

SUBMISSION

**National Review into Model Occupational
Health and Safety Laws**

Australasian Railway Association

11 July 2008

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1. Executive Summary

- 1.1 An executive summary of the recommendations made by ARA in these submissions is outlined in the table below.

Issue	Recommendation
Rail Industry Specific Legislative Concerns	
<p>What is the preferred legislative framework?</p>	<ul style="list-style-type: none"> • We recommend that the Panel consider unified Commonwealth legislation rather than a harmonisation process between the jurisdictions as the experience of industry has been that exercises in harmonisation are destined to failure. • We recommend that States and Territories surrender power to the Commonwealth for the making of regulation in relation to OHS and the Commonwealth use those powers to create Commonwealth legislation and a single national OHS regulatory authority which provides the framework for OHS regulation throughout Australia. There should be no overlap with Industry specific regulation such as rail safety. • We recommend a tiered approach for the legislative framework with an overarching Commonwealth OHS Act, supported by regulations, Codes of Practice and guidelines. • We recommend that a performance based, outcome approach be adopted in the legislation. The legislation should not be overly prescriptive. • We recommend (in the event that unified Commonwealth legislation is not accepted as the model) that the rail safety legislation throughout the jurisdictions be amended to remove the overlap and duplication between OHS and rail safety regimes, particularly in relation to general duties. • We recommend that the Panel consider the other reform agendas being implemented including the efforts of the ATC in the creation of a national rail safety regulator, national investigators and any other developments in the ATC's reform agenda in this review.
Scope of Duties	
<p>What is the standard for the absolute duties?</p>	<ul style="list-style-type: none"> • We recommend that the general duty must be qualified by what is "reasonably practicable". The industry does not support 'absolute duties' - there is a fundamental divergence in the OHS legislation between the jurisdictions on this point. • We recommend the approach where the requirement to do what is reasonably practicable is part of the duty – but the legislation applies the burden of proof on the duty holder.

Issue	Recommendation
What does “reasonable practicability” mean?	<ul style="list-style-type: none"> We recommend that more guidance is provided to duty holders on the meaning of reasonably practicable by providing adequate definitions in the legislation (not necessarily in the Act). Definitions must contain a greater level of specificity and include proactive steps duty holders must take to satisfy the standard beyond broad principles. They should be guided by practicality, affordability, clarity, certainty and finiteness.
Categories of Duty Holders	
Do the categories of duty holders sufficiently deal with the roles and relationships in the workplace?	<ul style="list-style-type: none"> We recommend that each general duty be supplemented by specific guidance in the legislation (not necessarily in the Act) as to the scope of that duty, commensurate to the level of control the duty holder has over OHS matters in the workplace.
Are the individual categories of duty holders sufficient?	<ul style="list-style-type: none"> We recommend that a new ‘Supervisor’ category of duty holder be included in the model legislation to appropriately recognise the position of a supervisor as different to that of an employee or a person concerned in the management of a corporation. We recommend the duties be commensurate to the supervisor’s level of control over OHS.
Risk Management	
What does risk management mean?	<ul style="list-style-type: none"> We recommend that the relationship between risk management, risk assessment and reasonably practicable be the subject of greater clarity in the OHS legislation. We recommend that the Panel consider any inconsistencies between the approach to risk management in the rail safety legislation and the approach adopted by the Panel in its model OHS legislation.
What are the triggers for risk assessment?	<ul style="list-style-type: none"> We recommend that the OHS legislation provide clear, practical and workable triggers for each stage of the risk assessment process, namely identification, assessment, control and review.
Should effective risk assessment be a defence?	<ul style="list-style-type: none"> We recommend that the model legislation elaborate upon the relationship between the general duties and the risk management process, particularly providing that an effective risk assessment be a defence to a breach of the legislation.
Personal Liability	
What is the rationale for personal liability?	<ul style="list-style-type: none"> We recommend that the approach to personal liability provisions in the OHS legislation be fair and reasonable so that it is an effective mechanism for individual monitoring of corporate compliance.

Issue	Recommendation
Is the current approach to personal liability effective?	<ul style="list-style-type: none"> We recommend that the model legislation adopt the Victorian approach to personal liability provisions providing that officers of a corporation will be held liable for a contravention by the corporation of the OHS legislation if that contravention is attributable to an officer's failure to take reasonable care.
How do directors/managers fulfil their obligations?	<ul style="list-style-type: none"> We recommend that clarity for the scope of personal liability be provided by the model legislation with a clear description of each officer who is subject to the personal liability provisions to avoid ambiguity and confusion. We recommend that the adoption of good practice OHS governance principles be a recognised method for individuals to demonstrate they have taken reasonable steps to ensure compliance with OHS legislation.
Defences	
What should be included in defences to breaches of OHS legislation?	<ul style="list-style-type: none"> We recommend the following be adopted in the model legislation as defences to breaches of the OHS legislation: <ul style="list-style-type: none"> Compliance with a code of practice Existence of an adequate risk management process Compliance with and implementation of a safety case which has been approved by an OHS regulator
Consultation	
Are the current triggers for consultation appropriate?	<ul style="list-style-type: none"> We recommend that the triggers for consultation within the OHS legislation be practical, efficient, useful and affordable. We recommend that the model OHS legislation facilitate the establishment of a health and safety committee as one means of consultation but should not be prescriptive as to its format and functions.
What is the preferred position in relation to right of entry – and cease work arrangements?	<ul style="list-style-type: none"> We recommend that employee representatives are not provided with a right of entry in the OHS legislation. We recommend that the legislation provide the capacity for workers to refuse or cease to undertake work if there is an immediate and serious danger.
Reporting	
Are the current notification requirements adequate?	<ul style="list-style-type: none"> We recommend that the OHS legislation provide a consistent and clear description of the incident and event which requires notification to the OHS regulator.
Prosecution	
What should be included in the functions of the OHS regulator?	<ul style="list-style-type: none"> We recommend the separation of all enforcement and prosecution functions relating to OHS from the research and advice functions, with the former being handled by the DPP and the latter by the OHS Regulator in each State and Territory.

Issue	Recommendation
What are the duties of the Prosecutor?	<ul style="list-style-type: none"> • We recommend that the OHS legislation provide that the OHS prosecutor is required to abide by the ethical duties of a prosecutor to act objectively, fairly, consistency and transparently in exercising its prosecutorial functions. • We recommend that the OHS legislation require OHS regulators/prosecutors to be bound by DPP Prosecution Guidelines. • We recommend that OHS prosecutions be heard in magistrate, county, supreme and federal courts and not in industrial courts or commissions.
How should the legislation deal with multiple offenders?	<ul style="list-style-type: none"> • We recommend that the OHS legislation provide a mechanism for all relevant duty holders to be joined as co-defendants to an OHS prosecution.
Is the decision to prosecute reviewable?	<ul style="list-style-type: none"> • We recommend that the OHS legislation provide that the decision to prosecute be a reviewable decision under the OHS legislation.
Penalties, Sentencing and Enforcement	
What is the purpose of penalties?	<ul style="list-style-type: none"> • We recommend that the approach to enforcement action be a tiered enforcement pyramid approach, utilising the full range of possible enforcement mechanisms including informal warnings, improvement and prohibition notices, publicity orders, community services orders, prosecution (in lower and higher courts), and penalties. This full range of penalties structurally speaking does not necessarily have to sit in the Act.
Is the current approach to sentencing adequate?	<ul style="list-style-type: none"> • We recommend that the OHS legislation provide guidance to the Courts (not necessarily in the Act but in the related legislation) that there should be no limitation to the maximum discount available for subjective factors so that incentives are provided to duty holders in taking remedial action and making improvements in OHS management after an alleged breach.
Should there be a right to civil enforcement of the OHS legislation?	<ul style="list-style-type: none"> • We recommend the inclusion of provisions for private action civil enforcement of the OHS legislation.
What happens to fines obtained in an OHS prosecution?	<ul style="list-style-type: none"> • We recommend the abolition of moiety for prosecutors in the OHS jurisdiction. • We recommend that fines be re-invested in safety through the establishment of a fund for OHS research and development.
What should be the effect of a successful defence?	<ul style="list-style-type: none"> • We recommend that the OHS legislation provide that costs are recoverable in the event of a successful defence to an OHS prosecution.

