

SUBMISSION

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

CSR Limited

July 2008



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1. Executive Summary

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

Issue	Recommendation
Scope of Duties	
What is the preferred legislative framework?	We recommend that a performance based, outcome approach be adopted in the legislation. The legislation should not be overly prescriptive.
What is the standard for the absolute duties?	We recommend that the general duty be qualified by what is “reasonably practicable” and that the prosecution bear the onus of proving the ‘reasonably practicable’ element of the offence to the criminal standard of ‘beyond reasonable doubt’.
What does “reasonable practicability” mean?	We recommend that more guidance is 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. We recommend that further guidance be provided in relation to the relationship between “reasonably practicable” and compliance with relevant Australian Standards.
Categories of Duty Holders	
Do the categories of duty holders sufficiently deal with the roles and relationships in the workplace?	<p>We recommend that each general duty be supplemented by specific guidance as to the scope of that duty, commensurate to the level of control the duty holder has over OHS matters in the workplace.</p> <p>We recommend that further guidance be provided in relation to the relationship with contractors and subcontractors.</p> <p>We also recommend that there be further guidance provided in relation to legislative obligations for duty holders for working from home arrangements.</p>
Are the individual categories of duty holders sufficient?	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?	<p>We recommend that the relationship between risk management, risk assessment and reasonably practicable be the subject of greater clarity in the OHS legislation.</p> <p>We recommend that requirements for competence and training in risk assessment be provided by the OHS</p>

Issue	Recommendation
	legislation.
What are the triggers for risk assessment?	<p>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.</p> <p>We also recommend that the OHS legislation provide that the person leading the risk assessment process in an organisation be competent and trained in the risk management approach.</p>
Should effective risk assessment be a defence?	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?	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.
Is the current approach to personal liability effective?	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. Personal liability provisions should be reserved to the recalcitrant, reckless, rogue director or manager, and not used as a matter of course.
How do directors/managers fulfil their obligations?	<p>We recommend that clarity for the scope of personal liability be provided by the model legislation with a precise shopping list of each officer who is subject to the personal liability provisions to avoid ambiguity and confusion.</p> <p>We recommend that the adoption of best practice OHS governance principles be a recognised method for individuals to demonstrate they have taken reasonable steps to ensure compliance with OHS legislation.</p> <p>We recommend that training be provided for directors/managers, similar to that required by OHS legislation in South Australia for "responsible officers".</p>
Defences	
What should be included in defences to breaches of OHS legislation?	<p>We recommend the following be adopted in the model legislation as defences to breaches of the OHS legislation:</p> <ul style="list-style-type: none"> • Compliance with a code of practice or relevant Australian Standard • Existence of an adequate risk management process • Compliance with and implementation of a safety case which has been approved by an OHS regulator • Compliance with advice provided by an OHS regulator

Issue	Recommendation
Consultation	
Are the current triggers for consultation appropriate?	We recommend that the triggers for consultation within the OHS legislation be practical, efficient, useful and affordable.
Reporting	
Are the current notification requirements adequate?	We recommend that the OHS legislation provide a consistent and precise shopping list of each specific incident and event which requires notification to the OHS regulator.
Prosecution	
What should be included in the functions of the OHS regulator?	<p>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.</p> <p>Further, we recommend that the emphasis for the function of the Regulator should be on encouraging education and continuous improvement rather than on enforcement activities.</p>
What are the duties of the Prosecutor?	<p>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, consistently and transparently in exercising its prosecutorial functions.</p> <p>We recommend that the OHS legislation require OHS regulators/prosecutors to be bound by DPP Prosecution Guidelines.</p>
How should the legislation deal with multiple offenders?	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?	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?	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, enforceable undertakings, prosecution (in lower and higher courts), and penalties.
Should enforceable undertakings be available in all jurisdictions?	<p>We recommend that the OHS legislation make enforceable undertakings available as an alternative enforcement action for alleged breaches of the legislation.</p> <p>Enforceable undertakings should not be limited on the basis of the consequences of a specific alleged breach.</p> <p>We also recommend that enforceable undertakings be accompanied by guidelines for the use of OHS regulators which are made publicly available.</p>

Issue	Recommendation
Should the penalties and procedure be criminal or civil?	<p>We recommend that criminal penalty provisions must be subject to strictly applied rules of criminal procedure.</p> <p>We recommend that there should also be a civil penalties regime in the model OHS legislation, similar to that included in the Corporations Law.</p>
Are the penalties for employees adequate?	We recommend that the maximum penalty for employees be increased in order to facilitate greater enforcement action in circumstances where an employee has knowingly failed to comply with safety instructions and working procedures from their employers which has resulted in enforcement action against other duty holders such as employers.
Should there be a separate provision for workplace death in the OHS legislation?	We recommend that no separate provision for workplace death be included in the model OHS legislation as it amounts to an inappropriate watering down of the elements of manslaughter.
Is the current approach to sentencing adequate?	We recommend that the OHS legislation provide guidance to the Courts 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?	We recommend the inclusion of provisions for private action civil enforcement of the OHS legislation.
Should there be a union right of entry?	We recommend that there be no provision in the OHS legislation for union right of entry as the presence of union representatives often leads to risks to health and safety rather than the prevention of such risks. We recommend that OHS representatives in the workplace should be able to bring approved OHS consultants into the workplace where there is a risk to health and safety to assist them to exercise their functions. This would lead to greater safety outcomes.
Should there be offences for authorised representatives?	We recommend that there should be offences for authorised representatives improperly using their powers in the event that the Panel does not agree with our submissions for the removal of union right of entry. There must be deterrence for the improper use of powers.
What happens to fines obtained in an OHS prosecution?	<p>We recommend the abolition of moiety for prosecutors in the OHS jurisdiction.</p> <p>We recommend that fines be re-invested in safety through the establishment of a fund for OHS research and development.</p>
What should be the effect of a successful defence?	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 Originally founded in 1855 as a sugar company, CSR Limited (**CSR**) is one of Australia's oldest companies, and has grown into one of Australia's leading manufacturing companies with operations throughout Australia as well as in Asia and New Zealand. CSR and its subsidiary companies employ over 7,000 employees in Australia, New Zealand and Asia with 5452 employees in Australia and achieved annual earnings of \$386.3 million this financial year.
- 2.2 Through its principal businesses, CSR is a leading supplier of building products, farms, mills and refines sugar, holds an effective 25% interest in the Tomago aluminium smelter and has a property development group.
- 2.3 As Australia's largest sugar producer, CSR has seven mills located in some of Australia's most productive sugarcane regions and manufactures approximately 40% of the nation's raw sugar output. CSR's raw sugar mills produce about 4% of the internationally traded raw sugar. CSR also owns 75% of joint venture interests in sugar refining in Australia and New Zealand and is a major Australian ethanol producer. CSR Ethanol is one of two major Australian producers of ethanol products, supplying around half of the domestic ethanol market and exporting throughout the Asia Pacific region.
- 2.4 Within building products, CSR is a leading supplier to the construction industry - supported by a nationwide distribution network. CSR manufactures and supplies a wide range of building products including glass, plasterboard, fibre cement, bricks, roof tiles and insulation.
- 2.5 CSR has 39 wholly owned or majority owned manufacturing plants in Australia and operations in New Zealand and Asia.
- 2.6 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**).
- 2.7 The Panel released an Issues Paper in May 2008, calling for submissions to be received by 11 July 2008.
- 2.8 CSR welcomes the Review as there is a great deal of frustration at the differences in the obligations and interpretations between jurisdictions creating confusion on specific issues, while attempting to fulfil the OHS obligations.

