern that the non-application of the controller provisions under section 10(3)(b) of the OHS Act did not extend to the common property of strata titled residential premises.

The current exemption applies to the common property of residential strata schemes that are comprised only of residential units or are a mix of residential and commercial units, in which case the exemption applies to that part of the common property that is used exclusively by the occupants of the residential units.

The exemption is due to expire in November 2007. In making the exemption order it was envisaged that the provisions of the exemption should be incorporated in the

legislation prior to its expiration. The OHS Review also sought specific public comment on amending the OHS Act to correct this anomaly.

Much of the comment received about the obligations for controllers of premises related to the need for further clarification and guidance on the discharge of controller obligations.

From the comment received, there appeared to be a general lack of clarity about who is covered by the controller obligations and how those obligations ought to be discharged, particularly when the responsibilities are shared or when work is undertaken in non-workplace premises, such as health care workers visiting a client at their home or work undertaken in public places.

In response to the comments received, an Issue Paper on *Controllers of Work Premises* was released for public comment. The Issue Paper sought further comment on the obligations of controllers of work premises but also posed specific questions on whether the scope of the controller of premises provisions should be amended to reflect the provisions of the exemption relating to the common property of strata titled residential premises; whether the health and safety obligations of employers in relation to employees working at domestic premises, over which the employer may have limited control, should be more clearly recognised in the legislation and whether it is necessary to clarify the extent to which an employer should control occupational health and safety risks away from work premises and in the public domain.

Public comment on the Issue Paper generally supported amending the Act to reflect the provisions of the exemption relating to strata titled residential premises, although there were three submissions that advocated that the controller provisions should apply to controllers of all premises, regardless of the nature of the premises. Other suggestions included extending the exemption to include the common property in all strata arrangements and extending the exemption to include public spaces, such as roads and beaches, in order to cover situations where emergency services are required.

Public comment strongly identified the need for clarity and guidance on how controller obligations can be satisfactorily discharged by duty holders and it was suggested that the concept of 'proportionate liability' be introduced in relation to situations involving multiple duty holders.

### Recommendations

During the review, stakeholders provided examples of allegedly unnecessary or counterproductive risk controls, for example cancelling public events to avoid potential health and safety risks.

Examples such as this highlight the need to put risk management into context. Consequently, WorkCover's recommendations with regard to the general duty provisions are intended to foster a better understanding and application of a practical approach to risk management.

## *Practical Risk Management*

There are many far-fetched or insignificant risks for which the cost, time and trouble of further risk controls is not warranted. There are however risks that may be eliminated through substitution with a non-hazardous alternative material or process, and some unavoidable higher-level risks that will need to be reduced so far as is reasonably practicable.

Practical risk management requires the identification of risks that are likely to affect health and safety and over which the duty holder has a level of control. For example, duty holders have a limited control over risks associated with everyday living (eg outdoor air quality, built environment of public spaces) and over persons who do not have duties under the OHS Act (e.g. members of the public). Risk management, in an occupational health and safety context, is about finding workable solutions for each workplace risk, it should not be seen as an obstacle to the vision or mission of the workplace.

Practical health and safety management involves a common sense approach to managing risks to health and safety. This is done by:

- employers and employees taking an active role in promoting a culture of safety,
- effective consultation and co-operation between employers and employees about decisions affecting health, safety and welfare at work,
- knowing the hazards and understanding the risk of harm,
- eliminating unnecessary hazards and controlling other risks of harm to the lowest reasonably practicable level,
- monitoring performance and taking corrective actions to achieve ongoing improvements in workplace health and safety.

The way these arrangements are addressed at a workplace should be relative to the size of the business, the nature of the hazards and risk of harm. Those arrangements may be very simple for a small office-based business or very complex for an explosives manufacturing facility.

## *Outworkers and contractors*

Current general duty provisions cover persons who outsource work and others, such as controllers of work premises, to the extent that they retain control over the work process or work premises.

WorkCover considered that the existing general duty on employers and self-employed persons to 'others' in the workplace provides appropriate health and safety protections for persons who may be working without remuneration, such as students and volunteers and other non-employees. WorkCover does not recommend expanding the scope of the OHS Act in this regard.

Suggestions that the general duty on employers to ensure the health and safety of their employees should be relaxed in circumstances where work is not undertaken at the employer's work premises were not supported by WorkCover. The recommendation to amend the OHS Act to clarify that the general duties are

subject to the concept of 'reasonably practicable' should however provide clarity that employer responsibilities are limited by the level of control that the employer is able to exercise over work undertaken in domestic premises or other locations away from the employer's premises.

Submissions in favour of providing additional protections for clothing outworkers were supported by WorkCover. WorkCover considers that clothing outworkers are particularly vulnerable to risks of injury and that the general duties do not adequately cover employer/principal relationships with outworkers where work is conducted away from the employer's/principal's place of work.

### *Proportionate liability*

The concept of 'proportionate liability' for controllers of work premises was considered during the review. Courts already have the capacity to apportion liability where multiple parties are involved in a matter. As such, it was not considered necessary to include the concept in the legislation, which relies on the principle of persons retaining responsibility for shared OHS matters and discharging those responsibilities in a co-ordinated manner.

WorkCover recommends the following legislative and non-legislative action.

The recommended legislative amendments to the general duty provisions are:

- clarifying that the general duties apply 'so far as is reasonably practicable' in place of the existing defences under section 28 of the OHS Act (similar to the Victorian *Occupational Health and Safety Act 2004*),
- clarifying that 'ensuring' health and safety means eliminating risks to health and safety so far as is reasonably practicable and if it is not reasonably practicable to eliminate, to reduce the risks to the lowest level that is reasonably practicable,,
- explaining the meaning of 'reasonably practicable' as involving consideration of the following (similar to section 20 of the Victorian *Occupational Health and Safety Act 2004*):
  - what the person concerned knows, or ought reasonable to know, about the hazards giving rise to the risk concerned,
  - the likelihood of the risk eventuating,
  - the degree of harm that would result if the risk eventuated,
  - what the person concerned knows, or ought reasonably to know, about any ways of eliminating or reducing the risk,
  - the availability and suitability of ways to eliminate or reduce the risk, and
  - the cost of eliminating or reducing the risk.
- clarifying that all persons at a place of work have an active role in contributing to a healthy and safe workplace,
- providing a duty for the health, safety and welfare of clothing outworkers and a duty to consult on health and safety issues. These duties should apply to clothing outworkers engaged by the employer and any employees of the

clothing outworker. These duties should be qualified to apply only to those matters over which the employer has control or would have control if not for any agreement purporting to limit that control,

- providing clothing outworkers with the same responsibilities as other types of employee (section 20), including an obligation to take reasonable care for their own safety and the safety of others in the workplace, and providing that clothing outworkers have access to employee protections (section 23), which prevent the unlawful dismissal or other victimisation of an employee for doing things allowed under the OHS Act, for example making a complaint about safety,
- providing a definition of 'clothing outworker', based on the definition under the *Industrial Relations Act 1996*. This definition defines a clothing outworker as any person who performs, outside a factory, any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail,
- clarifying that the common areas of strata titled residential premises are excluded from the provisions relating to controllers of work premises,
- allowing WorkCover and DPI (in relation to mines) to issue guidelines on the interpretation of the OHS Act and regulations.

Non-legislative strategies recommended to support these arrangements are:

- guidance on what is meant by 'reasonably practicable',
- guidance for shared or multiple duty holders,
- guidance on good practice consultation with third parties,
- the development of guidance on clothing outworker obligations under the OHS Act.

## **6.3 Duties of People at Work**

### Employees and Other Persons at a Place of Work

The OHS Review sought comment on the responsibilities and rights of employees and persons at a place of work. The duties under the OHS Act are as follows:

#### **20 Duties of employees**

- (1) An employee must, while at work, take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.
- (2) An employee must, while at work, co-operate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that is imposed in the interests of health, safety and welfare on the employer or any other person.

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

A person must not, intentionally or recklessly, interfere with or misuse anything provided in the interests of health, safety and welfare under occupational health and safety legislation.

#### **24 Person not to hinder aid to injured worker etc**

- (1) A person must not, by intimidation or by any other act or omission, intentionally hinder or obstruct or attempt to hinder or obstruct, without reasonable excuse:
  - (a) the giving or receiving of aid in respect of the illness or injury of a person at work, or
  - (b) the doing of any act or thing to avoid or prevent a serious risk to the health or safety of a person at work.
- (2) A person at a place of work must not, without reasonable excuse, refuse any reasonable request:
  - (a) for assistance in the giving or receiving of aid in respect of the illness or injury of a person at work at that place of work, or
  - (b) for the doing of any act or thing to assist in the avoidance or prevention of a serious risk to the health or safety of a person at work at that place of work.