2. Introduction

- 2.1 The independent advisory panel (the **Panel**), appointed by the Federal Minister for Employment and Workplace Relations, the Hon. Julia Gillard MP, has been charged with conducting a review of the OHS legislation nationally (the **Review**).
- 2.2 The Panel released an Issues Paper in May 2008, calling for submissions to be received by 11 July 2008.
- 2.3 The transport industry is a significant contributor to Australia's economy and national well-being, contributing 4.63 per cent of total Gross Domestic Produce in 2006/07 which amounted to \$42.6 billion. Employment in the transport industry reached nearly half a million jobs in the 12 months to August 2007, which constituted 4.7 per cent of total employment in Australia.
- 2.4 The Australasian Railway Association (**ARA**) represents all rail operators and track owners in Australia.
- 2.5 The ARA has a strategic objective to achieve single national regulatory frameworks for the rail industry, including OHS.
- 2.6 Industry notes that governments are working co-operatively to harmonise OHS legislation – and that Workplace Relations Ministers have agreed to the use of model OHS legislation as the most effective way to achieve harmonisation.
- 2.7 Industry considers that such hopes - based on each jurisdiction enacting that model legislation to achieve national, consistent OHS regulation – are destined for failure. It is most unlikely that all jurisdictions will agree a common approach. Experience with Rail Safety Legislation shows that, even when ministers approve a 'model', respective jurisdictions will enact their own specific legislation that is not consistent with the model or with each other. The intergovernmental agreement of 3 July 2008 in this regard provides little comfort given the ability of jurisdictions to enact "additional provisions"¹ and the qualifications to the obligations arising from "drafting protocols"² and the qualification that the agreement is subject to the parliamentary and other law making processes of the jurisdictions.³
- 2.8 However, this review seeks to make recommendations on the optimal structure and content of a model OHS act that is capable of being adopted in all jurisdictions. Industry is providing this submission to assist development of that optimal structure and content. Such a model may provide the building block for a future, single OHS regulatory framework that is one of the industry's strategic objectives.

¹ see clause 5.1.8

² see clause 5.1.7

³ see clause 5.1.6

3. Rail Industry Specific Legislative Concerns

What is the preferred legislative framework?

- 3.1 As stated above, the ARA has a strategic objective to achieve a single national OHS regulatory framework for the rail industry.
- 3.2 The aim is for the rail industry to be operating under a single national regulatory framework for OHS administered by one national regulator, and a single national regulatory framework for rail safety administered by a single rail safety regulator. The regulators would be operating out of Canberra with state and territory offices to ensure compliance.
- 3.3 The review provides an opportunity for the replacement of the current dysfunctional regulation of OHS by multiple, jurisdictional based regulators with a new, comprehensive national OHS regulatory authority.
- 3.4 The legislative framework and associated regulatory structure would be as follows:
- (1) Unified Commonwealth OHS legislation aimed at ensuring the health and safety of those at work or affected by work activities, so far as is reasonably practicable, covering all workplaces in Australia. All jurisdictions would rescind their current legislation and states and territories would surrender their powers to regulate OHS in favour of the Commonwealth; and
 - (2) Unified Commonwealth rail safety legislation that would be related to the OHS legislation. Importantly rail safety legislation would be aimed at specific regulation of rail operators and track owners to deliver, so far as is reasonable practicable, safe transport functions. The rail safety regulator would administer accreditation regimes. In addition a separate rail safety investigator would conduct 'just culture' accident investigations. All jurisdictions would rescind their current legislation and states and territories would surrender their powers in relation to rail safety regulation in favour of the Commonwealth; and
 - (3) a tiered approach for the legislative framework with an overarching Commonwealth OHS Act, supported by regulations, Codes of Practice and guidelines (in these submissions ARA refers to "legislation" to encapsulate all tiers in the legislative framework).
- 3.5 The above OHS and specific rail safety functions would be delivered by the relevant respective rail safety and OHS national statutory authorities. Rail safety functions (regulation and investigation) would not duplicate the primary OHS statutory functions. There would be no areas of overlap in their enabling legislation. . In that regard, rail specific obligations would override the general OHS obligations to the extent of any inconsistency. Appropriate provisions must be made to protect against double jeopardy. Regulatory guidelines would

delineate the respective roles of regulators in relation to investigations to avoid duplication of investigations.

- 3.6 Without being prescriptive, such an arrangement may also be developed to remove overlap with other industry specific safety regulation which exists in relation to areas such as electrical safety, mining safety, and road transport safety. The single statutory OHS role may evolve into a particular modus operandi for ‘accredited operators’ in those industries and another modus operandi for all other workplaces.



- 3.7 It is vital that the interface between rail safety regulation and OHS regulation is well managed. Apart from an MOU between both agencies, the OHS and Rail Safety regulators should establish a dedicated liaison facility between both organisations to assist in managing the relationship between both organisations. This would be most effectively achieved by “embedding” a rail safety regulatory officer in the OHS regulator, and an OHS officer in the Rail Safety Regulator.

What is the experience of industry in relation to harmonisation?

- 3.8 In early 2004, the National Transport Commission (**NTC**) commenced work on national regulatory reform on behalf of all governments represented as the Australian Transport Council (**ATC**).
- 3.9 Industry applied significant efforts and support. Industry for example, supported the principles underpinning the ATC approved model Rail Safety Bill, which included a co-regulatory structure, with rail operators and owners being primarily responsible for risk identification, assessment and control. Rail operators and owners accepted the primary regulatory instrument – accreditation – as a demonstration that they have the capacity and competency to operate safely. They also accepted a process regulation approach which focuses on achieving regulatory outcomes through application of systematic management processes based on risk identification, assessment and control.
- 3.10 However, four years later, industry is disappointed that the opportunity for regulatory reform has not been grasped.

- 3.11 Some progress has been achieved with model legislation. In July 2005, ATC approved in principle changes to the co-regulatory framework proposed by NTC and authorized development of model rail safety legislation and regulations. Subsequently, ATC approved:
- (1) a national model Rail Safety Bill in June 2006;
 - (2) associated model Regulations in December 2006;
 - (3) further provisions for the model Bill relating to road – rail crossings in February 2008; and
 - (4) guidelines in February 2008.
- 3.12 In February 2006, the Council of Australian Governments (**COAG**) set a target of 1 July 2007 for jurisdictions to develop and implement legislative reforms in a nationally consistent and co-ordinated manner. ATC set a common compliance date for accredited operators of 1 July 2008.
- 3.13 During the drafting of model legislation jurisdictions ensured that the ability for local variations was built into many provisions including those relating to general duties. In addition ATC Ministers added caveats to their jurisdiction's acceptance of the model legislation. As a result consistency has been lost.
- 3.14 Jurisdictions have failed to meet these COAG/ATC targets both in terms of deadlines and consistency with the model legislation. Industry is uncertain whether and when new legislation will be applied in most jurisdictions. Victoria enacted new legislation in March 2006, ahead of ATC approval, and has regulations in effect and requires re-accreditation of operators by July 2008. South Australia passed a new Act, based on the model Bill in October 2007 and expects to make regulations shortly. New South Wales released a draft Bill in February 2007 and subsequent draft regulations – but has yet to introduce legislation into Parliament. Queensland introduced a Bill in February 2008 – but debate has not taken place. Western Australia, Tasmania and the Northern Territory have yet to release draft legislation. The Victorian legislation and the draft New South Wales Bill differ in significant aspects from the model Bill. The legislation produced by Victoria, South Australia, New South Wales and Queensland are not consistent with each other.
- 3.15 Reflecting on this experience, industry considers that the approach agreed by Workplace Relations Ministers to reform OHS regulation through the use of model OHS legislation to achieve harmonization will fail to achieve national, consistent OHS regulation.
- 3.16 The ARA submits that a Federal approach with a single OHS legislative instrument is the only method by which it is possible to achieve truly nationally consistent regulation for safety. The experience of the introduction of model legislation in other arenas has demonstrated that

model legislation is rarely adopted by States and Territories without (sometimes substantial) amendment.

What has been the effect of the reforms to rail safety regulation?

- 3.17 In state and territory jurisdictions rail operators are subject to OHS regulation and to specific rail safety regulation. Industry has, in recent times, expected that announced reforms to the rail safety regulatory arrangements would have achieved more efficient and effective safety outcomes.
- 3.18 This has not been achieved. Despite good intentions expressed by ministers and officials, state and territory jurisdictions have failed to develop and implement comprehensive national rail safety regulation in Australia.
- 3.19 Rather, the result has been industry is subject to two related but separate regulatory schemes which overlap and are unnecessarily duplicated. We submit that the removal of the overlap and duplication between the two areas will lead to more efficient and effective safety outcomes in rail operations.

Are there other related rail reforms to be taken into consideration?

- 3.20 On 18 June ARA provided a submission to the CEOs of Transport portfolios to assist officials who are preparing advice for the Australian Transport Council (ATC) on governance arrangements to deliver a national rail safety regulator and a national rail safety investigator.
- 3.21 In light of the current duplication and conflicting obligations on accredited rail operators by OHS and rail safety regulation, the rail industry recommends that the review Panel take into account possible ATC decisions and developments during the course of this review.

4. Scope of Duties

What is the standard for the absolute duties?

- 4.1 The rail industry does not support the 'absolute duties' imposed in New South Wales and Queensland and submits that this is a fundamental point of divergence in current OHS regulation between the jurisdictions. Unless this fundamental divergence can be resolved, there is no likelihood that the Workplace Relations Ministers could agree on a single model OHS Act. In the event that the various jurisdictions reserved the right to retain their approaches in this regard, then the object of the OHS reform and harmonisation process will not be achieved.