- 2.9 Legislation in different jurisdictions which has corresponding differences in standards and approaches makes compliance costly, ineffective and difficult. Most large organisations have some kind of corporate safety and health structure providing guidance to business units. Keeping abreast of the differences in legislation is difficult, costly and time-consuming. There is no geographic or cultural boundary in the realm of health and safety in Australia and a national scheme or at least a close alignment of state schemes is necessary. This should not only include the policy objectives and model OHS legislation but also extend to administrative practices, enforcement practices and compliance standards. CSR encourages the development of complementary legislation and administrative processes and procedures.
- 2.10 The existing legislative approach to OHS requires some improvement. Perhaps the National injury statistics for the manufacturing industry provide an indication of this fact. In 2005-06, the manufacturing industry had Australia's highest incidence rates of any industry sector, recording 28.6 claims per 1,000 employees.¹
- 2.11 CSR understands the importance of safety for its employees, contractors, visitors and the public at large. In CSR, we regard management of health and safety as an integral and fundamentally important part of our business. CSR's goals for Safety, Health and Environment are: "no injuries, ever" and "no environmental incidents". We believe that all injuries, occupational illnesses and incidents can be prevented. Our managers are held accountable for safety performance, and all employees are expected to take personal responsibility for their actions, and to be involved in improvement initiatives and setting standards.
- 2.12 CSR has a strong commitment to the protection of the Safety, Health and Welfare of our people and the Environment and has established clear responsibilities for these matters across the organisation.
- 2.13 This is reflected within CSR's Safety, Health and Environment (SHE) policy which states:
- We recognise that Safety, Health and Environmental responsibility is a vital part of our business. We are all responsible for:***

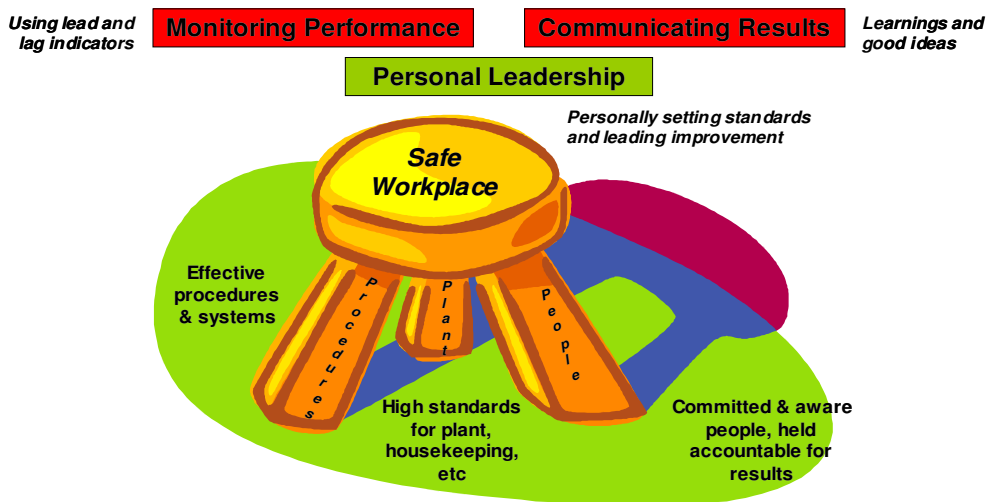
 - ***not injuring people***
 - ***not causing occupational illnesses***
 - ***minimising the adverse impacts of our activities on the environment***
 - ***complying with all legal requirements.***
- 2.14 This policy and CSR's approach to managing SHE responsibilities is based on six key principles:

¹ Workplace Relations Ministers' Council, (2008) *Comparative Performance Monitoring Report: Comparison of occupational health and safety and workers compensation schemes in Australia and New Zealand*, 9th Edition, p viii.

- (1) all injuries, occupational illnesses and environmental incidents can be prevented;
- (2) management is accountable for safety, health and environment performance;
- (3) working in a safe and environmentally responsible manner is a condition of employment;
- (4) personal responsibility and involvement are essential;
- (5) all operating exposures can be safeguarded; and
- (6) training employees to work safely and respect the environment is essential.

2.15 In our view, good safety and health performance requires a strategic and systematic approach that includes:

- (1) suitable plant and equipment;
- (2) effective systems and procedures for operations and maintenance;
- (3) trained and motivated people;
- (4) personal leadership from managers and supervisors;
- (5) communications of lessons from injuries and good ideas; and
- (6) continual monitoring of performance, using lead and lag indicators.



- 2.16 Trained and motivated people, with high levels of awareness and a proactive and resilient culture, are essential to stop people getting injured.
- 2.17 Managers and supervisors are responsible and accountable for the safety and health of the people that work in and visit their operations.
- 2.18 CSR managers and supervisors are required to personally lead improvement by:
- (1) ensuring that all legal requirements are complied with;
 - (2) developing and sustaining a strong culture of working safely and protecting the environment;
 - (3) ensuring the requirements of the SHE Standard are effectively implemented, as much as is reasonably practicable;
 - (4) setting and meeting improvement objectives;
 - (5) allocating sufficient resources to implement the SHE Standard requirements and achieve the improvement objectives; and
 - (6) ensuring that good records are kept of the actions taken to meet the SHE Standard requirements.
- 2.19 Implementation of these practices has reduced our Total Recordable Injury Frequency Rate by 11%pa from 60 in 1999 to 24.7 in 2007. Our LTIFR is now less than 7.4 with a target of 0 for 2008.
- 2.20 While CSR understands the importance of safety and has made a number of improvements for safety, health and environmental performance, we are of the view that the improvements detailed in this submission would lead to greater safety outcomes for our organisation and within the manufacturing industry more broadly.

3. Scope of Duties

What is the standard for the absolute duties?

- 3.1 All jurisdictions in Australia require employers to ensure 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.
- 3.2 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.² Queensland adopts a related defence of 'due diligence'³. 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.⁴
- 3.3 Given that seven out of nine Australian jurisdictions adopt the approach of qualifying the duty by what is reasonably practicable (with the implication that the prosecutor bears the onus) any harmonised regime must adopt this approach.
- 3.4 It would be useful to the interpretation of legislation if the duties and the requirement to meet the standard of reasonable practicality were contained within the one clause.
- 3.5 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 CSR takes.
- 3.6 We submit that the legislation provide that the prosecution bear the onus of proving the 'reasonably practicable' element of the offence to the criminal standard of 'beyond reasonable doubt'.

² *Occupational Health and Safety Act 2000* (NSW) s 28.

³ *Workplace Health and Safety Act 1995* (Qld) s 37.

⁴ *Chugg v Pacific Dunlop* (1990) 170 CLR 249 at 257.

What does “reasonable practicability” mean?