#### **25 Person not to disrupt workplace by creating health or safety fears**

A person must not, without reasonable excuse, deliberately create a risk (or the appearance of a risk) to the health or safety of people at a place of work with the intention of causing a disruption of work at that place.

### *Duties Owed to Volunteers*

The OHS Act places an obligation on every employer to ensure that people at their workplace are not exposed to risk arising out of the conduct of the employer's undertaking. This protection extends to volunteers who may be engaging in activities at a workplace for which the employer is responsible.

The Act does not explicitly require volunteers to be trained or particular safety measures to be implemented. Nor does it require that volunteers be accredited or specially qualified for the purpose of engaging in an employer's activities.

The OHS Regulation does however require an employer to provide information, instruction and training to non-employees which may be necessary to ensure their health and safety if they may be exposed to risk at the employer's workplace. It is a matter for each employer to judge the risks that particular volunteers may be exposed to in particular circumstances and to implement appropriate preventative measures.

### *Public Comment*

Overall comment was mixed, suggesting both support for the existing employee duties and support for clarification of those duties. A number of submissions suggested changes to the employees' duties, suggesting that the OHS Act is not sufficiently explicit about the obligation of employees to take reasonable care of their own health and safety. Most other Australian jurisdictions have explicit obligations for employees to take care of their own health and safety.

Another common theme was the suggestion to make it clear that employees have an active role to operate in accordance with workplaces safety policy and procedures.

Suggestions were also made concerning the need to emphasise that no financial costs or other disadvantages should be imposed on employees for taking part in OHS related matters and to ensure that training in relation to OHS activities is regarded as part of an employee's normal work duties and is remunerated as such.

It was also suggested that the victimisation of employees provisions (section 23) ought to be expanded to cover principal contractors in their dealings with sub-contractors and should be broadened to cover victimisation for taking part in any OHS activity or for refusing to undertake unsafe work.

### *Recommendations*

WorkCover recommends several legislative and non-legislative actions to respond to the issues raised.

The recommended amendments to the OHS Act are:

- clarifying that all persons at a place of work have an active role in contributing to a healthy and safe workplace,
- providing that an employee must take reasonable care for their own health and safety while at work.

A related non-legislative strategy recommended by WorkCover is development of guidance on the rights and responsibilities of persons at a place of work.

The current provisions of sections 22 and 23 of the Act, which deal with not charging employees for OHS related matters and not dismissing or otherwise victimising employees because of their involvement in OHS matters, are regarded as providing sufficient protections for employees. The recommended new guidance on the rights and responsibilities of persons at a place of work, including employees, will cover the rights of employees in relation to OHS matters.

The suggestion to extend the provisions of section 23 of the OHS Act to cover principal contractors was considered during the review, however, as contractor arrangements are fundamentally different from the relationship between an employer and an employee it was considered that it would not be feasible to apply the provisions to contractual arrangements and the requirement would not be able to be enforced.

### Directors and Managers

The OHS Review sought comment on the provisions and defences applying to directors and managers of corporations. The duties under the OHS Act are as follows:

#### **26 Offences by corporations—liability of directors and managers**

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

The Legal Panel that provided advice in relation to workplace deaths in June 2004 suggested the following three principles that should inform any new approach to the liability of directors and managers:

- *The conviction of directors and managers without fault is unacceptable.*
- *Corporate personnel have and should be accountable for individual responsibilities where personal fault exists.*
- *Principles of individual responsibility however, must also allow for:*

- excuse where relevant events occur without an individual's actual or constructive knowledge of material facts;
- excuse where relevant events are beyond that individual's control.

(McCallum, Hall, Hatcher, Searle, 2004– *Report to WorkCover Authority of NSW*, p.57)

The Panel also recommended the development of a code of practice that identifies the following individual responsibilities of management personnel:

- the obligations and requirements for an adequate safety management system,
- the development of a relevant risk assessment plan,
- the methodology and strategies required and that should be followed for implementing, overseeing and enforcing compliance with relevant safety management systems.

### *Public Comment*

A number of stakeholders reaffirmed support for the principles and the development of a code or other guidance in their public comment.

In relation to overall comment on directors' and managers' obligations there was significant comment regarding the section 26 derivative liability duties for directors and managers of corporations. These duties deem directors and managers to be liable for offences committed by corporations, unless the director or manager demonstrates that they were not in a position to influence the conduct of the corporation in relation to its contravention of the provision or that they used all due diligence to prevent the contravention. Many submissions sought clarification of who in a corporation should be considered a 'manager' and WorkCover's expectations regarding 'due diligence' under section 26 of the OHS Act.

The OHS Act does not currently provide a definition for a 'person concerned in the management of the corporation'. Public comment on the OHS Act review sought clarification on who is covered by this term. Concerns were also expressed that the broad scope of the current provision could cover employees who may not necessarily be in a position of real influence within a corporation.

Interpretation of the term by the courts suggests that the term 'person concerned in the management of a corporation' might be taken to refer to either a person concerned with the totality of the operations of the corporation or a person concerned only with the management of some defined portion of the affairs of the corporation. The New South Wales Court of Appeal held (in *Powercoal Pty Ltd & Peter Lamont Foster v Industrial Relations Commission of NSW & Rodney Dale Morrison* [2005] NSWCA 345) that individuals do not need to be involved in the central management of a corporation to be prosecuted, and that in light of the objects of the OHS Act and the general nature of the duties imposed, Parliament did not intend for the provision to have a narrow and technical meaning and should not be read down to apply only to central management.

There was support for adopting section 144 of the Victorian *Occupational Health and Safety Act 2004*, which does not cover relatively junior officers of an

organisation. The potential coverage of junior officers was a concern raised by both industry and unions.

The Victorian model of 'officers' obligations is also supported by a recent evaluation by the National Research Centre for OHS Regulation (Johnstone et al, 2006) *Take Me to your Employer: The Organisational Reach of Occupational Health and Safety Regulation*. Section 144 of the Victorian *Occupational Health and Safety Act 2004* is reproduced below.

#### **Victorian Occupational Health and Safety Act 2004**

##### **144. Liability of officers of bodies corporate**

- (1) If a body corporate (including a body corporate representing the Crown) contravenes a provision of this Act or the regulations and the contravention is attributable to an officer of the body corporate failing to take reasonable care, the officer is guilty of an offence and liable to a fine not exceeding the maximum fine for an offence constituted by a contravention by a natural person of the provision contravened by the body corporate.
- (2) In determining whether an officer of a body corporate is guilty of an offence, regard must be had to—
  - (a) what the officer knew about the matter concerned; and
  - (b) the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned; and
  - (c) whether the contravention by the body corporate is also attributable to an act or omission of any other person; and
  - (d) any other relevant matter.
- (4) An officer of a body corporate may be convicted or found guilty of an offence in accordance with sub-section (1) whether or not the body corporate has been convicted or found guilty of the offence committed by it.
- (5) An officer of a body corporate (including a body corporate representing the Crown) who is a volunteer is not liable to be prosecuted under this section for anything done or not done by him or her as a volunteer.

Note 1: "Officer" of a body corporate includes a person who makes or participates in the making of decisions that affect the whole or a substantial part of the body corporate's business and a person who has the capacity to affect significantly the body corporate's financial standing (see section 5).

Note 2: For "volunteer", see section 5.

In the Victorian *Occupational Health and Safety Act 2004*, the term ‘officer of a body corporate, unincorporated body or association or partnership’ has the same meaning as in section 9 of the *Corporations Act 2001(Cth)*, reproduced below:

### **Corporations Act 2001 (Cth)**

**officer** of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
  - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  - (ii) who has the capacity to affect significantly the corporation’s financial standing; or
  - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Note: Section 201B contains rules about who is a director of a corporation.

**officer** of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is an unincorporated association; or
- (c) a person:
  - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
  - (ii) who has the capacity to affect significantly the entity’s financial standing.

### *Recommendations*

WorkCover recommends replacement of the existing section 26 (director’s and manager’s duties) with a new duty for ‘officers’ of corporations, similar to the duty set out in the Victorian OHS legislation<sup>1</sup>.

The term ‘officer of a corporation’ should be clearly defined in similar terms to the Victorian OHS legislation by reference to section 9 of the Commonwealth *Corporations Act 2001*.

An ‘officer’ who is acting in a voluntary capacity should be exempt from prosecution for occupational health and safety offences committed by them while acting as a volunteer.

WorkCover also recommends it provide guidance for directors and managers to assist them understand how the OHS Act applies to them, the nature and extent of their responsibilities under the OHS Act and how these responsibilities might be fulfilled.

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<sup>1</sup> The Victorian OHS Act also includes specific provisions (sections 143 and 145) to cover partnerships and unincorporated associations because they are not covered by the general employer duties in the Victorian Act. Those people are covered by section 8 (duties of employers) in New South Wales and therefore a separate provision is unnecessary.