- 4.2 All jurisdictions in Australia require employers to provide for the health and safety of employees at work and to ensure non-employees are not exposed to risks to their health and safety arising from the conduct of an employer's undertaking. It is important that legislative obligations for particular industries are not expanded beyond those concerning OHS through special sub-ordinate provisions in their specific regulations.
- 4.3 Those duties in the context of New South Wales and Queensland are expressed as absolute duties. The other jurisdictions qualify the absolute duties to the standard of what is "reasonably practicable". In New South Wales however, reasonable practicability is a defence.⁴ Queensland adopts a related defence of 'due diligence'⁵. The anomaly in the New South Wales and Queensland approach is that the defendant bears the onus of proving the defence of reasonable practicability to the civil standard. The implications for the approach in Victoria, South Australia, Western Australia, Australian Capital Territory and the Northern Territory is that the onus is on the prosecution to prove 'reasonably practicable' as an element of the offence. The prosecution is held to the criminal standard of proving the elements of the offence beyond reasonable doubt.⁶
- 4.4 Given that seven out of nine Australian jurisdictions currently adopt the approach of qualifying the duty by what is reasonably practicable, any harmonised regime must adopt this approach. An outcome, performance based approach is preferred. The wording of duties drives (or not) compliance – absolute duties do not prompt managers to take proactive, safety improving actions.
- 4.5 Critics of adopting the prevalent approach at best point to the fact that the question of onus arises only in exceptional circumstances and that for the most part, the reporting of cases would be determined in the same way regardless of who bears the onus. We submit in that respect that such arguments miss the point. In a criminal system, the defendant should be given the benefit of the doubt and it is precisely those exceptional cases that the issue matters. Furthermore, if there is little practical difference in the approach then there is no harm in adopting the view which ARA takes.
- 4.6 The industry supports the approach adopted in the UK where the requirement to do what is reasonably practicable is part of the duty – but the legislation applies the burden of proof on the duty holder, who is to prove reasonable practicability.

What does "reasonable practicability" mean?

- 4.7 The rail industry considers it essential that a test of 'reasonably practicable' be included as an integral component of the model OHS Act.

⁴ *Occupational Health and Safety Act 2000* (NSW) s 28.

⁵ *Workplace Health and Safety Act 1995* (Qld) s 37.

⁶ *Chugg v Pacific Dunlop* (1990) 170 CLR 249 at 257.

- 4.8 All jurisdictions adopt the test of “reasonable practicability” to the scope and application of the duties.⁷ Regardless of the way the legislation casts the test of reasonable practicability (whether as a qualification to the duty or a defence to a charge), what the concept of reasonable practicability actually encompasses need to be adequately addressed in the legislation.
- 4.9 There is no definition of “reasonably practicable” contained within the legislation in Tasmania, South Australia, Queensland or New South Wales.
- 4.10 Some very broad guidance is provided in the other jurisdictions.⁸ The Victorian legislation for example provides some guidance as to the meaning of the qualification to the general duties in Section 20 of the *Occupational Health and Safety Act 2004*.
- 4.11 The difficulty with the Victorian definition is that it does not provide sufficient clarity as to the meaning of the term. While not wanting to be overly prescriptive, some guidance⁹ on what, where, when and how would be of assistance. For example, when considering the matters listed above, is the duty holder to consider the cost of eliminating or reducing that hazard at a micro or a macro level? That is, should the duty holder weigh up the risk against the cost on the basis of risk and costs per individual piece of plant and equipment or should that balancing proposition be undertaken at the level which considers all plant and equipment in all the business’ undertakings across several locations?
- 4.12 The questions above are important because OHS regulators almost have a bet both ways in applying the standard. When discussing these matters with duty holders outside the context of enforcement action, OHS regulators make comments which suggest an understanding of the costs of eliminating or reducing hazards and risks across businesses as a whole as being impossible.¹⁰ However, in the context of enforcement action (prosecution in particular), the regulator tends to view the costs and suitability at a micro level, considering what is reasonably practicable in relation to an individual piece of machinery, in an event focused setting, without regard for the costs or resourcing issues at a broader level.
- 4.13 Without the appropriate legislative guidance, the Courts are left to interpret the meaning of the term. Courts have taken an incredibly broad approach to the meaning of the words which provides only broad principles and little detail as to where the standard begins and ends.¹¹

⁷ Tooma, M *Safety, Security, Health and Environment Law* Federation Press, 2008 at p 85; Liz Bluff and Richard Johnstone ‘The Relationship Between ‘Reasonably Practicable’ and Risk Management Regulation’ (Working Paper No 27, National Research Centre for OHS Regulation, 2004) 9, 10.

⁸ For relevant jurisdictions see the meaning of “practicable” in the *Occupational Safety and Health Act 1984* (WA) s 3; the meaning of “practicable” in the *Work Health Act 1986* (NT) s 28; and the meaning of “reasonably practicable steps” in the *Occupational Health and Safety (General) Regulation 2007* (ACT) reg 8.

⁹ Such guidance need not be provided in the OHS Act but rather may be included in the regulations.

¹⁰ As an example, Employers First in their submission to the 2005 Review of the *Occupational Health and Safety Act 2000* (NSW) pointed to a statement made by Peter Dunphy of the WorkCover Authority of NSW in a public Information Session in Newcastle on 14 July 2005: “It’s always helpful to go back to objectives to see what we are actually trying to achieve in the first place. One of the important things about these objectives is that they talk about not the elimination of all risks and hazards in the workplace because we know that that’s not practicable or even realistic or appropriate in many circumstances, but it is about the securing and promoting health and safety and ensuring that we have the best that we can in terms of health and safety. And certainly during the public comment period that is one of the issues we are generally seeking clarification on in terms of people’s understanding of the general duties of the legislation, and people do tend to interpret that ensuring is an absolute duty to eliminate every hazard in the workplace. And certainly when you look at the principles that is really not what the objectives of the legislation are about.” This statement is clearly different to the approach adopted by WorkCover in OHS prosecutions.

¹¹ See *WorkCover Authority (NSW) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182 per Walton J, VP at 206-207: “It is evident from these authorities that what is required...is a balancing of the nature, likelihood and gravity of the risk to safety

- 4.14 More guidance should be provided to duty holders on the meaning of reasonably practicable by providing adequate definitions in the legislation. Definitions must contain a greater level of specificity and include proactive steps duty holders must take to satisfy the standard beyond broad principles. They should be guided by practicality, affordability, clarity, certainty and finiteness.
- 4.15 Xanthaki, paraphrasing Thornton has stated:
*"Clarity, simplicity, precision, accuracy and plain language are common standards of good quality of legislation both in the common and in the civil law drafting styles."*¹²
- 4.16 Reasonably practicable must be discernable by duty holders on the face of the legislation. Like other businesses, rail operators need to understand where the bar is set and that certainty must be provided by the legislation itself. That is the best way to ensure compliance.
- 4.17 Consideration of the application of 'gross disproportion' is also needed. Inconsistency of application of this concept is often a driver for inconsistency of court decision and regulator behaviour. Legislation must make it clear whether reasonable practicability is predicated on cost-benefit parity or gross disproportion.

What is the relationship with rail safety legislation?

- 4.18 As stated above in paragraph 3, the ARA considers that a model OHS Act should stand alone with a related Rail Safety Act governed by national regulators (along with other industry specific safety legislation). This would preferably be delivered by means of an exclusive Commonwealth legislative framework consisting of a Commonwealth OHS Act and a Commonwealth Rail Safety Act, along with related rail accident investigator regulation.
- 4.19 Should the model OHS Act be based on principles-based standards (general duties of care), and enacted in state and territory jurisdictions as the Panel's Issues Paper seems to suggest, industry considers that the model Rail Safety Bill should be revised and general duties be removed from the rail safety legislation to avoid duplication – likewise for any new rail safety legislation enacted by jurisdictions following the ATC approval of the model Bill. Further consideration would need to be given to the relationship between the operator and its contractors when general duties are removed.
- 4.20 Should the industry strategic objective be achieved, the unified Commonwealth OHS legislation and the unified Commonwealth rail safety legislation would be complementary, thus avoiding any duplication in relation to the general duties.

occasioning the offence with the costs, difficulty and trouble necessary to avert the risk." See also *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 per Gaudron J at 322-323; *Holmes v R E Spence & Co Pty Ltd* (1993) 5 VIR 119 per Harper J at 123; *WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd* (No 1) (2000) 101 IR 239 at 260. For a discussion of relevant authorities see Michael Tooma *Tooma's Annotated Occupational Health and Safety Act 2000 New South Wales* (2004) [1.28.10].

¹² Helen Xanthaki 'The Problem of Quality in EU Legislation: What on Earth is Really Wrong?' (2001) 38 CML Rev 651 at 660 paraphrasing Garth Thornton, *Legislative Drafting* (1996) 52-54.

5. Categories of Duty Holders

Do the categories of duty holders sufficiently deal with the roles and relationships in the workplace?