- 3.7 All jurisdictions adopt the test of “reasonable practicability” to the scope and application of the duties.⁵ What the concept of reasonable practicability actually encompasses need to be adequately addressed in the legislation, regardless of how the legislation casts the test of reasonable practicability (whether as a qualification to the duty or a defence to a charge).
- 3.8 There is no definition of “reasonably practicable” contained within the legislation in Tasmania, South Australia, Queensland or New South Wales.
- 3.9 Some very broad guidance is provided in the other jurisdictions.⁶ 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* (Vic).
- 3.10 The difficulty with the Victorian definition is that it does not provide sufficient clarity as to the meaning of the term. It does not provide enough detail in terms of what, where, when and how. 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?
- 3.11 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.⁷ 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.

⁵ Michael Tooma, *Safety, Security, Health and Environment Law* (2008) 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.

⁶ 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.

⁷ 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.

- 3.12 One example to demonstrate the difficulty for the construction industry in understanding the meaning of “reasonably practicable”, is the relationship between “reasonably practicable” and compliance with relevant Australian Standards. The construction industry relies on AS4804 Guarding of Machinery. In fact, it is the ‘bible’ for tradespeople for the guarding of machinery. Most Australian jurisdictions make mention of the Standard in the OHS regulations.
- 3.13 Appreciating that standards are taken as minimum benchmarks but are not mandatory, when they are mentioned or called up by the legislation, they are followed by the industry very closely. Where a construction company follows the Standard, guards the machinery as required, and puts other controls in place including administrative or personal protective equipment (PPE), there should be opportunity to demonstrate that the organisation has done what is reasonably practicable.
- 3.14 If an injury occurs involving machinery that is well guarded, and the guarding is assessed by an expert as not only meeting the relevant Australian Standard but going well beyond the Standard’s requirements, and that all controls are in place, an organisation can still be prosecuted for not doing all that was “reasonably practicable”.
- 3.15 This point is highlighted by the case of *Inspector Colin Wall v Hunter Douglas Ltd* [2007] NSWIRComm 56. The case involved an incident during the incorrect operation of a metal slitting machine which resulted in crush and laceration injuries involving finger amputations for the worker.
- 3.16 In that case, the employer defendant had a regularly reviewed formal occupational health and safety management system, an internal six month audit, OHS committee members conducting monthly inspection reports, inspections undertaken by team leaders and area line managers monthly. There was also a monthly review of all accident, incident and hazard reports. There was a risk management review schedule. There were legal and practice updates on occupational health and safety from representative bodies, and publishers in the field. There were review processes undertaken by external providers. Safety information was communicated to employees through the safety strategic plans, through safety committee meetings, through safety alerts and notices when an important occupational health and safety issue was identified and by safety training and team meetings.
- 3.17 For the particular machine in question, the employer had implemented extensive controls (more controls than most organisations in the industry) including the installation of a safety light curtain from the uncoiler to the pit entry of the machine; a safety light curtain from the pit exit to the rewinder; a pressure sensitive mat near the exit to the slitter head and a pressure sensitive mat near the entry to the rewind section of the plant. The slitting standard procedure manual was located at the slitting machine.

- 3.18 The company had done all that was required by the guarding standard but still, the company was charged with breaching its duty to health and safety, not having done all that was reasonably practicable, even though it had implemented extensive controls for managing the risks to health and safety on the machinery. The Court found that there were other steps available including the installation of additional laser beams, additional guarding, additional training for employees and revised documentation.
- 3.19 As the case demonstrates, the term “reasonably practicable” is confusing and seems to encapsulate whatever it is the OHS regulator determines in initiating the particular prosecution. Further, the use of Standards and Codes of Practice must be questioned. Why are the Standards referred to in OHS regulation if they are not mandated and able to be used as evidence by a defendant to demonstrate the duty holder has done what is “reasonably practicable” in the circumstances?
- 3.20 CSR submits that “reasonably practicable” must be clearly defined and proactive steps be provided including Standards as guidance. Where Australian Standards and National Codes of Practice provide the specific guidance as to the meaning of “reasonably practicable” compliance with such Codes and Standards must be available to defendants as evidence that an organisation has done all that is “reasonably practicable”.
- 3.21 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.⁸
- 3.22 In our submission, 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.
- 3.23 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."⁹*

⁸ 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 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].

⁹ 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.

- 3.24 Reasonably practicable must be discernable by duty holders on the face of the legislation. Like other businesses, CSR as a company need certainty of where the bar is set and that certainty must be provided by the legislation itself. That is the best way to ensure compliance.

4. Categories of Duty Holders

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

- 4.1 Clearer guidance is required with respect to the categories of duty holders.
- 4.2 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. CSR 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 guidance 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?
- 4.3 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.”¹⁰

¹⁰ Liz Bluff and Neil Gunningham ‘Principle, Process, Performance or What? New Approached to OHS Standards Setting’ (Working Paper No 9, National Research Centre for OHS Regulation, 2003).

4.4 The changes include:

- (1) a rise in sub-contracting and use of agency labour¹¹ 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”);
- (2) an increase in self-employment arrangements;
- (3) an increase in flexible working arrangements;
- (4) an increased casualisation of the workforce, with increases in part-time working arrangements and short-term employment arrangements;
- (5) aging of the workforce; and
- (6) an increase in trade in goods and services globally, associated with the removal of trade barriers and mutual recognition of standards.¹²

4.5 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 increasing the burn of “traditional” duty holders such as employers.

4.6 The traditional model of single employers as the centre of production activity is a thing of the past.

4.7 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.

4.8 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

¹¹ 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.

¹² 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.

the occupier of premises owned and controlled by others, use equipment supplied by others and supply services, as a sub-contractor, to others.”¹³

- 4.9 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. As a significant employer which utilises over 700 contractors including labour hire, CSR wants certainty that contractors will know their obligations on the face of the legislation. This will improve compliance by those contractors and therefore safety at our sites.
- 4.10 We also require guidance on where our obligation towards the contractor starts and finishes. Do we need to second guess the expertise of specialist contractors by engaging other superintendents to verify the Safe Work Method Statements as the Qantas Case¹⁴ suggests? Do we need our own supervisor to supervise the supervisor provided by the contractor?
- 4.11 There is also a need to define “working from home” in the OHS legislation. Currently, the OHS legislation throughout Australia encompasses employees working from home in the general duties to protect the health and safety of employees at work due to the broad definitions of “workplace” or “place of work”.¹⁵ In order to assist many employees meet their family obligations and a work/life balance, employers often allow an employee to “work from home”. Currently if an employee works from home under an agreement, for example, for three days per week, the employer is held responsible for ensuring the health and safety of the employee whilst they are working from home and a risk assessment of the ‘home office’ is required. However, further clarification around working from home arrangements is required. What is the legal position where employees “work from home” without any formal agreement? There may be, for example, circumstances where an employee performs work from home in the evening or on the weekend, and their manager is unaware that the employee does this. How should employers manage this possibility?

Are the individual categories of duty holders sufficient?

- 4.12 There are two tiers of duty holders at the individual level under existing legislative arrangements. These are:
- (1) employees; and

¹³Liz 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.

¹⁴ *Inspector Seneviratne v Qantas Airways Ltd* [2006] NSWIRComm 69.

¹⁵ See for example, the definitions provided by the *Occupational Health and Safety Act 2000* (NSW) s 4; *Occupational Health and Safety Act 2004* (Vic), s 5; *Workplace Health and Safety Act 1995* (Qld) s 9; *Occupational Safety and Health Act 1984* (WA) s 3.