## Duty to Consult

The OHS Act Review sought comment on any issues relating to the scope and effectiveness of the consultation obligations and whether these obligations provide sufficient flexibility.

### *Public Comment*

There was general support for the adequacy of the existing consultation provisions, but also a range of suggested changes to improve the existing requirements. The general themes for change were:

- a broader consultation duty on all persons affected by workplace risks, including third parties,
- a specific requirement to consult directly with employees who are affected by a work hazard;
- greater clarity about the process for resolving issues relating to consultation mechanisms,
- more flexibility to address complex organisational structures,
- limitations on the use of 'other agreed arrangements' and a greater level of detail for such arrangements. Unions in particular sought to restrict 'other agreed arrangements' to arrangements whereby a Federal or State industrial organisation would represent employees,
- the introduction of 'roving' OHS representatives for transient workforces,
- issues relating to consultation training.

Unions, in particular, provided a range of specific suggestions in relation to operational mechanisms for 'other agreed arrangements'. Specific suggestions included: demonstrating that 'other agreed arrangements' had been approved by employees; requiring 'other agreed arrangements' to be displayed; and lodging 'other agreed arrangements' with WorkCover or DPI or the Industrial Relations Commission, as appropriate.

Specific suggestions were also made in regard to other types of consultation arrangements. These included: demonstrating that workgroups have been agreed to by employees; detailing the functions and obligations of OHS Committees and OHS representatives; documenting OHS decision making processes and providing feedback following consultation; including consultation as part of the site induction process; and requiring employers to have a 'consultation policy'.

Unions expressed concern that they are often unable to resolve outstanding issues in negotiations about consultation arrangements at particular workplace and expressed a preference for WorkCover to resolve such issues. Unions also suggested that the Industrial Relations Commission be empowered to resolve disputes about occupational health and safety issues (including those about consultation).

It was further suggested by Unions that workers would benefit from authorised union officials being able to enter workplaces to provide advice and discuss occupational health and safety with workers while at work

## *Recommendations*

A number of the identified issues relate more directly to requirements contained in the OHS Regulation and will be considered as part of that review, including specific suggestions relating to OHS Committees, OHS representatives, workgroups and 'other agreed arrangements'. Delegates at the 2005 NSW Workplace Safety Summit identified principles which underpin effective workplace consultation, including the importance of employees (with other workplace parties) having sufficient occupational health and safety skills to allow them to participate in consultations and identify hazards.

To increase employee awareness of workplace safety, in keeping with the proposed amendments to the Act objects, which encourage all workplace parties to take an active role in workplace safety, it is recommended that

- the powers available to authorised employee representatives under the OHS Act be modified to include the authority to enter a workplace to discuss matters related to occupational health and safety, similar to provisions in the Queensland *Workplace Health and Safety and other Acts Amendment Bill 2006*, namely:
  - discussion may only take place when the worker(s) is on a work break,
  - the place of work where the discussions are contemplated must meet the existing test under Section 77 of the OHS Act, that is, the authorised employee representative must have reason to believe that the premises in question is a place of work where members (or persons eligible to be members) of the organisation work,
  - at least 24 hours written notice should be provided.

These recommended modification of powers and the associated limitations should not limit the current powers of authorised employee representatives, including the power to enter a workplace without notice for the purpose of investigating a suspected breach of occupational health and safety legislation.

WorkCover recommends the following additional amendments to sections of the OHS Act relating to consultation:

- providing a duty for the health, safety and welfare of clothing outworkers and a duty to consult on health and safety issues. These duties should apply to clothing outworkers engaged by the employer and any employees of the clothing outworker. These duties should be qualified to apply only to those matters over which the employer has control or would have control if not for any agreement purporting to limit that control,
- providing a mechanism for WorkCover and DPI to resolve disputes about consultation arrangements.

Restricting the use of 'other agreed arrangements' was not supported on the grounds that the intent of the provisions for 'other agreed arrangements' is to facilitate tailored consultation arrangements for diverse working environments. Restricting the flexibility of the current provisions would not be in keeping with the intent of the consultation provisions. The suggestion relating to the lodgement of

'other agreed arrangements' with WorkCover, DPI or the Industrial Relations Commission was also considered, however, given that inspectors are already able to check and advise on consultation arrangements, when requested, or even as part of a general inspection, there appeared to be no advantage in requiring the registration of agreements, therefore no registration requirement is recommended at this time. It was however considered appropriate to allow inspectors to formally resolve disputes about such arrangements.

In response to a submission in favour of amending the legislation to require direct consultation between employer and employee, it was considered that the existing consultation requirements allow for direct consultation to occur. While the OHS Act provides for consultative mechanisms (such as OHS Committees) which perform specific functions, it does not prevent direct consultation from occurring. The OHS Act obligations for an employer to consult with their employees are broad and ultimately intended to enable employees to contribute to the making of decisions affecting their health, safety and welfare at work.

The WorkCover Advisory Council is currently reviewing occupational health and safety consultation training requirements and the content of the course of training for members of OHS committees and OHS representatives. Accordingly, WorkCover recommends no changes to consultation training arrangements, pending the Advisory Council's consideration of the issues.

### Safe Design

The OHS Review sought comment on the appropriateness and practicability of the current coverage of the general duties as they relate to safe design.

The Australian Safety and Compensation Council has introduced safe design obligations in the *National Standard for Construction Work*. Some jurisdictions, including Victoria and Queensland, have adopted general duties for designers of workplace buildings and structures. The issue of safe design was also considered at the 2005 New South Wales Safety Summit where the construction industry recommended an educational and advisory approach.

### *Public Comment*

Overall comment was mixed with both support for and against the concept of introducing a new general duty for designers of work premises and or work processes. Suggestions were also made that designer obligations should extend to persons who commission the design of buildings.

### *Recommendations*

WorkCover does not recommend amending the OHS Act to address the issue of design safety. Introducing a new class of duty holder would significantly extend the scope of the Act. Rather, WorkCover supports an educational and advisory approach and recommends further consideration of regulatory change when considering the implementation of the *National Standard for Construction Work* and during the forthcoming review of the OHS Regulation.

## The Role of Codes of Practice

The OHS Act Review sought comment on issues relating to approved industry codes of practice and their role in the health and safety framework, particularly in regard to the role of codes of practice in demonstrating that occupational health and safety obligations have been discharged.

Section 40 of the OHS Act provides that the purpose of a code of practice is to provide practical guidance to employers and others who have duties under Part 2 of the OHS Act with respect to health and safety.

### *Public Comment*

While public comment on the role of codes of practice was generally supportive of the need for codes, a range of issues were raised in submissions regarding the role codes should play in the occupational health and safety framework.

Key areas of interest included the use of codes to demonstrate compliance with occupational health and safety legislative requirements; the status of codes within the OHS framework; the general content of codes; and the processes for developing codes, including consultation processes.

An Issue Paper on *The Role of Codes of Practice in the Occupational Health and Safety Framework* was also released for public comment. The Issue Paper sought further comment on the role that codes of practice should have in the OHS framework and posed specific questions relating to:

- the use of codes, both in proceedings for an offence under the OHS Act and as part of a defence to demonstrate compliance with the OHS Act;
- the status of codes – ie whether codes should have a mandatory or non-mandatory status; and
- the development and consultation processes for codes of practice, including whether any aspects of such processes ought to be legislated.

Public comment on the Issue Paper supported a role for codes of practice in providing practical guidance and specific advice on how obligations under OHS legislation can be satisfactorily met.

It was generally considered that codes of practice should have a non-mandatory status. However, there was mixed support for codes being able to be used as evidence in both proceedings for an offence under the OHS Act and as part of a defence to demonstrate compliance with occupational health and safety obligations.

Some submissions noted that the use of codes as evidence in proceedings and as part of a defence ought to go 'hand-in-hand'.

Some submissions went further and suggested that codes could be used in a 'deemed to comply' approach, whereby following the advice of a code of practice would be regarded as achieving compliance with relevant legislative requirements.

A range of suggestions were made supporting appropriate consultation practices (generally tripartite consultation arrangements) incorporating the involvement of appropriate specialists. Comment on whether consultation arrangements for the drafting of codes should be legislated was divided.

Public comment supported the regular review of codes of practice. Periods of between three and five years were suggested as appropriate timeframes for the review of codes. Some submissions further suggested that there ought to be a mandatory review process for codes of practice.

### *Recommendations*

In response to the comments submitted on the role of codes of practice in the occupational health and safety framework, it is noted that amending the general duty provisions of the OHS Act to introduce the concept of 'reasonably practicable' and removing the existing defences under section 26 would address the issue of the status of codes. This is because codes of practice are designed to provide practical guidance on what is a reasonably practicable approach and therefore would be able to be used to demonstrate that a duty holder has or has not discharged their obligation.

In view of this, WorkCover did not consider it necessary or appropriate to support suggestions that there be an additional defence created under the OHS Act that takes into account an organisation's OHS systems, including following a code of practice.