- 5.1 The rail industry supports the notion that primary reliance on employment relationships is a valid basis for framing OHS obligations.
- 5.2 While not being overly prescriptive, clearer guidance is required with respect to the categories of duty holders to ensure that there is recognition that the duties extend to persons who may be affected by the conduct of the business, including contractors and labour hire personnel.
- 5.3 Currently, the approach to each category of duty holder appears to be to require each type of duty holder to “ensure health and safety” regardless of the role that duty holder has in the workplace. The risk with such an approach is that where everyone is given overarching responsibility, no-one takes responsibility. ARA favours an outcome, performance-based approach to OHS regulation as opposed to a prescriptive standards approach. We support general duties but we believe the general duties should be supplemented by specific guidance¹³ as to what that general duty involves for each category of duty holder i.e. where does one duty holder’s obligation end and another’s begin – for example with a contractor?
- 5.4 In that context, the legislation needs to be updated to take into account the greater variety of contractual arrangements which exist in modern business in Australia. As Bluff and Gunningham (2003) have stated:
- “As we enter the 21st century, Australian workplaces, the nature of work performed and employment arrangements are quite different from the world of work observed by the Robens Committee in 1972. Work is no longer predominantly undertaken by full-time employees, with relatively stable employment, working for large, unionised organisations in “blue collar” industries or in the public sector. A series of interlinked economic, political, managerial and organisational influences have contributed to a significant alteration in the economy, the labour market and the structure of organisations.”¹⁴*
- 5.5 The changes include:
- (1) a rise in sub-contracting and use of agency labour¹⁵ and increased complexity in commercial contracting arrangements such as unincorporated joint ventures, alliance arrangements, bundling up plant, substance or product services (that is, multiple suppliers of a “service”);

¹³ Not necessarily in the OHS Act. Consider paragraph 3.4(3) which refers to a preference for a tiered legislative framework consisting of the Act, regulations, Codes of Practice and guidelines.

¹⁴ Liz Bluff and Neil Gunningham ‘Principle, Process, Performance or What? New Approaches to OHS Standards Setting’ (Working Paper No 9, National Research Centre for OHS Regulation, 2003).

¹⁵ For example, one survey has suggested that the use of labour hire firms by manufacturers increased from 14% of companies in 1990 to 21% in 1995 cited in Richard Johnstone, ‘Paradigm crossed? The statutory occupational health and safety obligations of the business undertaking’ (1999) 12 *Australian Journal of Labour Law* 73 at 74.

- (2) an increase in self-employment arrangements;
 - (3) an increased casualisation of the workforce, with increases in part-time working arrangements and short-term employment arrangements;
 - (4) aging of the workforce; and
 - (5) an increase in trade in goods and services globally, associated with the removal of trade barriers and mutual recognition of standards.¹⁶
- 5.6 The implications of the simplistic approach of making everyone responsible for everything in complete denial of those changes is that “new” duty holders will not comply with their obligations thus increasing the focus on “traditional” duty holders such as employers.
- 5.7 The traditional model of single employers as the centre of production activity is a thing of the past.
- 5.8 Rarely does one individual organisation dictate working arrangements. The working arrangements in business are sophisticated and often involve overlapping roles and relationships in terms of both those who control the risks and those who are exposed to risk.
- 5.9 As Gunningham and Bluff (2003) argue:
- “...a manufacturer of workplace machinery is also an employer, may be a principal contractor who outsources some work to sub-contractors, may be a host employer engaging labour hire workers to cover staff shortages, and may procure equipment, specifying requirements that impact upon OHS...”*
- “Those exposed to risk, are not only employees, that is, persons working under a contract of service. The “risk exposed” include sub-contractors, self-employed, labour hire workers, franchisees and their employees, the occupants of workplaces and the users of plant, equipment, substances, materials and systems designed, produced and supplied by a variety of sources. Again, these roles are overlapping. For example, a self-employed person may be the occupier of premises owned and controlled by others, use equipment supplied by others and supply services, as a sub-contractor, to others.”¹⁷*
- 5.10 The OHS legislation throughout Australia does not expressly recognise all those with control over the OHS arrangements in modern business leaving it instead to the Courts to expand existing duty holder definitions to capture those arrangements. This approach lacks clarity and consistency. The rail industry utilises contractors including labour hire, and as such, wants certainty that contractors will know their obligations on the face of the legislation. This will improve compliance by those contractors and therefore safety in rail operations.

¹⁶ Michael Quinlan and Claire Mayhew, ‘Precarious employment, work re-organisation and the fracturing of OHS management’ in K Frick, P Jensen, M Quinlan and T Wilthagen (eds), *Systematic Occupational Health and Safety Management. Perspectives on an International Development* (2000) 175-198.

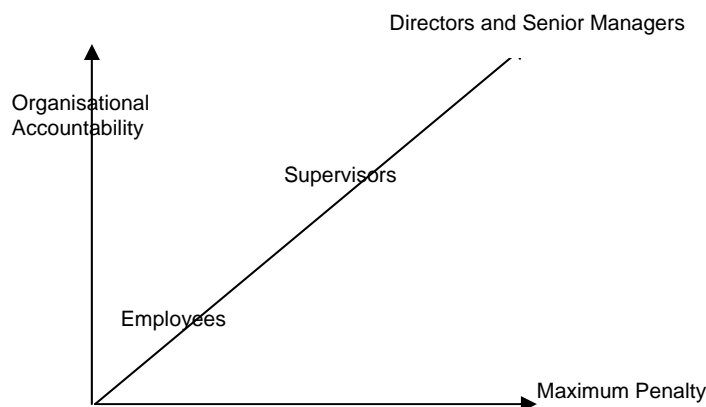
¹⁷ Liz Bluff and Neil Gunningham ‘Principle, Process, Performance or What? New Approaches to OHS Standards Setting’ (Working Paper No 9, National Research Centre for OHS Regulation, 2003) 4.

5.11 A rail operator would also require guidance¹⁸ on where its obligation towards the contractor starts and finishes. Is it necessary to second guess the expertise of specialist contractors by engaging other superintendents to verify the Safe Work Method Statements as the Qantas Case¹⁹ suggests? Is it the case that an operator needs its own supervisor to supervise the supervisor provided by the contractor?

Are the individual categories of duty holders sufficient?

5.12 There are two tiers of duty holders at the individual level under existing legislative arrangements. These are:

- (1) employees; and
- (2) persons concerned in the management of the corporation.



5.13 Currently, it is not clear on the face of the existing legislation whether supervisors are employees or persons concerned in management. Supervisors must be labelled one or the other. Courts have interpreted the current provisions in such a way that supervisors are grouped as persons concerned in the management of a corporation. However, supervisors will not necessarily have the same degree of control or ability to make decisions in relation to OHS. On the other hand, employers rely heavily on suppliers to implement the systems which they have developed. Supervisors are at the coal face of the implementation pyramid, if they don't fulfil their obligations, nor can the employer.

5.14 The model legislation should include a new category of individual duty holder for supervisors – who supervise other people and/or supervise work done by others - which sits between the two current levels of individual duty holders and supervisors be given guidance on the face of the legislation as to what is expected of them.

¹⁸ Such guidance should not be overly prescriptive and need not necessarily be contained within the OHS Act. Consider paragraph 3.4(3) of these submissions which refers to a preference for a tiered legislative framework consisting of the Act, regulations, Codes of Practice and guidelines.

¹⁹ *Inspector Seneviratne v Qantas Airways Ltd* [2006] NSWIRComm 69.

- 5.15 The applicable penalties for supervisors should be commensurate with the duty holders' position and level of control (that is, less than managers but more than employees).

6. Risk Management

What does risk management mean?

- 6.1 The rail industry supports and applies risk identification, assessment and control as fundamental underpinning of their operations. OHS legislation should provide enough guidance²⁰ as to what risk management actually means.

- 6.2 Johnstone and Bluff (2004) have pointed out:

*"Curiously, the OHS statutes in all jurisdictions apart from Queensland make no reference to risk management principles, and give no guidance as to the relationship between 'reasonably practicable' and risk management. Both processes appear to require duty holders to identify and weigh up risks and possible control measures, but it is far from clear exactly what is the relationship between these two processes."*²¹

- 6.3 Queensland provides for the risk management process under the *Workplace Health and Safety Act 1995*, as part of the general arrangements for 'ensuring workplace health and safety'²² whereas, the other jurisdictions include provisions associated with risk management in the OHS regulations and/or evidentiary standards.²³ The Commonwealth jurisdiction²⁴ and in New South Wales²⁵, South Australia²⁶, Tasmania²⁷, Western Australia²⁸ and the Northern Territory²⁹ expressly require employers (and similar obligations are imposed on controllers of premises, suppliers and manufacturers of plant) to identify, assess and control risks in their workplaces or arising from their work activities which have the potential to harm the health and safety of people. Queensland also has an approved Advisory Standard on Risk Management.³⁰ The risk management approach to OHS risks in the workplace is a stated objective of OHS legislation.³¹

²⁰ Once again, such guidance should not be overly prescriptive and need not necessarily be contained within the OHS Act. Consider paragraph 3.4(3) of these submissions which refers to a preference for a tiered legislative framework consisting of the Act, regulations, Codes of Practice and guidelines.

²¹ Liz Bluff and Richard Johnstone 'The Relationship Between 'Reasonably Practicable' and Risk Management Regulation', (Working Paper No 27, National Research Centre for OHS Regulation, 2004) 4.

²² *Workplace Health and Safety Act 1995* (Qld) s 22.

²³ Liz Bluff 'Regulatory Strategies for the Safe Design of Plant', (Working Paper No 24, National Research Centre for OHS Regulation, 2004).

²⁴ *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) Regs 1.05-1.06.

²⁵ *Occupational Health and Safety Regulation 2001* (NSW), chapter 2.

²⁶ *Occupational Health Safety and Welfare Regulations 1995* (SA) regs 1.3.2 -1.3.3.

²⁷ *Workplace Health and Safety Regulations 1998* (Tas) regs 17-19.