- (2) persons concerned in the management of the corporation.
- 4.13 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.
- 4.14 The model legislation should include a new category of individual duty holder for supervisors 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.
- 4.15 The applicable penalties for supervisors should be commensurate with the duty holders' position, level of control and level of experience (that is, less than managers but more than employees).

5. Risk Management

What does risk management mean?

- 5.1 The OHS legislation does not provide enough guidance as to what risk management actually means.
- 5.2 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.”¹⁶*
- 5.3 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’¹⁷ whereas, the other jurisdictions include provisions associated with risk management in the OHS regulations and/or evidentiary standards.¹⁸ The Commonwealth jurisdiction¹⁹ and

¹⁶ 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.

¹⁷ *Workplace Health and Safety Act 1995* (Qld) s 22.

¹⁸ Liz Bluff ‘Regulatory Strategies for the Safe Design of Plant’, (Working Paper No 24, National Research Centre for OHS Regulation, 2004).

in New South Wales²⁰, South Australia²¹, Tasmania²², Western Australia²³ and the Northern Territory²⁴ 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.²⁵ The risk management approach to OHS risks in the workplace is a stated objective of OHS legislation.²⁶

- 5.4 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).
- 5.5 These process steps are too broad and vague to mean anything to duty holders practically speaking.
- 5.6 In our submission 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?

- 5.7 The triggers for risk assessment in the legislation must be clearer.
- 5.8 The risk assessment processes do not provide workable triggers in practice. While it is important for organisations to adopt a risk management process, it is virtually impossible for business to comply with the process as it currently exists. It is so broad that organisations 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:

¹⁹ *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) Regs 1.05-1.06.

²⁰ *Occupational Health and Safety Regulation 2001* (NSW), chapter 2.

²¹ *Occupational Health Safety and Welfare Regulations 1995* (SA) regs 1.3.2 -1.3.3.

²² *Workplace Health and Safety Regulations 1998* (Tas) regs 17-19.

²³ *Occupational Safety and Health Regulations 1996* (WA) reg 3.1.

²⁴ *Work Health (Occupational Health and Safety) Regulations 1992* (NT) reg 38-39.

²⁵ Queensland Risk Management Advisory Standard, 'The Risk Management Advisory Standard 2000', (Queensland Department of Employment Training and Industrial Relations, Workplace Health and Safety, 2000).

²⁶ *Occupational Health and Safety Act 2000* (NSW) s 5(e).

- (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)²⁷;
- (2) before plant is installed, commissioned, erected, altered (NSW, SA, Tas, NT, Cth)²⁸;
- (3) before substances are introduced at the place of work (NSW, SA, Tas, NT, Cth)²⁹;
- (4) before changes are introduced to work practices or systems of work (NSW, SA, Tas, NT, Cth)³⁰;
- (5) on an ongoing basis, even as work is being carried out (in NSW)³¹.

5.9 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.³²

5.10 CSR submits that a consistent 'Risk Scoring' approach is required. Currently there are numerous risk scoring approaches and tools used, across and within the different industries, with different scoring techniques and numbering systems. Risk scoring can be very subjective at the best of times and having so many approaches causes confusion, often resulting in incorrect corrective action priorities being allocated or nothing done at all because the risk is considered low when it really is high.

5.11 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.

²⁷ *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).

²⁸ *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 Safety) Regulations 1992* (NT) reg 38(2)(a); *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) reg 1.05(4)(a).

²⁹ *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 1992* (NT) reg 38(2)(a); *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) reg 1.05(4)(a).

³⁰ *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 1992* (NT) reg 38(2)(c); *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) reg 1.05(4)(b).

³¹ *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.

³² 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.

- 5.12 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.”³³

- 5.13 CSR, as one of Australia’s leading manufacturers, operating over 167 sites, with thousands of plant items, using dozens of substances, requires meaningful and practical triggers for undertaking risk assessments.
- 5.14 Furthermore, “risk assessment” 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. Tell us how, when and in what form and we will happily comply, but don’t leave it vague and tell us that it was “inadequate” with the benefit of hindsight.
- 5.15 To assist certainty of outcome, the person who is leading the risk assessment process in an organisation should be competent and trained in the risk management approach. This would include, for example, use of concepts such as the hierarchy of controls. Too often the people conducting risk assessments have little or no training or true understanding of what risk management is all about. Requirements for competence and training in risk assessment should be spelled out in the legislation. This will also form part of an appropriate basis for an effective risk assessment defence in relation to a breach of OHS legislation.

Should effective risk assessment be a defence?

- 5.16 The existence of an effective risk assessment process should be a defence to a breach of the legislation.
- 5.17 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

³³ 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.

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.

6. Personal Liability

What is the rationale for personal liability?

- 6.1 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. Further, personal liability should not attach if the individuals did not have control of the causes leading to the offence.
- 6.2 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).³⁴
- 6.3 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?

- 6.4 OHS legislation in the various jurisdictions provides very different models of personal liability.
- 6.5 In New South Wales³⁵, Queensland³⁶ and Tasmania³⁷, 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 offence³⁸; and
 - (2) that they exercised all due diligence.

³⁴ 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.

³⁵ *Occupational Health and Safety Act 2000* (NSW) s 26.

³⁶ *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.

³⁷ *Workplace Health and Safety Act 1995* (Tas) s 53.

³⁸ *Occupational Health and Safety Act 2000* (NSW) s 26(1)(a); *Workplace Health and Safety Act 1995* (Qld) s 167(4)(b).

- 6.6 Tasmania's defences³⁹ 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.
- 6.7 In Western Australia⁴⁰ and the Northern Territory⁴¹, 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.
- 6.8 In the ACT, a senior officer can be guilty of industrial manslaughter.⁴²
- 6.9 In Victoria⁴³ and South Australia⁴⁴, 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.
- 6.10 The personal liability provisions outlined above demonstrate differences of terminology for the particular types of persons captured by personal liability provisions. Whichever persons are captured by personal liability provisions in the OHS legislation, there is a need to provide adequate definitions for the terms used (using current terms these may be director, responsible officer, person responsible) to refer to the persons subject to personal liability provisions in the legislation.
- 6.11 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 legislation.⁴⁵ In CSR'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.
- 6.12 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.

³⁹ *Workplace Health and Safety Act 1995* (Tas) ss 53(1)(a), 53(1)(b).

⁴⁰ *Occupational Safety and Health Act 1984* (WA) s 55.

⁴¹ *Work Health Act 1986* (NT) s 180.

⁴² *Crimes Act 1900* (ACT) ss 49A-49E.

⁴³ *Occupational Health and Safety Act 2004* (Vic) s 144.

⁴⁴ *Occupational Health, Safety and Welfare Act 1986* (SA) s 61.

⁴⁵ 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).

6.13 Further, CSR submits that in addition to more guidance, directors and persons involved in the management of the corporation should attend a training course. An example of the type of training which would be appropriate is the training required under section 61 of the *Occupational Health, Safety and Welfare Act 1986 (SA)* for those appointed “responsible officers” for the organisation. Training is provided in relation to the following areas:

- (1) the role of the responsible officer in supporting the body corporate in ensuring compliance with OHS obligations;
- (2) a summary of the key OHS functions of the responsible officer;
- (3) an explanation of the OHS legislative framework;
- (4) clarification of the reasonable actions to be established and maintained to ensure legal compliance as a part of an organisational systematic approach to managing OHS; and
- (5) adopting systematic approaches to safety including Occupational Health and Safety Management Systems.⁴⁶

How do directors/managers fulfil their obligations?