WorkCover intends that all codes of practice are kept up to date and has implemented a rolling review process for reviewing industry codes of practice. Codes of practice are not developed or updated by WorkCover in a vacuum. Rather, WorkCover seeks the input and assistance of stakeholders and industry experts to ensure codes of practice are effective.

WorkCover recommends that this collaborative review process for updating codes of practice continue so as to ensure codes remain current.

## CHAPTER 7. THE ROLE OF THE REGULATOR

WorkCover's corporate vision is for safe, secure workplaces. As a step towards achieving this vision, the NSW Government has committed to reducing the incidence of workplace injury by 40% by 30 June 2012 and to reducing workplace fatalities by 20% by 30 June 2012.

WorkCover aims to assist industry to comply with its statutory obligations through prevention programs focussing on the provision of information and advice, specialised assistance services, standard setting and practical guidance, consultative forums and other advisory mechanisms.

WorkCover also has a role to monitor industry to ensure that risks of harm are properly controlled. Inspectors verify this by visiting workplaces, performing inspections and monitoring hazardous activities where there is an elevated risk of harm. The overall approach of WorkCover is intended to be constructive and supportive in the provision of preventative information and advice, and yet rigorous in the enforcement of sanctions where necessary.

### *Public Comment*

The OHS Act Review produced significant comment about the role of WorkCover and numerous suggestions for how WorkCover might function more effectively.

Generally, stakeholders were of the view that WorkCover should seek to develop a more collaborative relationship with workplaces by utilising a balanced combination of advisory and enforcement activities.

Duty holders, including employers and employees, raised a number of issues about the nature and type of information and advice that WorkCover currently provides:

- stakeholders felt that WorkCover officers may be reluctant to provide practical advice about occupational health and safety solutions, and may be more likely to tell duty holders what they should not do rather than what they needed to do to comply,
- workplaces, and in particular small businesses sought practical 'hands on' advice and assistance,
- stakeholders indicated their preference that WorkCover take account of the diversity of industry sectors and recognise the variety of issues faced by different industry sectors,
- in addition to providing advice that is relevant at the industry level, WorkCover could give advice focusing on individual workplaces.

Several comments were made regarding WorkCover's enforcement of OHS Act obligations, some contradictory, including:

- how to reconcile the perceived absolute duties of the OHS Act with the OHS Regulation's risk management framework, which allows risks to be controlled where elimination is not reasonably practicable,

- a view that WorkCover and the Courts may sometimes set unrealistic expectations about the control of workplace risks. This led to a perception by some that all risk was required to be eliminated from the workplace regardless of the duty holder's level of control over the risk or how far-fetched the potential for the risk to cause harm,
- a perception by some stakeholders that regardless of whether they had achieved 1% or 99% compliance, if an incident occurred they might be treated the same by WorkCover,
- a preference for WorkCover to take a duty holder's compliance efforts into account when investigating workplace incidents,
- too much emphasis on reactive inspections, notices, investigations and prosecutions, with insufficient time available for the development of proactive and collaborative prevention partnerships focusing on improving workplace safety,
- matters should be dealt with according to the severity of the breach, rather than the severity of the outcome of that breach,
- WorkCover was unfairly focusing on the 'good actors' that report workplace incidents while the 'cowboys' in industry, who were flagrantly avoiding compliance, were not being actively targeted,
- WorkCover should conduct more intensive enforcement activity including prosecutions.

### *Recommendations*

WorkCover recommends several amendments of the OHS Act, specifically to:

- refer, in the OHS Act, to the functions of WorkCover under the *Workplace Injury Management and Workers Compensation Act 1998* and amending those functions to clearly articulate WorkCover's OHS prevention, advisory, assistance and educational functions,
- clarify WorkCover and DPI's power to provide compliance advice (both oral and written) to persons who have a duty or obligation under the OHS Act or regulations,
- require that copies of any written compliance advice or notices issued by DPI or WorkCover be provided to an appropriate employee at the workplace,
- allow WorkCover and DPI (in relation to mines) to issue guidelines on the interpretation of the OHS Act and regulations to assist industry understand and meet its occupational health and safety obligations.

## CHAPTER 8 – THE ENFORCEMENT FRAMEWORK

### ***8.1 The Enforcement Framework***

The OHS Act currently gives inspectors employed by WorkCover and DPI the discretion to use a range of compliance tools in support of their occupational health and safety enforcement activities. These may be used singly or in combination, depending on the circumstances of the matter in question. The compliance tools available include:

- provision of information and advice,
- Investigation Notices,
- Improvement Notices,
- Prohibition Notices,
- Penalty Notices (which impose a monetary fine), and
- Prosecution.

These tools and WorkCover's policy dealing with how they should be used are described in detail in WorkCover's *Compliance Policy and Prosecution Guidelines* (accessible at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)).

The compliance strategy itself consists of the application of a graduated intervention arrangement:

1. advice, counselling, cautioning – first preference,
2. issue of remedial notices (ie prohibition and improvement notices) as the second-preference intervention measure,
3. imposition of on-the-spot fines (via penalty notices) as the third-preference measure,
4. prosecution action against an offender as the enforcement action of last resort.

This description is not intended to imply a staged response. Rather, it is intended to show the increasing severity of the compliance options at the Inspectorate's disposal, any of which may be utilised depending on the severity of the matter in question.

#### *Public Comment*

Overall comment on the enforcement framework was mixed with both support for and opposition to the status quo. New activities for which there was either general or qualified support were:

- the introduction of enforceable undertakings,
- informing the family of a deceased worker of the status of the recovery of fines, where requested.

These two issues will be explored further in the following sections.

## **8.2 Enforceable Undertakings**

Enforceable undertakings are an Australian innovation first used by the Australian Competition and Consumer Commission in 1993. The popularity of this approach has resulted in its adoption by OHS jurisdictions of the Commonwealth, Australian Capital Territory, Victoria, Queensland and Tasmania.

An enforceable undertaking is a binding commitment by a duty holder to the regulator to take preventative actions to correct or prevent breaches of the occupational health and safety legislation, which will benefit the workplace, industry and community.

Enforceable undertakings are an alternative to criminal and other proceedings. They provide a timely 'restorative justice' approach that engages organisations to achieve systematic solutions that correct or prevent breaches and their underlying causes. In this way they are a departure from the traditional punitive approach of prosecuting for one-off or unlikely-to-be-repeated events providing a responsive and timely sanction that can be part of an effective enforcement strategy.

### *Public Comment*

There was strong stakeholder support for the adoption of enforceable undertakings as part of an overall enforcement strategy.

Some stakeholders supported unions, in addition to the regulator, having the right to enter into enforceable undertakings with potential defendants.

### *Recommendations*

WorkCover recommends providing for the addition of enforceable undertakings to the compliance regime contained in the OHS Act, as an alternative to prosecution for breaches of the OHS Act, with the exception of a breach of the section 32A offence for reckless conduct causing death. The exception is recommended on the basis of the seriousness of that offence.

It is further recommended that enforceable undertakings may only be agreed to between WorkCover or DPI and the duty holder, making the approach similar to that adopted under Victorian and Queensland OHS legislation.

WorkCover recommends adoption of the following arrangements for administering enforceable undertakings:

- An undertaking could be suggested by either the regulator or the duty holder in relation to an alleged contravention of the Act or regulations. Entry into an undertaking by the duty holder should be voluntary.
- In considering whether an enforceable undertaking is suitable in the circumstances, the regulator should consider matters including:
  - gravity of the alleged contravention and actual and potential health and safety risks involved,
  - prospect of a rapid resolution of the issue,
  - cooperation and remorse of the duty holder,

- demonstrated level of senior management commitment,
- level of consultation with employees regarding the intended action,
- previous compliance history including workers compensation data and enforcement sanctions that suggests an undertaking would be sufficient to deter the duty holder from further contraventions,
- capacity of duty holder to fulfil the undertaking.
- The regulator should advise the duty holder (in writing) of their intention to enter into an enforceable undertaking or not.
- The regulator should accept or reject the application based on assessment criteria including:
  - an acknowledgement that the regulator alleges a contravention has occurred,
  - circumstances of the alleged contravention,
  - provision of an assurance to cease any alleged contravention and not to recommence it,
  - demonstration that the undertaking will rectify the consequences of the conduct and deliver tangible benefits to workers, industry and/or the community in relation to occupational health and safety, workers compensation or injury management,
  - demonstration that the benefits are beyond compliance and will promote a culture of safety through the implementation, maintenance and verification of a systematic approach to health and safety, workers compensation and injury management,
  - arrangements for communicating the details of the enforceable undertaking to staff and the public (where appropriate).
  - arrangements for third party auditing and monitoring of the enforceable agreement and reporting results/progress to the regulator. Third party auditors would need to be agreed to by WorkCover/DPI.
- The regulator should not accept an enforceable undertaking if:
  - the duty holder concerned denies culpability,
  - it relates to a breach of the section 32A offence for reckless conduct causing death,
  - it places obligations on third parties,
  - it purports to place an obligation on the regulator that it does not already have,
  - it contains any provision that purports to limit the regulator's discretion,
  - it contains confidentially or non-disclosure provisions.
- The enforceable undertaking should be filed with the Registry of the Industrial Court of New South Wales within seven days of acceptance.
- A registered enforceable undertaking should have the same status as a court order.