²⁸ *Occupational Safety and Health Regulations 1996* (WA) reg 3.1.

²⁹ *Work Health (Occupational Health and Safety) Regulations 1992* (NT) reg 38-39.

³⁰ Queensland Risk Management Advisory Standard, '*The Risk Management Advisory Standard 2000*', (Queensland Department of Employment Training and Industrial Relations, Workplace Health and Safety, 2000).

³¹ *Occupational Health and Safety Act 2000* (NSW) s 5(e).

- 6.4 OHS legislation applies risk assessment process steps requiring the duty holder to systematically identify work hazards, assess risks and implement control measures to eliminate or minimise those risks, elaborating the strategy of risk reduction, by using the hierarchy of controls (controlling risks at the source by elimination, redesign, substitution, isolation or engineering means, before considering administrative controls or use of personal protective clothing and equipment).
- 6.5 These process steps are too broad and vague to mean anything to duty holders practically speaking. OHS legislation must be clear in its use of risk terminology. It must not confuse or interchange the terms “hazard” and “risk”. For example, hazard management and control of hazards through a hierarchy of controls is only part of contemporary risk management practice. Such use fosters a belief that all organisations should, at a macro level, have no appetite for safety risk, which and can lead to safety improvement opportunities being lost.
- 6.6 Furthermore, the risk management obligations contained within the Rail Safety legislation may be in conflict with those provided in the model OHS legislation.³² The Panel should consider any inconsistency between the legislative frameworks in its review.
- 6.7 The relationship between risk management, risk assessment and reasonably practicable should be the subject of greater clarity in the OHS legislation.

What are the triggers for risk assessment?

- 6.8 The triggers for risk assessment in the legislation must be clearer.
- 6.9 The risk assessment processes do not provide workable triggers in practice. While it is important for organisations and operators in the rail context to adopt a risk management process, it is virtually impossible for operators to comply with the process as it currently exists. It is so broad that operators have difficulty working out what it means, and when it applies. Different jurisdictions require risk assessment processes to be entered into at different points. Hazard identification procedures for example are extremely broad and onerous. The OHS legislation variously requires hazard identification:
- (1) in premises they intend to use as a place of work before using for the first time (in NSW, SA, Tas, NT, and Cth)³³;
 - (2) before plant is installed, commissioned, erected, altered (NSW, SA, Tas, NT, Cth)³⁴;

³² See Section 57 of the National *Model Rail Safety Bill* 2006 which provides the power to prescribe risk management principles, methods and procedures. Also see Schedule 1 of the *Model Rail Safety Regulations* 2006 at M which provides for systems and procedures for compliance with the risk management obligations set out in ss 7, 57(1)(c), 57(1)(d) and 57(1)(e) of the *National Model Rail Safety Bill* 2006 in relation to the contents of safety management systems. See also the requirements for accreditation as a way to manage risks *Model Rail Safety Bill* 2006, Part 4, Division 2, ss 30- 34.

³³ *Occupational Health and Safety Regulation 2001* (NSW) cl 9(3)(a); *Occupational Health Safety and Welfare Regulations 1995* (SA) reg 1.3.2(4)(c); *Workplace Health and Safety Regulations 1998* (Tas) reg 18(1)(c); *Work Health (Occupational Health and Safety) Regulations 1992* (NT) reg 38(2)(b); *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) reg 1.05(4)(c).

³⁴ *Occupational Health and Safety Regulation 2001* (NSW) cl 9(3)(b); *Occupational Health Safety and Welfare Regulations 1995* (SA) reg 1.3.2(4)(a); *Workplace Health and Safety Regulations 1998* (Tas) reg 18(1)(b); *Work Health (Occupational Health and*

- (3) before substances are introduced at the place of work (NSW, SA, Tas, NT, Cth)³⁵;
- (4) before changes are introduced to work practices or systems of work (NSW, SA, Tas, NT, Cth)³⁶;
- (5) on an ongoing basis, even as work is being carried out (in NSW)³⁷.
- 6.10 Even within the broad scenarios discussed above, there are differences in approach. The requirement for risk assessment/risk management when changes occur in a workplace for example, varies between jurisdictions and variously includes requirements to take action prior to the first use of premises, before introducing new plant and substances, before changing work practices, when new information becomes available, and after an incident. As Bluff and Johnstone have identified, this does not provide for risk assessment at all stages of the life cycle.³⁸
- 6.11 The requirement for risk assessment on an ongoing basis is completely unworkable as the legislation does not assist in telling duty holders what that means, at what points it is absolutely required within an ongoing process and therefore, what the scope of that duty is. Without being too prescriptive, the OHS legislation should provide duty holders with a clear indication of the scope of the duty.
- 6.12 Bluff and Johnstone have recognised the difficulties for duty holders:
- “While in broad terms risk management is concerned with identifying, assessing and treating risks, it is a collective term applied to many different activities and approaches, to many different kinds of risks, and using variable terminology.*
- Moreover, “the recursive nature of terms such as ‘hazard’ and ‘risk’ and terms such as ‘assessment’, ‘analysis’, ‘estimation’ and ‘evaluation’ in everyday speech, creates fertile ground for ambiguity and confusion” (Waring and Glendon 1998, p. 22). All of this suggests that OHS risk management principles could be difficult for duty holders to engage with, quite apart from the uncertainty about how the risk management process relates to the general duties.”³⁹*
- 6.13 As an industry that carries over 666 million tonnes of freight, and over 667 million passenger journeys and owns and manages more than 33,000 kilometres of track, we need meaningful and practical triggers for undertaking risk assessments.

Safety) Regulations (NT) reg 38(2)(a); Occupational Health and Safety (Safety Standards) Regulations 1994 (Cth) reg 1.05(4)(a).

³⁵ *Occupational Health and Safety Regulation 2001 (NSW) cl 9(3)(d); Occupational Health Safety and Welfare Regulations 1995 (SA) reg 1.3.2(4)(a); Workplace Health and Safety Regulations 1998 (Tas) reg 18(1)(b); Work Health (Occupational Health and Safety) Regulations (NT) reg 38(2)(a); Occupational Health and Safety (Safety Standards) Regulations 1994 (Cth) reg 1.05(4)(a).*

³⁶ *Occupational Health and Safety Regulation 2001 (NSW) cl 9(3)(c); Occupational Health Safety and Welfare Regulations 1995 (SA) reg 1.3.2(4)(b); Workplace Health and Safety Regulations 1998 (Tas) reg 18(1)(d); Work Health (Occupational Health and Safety) Regulations (NT) reg 38(2)(c); Occupational Health and Safety (Safety Standards) Regulations 1994 (Cth) reg 1.05(4)(b).*

³⁷ *Occupational Health and Safety Regulation 2001 (NSW) reg 9(3)(s) requires employers to ensure the effective procedures are put in place and are implemented to systematically identify hazards even as work is being carried out.*

³⁸ Liz Bluff and Richard Johnstone ‘The Relationship Between ‘Reasonably Practicable’ and Risk Management Regulation’, (Working Paper No 27, National Research Centre for OHS Regulation, 2004) 35.

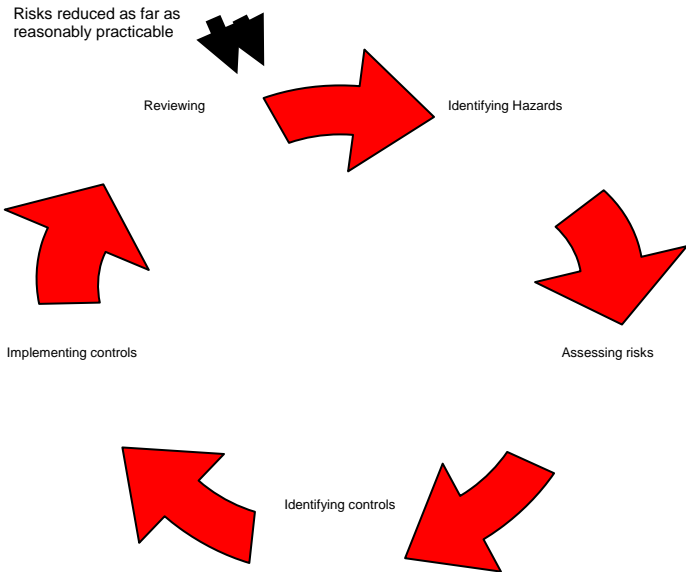
³⁹ Liz Bluff and Richard Johnstone ‘The Relationship Between ‘Reasonably Practicable’ and Risk Management Regulation’, (Working Paper No 27, National Research Centre for OHS Regulation, 2004) 4.

6.14 Furthermore, “risk assessments” means different things to different people. The looseness in the terminology is used as a tool by regulators. We favour an approach which delivers clarity and certainty of outcome as to what is expected in undertaking risk assessments. Don’t leave it vague and tell an operator that it was “inadequate” with the benefit of hindsight.

Should effective risk assessment be a defence?

6.15 The existence of an effective risk assessment process should be a defence to a breach of the legislation.

6.16 The legislation should provide that an effective risk management/risk assessment process adopted by an organisation is sufficient to meet the requirements of doing all that is reasonably practicable. This would provide duty holders with guidance as to the relationship between the general duties in the OHS legislation and the risk assessment processes provided in regulation and further, would provide incentives for organisations to adopt rigorous risk management practices.