6.14 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. What does it mean for a director to “take reasonable care” or “all due diligence” or “reasonable diligence”? CSR 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.

6.15 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.

⁴⁶ For further detail in relation to the broad areas of training in the Responsible Officers Course, see SafeWork SA, *Responsible Officer Course*, Version 1, 4 December 2007, <http://www.safework.sa.gov.au/contentPages/docs/resOfficerCourse.pdf>

- 6.16 As an example, a recent report commissioned by Insight Investment in conjunction with the UK's Health Safety Commission (the **HSC Report**)⁴⁷, indicated that a 'best practice' approach would seek to integrate the OHS governance process into the main corporate governance structures within a business.
- 6.17 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:
- (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.
- 6.18 Such an approach has merit, in CSR's submission.

⁴⁷ 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_safe_ty.pdf

7. Defences

- 7.1 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.
- 7.2 While it is important that the offences affect the purposes of OHS legislation, that is, to ensure 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.
- 7.3 Real and genuine attempts by duty holders to manage their OHS obligations would include complying with codes of practice, adopting an adequate risk management process including adequate risk assessment 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 an organisation.
- 7.4 Further, CSR is of the view that OHS regulators must be held accountable for the advice they provide to duty holders. Currently, if advice is provided by an OHS regulator in relation to a legislative obligation, that advice is not admissible as evidence in refuting allegations that a defendant failed to do all that is reasonably practicable or failed to take reasonably practicable steps. In these circumstances, the reasonableness of an individual's action cannot be fully explored by the Court. It is recognised that advice has to be tailored to a specific set of circumstances and does not mitigate appropriate risk consideration. However, we are of the view that obtaining and implementing the compliance advice received from an OHS regulator must be admissible as evidence in a defence to a breach of the duty holder's OHS obligations.

8. Consultation

Are the current triggers for consultation appropriate?

- 8.1 CSR 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 unworkable.

- 8.2 New South Wales⁴⁸, Victoria⁴⁹ and South Australia⁵⁰ 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.
- 8.3 A decision to change the brand of pen used at work requires consultation under the above triggers.
- 8.4 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.⁵¹
- 8.5 The approach to consultation contained within the legislation of the Australian Capital Territory⁵², Western Australia⁵³ and Tasmania⁵⁴ 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.
- 8.6 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.
- 8.7 We submit that the triggers for consultation within the OHS legislation must be practical, efficient, useful and affordable.

⁴⁸ *Occupational Health and Safety Act 2000* (NSW) ss 15,19.

⁴⁹ *Occupational Health and Safety Act 2004* (VIC) s 35.

⁵⁰ *Occupational Health Safety and Welfare Act 1986* (SA) s 34.

⁵¹ *Work Health (Occupational Health and Safety) Regulations 1992* (NT) reg 44.

⁵² *Occupational Health and Safety Act 1989* (ACT) s 61.

⁵³ *Occupational Safety and Health Act 1984* (WA) s 35.

⁵⁴ *Workplace Health and Safety Act 1995* (TAS) s 31.

9. Reporting

Are the current notification requirements adequate?

- 9.1 Circumstances requiring notification are not consistent across the jurisdictions. Some jurisdictions (particularly New South Wales⁵⁵, Australian Capital Territory⁵⁶, and Tasmania⁵⁷) rely upon classes of incidents with complicated definitions. Western Australia's approach refers to types of injuries or diseases⁵⁸.
- 9.2 There needs to be a precise "shopping list" 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 Territory⁵⁹.
- 9.3 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.
- 9.4 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"⁶⁰, "dangerous occurrences"⁶¹ and "serious bodily injuries"⁶².
- 9.5 Insurance companies are able to define clearly in their policies the degrees of severity associated with injury, which might provide a starting point for further consideration.

10. Prosecution

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

- 10.1 There is value for skilled and impartial advice to be provided to workplaces by an independent agency, which could mean the OHS regulator. However, CSR is of the view that the

⁵⁵ *Occupational Health and Safety Act 2000* (NSW) s 86, 87.

⁵⁶ *Occupational Health and Safety Act 1989* (ACT) s 204; *Occupational Health and Safety (General) Regulation 2007* (ACT) reg 62.

⁵⁷ *Workplace Health and Safety Act 1995* (TAS) s 47; *Workplace Health and Safety Regulations 1998* (TAS) reg 62.

⁵⁸ *Occupational Safety and Health Act 1984* (WA) s 231.

⁵⁹ *Work Health Act 1986* (NT) s 48A.

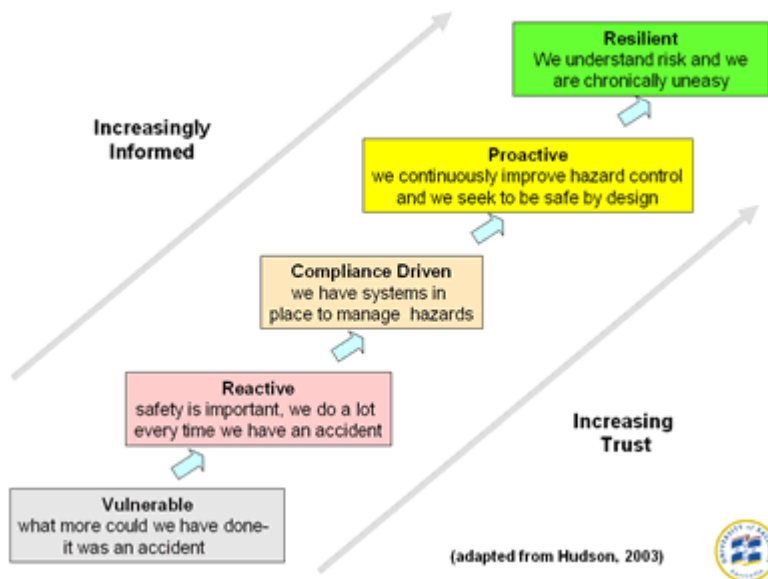
⁶⁰ *Occupational Health and Safety Act 2000* (NSW) s 86, 87.

⁶¹ *Occupational Health and Safety (General) Regulation 2007* (ACT) reg 80.

⁶² *Workplace Health and Safety Act 1995* (Tas) s 47.

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.

- 10.2 It is our belief that 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.
- 10.3 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.
- 10.4 While compliance with rules and regulations is an important and integral part of OHS policy, to achieve higher levels of safety performance it is necessary to move toward a resilient culture where continuous improvement and workforce engagement are established practice.
- 10.5 This requires a broader approach to reducing risk and altering attitudes to workplace health and safety. Risk, by definition, can never be removed, but much can be done to minimise the risk. To this end CSR has introduced a new site accreditation scheme. This scheme provides a road map to operationalise corporate processes and procedures. It focuses on facilities, systems and people. The highest rating goes to those sites who demonstrate a resilient culture through shared ownership of SHE responsibilities with management, staff and contractors. The intermediate standard must demonstrate implementation of a systematic approach to managing SHE with a clear focus on continuous improvement. The minimum acceptable standards to which all sites are required to meet must have a management process focused on compliance.