- A register of enforceable undertakings should also be maintained on the WorkCover and DPI website.
- An enforceable undertaking should only be varied or withdrawn with the agreement of the regulator.
- A WorkCover/DPI auditor or third party auditor should carry out auditing for demonstration of compliance. If the duty holder has been assessed by the regulator as having complied with all the requirements of the enforceable undertaking, the regulator should advise the duty holder and the registry of the Industrial Court that the enforceable undertaking has been completed. If non-compliance is detected, the regulator may escalate enforcement action.

A non-legislative strategy recommended by WorkCover is development of guidance on the enforceable undertaking approach.

### **8.3 Informing a Deceased Worker's Next of Kin about the Recovery of Fines**

#### *Public Comment*

The General Purpose Standing Committee, in conducting its *Inquiry into Serious Injury and Death in the Workplace*, 2004, noted that the non-payment of a fine relating to a breach of occupational health and safety legislation can add to the suffering of the individual or a victim's family affected by an incident in which the family member died.

Overall public comment suggested common general support for the concept of informing families of victims of the status of the recovery of fines, when requested. There was one qualified support that provided for the consent of the person fined to be given.

#### *Recommendation*

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

WorkCover recommends amendment of the OHS Act and, if necessary, consequential amendments to the Fines Act 1996, to allow for the provision of advice on the status of fine repayments to the next of kin of a person who has died as a result of the commission of an offence under the OHS Act, if requested.

### **8.4 Resolution of OHS Disputes**

Under the OHS Act (Part 5 Division 3) an authorised representative of an industrial organisation of employees has the power to enter a workplace for the purposes of investigating a suspected breach of OHS legislation. It is currently an offence to obstruct or hinder such a person from performing these official functions.

The OHS Act also allows an Inspector to assist where the authorised employees' representative believes they may be obstructed.

Section 23 of the OHS Act provides that it is an offence for an employer to, among other things, dismiss an employee because the employee makes a complaint about a workplace matter that they consider is a risk to health, or is a member of an OHS committee or is an OHS representative. Dismissed employees can seek reinstatement, reimbursement for lost wages or other remedies under the *Industrial Relations Act 1996*.

### *Public Comment*

Submissions received during the period of public comment called for the OHS Act to provide greater certainty about, and a means of resolving disputes regarding, situations where an authorised representative may have been unlawfully obstructed from entering a workplace.

Other submissions called for the powers of employee representatives to be extended to include powers similar to those available to WorkCover inspectors, including the power to issue notices and stop work.

Some stakeholders specifically sought the ability for authorised employees' representatives to issue 'notices' in a similar manner to the 'provisional improvement notices', issued by OHS representatives in Commonwealth, Victorian and South Australian OHS legislation.

Public comment also raised concerns about the remedies available for employees for breaches of section 23 of the OHS Act (unlawful dismissal or other victimisation of employee). Comments supported a more transparent mechanism to resolve disputes on this matter.

### *Recommendations*

WorkCover does not recommend giving authorised employees representatives the power to issue notices such as a penalty notice. However, WorkCover does recommend that New South Wales adopt the concept of the 'provisional improvement notice', already in place in many other Australian jurisdictions.

The experience in other jurisdictions indicates that provisional improvement type notices are an effective means of resolving health and safety issues at the local level, avoiding the need to escalate disputes by involving an Inspector.

WorkCover therefore recommends that the OHS Act be amended to provide for OHS Committee Chairpersons and OHS Representatives, who are appropriately trained and authorised, to issue a safety recommendation notice where the representative believes on reasonable grounds that a person has contravened a provision of the legislation.

WorkCover recommends the following arrangements for the issue of safety recommendation notices:

- an OHS Committee Chair or OHS Representative should be able to issue a safety recommendation notice if he or she has reasonable grounds to believe that an employer:

- is contravening a provision of the legislation that directly affects the health or safety of the employees for whose protection the OHS Committee Chair or OHS representative is authorised to issue the notice, or
- has contravened such a provision in circumstances that make it likely the contravention will continue or be repeated.

A safety recommendation notice should be able to include recommendations about measures to be taken to remedy the situation including reference to a code or offering the employer a choice of ways to remedy the contravention.

A safety recommendation notice should however only be issued after:

- the person issuing the notice has consulted the employer (or their representative) in accordance with any established consultative arrangements, and
- the employer has been given a reasonable opportunity to consider and remedy the matter.

A safety recommendation notice should be required to:

- be in a form approved by WorkCover,
- state the OHS Committee Chair's or OHS Representative's belief on which the issue of the notice is based and the grounds for that belief,
- specify the provision of the legislation the Chair/Representative considers has been or is likely to be contravened,
- include information about the employer's right to seek a review of the safety recommendation notice,
- specify a day (at least 8 days after the day on which the notice was issued) before which the person is required to remedy the contravention.

An employer may request that an inspector review a safety recommendation notice within 7 days of issue of the safety recommendation notice. When a review has been requested, the notice should be stayed until an inspector has affirmed or withdrawn the notice.

An inspector should be required to review the safety recommendation notice, as soon as possible but no later than 14 days after receiving the request. On review, the inspector should be able to affirm or withdraw the safety recommendation notice by giving written advice to the person who issued the notice and the person who received the notice. Where an inspector affirms a safety recommendation notice, they should do so by issuing an improvement or prohibition notice. If the inspector determines to withdraw a safety recommendation notice, they must advise the employer and person who issued the notice of their decision in writing. The inspector's written advice should set out the basis for withdrawing the notice.

The issue or cancellation of a safety recommendation notice should not affect any proceedings for an offence against the legislation in connection with any matter for which the notice was issued. Nor should it stop an inspector from performing or

exercising any of his or her functions or powers that may be required in the circumstances.

The person who issued the safety recommendation notice and the employer receiving it should be able to appeal against an inspector's decision to a Local Court constituted by an Industrial Magistrate sitting alone.

In situations where an inspector has affirmed a safety recommendation notice by issuing an improvement or prohibition notice, the existing right of appeal (section 97) in the OHS Act would apply.

There is however no existing right of appeal which would apply where an inspector advises that a safety recommendation notice is withdrawn. Consequently, it is recommended that the OHS Act provide a right of appeal against an inspector's decision to withdraw a safety recommendation notice.

To support this proposal WorkCover should develop an additional training module for those people who would be authorised to issue safety recommendation notices. WorkCover accredited trainers could deliver the training module over a half-day period. WorkCover should issue a person with an authority to issue safety recommendation notices upon advice from the accredited trainer that the person has successfully completed the course.

OHS Committee Chairs should not be able to issue safety recommendation notices until they have undertaken the requisite training and received their authorisation.

Penalties should apply for the misuse of safety recommendation notices. The OHS Act should also provide for a person's authority to issue a safety recommendation notice to be revoked if the power is misused.

Non-legislative strategies recommended to support these recommended arrangements involve the development and provision of guidance and training materials on the arrangements for safety recommendation notices.

In order to provide clarity about the powers of authorised employee representatives and to assist in the resolution of disputes regarding those powers, WorkCover recommends amending the OHS Act to:

- provide for determination of disputes regarding an authorised employee representative's right of access to a workplace to be referred to the Industrial Relations Commission in cases where the authorised representative has requested the assistance of a WorkCover or DPI inspector under section 83 and the dispute remains unresolved,
- empower the Industrial Relations Commission to make orders as it considers appropriate for the resolution of the dispute.

To provide employees with a transparent mechanism for remedying breaches of section 23 of the OHS Act, it is recommended that the OHS Act be amended to provide an employee affected by a breach of section 23 with a reinstatement remedy similar to that available under section 213 of the *Industrial Relations Act 1996*.

A non-legislative strategy recommended for addressing concerns about the resolution of OHS disputes is development of guidance on the rights and responsibilities of persons at a place of work,

### ***8.5 Sharing of Enforcement Information with other Jurisdictions***

The OHS Act Review sought comment on the desirability of introducing a system for the mutual recognition of health and safety inspectors from other jurisdictions.

At present there is no formal system in place that automatically recognises inspectors from other jurisdictions to act under the authority of the *Occupational Health and Safety Act 2000*, nor are New South Wales inspectors recognised in other jurisdictions. This means that cross-border cooperation between jurisdictions needs to be organised on a case-by-case basis.