7. Personal Liability

What is the rationale for personal liability?

7.1 As a matter of public policy it is important that companies comply with legislation. Given the nature of companies as inanimate, artificial entities, it is inevitable that some degree of personal liability will need to attach to those who are the directing will and mind of the corporate legal person. However, in our submission, that should be reserved to the recalcitrant, reckless, rogue director or manager, not used as a matter of course.

- 7.2 A review of senior management drivers by Gunningham found that compliance is motivated by symbolic drivers (moral compulsion to obey a legitimate and fair law) rather than instrumental drivers (fear of retribution and punishment).⁴⁰
- 7.3 Therefore there should be more focus on establishing fair parameters to personal liability provisions than focus on the punishment.

Is the current approach to personal liability effective?

- 7.4 OHS legislation in the various jurisdictions provides very different models of personal liability.
- 7.5 In New South Wales⁴¹, Queensland⁴² and Tasmania⁴³, directors and managers are deemed liable for the OHS offences committed by the corporation unless they are able to establish a defence. The defences in New South Wales and Queensland are:
- (1) that they were not in a position to influence the conduct of the corporation in relation to the offence⁴⁴; and
 - (2) that they exercised all due diligence.
- 7.6 Tasmania's defences⁴⁵ include:
- (1) that they had no knowledge of the offence and that it was not reasonable for them to have that knowledge; and
 - (2) that they exercised all due diligence.
- 7.7 In Western Australia⁴⁶ and the Northern Territory⁴⁷, officers of a corporation are held personally liable if it is established that an offence was committed with their consent, connivance, or was due to their wilful neglect.
- 7.8 In the ACT, a senior officer can be guilty of industrial manslaughter.
- 7.9 In Victoria⁴⁸ and South Australia⁴⁹, an officer of a corporation is liable if the contravention is attributable to an officer failing to take reasonable care/reasonable steps to ensure compliance by their corporation with its OHS duties.
- 7.10 Adopting the Victorian model would ameliorate concerns with derivative or deemed liability models such as the model encapsulated in section 26 of the New South Wales OHS

⁴⁰ Neil Gunningham, 'CEO and Supervisors Drivers: Review of Literature and Current Practice', (Report to National Occupational Health and Safety Commission, 1999) 12; Michael Tooma, *Safety, Security, Health and Environment Law* (2008) 162-172.

⁴¹ *Occupational Health and Safety Act 2000* (NSW) s 26.

⁴² *Workplace Health and Safety Act 1995* (Qld) s 167. The approach in Queensland is complicated by the definitional aspects of 'executive officers'; Michael Tooma, *Safety, Security, Health and Environmental Law* (2008) 173.

⁴³ *Workplace Health and Safety Act 1995* (Tas) s 53.

⁴⁴ *Occupational Health and Safety Act 2000* (NSW) s 26(1)(a); *Workplace Health and Safety Act 1995* (Qld) s 167(4)(b).

⁴⁵ *Workplace Health and Safety Act 1995* (Tas) ss 53(1)(a), 53(1)(b).

⁴⁶ *Occupational Safety and Health Act 1984* (WA) s 55.

⁴⁷ *Work Health Act 1986* (NT) s 180.

⁴⁸ *Occupational Health and Safety Act 2004* (Vic) s 144.

⁴⁹ *Occupational Health, Safety and Welfare Act 1986* (SA) s 61.

legislation.⁵⁰ In ARA's submission, the derivative liability is unfair and a general abrogation of the rights of individuals. This is especially the case in larger companies where there are a number of non-executive or independent directors who are not involved in the day to day operations of the company. Individuals should not be penalised for misconduct by a company unless they are accessories to such conduct.

- 7.11 As an alternative to the "derivative liability" model, the personal liability provisions in the Victorian occupational health and safety legislation are preferred. In Victoria, the onus rests on a Prosecutor to prove that an officer of a corporation failed to take reasonable care having regard to, among other things, the officer's knowledge and 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.

How do directors/managers fulfil their obligations?

- 7.12 In any event, directors (and persons involved in the management of a corporation) require more guidance in the legislation as to the scope of their duties. While not wanting to be overly prescriptive, what does it mean for a director to "take reasonable care" or "all due diligence" or "reasonable diligence"? ARA favours an approach where the extent of those obligations is spelled out for executive directors, non-executive directors, operational senior managers, non-operational senior management, and mobile management. This will on the one hand provide certainty and on the other, improve compliance.
- 7.13 Furthermore, the description of officers of companies who can be held personally liable in relation to the conduct of their company differs amongst the various statutes which impose personal liability. These descriptions range from "officers of a corporation", "executive officers of a corporation", "responsible officers" of a corporation, "persons concerned in the management of a corporation", directors, managers, secretaries, and other officers. Many of these terms have required judicial interpretation and have been broadly construed. Who is subject to personal liability must be clearer on the face of the legislation.
- 7.14 As an example, a recent report commissioned by Insight Investment in conjunction with the UK's Health Safety Commission (the **HSC Report**)⁵¹, indicated that a 'best practice' approach would seek to integrate the OHS governance process into the main corporate governance structures within a business.
- 7.15 While it was acknowledged that there is no "one size fits all" solution to OHS governance, the authors of the HSC Report located seven fundamental best practice principles that are consistent with the general commentary and empirical evidence promoting the systematic approach to OHS Management. The principles are:

⁵⁰ Such concerns were expressed in the Corporations and Markets Advisory Committee report on personal liability for corporate fault: Richard St John, Zelinda Bafile, Louise McBride, Alice McCleary, & Marian Micalizzi, *Personal Liability for Corporate Fault Report*, (2006).

⁵¹ Insight Investment, *'Defining Best Practice in Corporate Occupational Health and Safety Governance.'* See http://www.insightinvestment.com/Documents/responsibility/Briefings/Report_on_governance_of_occupational_health_and_safety.pdf

- (1) *Director competence* – All directors should have a clear understanding of key OHS issues and be continually developing their skills and knowledge;
- (2) *Director roles and responsibilities* – All directors should understand their legal responsibilities and their role in governing OHS matters for their business;
- (3) *Culture, Standards and Values* – The Board should take ownership of key OHS issues and should set the right tone at the top of the organisation and establish an open culture across the organisation;
- (4) *Strategic implications* – The Board should be responsible for driving the OHS agenda;
- (5) *Performance management* - The Board should create an incentive structure for senior executives which drives good OHS performance;
- (6) *Internal controls* – The Board should ensure that OHS risks are managed and controlled adequately and a framework to ensure compliance is established, for example, via audit structures; and
- (7) *Organisational structures* – the OHS governance process should be integrated into the main corporate governance structures.

7.16 ARA submits that such an approach has merit.

8. Defences

- 8.1 The experience of the defences in OHS legislation is that they have been applied so narrowly that from the perspective of the duty holder, they appear to be unachievable.
- 8.2 While it is important that the offences affect the purposes of OHS legislation, that is, to protect the health, safety and welfare of people in a workplace, the defences must be achievable in order to provide incentives to businesses to make real and genuine attempts to manage their OHS responsibilities adequately and with regard to best practice.
- 8.3 Real and genuine attempts by duty holders to manage their OHS obligations would include complying with codes of practice, adopting an adequate risk assessment and treatment and implementing an OHS Regulator approved safety case approach, to their obligations. Currently, the incentives to adopt such approaches are minimal as there appears to be little difference of approach in the enforcement action taken by an OHS regulator where such processes have been adopted and where they have not been adopted by rail operators.

9. Consultation

Are the current triggers for consultation appropriate?

- 9.1 ARA is committed to consulting employees in relation to matters affecting their health and safety. However, we are concerned that the current legislative obligations on this issue are overly prescriptive and unworkable.
- 9.2 New South Wales⁵², Victoria⁵³ and South Australia⁵⁴ provide extremely broad and unworkable requirements for consultation. The New South Wales and Victorian provisions regarding consultation are very similar, effectively requiring consultation regarding:
- (1) risks to health and safety identified from assessments;
 - (2) decisions about measures to eliminate or control risks;
 - (3) the introduction or alteration of procedures to monitor risks;
 - (4) decisions about the adequacy of facilities;
 - (5) proposed changes to the systems or methods of work or to the plant or substances used for work; and
 - (6) decisions about consultation procedures.
- 9.3 The Northern Territory requires that consultation must address the identification, assessment and control of risks and involve the sharing of information and the exchange of views between the parties.⁵⁵
- 9.4 The approach to consultation contained within the legislation of the Australian Capital Territory⁵⁷, Western Australia⁵⁸ and Tasmania⁵⁹ effectively requires an employer to consult with the health and safety representatives or committee members on proposed changes to the workplace that may affect health and safety.
- 9.5 Such broad provisions have little practical benefit but create a significant compliance burden. Greater clarity is required in relation to triggers for consultation so that the triggers are limited to significant policy or process changes. Consultation should work towards achieving performance outcomes.

⁵² *Occupational Health and Safety Act 2000* (NSW) ss 15,19.

⁵³ *Occupational Health and Safety Act 2004* (VIC) s 35.

⁵⁴ *Occupational Health Safety and Welfare Act 1986* (SA) s 34.