- 10.6 The regulate and punish approach, adopted by a number of OHS regulators including Workcover NSW is not conducive or supportive of the broader corporate policies, processes and cultures which companies such as CSR wish to develop and implement. The prosecutorial approach taken by OHS regulators leads to a perception amongst employees of "we will do what we can, but we know we can't ever get it right in the eyes of the law". Most employees in line management positions in NSW appear to believe that there is no defence with WorkCover NSW and are fatalistic as to the result of any WorkCover action even when best practice safety methods have been adopted.
- 10.7 A more productive approach than using the regulatory stick is to sponsor and support people with aligned values. This approach is the only way in which to successfully achieve sustainable excellence.
- 10.8 The model OHS legislation needs to encourage OHS regulators and organisations to work together to promote safe and healthy work places, and to ensure that further safeguards are delivered in legislation resulting in fair treatment of all relevant parties.
- 10.9 We are also of the view that there needs to be nationally consistent powers for inspectors in incident investigation. To this end, we submit that a single Inspectors National Guideline be developed for adoption by the OHS Regulators in each jurisdiction to detail the way in which inspectors are expected to exercise their functions.

What are the duties of the Prosecutor?

- 10.10 CSR submits that the OHS legislation should spell out the role and duties of inspectors when acting as prosecutors.
- 10.11 Any prosecuting authority must be bound by the prosecution guidelines relevant in the particular jurisdiction (for example the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* promulgated by the International Association of Prosecutors which has been adopted by the New South Wales Director of Public Prosecutions).
- 10.12 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...*
- 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.*⁶³
- 10.13 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.*⁶⁴
- 10.14 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*

⁶³ Prosecution Guidelines by the Office of the Director of Public Prosecutions NSW, p 5.

⁶⁴ *Boucher v The Queen* (1954) 110 CCC 263 at 270.

*standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.*⁶⁵

- 10.15 However, the unique nature of OHS prosecutions and the lay character of inspectors creates 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.

How should the legislation deal with multiple offenders?

- 10.16 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.

- 10.17 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 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.⁶⁶

- 10.18 The NSW 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.”*⁶⁷

- 10.19 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?

⁶⁵ *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J).

⁶⁶ The decision of Walton J VP in *WorkCover Authority of New South Wales (Inspector 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.”

⁶⁷ New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage*, Discussion Paper No 38 (1997) Chapter 4 [4.7].

- 10.20 Currently, the decision to prosecute is not a reviewable decision under OHS legislation.
- 10.21 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.
- 10.22 The case of *WorkCover Authority of NSW (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIRComm 349 illustrates the necessity for such a process. In that case, the managing director was personally prosecuted by the OHS inspector in circumstances where the Inspector had provided assurances to the director that he would not be personally prosecuted. Indeed, the Inspector obtained a personal interview from Mr Smith on the basis that he was only interested in the corporation. There was a great deal of personal animosity between the inspector and the individual defendant which Staunton J described as “naked hostility”⁶⁸. The incident subject of the prosecution involved a labour hire company (Daly Smith) and a host employer (Hayman Industries). The Inspector commenced prosecutions against both corporations. However, personal prosecutorial action was taken only in relation to Daly Smith. The personal prosecution in the *Daly Smith* case was neither fair nor consistent and yet resulted in a conviction for the prosecutor in the face of flagrant abuses of process by Inspector Mansell which were recognised by the Courts.⁶⁹

11. Penalties, Sentencing and Enforcement

What is the purpose of penalties?

- 11.1 Courts and regulators have often stated that the main purpose of penalties is deterrence⁷⁰. 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’⁷¹.

⁶⁸ *WorkCover Authority of NSW (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIRComm 349 at para 123.

⁶⁹ See Michael Tooma, *Safety, Security, Health and Environment Law* (2008) 181-185 for a full discussion of the case.

⁷⁰ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) [3.4].

⁷¹ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) [4.8].

- 11.2 Regulation aims to ‘promote desired behaviour’⁷², therefore, the main aim of regulatory penalties involves the following two prongs:
- (1) deterring future non-compliance; and
 - (2) encouraging future compliance.
- 11.3 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?
- 11.4 CSR submits 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.
- 11.5 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.
- 11.6 The model legislation should include the greatest range of possible responses for enforcement of the OHS legislation in accordance with an Enforcement Pyramid which contains a broad range of available enforcement actions.⁷³
- 11.7 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.”*⁷⁴
- 11.8 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.

Should enforceable undertakings be available in all jurisdictions?

⁷² Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) [3.4].

⁷³ 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.

⁷⁴ Robens Committee (Committee on Safety and Health at Work), *Report of the Committee on Health and Safety at Work 1970-1972* (HMSO)(1972), 82.

- 11.9 Enforceable undertakings have been operating successfully in a number of jurisdictions including Queensland⁷⁵, Victoria⁷⁶, Western Australia⁷⁷ and the Commonwealth.⁷⁸
- 11.10 The *Workplace Health and Safety Act 1995* (Qld), for example allows corporations to enter into Enforceable Undertakings (**EU**) with Workplace Health and Safety Queensland as an alternative to pleading guilty in a prosecution.⁷⁹ Enforceable undertakings are considered by Workplace Health and Safety Queensland as a medium level sanction within the range of enforcement options available to the Department⁸⁰.
- 11.11 Enforceable Undertakings are legally binding agreements under which a person or organisation agrees to carry out specific activities to improve health and safety and deliver benefits to the community.
- 11.12 Although every EU is tailored to the specific facts and circumstances of a case, typical undertakings include:
- (1) undergoing a series of third party audits of the relevant corporation's occupational health and management system during the term of the undertaking;
 - (2) implementing any recommendations resulting from the audits of the OHS management system;
 - (3) contributing to research to improve safety outcomes;
 - (4) undertaking training and awareness programs in relation to specific safety issues; and
 - (5) participating in assistance programs with community organisations such as local fire brigades or hospitals.
- 11.13 In addition to carrying out these types of activities, corporations that enter into an EU may be required to publicise certain details pertaining to the EU in the corporation's Annual Report.
- 11.14 We are of the view that there should not be limitations in terms of exclusionary scenarios for consideration for an EU to be provided. Currently, the WHS Guidelines in Queensland for example, indicate that an enforceable undertaking will not usually be accepted in relation to workplace fatalities.⁸¹ However, this is not provided for in the legislation. Given that it is a well-established proposition that the gravity of the consequences of an accident, such as the damage or injury, does not, of itself, dictate the seriousness of the offence or the amount of

⁷⁵ *Workplace Health and Safety Act 1995* (Qld), Part 5.

⁷⁶ *Occupational Health and Safety Act 2004* (Vic), Part 2, Division 4.

⁷⁷ *Occupational Safety and Health Act 1984* (WA) Part VII, Division 3.

⁷⁸ Note also that enforceable undertakings are included in the Draft Bill in NSW following the five year statutory review of the OHS Act in that state. See *Occupational Health and Safety Amendment Bill 2006* (NSW).

⁷⁹ Queensland Department of Employment and Industrial Relations, *'Enforceable Undertakings under the Workplace Health and Safety Act 1995 and the Electrical Safety Act 2002: Information for Applicants'* (May 2008).

⁸⁰ Queensland Department of Employment and Industrial Relations, *'Enforceable Undertakings under the Workplace Health and Safety Act 1995 and the Electrical Safety Act 2002: Information for Applicants'* (May 2008), 2.