#### *Public Comment*

Public comment on the desirability of recognition of safety inspectors between jurisdictions was divided, with both support for and opposition to the concept.

Those that did not support the recognition of inspectors did so mainly because of a concern that, because occupational health and safety standards and requirements are not uniform across the jurisdictions, there would be a lack of consistency and expertise in the conduct of inspections where inspectors unfamiliar with the New South Wales legislation were involved.

Those that did support the concept believed recognition was a way of enhancing and strengthening cross-border powers, where enforcement of occupational health and safety requirements might otherwise be difficult. Most of those supporting the concept of recognition for safety inspectors also considered that the differing occupational health and safety legislation between the jurisdictions could prove problematic in effectively implementing a system of recognition.

The intention of this proposal was not to allow inspectors from another jurisdiction to undertake all the work of a New South Wales inspector. Rather it was to assist WorkCover investigate incidents or activities occurring in other jurisdictions but which relate to matters under investigation in New South Wales.

In response to this confusion and the concerns expressed in relation to the Discussion Paper, an Issue Paper on *Recognition Between Safety Inspectorates* was released seeking further comment on the issue of a recognition scheme for other safety inspectorates.

Public comment on the Issue Paper was generally supportive on the desirability of a recognition scheme for safety inspectorates where the role of inspectors from other jurisdictions is limited to one of support and assistance to the New South Wales inspectorate.

#### *Recommendations*

In response to the feedback received in relation to the recognition of safety inspectorates WorkCover recommends the OHS Act be amended to allowing the

exchange of information between WorkCover, DPI and occupational health and safety regulatory agencies from other Australian jurisdictions.

These amendments should not expand WorkCover's powers into other jurisdictions, or expand the power of other jurisdictions' safety authorities into New South Wales.

The change should allow WorkCover to obtain the assistance of the inspectorates from other jurisdictions to support occupational health and safety regulatory activity, for example, WorkCover should be able to advise another jurisdiction that a demolition licence has been suspended or that a defective amusement device has been identified and may have entered another jurisdiction.

A non-legislative strategy recommended in support of these arrangements is the development of guidance on inter-jurisdictional sharing of information. WorkCover also recommends that other Australian jurisdictions be requested to implement similar arrangements.

## **8.6 The Courts**

Proceedings for a prosecution under the OHS Act or OHS Regulation may be dealt with before a Local Court or the Industrial Court of NSW (formerly the Industrial Relations Commission in Court Session) (section 105 OHS Act) or by the Chief Industrial Magistrate or any other Industrial Magistrate (section 382 *Industrial Relations Act 1996*).

OHS prosecutions commenced in the Local Court in Sydney, Newcastle and Wollongong are generally heard by the Chief Industrial Magistrate. In regional areas where the Chief Industrial Magistrate does not sit, the local Magistrate (sitting as a Magistrate) hears OHS prosecutions as part of the general list.

The Industrial Court of New South Wales was granted jurisdiction to hear matters under the OHS Act 1983 in 1987 by the *Occupational Health and Safety (Workers Compensation) Amendment Act 1987*. Under this amendment the jurisdiction of the Supreme Court was removed.

The history behind these amendments is described in detail in *Advice in relation to workplace death, occupational health and safety legislation & other matters – Report to WorkCover Authority of NSW* (pp24-30), which was prepared by a panel of legal experts headed by the Dean of Law at Sydney University (accessible from [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)).

The reason for this amendment was that the Court has particular expertise in dealing with workplace issues. Since 2003, WorkCover's policy has been that all matters relating to a fatality are prosecuted in the Industrial Court of New South Wales.

### *Public Comment*

There was a significant amount of comment in relation to the jurisdiction of the Industrial Court of NSW and local courts, including the Chief Industrial Magistrate's Court, to hear OHS matters and the scope of current appeal rights. Employers

were generally concerned about a perceived emphasis in New South Wales on prosecutions and unions generally supported a more active prosecution approach.

Another issue of concern to employers was the time taken from offence to a determination by the courts and the need to consider other enforcement sanction options. On the other hand, unions suggested that the time to institute proceedings be extended from two years to seven years.

Employers also raised issues about the cost and effort expended in defending occupational health and safety prosecution matters. WorkCover also expends significant resources in prosecuting cases that often attract a monetary fine not significantly higher than an on-the-spot fine (Penalty Notice).

Another submission suggested a range of specific orders that could be made by a court if an offence is proved. Currently, the OHS Act allows the court to:

- order the offender to remedy any matter caused by the offence (s113);
- order the offender to take specified action to publicise the offence (s115); or,
- order the offender to carry out a specified project for the general improvement of health, safety and welfare (s116).

### *Recommendations*

Suggestions for additional types of Court order were not supported by WorkCover on the grounds that the Courts already have powers to order the notification of an offence or to order an offender to carry out a specified project for the general improvement of occupational health, safety and welfare.

Public comment suggested that there might be value in the development of an additional compliance measure, which could be used as an alternative to prosecution for dealing with serious contraventions of the OHS Act or OHS Regulation.

An enhanced system of penalty notices was identified as potentially increasing the effectiveness and efficiency of the occupational health and safety regime by:

- increasing inspectors' capacity to develop enforcement approaches that take account of the individual circumstances of a situation,
- increasing inspectors' capacity to adopt an enforcement approach that reflects the level of risk, extent of control and culpability of the duty holder,
- providing a more immediate response to offences warranting punitive action than would be the case if a prosecution was undertaken,
- providing a faster resolution of the compliance action, allowing duty holders to more quickly focus on prevention activities, rather than expending resources on defending a prosecution,
- providing a more cost effective remedy than prosecution to offences warranting a pecuniary penalty,

- potentially freeing up WorkCover and DPI legal resources to concentrate on the prosecution of severe offences or on entering into enforceable undertakings,
- increasing the time inspectors are able to spend providing information and assistance by reducing the time and resources required to support lengthy legal actions.

Consequently, it is recommended that detailed consideration be given to the development of an enhanced system of penalty notices. Specific issues for consideration should include:

- penalties that would be required to act as an effective deterrent,
- types of contravention that should be the subject of modified penalty notices,
- checks and balances to ensure any increased penalties are applied in a consistent and transparent manner,
- whether there ought to be any restrictions on who can issue modified penalty notices,
- the suitability of alternate compliance measures.

### ***8.7 Victim Impact Statements***

The court may currently receive and consider a victim impact statement where certain offences under occupational health and safety legislation result in death or actual physical bodily harm.

A victim impact statement is given after a person or company has been convicted and before they are sentenced.

Due to the structure of the OHS Act, it is not currently possible for a workplace fatality victim's next of kin to submit a victim impact statement in respect of a conviction against section 32A of the OHS Act (Reckless conduct causing death at workplace).

#### *Public Comment*

Public comments suggested common general support for expanding current victim impact statement arrangements to include proceedings brought under section 32A of the OHS Act.

## *Recommendations*

WorkCover recommends making a consequential amendment to the *Crimes (Sentencing Procedure) Act 1999* to ensure that the family of a person killed by reckless conduct at a workplace (offence under section 32A of the OHS Act) will be able to tender a victim impact statement to the Industrial Court, bringing victim impact statement arrangements for section 32A into line with those currently in place for general duty offences under the OHS Act involving a fatality or actual physical bodily harm.

### **8.8 Rights of Appeal**

#### *Public comment*

In relation to appeal rights, some employers raised concern about the fairness of the power to appeal against an acquittal and the perception that this allowed for essentially a 'double jeopardy' situation. Concerns were also expressed by the Full Bench of the Commission in *Rodney Morrison (WorkCover NSW) v Bradley Dean Murray* [2005] NSWIRComm 142 that under the *Industrial Relations Act 1996* and the *Criminal Appeal Act 1912* there is no right to appeal the interlocutory judgment of a Commission member to the Full Bench of the Commission.

#### *Recommendations*

The power to appeal against an acquittal is provided by section 197A of the *Industrial Relations Act 1996*. It is relatively unique to occupational health and safety prosecutions and is rarely used.

WorkCover recommends amending the *Industrial Relations Act 1996* to remove the right of appeal against an acquittal of an offence under the OHS Act.

With respect to the concerns regarding the right to appeal the interlocutory judgment of a Commission member to the Full Bench of the Commission, WorkCover considered that there should be such a right of appeal in order to be consistent with the *Criminal Appeal Act 1912*, which allows for such appeals in the Supreme Court, the District Court and the Land and Environment Court.

Consequently, WorkCover recommends amending the *Industrial Relations Act 1996* to allow for an interlocutory decision in occupational health and safety proceedings to be the subject of appeal in the same way as other criminal proceedings. Specifically, the right to appeal against interlocutory decisions should be limited in similar terms to section 5F of the *Criminal Appeal Act 1912*, to allow an appeal only where the Full Bench gives leave or where the judicial member certifies that the judgment or order is a proper one for determination on appeal.