⁵⁵ *Work Health (Occupational Health and Safety) Regulations 1992* (NT) reg 44.

⁵⁶ *Occupational Health and Safety Act 1989* (ACT) s 61.

⁵⁷ *Occupational Safety and Health Act 1984* (WA) s 35.

⁵⁸ *Workplace Health and Safety Act 1995* (TAS) s 31.

- 9.6 The ARA submits that the model OHS legislation should facilitate the establishment of a health and safety committee as one means of consultation but should not be prescriptive as to its format and functions.
- 9.7 The triggers for consultation within the OHS legislation must be practical, efficient, useful and affordable.

What is the preferred position in relation to right of entry – and cease work arrangements?

- 9.8 Employee representatives are not regulator inspectors and would not have an equivalent level of competence to inspect, audit, or determine contraventions of the Act. Employees and their representatives should have access to the regulator and the regulator should have a duty to consider all matters put to them by an employee or representative. Employee representatives should not have a right of entry.
- 9.9 The OHS legislation should provide the capacity for workers to refuse or cease to undertake work if there is an immediate and serious danger. This must be linked with a duty to report the issue and to contribute to resolution of the matter. This provision should not extend to employee representatives. There should be no penalty for workers who legitimately use the cease work provision, but protection should not be provided in the case of vexatious use or for use when no immediate or serious danger exists.

10. Reporting

Are the current notification requirements adequate?

- 10.1 Circumstances requiring notification are not consistent across the jurisdictions. Some jurisdictions (particularly New South Wales⁶⁰, Australian Capital Territory⁶¹, and Tasmania⁶²) rely upon classes of incidents with complicated definitions. Western Australia's approach refers to types of injuries or diseases⁶³.
- 10.2 There needs to be clear description of incidents and events requiring notification to the OHS regulator. It is too difficult for duty holders to work their way through the sometimes confusing definitional thresholds contained within the OHS legislation in relation to incident notification. The jurisdiction which most closely resembles this approach is the list provided by the legislation in the Northern Territory⁶⁴.

⁶⁰ *Occupational Health and Safety Act 2000* (NSW) s 86, 87.

⁶¹ *Occupational Health and Safety Act 1989* (ACT) s 204; *Occupational Health and Safety (General) Regulation 2007* (ACT) reg 62.

⁶² *Workplace Health and Safety Act 1995* (TAS) s 47; *Workplace Health and Safety Regulations 1998* (TAS) reg 62.

⁶³ *Occupational Safety and Health Act 1984* (WA) s 231.

⁶⁴ *Work Health Act 1986* (NT) s 48A.

- 10.3 Ambiguity as to whether an event is reportable or not can lead to inadvertent failures to notify (which are offences under the legislation). Such inadvertence is not a defence to a failure to comply with notification provisions in OHS legislation.
- 10.4 The legislation should make clarity paramount in notification requirements and the easiest and simplest way to do so is to simply list each and every event which requires notification in plain English rather than relying on ambiguous and difficult definitions such as “non-disturbance occurrences”⁶⁵, “dangerous occurrences”⁶⁶ and “serious bodily injuries”⁶⁷.

11. Prosecution

What should be included in the functions of the OHS regulator?

- 11.1 There is value for skilled and impartial advice to be provided to workplaces by an independent agency, which could mean the OHS regulator. However, we are of the view that the prosecutorial and the advisory functions of an OHS regulator should be very separate. Inspectors should have clearly delineated roles which involve the investigation and prosecution of regulatory breaches only.
- 11.2 Where inspectors themselves have a dual role to both prosecute and provide advice to workplaces, companies are reluctant to seek that advice as there is a fear that the company could then be targeted for investigation and ultimately, prosecution in relation to those matters.
- 11.3 It is in the interests of safety that advice be sought by companies in an unfettered way and this can only be achieved by a complete separation of the functions of the Regulator as prosecutor and consultant in OHS matters.
- 11.4 OHS prosecutions should be heard in magistrate, county, supreme and federal courts and not in industrial courts or commissions.

What are the duties of the Prosecutor?

- 11.5 The OHS legislation should spell out the role and duties of inspectors when acting as prosecutors.
- 11.6 The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales, for example include the following detail about the role of the prosecutor:
- “a prosecutor is a “minister of justice”. The principal role of a prosecutor is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness...”*

⁶⁵ Occupational Health and Safety Act 2000 (NSW) s 86, 87.

⁶⁶ Occupational Health and Safety (General) Regulation 2007 (ACT) reg 80.

⁶⁷ Workplace Health and Safety Act 1995 (Tas) s 47.

*A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest.*⁶⁸

- 11.7 The roles of the prosecutor need to be clearly articulated and understood. As Rand J stated in a Canadian Supreme Court decision, *Boucher v The Queen* (1954) 110 CCC 263:

*"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*⁶⁹

- 11.8 The expectations of the community in relation to role of prosecutor has been described as follows:

*"Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."*⁷⁰

- 11.9 However, the unique nature of OHS prosecutions and the lay character of inspectors create doubt as to the application of those guidelines to inspectors who are commencing prosecutions. In the circumstances, it is appropriate in our submission that those roles, responsibilities and duties of inspectors when prosecuting are spelled out in the legislation – with these being bound by the DPP Prosecution Guidelines.

How should the legislation deal with multiple offenders?

- 11.10 Currently, there are no specific provisions in the OHS legislation nationally aimed at ensuring that all those who contribute to an incident/risk to health and safety resulting in a prosecution are joined as defendants to the prosecution.

- 11.11 Often, there are situations where a number of duty holders are involved in relation to a particular contravention of the OHS legislation but not all duty holders are prosecuted by the regulator. This brings the system into disrepute as it appears to the public that the legislation is not enforced with the principles of fairness, consistency, transparency and accountability in

⁶⁸ Prosecution Guidelines by the Office of the Director of Public Prosecutions NSW, p 5.

⁶⁹ *Boucher v The Queen* (1954) 110 CCC 263 at 270.

⁷⁰ *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J).

mind. Companies then begin to see prosecution (and the decision to prosecute) as completely arbitrary. The principles of parity have been said to have limited application in that regard.⁷¹

11.12 The New South Wales Law Commission has stated:

*“rights of contribution are concerned with apportioning responsibility between defendants in circumstances where there is little reason for allowing a plaintiff to decide which defendant should bear the ultimate burden.”*⁷²

11.13 It is necessary for the administration of justice for such a right to be extended to the OHS context in allowing defendants to join other parties to proceedings so that “true” culpability can be explored and determined as it is manifestly unfair for the OHS regulator to decide that one party should bear the ultimate burden of failing to comply with OHS legislation where more than one duty holder is liable and opens up the potential for abuse and corruption.

Is the decision to prosecute reviewable?

11.14 Currently, the decision to prosecute is not a reviewable decision under OHS legislation.

11.15 Furthermore, we recommend that the legislation provide that a decision to prosecute (or not to prosecute) be a reviewable decision under the legislation so that there is an avenue for those duty holders who have been prosecuted in circumstances where the decision has been made without the appropriate regard to the principles contained within the relevant Prosecution Guidelines.

12. Penalties, Sentencing and Enforcement

What is the purpose of penalties?

12.1 Courts and regulators have often stated that the main purpose of penalties is deterrence⁷³. Deterrence is closely related to what has been stated to be the overriding purpose of regulation - to encourage compliance with regulation in order ‘to maximise benefit or convenience to society’⁷⁴.

⁷¹ The decision of Walton J VP in *WorkCover Authority of New South Wales (Insector Petar Ankucic) v McDonald's Australia Limited and Another* [2000] NSWIRComm 277 at paragraphs 142-164. Walton J took the view that the parity principle cannot apply where there are no co-defendants as “the principle of parity only operates to the extent of comparing like with like.”

⁷² New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage*, Discussion Paper No 38 (1997) Chapter 4 [4.7].

⁷³ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) [3.4].

⁷⁴ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) [4.8].

- 12.2 Regulation aims to ‘promote desired behaviour’⁷⁵, therefore, the main aim of regulatory penalties involves the following two prongs:
- (1) deterring future non-compliance; and
 - (2) encouraging future compliance.
- 12.3 This suggests that the main questions to ask are - how will *this penalty* encourage *this offender* towards compliance? And how might *this penalty* encourage *others* to comply?
- 12.4 We submit that a criminal conviction and monetary penalty is not always the most appropriate penalty to impose if the aim is to encourage compliance with OHS obligations. A criminal conviction and monetary penalty is in no way directing resources to safety.
- 12.5 If finding an appropriate level of deterrence is the main task in setting penalties then it is self-evident that allowing the court to select from a range of penalties will facilitate this. It is also self-evident that any penalty imposed should take account of the particular characteristics of the offender. In the safety context, these particular characteristics must include the steps the organisation has taken to remedy the breach.
- 12.6 The model legislation should include a full range of possible responses for enforcement of the OHS legislation⁷⁶ in accordance with an Enforcement Pyramid which contains a broad range of available enforcement actions.⁷⁷
- 12.7 The Robens Report itself stated:
- “We recommend that criminal proceedings should, as a matter of policy, be instituted only for infringement of a type where the imposition of exemplary punishment would be generally expected and supported by the public. We mean by this offences of a flagrant, wilful or reckless nature which either have or could have resulted in serious injury.”*⁷⁸
- 12.8 Prosecution is not always the ideal response to a breach of the legislation. If the purpose of the legislation is to achieve better safety outcomes and minimise the risk to health and safety, in some circumstances, there are better remedies than prosecution which will target resources to achieving those objectives.