⁸¹ Queensland Department of Employment and Industrial Relations, *'Enforceable Undertakings under the Workplace Health and Safety Act 1995 and the Electrical Safety Act 2002: Information for Applicants'*, (May 2008), 4.

penalty to be imposed⁸² in relation to a contravention of OHS legislation, we think it is entirely inappropriate that there be an exclusion of the availability of enforceable undertakings purely on the basis that the incident involved a fatality or a serious injury.

- 11.15 We would also recommend, in line with research undertaken by Parker (2003) that enforceable undertakings be accompanied by guidelines for the use of OHS regulators which are made publicly available. The guidelines should indicate when enforceable undertakings will be considered, that the undertakings will not accepted in circumstances of a denial of liability, and a position in relation to deterrence factors such as the duty holder's previous OHS record.⁸³
- 11.16 There should also be provision for a limitation period of two years for prosecution action in circumstances where an undertaking has been withdrawn. The legislation should set out the process for administrative/judicial review and ant guidelines should provide guidance in relation to the review process.
- 11.17 In the Queensland context, a number of principles and considerations applicable for determining when an EU will be accepted have been developed. These include, but are not limited to:
- (1) compliance with the principles of risk management;
 - (2) the actual and potential risks of the offence;
 - (3) culpability;
 - (4) aggravating or mitigating factors;
 - (5) co-operation with the relevant Department throughout the investigation;
 - (6) previous sanctions and prior prosecutions;
 - (7) remorse; and
 - (8) previous compliance history.
- 11.18 We think enforceable undertakings should be available as a remedy for alleged breaches of the legislation in certain circumstances. Indeed, in many cases where enforceable undertakings have been provided, the actions companies voluntarily take are often far more stringent and apply to a greater period of time than the sentences handed down in the normal course of a prosecution.

⁸² *Capral Aluminium Limited v WorkCover Authority of New South Wales (Inspector Mayo-Ramsay)* [2000] NSWIRComm 71 at para 94,95 (Wright J, Walton J and Kavanagh J).

⁸³ Christine Parker, 'Arm Twisting, Auditing and Accountability: What Regulators and Compliance Professionals should know about the Use of Enforceable Undertakings to Promote Compliance', (speech delivered at the Australian Compliance Institute, Melbourne, 28 May 2003).

Should the penalties and procedure be criminal or civil?

- 11.19 CSR submits that the rules relating to criminal procedure ought to be strictly applied in criminal proceedings.
- 11.20 Such strict application of criminal procedural requirements should extend to the OHS regulator in the exercise of their investigative functions. If OHS offences are to be criminal offences then the rules of criminal procedures should be consistent with practice in criminal proceedings. The right for a defendant not to be compelled to give evidence for the prosecution is a fundamental right of those facing criminal investigation and one that should be respected in the OHS context.
- 11.21 If the penalties under OHS legislation are criminal, then the entire prosecutorial process should be subject to the normal rules of criminal procedure rather than a “quasi-criminal” process. That being, usual criminal processes such as committal hearings, trial proceedings and juries in the Criminal Courts. In this regard, we refer the Panel to the Criminal Procedure legislation in various jurisdictions.⁸⁴ See for example, the *Criminal Procedure Act 1986* (NSW).
- 11.22 One method to adopt such an approach would be simply to include provision in the OHS legislation that the criminal procedure legislation operating in that jurisdiction applies to the OHS legislation.
- 11.23 Like many parties, CSR believes that prosecutions which have potential criminal sanctions must be heard by courts experienced and knowledgeable in criminal law. OHS legislation in some States provide jurisdiction to Courts which are specific to industrial relations issues. The NSW Industrial Relations Commission (the IRC) has a broad range of objectives relating to industrial matters in the workplace. Safety is certainly a work place issue, but not necessarily an industrial relations (IR) issue.
- 11.24 When safety and IR issues are confused or conflated by a regulator or judicial body, the result is confusion in the minds of workers and employers. Workers have been known to suggest that safety issues may be traded off by an increase in remuneration. While CSR considers such an approach is unacceptable, it does demonstrate the confusion between safety and IR issues in the workplace.
- 11.25 Mixing up the issues of IR and Safety and not having clear segregation can lead to unsafe behaviour continuing. There have been cases where employers have been criticised for

⁸⁴ We specifically refer the Panel to the *Magistrates Court Act 1930* (ACT); *Justices Act 1928* (NT); *Justices Act 1886* (Qld); *Summary Procedure Act 1921* (SA); *Justices Act 1959* (TAS); *Magistrates Court Act 1989* (VIC); and the *Criminal Procedure Act 2004* (WA).

dismissing employees when they have engaged in multiple breaches of safety systems.⁸⁵ In our own experience in prohibiting a contractor's worker from site, the matter ended up in the IR system for resolution. Yet the individual specifically breached safety laws and put his co-workers at serious risk.

- 11.26 The current approach to procedure for OHS prosecutions in Victoria is a good model for the preferred procedural requirements. In Victoria, offences under the *Occupational Health and Safety Act 2004* are indictable offences⁸⁶. Indictable offences are heard and determined by a Judge and jury in the County Court or the Supreme Court of Victoria. However, there are a number of offences which are categorised as indictable offences triable summarily⁸⁷. This means, in relation to those offences, that although they are indictable offences, they can be heard and determined in the Magistrates' Court on the application of the prosecution, the defendant or by order of the Court but, in any case, only with the consent of the defendant.
- 11.27 If the defendant consents to having the matters heard summarily in the Magistrates' Court, a Magistrate will determine all matters of law and fact to make his or her findings. If, on the other hand, the defendant decides to contest the charges, it has the option of electing to have them heard and determined in the County Court by a Judge and jury. In County Court trials, the Judge decides the legal issues whereas the jury is left to determine matters of fact. There is also an option to have the matter dealt with by the County Court by way of plea. In the County Court system, WorkSafe Victoria commences the prosecution but the matter is handled by the Office of Public Prosecutions after the committal hearing.
- 11.28 Prior to a County Court trial, there is usually a committal hearing conducted by a Magistrate. The purpose of a committal hearing is to narrow the issues that should go to trial in the County Court. A committal hearing gives a defendant the opportunity to test the evidence of vital witnesses for the prosecution before any trial, as the Court is essentially asked whether the evidence is of sufficient weight to support a conviction for the indictable offences with which the defendant is charged.
- 11.29 After a committal hearing, and prior to a trial commencing in the County Court, a defendant can make application to the Director of Public Prosecutions for a *nolle prosequi*. The application for a *nolle prosequi* is, in effect, an application to the Director of Public Prosecutions to permanently stay or withdraw the charges.
- 11.30 If the prosecutorial process in the OHS context is not subject to the normal rules of criminal procedure, breaches of OHS legislation ought to be dealt via a civil penalty regime. Civil penalties are hybrid sanctions combining both civil and criminal remedies.

⁸⁵ See for example [BHP Billiton Iron Ore Pty Ltd v CFMEU \[2004\] WAIRC 13308 \(15 November 2004\)](#) and [CFMEU v BHP Billiton Iron Ore Pty Ltd \[2004\] WAIRC 13424 \(26 November 2004\)](#).