### **8.9 Prosecution and Investigation Powers**

Section 106 of the OHS Act allows for proceedings for an offence (other than the offence of reckless conduct causing death at a workplace) against the OHS Act or regulations to be instituted by any of the following:

- a person with the written consent of a Minister of the Crown,

- a person with the written consent of an officer prescribed by the regulations,
- an inspector, or
- the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate.

The power to institute proceedings in relation to the offence of reckless conduct causing death at a workplace under section 32A of the OHS Act is limited under section 32B(2) to:

- a person with the written consent of a Minister of the Crown, or
- an inspector.

Regardless of whether WorkCover or an industrial organisation undertakes an occupational health and safety prosecution, it is ultimately up to the relevant court to determine whether the prosecution is successful or not.

The *Fines Act 1996* provides a court may award up to one-half of the fine to the prosecutor. This is entirely at the discretion of the court. This has been an element of New South Wales law since 1901. The court may also order the prosecutor to pay costs, where proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner.

#### *Public Comment*

There was significant comment about the right of a secretary of an industrial organisation of employees to prosecute for a breach of the OHS Act. Employer groups were opposed to this, suggesting that a regulator should be the only prosecutor.

Some employer groups further suggested the prosecutor should be the Director of Public Prosecutions rather than WorkCover or DPI.

Unions strongly supported the right for unions to prosecute on the basis that it is a longstanding feature of occupational health and safety legislation and that unions have a significant role to play in ensuring the health and safety of employees.

During the public comment period the inspectorate of WorkCover and DPI also recommended clarification of some inspector investigation functions. Concerns were raised that some lawyers are advising defendants in a prosecution matter not to allow the taping of interviews. It was suggested that this is unnecessarily lengthening interviews, as evidence must be transcribed while the interview is in progress.

## *Recommendations*

The right of unions to prosecute is also supported by Gunningham, Johnstone (1999) and Braithwaite (2003) of the National Research Centre for OHS Regulation, Australian National University. These researchers recommended providing the ability for unions to prosecute, where a regulator is not taking action.

WorkCover does not recommend removing or qualifying a union's ability to bring a prosecution.

In forming this recommendation, WorkCover was cognisant of the fact that trade unions have been able to prosecute breaches of workplace safety legislation for more than 60 years. Regardless of whether WorkCover or an industrial organisation undertakes an occupational health and safety prosecution, it is ultimately up to the relevant court to determine whether the prosecution is successful or not.

The OHS Act currently provides for a prosecution by WorkCover or DPI to be brought by an inspector.

To address issues associated with an inspector's retirement or resignation and to reinforce that the decision to prosecute is for the regulator to make, rather than an individual inspector, WorkCover recommends amending section 106(1)(c) of the OHS Act to provide that the authority to prosecute is to be instituted by WorkCover or DPI rather than an inspector.

WorkCover recommends however to continue the practice of commencing prosecutions with the name of the agency as well as the inspector eg WorkCover (Inspector Smith).

WorkCover also recommends:

- amending section 62(1)(c) of the OHS Act to provide clarification of inspectors' investigation functions in relation to permitting the recording of oral evidence given during interviews by means of audio, video or other recording device,
- amending section 62(1)(c) of the OHS Act to remove doubt that giving evidence orally includes providing answers to questions properly asked by the inspector which is implicit but not explicitly stated in the provision,
- ensuring that section 62 notices (power of inspectors to obtain, information, documents and evidence) are subject to the section 101 (service of notices) provisions.

The non-legislative strategy recommended to support these arrangements is the development of guidance on the recording of oral evidence.

## CHAPTER 9 – OTHER MATTERS

### 9.1 Legislative Council Committee Proposals

The General Purpose Standing Committee No 1 *Inquiry into Serious Injury and Death in the Workplace*, 2004 made a number of recommendations referring to the OHS Regulation or the OHS Act. These recommendations were:

#### Recommendation 6

*That the Government review the OHS Regulation 2001 to provide clearer definitions of the obligations for the three parties involved in a labour hire relationship: the labour hire company, the host organisation and the on-hired employee.*

#### Recommendation 7

*That the Government investigate including in the OHS Regulation 2001 clearer definitions of the obligation of the parties involved in an apprentice hire relationship between a Group Training Organisation, a host employer and an apprentice.*

#### Recommendation 15

*That the Government consider how best to include enforceable agreements in the compliance regime contained in the OHS Act 2000, as an addition to prosecution for breaches of the OHS Act 2000, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission so that in the event the offender does not comply with the agreement, a prosecution may proceed.*

#### Recommendation 19

*That the Government take urgent steps to amend the OHS Act 2000 to redress the anomaly whereby an employer can effectively avoid prosecution for a breach of the Act through non-reporting of a serious incident in the workplace for two years.*

#### Recommendation 34

*That the Government amend the OHS Act 2000 to require WorkCover to inform the relevant insurer when it becomes aware of a serious injury or fatality.*

Recommendations 6 and 7 relate to the OHS Regulation and will be further considered during the review of the OHS Regulation. However, as part of the OHS Act review, development of a Guideline has been recommended in relation to the discharge of obligations between shared or multiple duty holders. Recommendation 15 on enforceable undertakings has been addressed in Chapter 6 of this paper.

Recommendation 19 has previously been adopted with a legislative amendment made to section 107 of the OHS Act to give effect to this recommendation from 15 December 2004. The new provision is provided below for information.

#### **107A Time for instituting proceedings—special provision for work incident notification**

- (1) If an act or omission alleged to constitute an offence against this Act or the regulations gives rise to an incident (a **work incident**) to which section 86 (Notification of incidents) applies, proceedings for the offence may be instituted:
- (a) within 2 years after the occurrence of the work incident, or
  - (b) within 6 months after WorkCover first becomes aware of the work incident,
- whichever provides the longer period to institute proceedings.

- (2) It is to be conclusively presumed for the purposes of this section that WorkCover does not become aware of a work incident until whichever of the following happens first:
  - (a) notice of the incident is given in compliance with section 86, whether or not that notice is given within the time required under that section,
  - (b) WorkCover gives the employer or occupier concerned notice in writing that is expressed to be notice for the purposes of this section and indicates that WorkCover has become aware of the incident.
- (3) The Chief Executive Officer of WorkCover may for the purposes of this section give a certificate in writing certifying as to when WorkCover first became aware of a work incident as provided by this section.
- (4) Proceedings for an offence against this Act or the regulations cannot be instituted under this section more than 2 years after the occurrence of the work incident unless the Chief Executive Officer of WorkCover has certified in writing that the proceedings are in the public interest.
- (5) A certificate given by the Chief Executive Officer of WorkCover under this section is conclusive evidence as to the matters certified and cannot be challenged, reviewed or called into question in any proceedings before any court or tribunal.
- (6) For the purposes of the application of this section to a mine, a reference in this section to section 86 is to be read as a reference:
  - in the case of a mine to which the *Mines Inspection Act 1901* applies—to section 47 of that Act or to such other provision of that Act as may be prescribed by the regulations, or
  - (b) in the case of a mine to which the *Coal Mines Regulation Act 1982* applies—to section 86 of that Act or to such other provision of that Act as may be prescribed by the regulations.
- (7) This section applies despite anything in any other Act.

WorkCover recommends that recommendation 34 be adopted through non-legislative means, as the recommendation is more applicable to the workers compensation legislation where sufficient powers already exist. WorkCover recommends that it establish administrative arrangements for the timely sharing of serious incident and fatality information between WorkCover and the New South Wales WorkCover Scheme agents and self-insurers.

The Inquiry also noted that the non-payment of a fine relating to a breach of OHS legislation can add to the suffering of the individual or a victim's family affected by the incident.

WorkCover has suggested the Committee's recommendation be adopted (Chapter 6 refers).

## **9.2 Independent Commission Against Corruption Proposals**

The 2004 Report by Independent Commission Against Corruption (ICAC) on safety certification and training in the New South Wales construction industry revealed corrupt conduct by accredited assessors and trainers. The Commission recommended that an offence of issuing a false statement of training be created under the OHS Regulation (Recommendation 12, ICAC, 2004).

The OHS Act Review sought comment on the desirability of creating two additional general offences under the OHS Act. The two possible offences considered were:

- for a person to falsely represent that they are permitted to do anything under occupational health and safety legislation for which they are not duly authorised,
- for a person who, by deception, obtains or attempts to obtain for themselves any financial advantage in connection with occupational health and safety legislation.

The proposal would address a gap in the current OHS Act, which does not currently contain any deterrents for fraudulent activities relating to licensed activities. The proposals also aim to increase public confidence in OHS licensing systems following two recent ICAC investigations involving licensing fraud. At the time, investigations by both WorkCover and ICAC identified instances where persons purporting to be accredited trainers issued 'statements of training' to workers. However, because these persons were not accredited assessors, they had not breached any occupational health and safety legislation and no action could be taken against them under the OHS Act.