Is the current approach to sentencing adequate?

- 12.9 The current approach to sentencing does not provide enough incentives for improved safety performance following an alleged breach of OHS legislation.
- 12.10 In the absence of express provisions in legislation, the Courts have established the approach to sentencing. The sentence must reflect the objectives of the applicable legislative provisions and using the “instinctive synthesis” approach, determine a penalty which includes an

⁷⁵ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) [3.4].

⁷⁶ This full range of penalties structurally speaking does not necessarily have to sit in the Act but could be included in other instruments of the legislative framework.

⁷⁷ For a complete discussion of the concept of the “enforcement pyramid” within OHS Regulation see Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (1999) Chapters 4, 6, 7, and 8.

⁷⁸ Robens Committee (Committee on Safety and Health at Work), *Report of the Committee on Health and Safety at Work 1970-1972* (HMSO)(1972), 82.

assessment of the objective and individual subjective factors, with the appropriate weight given to each factor.⁸⁰

- 12.11 In the High Court case of *Markarian v R* (2005) 215 ALR 213⁸¹, McHugh J discussed what was involved in the instinctive synthesis approach at paragraph 51:

“By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.”

- 12.12 The approach to sentencing in the OHS jurisdiction in New South Wales for example is well settled. The leading authority is *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector James Swee Ch'ng)* (1999) NSWIRComm 343. At 474-475 the Full Bench stated:

*“However, in our view, it is important to reiterate that the primary factor to be considered when a judicial officer is determining the appropriate sentence to impose is the objective seriousness of the offence charged. In case of prosecutions under the OH&S Act, this proposition has often been expressed by saying that the “true measure of penalty lies in the nature and quality of the offence”: see *Independent Cargo & Wool Services Pty Limited v Mingare* (unreported, Fisher CJ, Glynn and Peterson JJ, CT92/1041, 10 March 1994) at p4; *Inspector Hannah v Wonar Pty Limited* (unreported, Fisher CJ, Glynn and Cullen JJ, CT90/1214, 30 June 1992) at p9; *Inspector Mauger v P Ward Civil Engineering Pty Limited* (unreported, Fisher CJ, CT94/1212, 21 December 1995) at p8-9. It has been observed on a number of occasions that subjective factors which mitigate the seriousness of the offence or exculpate the accused must be secondary to consideration of the nature and quality of the offence.”*

- 12.13 The approach dictated by *Lawrenson Diecasting* appears to be a two-stage approach looking at the objective seriousness of the offence as the primary factor to be looked at in relation to penalty and subjective factors playing only a subsidiary role. That is, in determining sentence, subjective factors will not carry as much weight as objective factors.

- 12.14 The current process for discounting of penalties as demonstrated appears to be limited to the following:

- (1) *Early Guilty Plea* - In determining sentence, the court is obliged to take into account a guilty plea and reduce the sentence according to how early in proceedings the defendant indicated the plea. The maximum discount is 25%;

⁷⁹ *Markarian v R* (2005) 215 ALR 213.

⁸⁰ *Markarian* involved an appeal from the Court of Criminal Appeal of New South Wales in relation to the sentencing of an offender convicted of an offence under the *Drug Misuse and Trafficking Act 1985* (NSW). The question for the High Court was whether the Court of Criminal Appeal failed to apply or misapplied orthodox sentencing principles in upholding an appeal against sentence by the Crown.

- (2) *Subjective Factors* – These include factors such as good industrial record, co-operation with the investigation and subsequent measures taken to improve safety. The maximum discount for subjective factors is 10%.

12.15 This seems unreasonably limited.

12.16 ARA submits that there should be no limit to the amount of discount which may be provided in relation to the subjective factors involved. To place a maximum discount on these factors is to provide a disincentive for companies to take necessary remedial action and to further resource safety. Industry should be encouraged as much as possible to put remedial actions in place. Theoretically it should be possible for a situation to arise where a company receives only a nominal fine in circumstances where the company has put in place very significant improvements after the breach.

Should there be a right to civil enforcement of the OHS legislation?

12.17 The right to bring prosecutions under the OHS legislation in NSW⁸², ACT⁸³, Victoria⁸⁴, Northern Territory⁸⁵, and Commonwealth⁸⁶ jurisdictions is generally limited to the OHS regulators in states and territories and in some cases, for example New South Wales, through the union.

12.18 Legislation in Queensland⁸⁷, South Australia, Western Australia and Tasmania⁸⁸ does not contain a provision which excludes civil liability and in the case of South Australia, contains a provision which does not limit civil rights or remedies outside the OHS legislation⁸⁹. The challenge which arises when there has been a failure to indicate whether there is an intention for civil liability to apply through express provision is demonstrated by Dixon J in *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 477 to 478:

“...the received doctrine is that when a statute prescribes in the interest of the safety of members of the public or a class of them a course of conduct and does no more than penalise a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject and an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show, an intention to give, or not to give, a private right has more

⁸² *Occupational Health and Safety Act 2000* (NSW) s 32.

⁸³ *Occupational Health and Safety Act 1989* (ACT) s 95.

⁸⁴ *Occupational Health and Safety Act 2004* (Vic) s 28.

⁸⁵ *Work Health Act 1986* (NT) s 34.

⁸⁶ *Occupational Health and Safety Act 1991* (Cth) s 79.

⁸⁷ While there is no provision excluding liability in Queensland, the case law on the topic in relation to different sections of the legislation is mixed. The Queensland Court of Appeal held in the case of *Schilliro v Peppercorn Child Care Centres Pty Ltd* (No 2) [2001] 1 Qd R 518, that the employer's general duty contained within section 28 of the Act gives rise to a civil cause of action for employees. However, in the case of *O'Brien and another v T F Woolam & Sons Pty Ltd* (2001) 105 IR 402, Phillippides J held that the duty of a person in control of a workplace in section 30 did not give rise to such an action.

⁸⁸ The Tasmanian Supreme Court, when looking at a claim for damages in the context of section 32 of the *Industrial Safety, Health and Welfare Act 1977* (Tas) found that the claim relating to the occupier's general duty had not been made out on the facts of the case.

⁸⁹ *Occupational Health, Safety and Welfare Act 1986* (SA) s 6(2).

often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument.”

- 12.19 Currently, where an organisation is aware of another duty holder breaching their occupational health and safety obligations, the only way to attempt to compel that duty holder to take remedial action, is to threaten to call the OHS regulator. The OHS regulator may then investigate and prosecute or choose not to do either of these things. Furthermore, there is a disincentive for an organisation to call the OHS regulator in such circumstances, as it may lead to an investigation which includes them. As such, any threat made to another duty holder is essentially hollow.
- 12.20 It would lead to greater safety outcomes if there was provision in the legislation for an organisation to enforce the OHS legislation itself where there was a risk to health and safety, for example, if a contractor was seen to be failing in their duty. It is our view that such ability acts as a ‘safety valve’⁹⁰.
- 12.21 This is currently done in other legislative contexts such as the *Trade Practices Act 1974* (Cth). Section 52 of the TPA is more often enforced by competitor activity than activity by the ACCC as there is provision for those parties to act in relation to a contravention.
- 12.22 It has been argued by some that private actions negate the role of the OHS regulator in enforcement and could be subject to abuse. However, private actions under OHS legislation would be subject to the same costs and legal procedures as private legal actions for other areas of law, such as private actions in relation to the trade practices legislation.
- 12.23 Johnstone has argued that scope for abuse is limited stating:

“It is expensive to investigate, prepare and bring such prosecutions. This in itself, together with the burden of proof on the person bringing the prosecution and the other requirements of due process in the criminal law, will ensure that such a right of private action is not abused.”⁹¹

⁹⁰ This conception of private actions was the view of the Industry Commission in *Work, Health and Safety: An Inquiry into Occupational Health and Safety* (Industry Commission Report No. 47, 11 September 1995).

⁹¹ Richard Johnstone, submission 277 to the *Work, Health and Safety: An Inquiry into Occupational Health and Safety*, (Industry Commission Report No. 47, 11 September 1995) 9.

What happens to fines obtained in an OHS prosecution?

- 12.24 There should be no incentive for an OHS regulator to commence a prosecution other than to hold an organisation or individual accountable for failing to comply with the legislation.
- 12.25 Currently, the prosecution can obtain a moiety which is equal to up to half of the fine. Providing a moiety may be viewed as an improper incentive to prosecute.
- 12.26 We recommend the abolition of moiety for prosecutors in the OHS jurisdiction.
- 12.27 A more appropriate avenue for any revenue which results from a successful prosecution would be to re-invest that revenue in safety. It is our view that such revenue should be put into a fund for research and development into safety related fields.

What should be the effect of a successful defence?

- 12.28 Currently, there are no legislative statements as to costs in relation to a successful defence.
- 12.29 In our view, costs should be recoverable (on an indemnity basis) if the duty holder is successful in defending an alleged breach of the OHS legislation. There should be no adverse impact on an innocent person.