### *Public Comment*

Public comment generally supported creating two new general offences relating to false representations and gain by deception. However, some concerns were raised about the broad scope of the offences, with the suggestion being made that the offences could be limited to situations where persons knowingly made false representations or incurred gain by deception. It was argued that this qualification should exclude persons who made a genuine mistake from the possibility of prosecution.

In response to these concerns an Issue Paper on *Offences for Fraudulent Activities* was released seeking comment on the scope of any new offences, whether any qualification should be made in relation to any new offences, what penalty levels would be appropriate for the new offences and whether there should be provision for the recovery of monies obtained by deception

Public comment on the Issue Paper again generally supported including offences for fraudulent activities in the OHS Act. Comment on the scope of the new offences was divided, however, there was slightly more support for a general offence model rather than a specific offence model which would restrict the offences to fraudulent activities relating to licences and authorisations.

There was also strong support for inclusion of a qualification on any new offences relating to fraudulent activities that, to have committed the offence, the person

knew or had reason to believe that they were not eligible to receive that financial advantage. Some suggested further that the qualification should apply to any gains, not just financial advantage.

Comment on appropriate penalty levels for offences for fraudulent activities generally favoured penalty levels that would reflect similar penalties under the *Crimes Act 1900*, rather than reflecting penalties under the *Workplace Injury Management & Workers Compensation Act 1998*. Support for penalties similar to those under the *Crimes Act* was generally based on the opinion that fraud should be regarded as a criminal activity.

Comment also indicated strong support for the inclusion of provisions for the recovery of monies or any other capital gained by deception.

### *Recommendations*

WorkCover recommends amending the OHS Act to create two new offences relating to knowingly false representations and gain by deception.

## **PART D – CONCLUSION**

The OHS Act review has provided an important opportunity to ensure that the legislative framework is effective and responsive to the needs of the current and future working arrangements of the New South Wales workforce.

The recommendations made by WorkCover are intended to ensure that New South Wales remains at the forefront of occupational health and safety regulatory policy and outcomes.

The review outcomes will assist WorkCover and DPI to provide an enhanced leadership role to motivate all stakeholders to fulfil their roles and responsibilities.

The legislative and non-legislative supporting recommendations made by WorkCover and set out in this report were intended to be responsive to a number of general themes which emerged from the OHS Act Review public comment:

- support for the policy objects of the OHS Act, incorporating a number of suggestions to clarify the existing objects,
- general support for a general duty framework, although there was a significant amount of comment on how the New South Wales' framework could be improved including qualification of the of 'strict liability' duties and clarification of the meaning of 'ensuring' health and safety,
- clarification of the rights and responsibilities of employees and authorised employees' representatives,
- the adequacy of the coverage of all workers under the general duties, in particular clothing outworkers,
- the adequacy of the rights and responsibilities of employees and people at a place of work,
- clarification of duties involving multiple parties with joint responsibilities,
- support for a more collaborative relationship between WorkCover and workplaces and an ability to provide more practical assistance through the provision of information and advice,
- a better understanding of WorkCover's expectations regarding legislative compliance and a greater recognition by WorkCover of duty holder's compliance efforts,
- support for a better balance between WorkCover's advisory services and its enforcement role. Some submissions favoured a greater emphasis on advice while others sought a stricter enforcement approach.

WorkCover NSW  
May 2006

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## **LEGISLATION**

*Coal Mines Regulation Act 1982*

*Corporations Act 2001*

*Crimes (Sentencing Procedure) Act 1999*

*Dangerous Goods Act 1975 (repealed)*

*Dangerous Goods (General) Regulation 1999 (repealed)*

*Explosives Act 2003*

*Fines Act 1996*

*Industrial Relations Act 1996*

*Industrial Relations (Ethical Clothing Trades) Act 2001*

*Listening Devices Act 1984*

*Mines Inspection Act 1901*

*Occupational Health and Safety Act 2000*

*Occupational Health and Safety Act 2004 (Victoria)*

*Occupational Health and Safety Act 1984 (Western Australia)*

*Occupational Health and Safety Amendment (Dangerous Goods) Act 2003*

*Occupational Health and Safety Amendment (Dangerous Goods) Regulation 2005*

*Occupational Health and Safety Amendment (Workplace Deaths) Act 2005*

*Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*

*Occupational Health and Safety Regulation 2001*

*Occupational Health and Safety (Clothing Registration) Regulation 2001*

*Occupational Health, Safety and Welfare Act 1986 (South Australia)*

*Rural Workers Accommodation Act 1969*

*Workplace Health and Safety Act 1995 (Queensland)*

*Workplace Injury Management and Workers Compensation Act 1998*

## **APPENDIX A - List of Public Submissions**

The following individuals and organisations provided a submission to the OHS Act Review as part of the call for public comment, responding to the *Occupational Health and Safety Act 2000 Discussion Paper* and/or the five supplemental Issue Papers.

Copies of submissions are accessible via the WorkCover website ([www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)) except where persons requested that their submission not be published.

- ACROD NSW Division
- Action on Smoking and Health (Australia) Pty Ltd
- Aged & Community Services Association of NSW and Act Inc
- Air Conditioners & Mechanical Contractors' Association of NSW Ltd
- AMH OH&S Services Pty Ltd
- The Association of Consulting Engineers Australia
- Australian Bankers' Association Inc
- Australian Constructors Association
- Australian Elevator Association Ltd
- Australian Finance Conference
- Australian Industry Group
- Australian Institute of Company Directors
- Australian Livestock and Property Agents' Association
- Australian Lot Feeders Association
- Australian Manufacturing Workers' Union
- Australian Meat Industry Council
- Barraba IGA
- BCS Inspections
- Bridgeford & Associates – Lawyers
- Bryan Bottomley and Associates
- Butler, Joel
- The Cancer Council NSW
- Catholic Commission for Employment Relations
- Centacare Sydney
- Centennial Coal Company Ltd
- Cessnock Community Transport Inc
- CGU Insurance
- Charles Sturt University
- Children's Cancer Institute Australia
- Clubs NSW
- Coal & Allied - A Rio Tinto Group Company

- Combined Employer Group (Australian Business Ltd)
- Community Transport Organisation of NSW
- CFMEU (NSW) Construction and General Division
- CFMEU Mining and Energy Division
- Consulting Mining and OHS Advisor
- Cotton Australia
- Country Women's Association of NSW
- Crane Group Ltd
- DADHC Stakeholder Forum
- Delta Electricity
- Employers First
- Eraring Energy
- Eris McCarthy Pty Ltd
- Exhaust Technologies Australia Pty Ltd
- Family Advocacy
- Fivestar Carpet & Upholstery Care
- Hastings Council
- Health Services Union NSW
- Housing Industry Association Limited
- Hudson Global Resources
- Human Services Chief Executive Officer's Forum
- Hunter Valley Training Company
- Illawarra Coal
- Independent Contractors of Australia
- Institute of Public Affairs Ltd
- Lambert-Smith, Phillip
- Longford Station Pty Ltd
- Langshaw, Michael
- Master Builders Association NSW
- Master Plumbers Association of NSW
- McCurdy, Daphne
- Media Entertainment and Arts Alliance
- Mental Health Coordinating Council
- Mine Managers Association of Australia
- Mirvac
- Motor Traders' Association of NSW
- Mushroom Composters Pty Ltd
- National Electrical and Communications Association (NECA)
- National Fire Industry Association of NSW Ltd

- NatRoad Ltd
- New Horizons Enterprises Ltd
- NSW Council for Intellectual Disability
- NSW Farmers Industrial Association
- NSW Minerals Council
- NSW Nurses' Association
- NSW Road Transport Association Inc
- Non-Smokers' Movement of Australia
- ParaQuad
- Peel Valley Machinery Service
- Plastics and Chemicals Industries Association
- Police Association of New South Wales
- Printing Industries Association of Australia
- Property Council of Australia
- Public Service Association of NSW
- Real Estate Employers Federation of NSW
- Recruitment & Consulting Services Association
- Ricegrowers' Association of Australia Inc
- The Royal Australian Institute of Architects
- Ryde-Eastwood Leagues Club
- Safety Institute of Australia
- The Salvation Army
- Shopping Centre Council of Australia
- SIMS Group Ltd
- Spotless Corporate
- State Chamber of Commerce (NSW)
- Sullivan Bill
- TAFE – Individual students
- Textile, Clothing and Footwear Union of Australia
- Timber Trade Industrial Association
- Tortoise Technologies Pty Ltd
- TSG International
- Tweed Shire Council
- Unions NSW
- Uniting Church in Australia
- University of New England
- University of New South Wales
- University of Sydney
- WECS Group Pty Ltd

- Welch, Alan
- Westpac
- Wingecarribee Shire Council
- Xstrata Coal

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