⁸⁶ See ss 21, 23- 29, 31-32, 40, 62, 63, 75, 76, 110 and 112 of the *Occupational Health and Safety Act (VIC) 2004*.

⁸⁷ See s 53(1) and Schedule 4, cl 53 of the *Magistrates' Court Act (Vic) 1989*.

- 11.31 Certain corporate crimes are subject to civil penalties in other areas of law. In the Corporations Law for example, civil penalties can apply to directors' duties in Part 9.4B of the *Corporations Act 2001* (Cth).⁸⁸
- 11.32 These provisions have operated in the Corporations Law since 1993 as a result of two key recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in their 1989 *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*. The two recommendations were as follows:
- (1) criminal liability under company law not apply in the absence of criminality; and
 - (2) civil penalties should be provided for breaches by directors where no criminality is involved.⁸⁹
- 11.33 In the Corporations Law context, breaches of civil penalty provisions can attract criminal sanctions (fines and/or imprisonment) in circumstances where the duty holder breached the provision knowingly, intentionally or recklessly, and was dishonest and intended to gain an advantage or intended to deceive or defraud someone. In other circumstances where a civil penalty provision in the Corporations Law is breached, the consequences include the court:
- (1) disqualifying the person who breached the civil penalty provision from managing a corporation for a specified period of time; and/or
 - (2) imposing a pecuniary penalty on the person for an amount not exceeding \$200,000.⁹⁰
- 11.34 CSR submits that the approach to civil and criminal sanctions in the OHS legislation should be that adopted by the Corporations Law.

Are the penalties for employees adequate?

- 11.35 Under the OHS legislation in Australia, employees have a duty to take reasonable care for their own health and safety and the health of others at the workplace.⁹¹ Employees must co-

⁸⁸ See ss 1317DA - 1317S of the *Corporations Act 2001* (Cth).

⁸⁹ Senate Standing Committee on Legal and Constitutional Affairs (1989), *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, Australian Government Printer, pp 190–191; Helen Bird 1996, 'The Problematic Nature of Civil Penalties in the Corporations Law', *Company and Securities Law Journal*, vol. 14, pp 405–427; and Michael Gething, 1996, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?', *Australian Business Law Review*, vol. 24, pp 375–390.

⁹⁰ George Gilligan, Helen Bird and Ian Ramsay, (1999) 'The Efficacy of Civil Penalty Sanctions Under the Australian Corporations Law' *Australian Institute of Criminology: Trends and issues in crime and criminal justice*, No 136, pp 1-2.

⁹¹ *Workplace Health and Safety Act 1995* (Qld) s 36; *Occupational Health Safety and Welfare Act 1986* (SA) s 21; *Work Health Act 1986* (NT) s 31; *Workplace Health and Safety Act 1995* (TAS) s 16; *Occupational Health and Safety Act 2000* (NSW) s 20; *Occupational Health and Safety Act 2004* (Vic) s 25; *Occupational Safety and Health Act 1984* (WA) s 20; *Occupational Health and Safety Act 1989* (ACT) s 30; *Occupational Health and Safety Act 1991* (Cth) s 21.

operate with their employer's initiatives in relation to OHS. Further, in New South Wales⁹² and South Australia⁹³, there is an express duty for employees to report hazards to the employer.⁹⁴

- 11.36 In contrast with the prosecutorial action in relation to the general duties of employers, the general duties of employees are not frequently prosecuted. Prosecutorial action appears to be limited to cases of extreme employee negligence and particularly, in the context of bullying.⁹⁵ If the OHS regulator is going to prosecute an employer in relation to an incident where an employee has contributed to the risk to health and safety by failing to follow the safety procedures laid down by the employer, then the employee, as a relevant duty holder involved in the breach should also be prosecuted. Even if the employee has suffered physically or mentally they should be held responsible for their actions or inactions, particularly if they cause injury to others.
- 11.37 The law needs to back those companies who are working through a process of education, training and individual and collective awareness to re-inforce safety discipline procedures. Based on precedent or the response of inspectors to employees, would any employee think that there was a serious employee liability in law? Inspectors often believe or are advised that discussing or promoting individual employee responsibility is an IR matter and they won't do it. Consistent enforcement is required to support workplace measures.
- 11.38 It may be that the failure to prosecute in relation to the employee provisions is a result of the low penalties which are recoverable for breaches of those provisions in some jurisdictions. In New South Wales for example, the maximum penalty is \$3000⁹⁶ under section 20 of the *Occupational Health and Safety Act 2000* (NSW). By comparison, under section 25 of the *Occupational Health and Safety Act 2004* (Vic), an employee may be subject to a maximum penalty of \$198,000. Penalties for breaching employee duties in the other jurisdictions range from \$5000 to \$200,000.⁹⁷
- 11.39 It is simply not good enough to fail to prosecute a relevant duty holder. It is in the public interest to enforce the employee duty where non-compliance has contributed to the breach

⁹² *Occupational Health and Safety Regulation 2001* (NSW) cl 28.

⁹³ *Occupational Health Safety and Welfare Regulations 1995* (SA) reg 1.3.8(3).

⁹⁴ See Michael Tooma, *Safety, Security, Health and Environment Law* (2008) 150-156. For a discussion of the employees duties in the New South Wales context see Michael Tooma *Tooma's Annotated Occupational Health and Safety Act 2000 New South Wales* (2004) [1.20 – 1.20.45]. For a discussion of the duty of employees in the Victorian context, see Breen Creighton & Peter Rozen *Occupational Health and Safety Law in Victoria*, 3rd Ed, (2007) 127-135.

⁹⁵ Michael Tooma, *Safety, Security, Health and Environment Law* (2008) 150.

⁹⁶ For a first time offender.

⁹⁷ In Queensland, the maximum penalties range from \$37,500 to \$150,000 depending on the seriousness of the breach, *Workplace Health and Safety Act 1995* (Qld) s 36 and s 24; In South Australia, maximum penalties for employee duty breaches range from \$5000 to \$10,000, *Occupational Health, Safety and Welfare Act 1986* (SA) s 21; In the Northern Territory the maximum penalty is \$5000, *Work Health Act 1986* (NT) s 31; In Tasmania, the maximum penalty is \$12,000, see *Workplace Health and Safety Act 1995* (Tas) s 16; Victorian penalties for employees are high at \$198,000, see *Occupational Health and Safety Act 2004* (Vic) s 25; in Western Australia the maximum penalties range from \$10,000 to \$31,2500 depending on the seriousness of the breach, see *Occupational Safety and Health Act 1984* (WA) s 20 and s 20A; the Australian Capital Territory provides a range of penalties (depending on the circumstances of the breach and the subsequent injury) from \$10,000 for breaching employee duties, see *Occupational Health and Safety Act 1989* (ACT) s 40 and s 47; a breach of the employee duty under s 21 of the *Occupational Health and Safety Act 1991* (Cth) is subject to a maximum penalty of \$9,900 under schedule 2, clause 4 of the *Occupational Health and Safety Act 1991* (Cth).

committed by an employer to ensure there is an adequate level of deterrence for non-compliance with the OHS obligations of employees.

- 11.40 We submit that there should be greater enforcement of the employee duties where an employee has knowingly failed to comply with safety instructions and working procedures from their employers. We submit that the maximum penalties should be increased in line with the maximum penalties available in Victoria to adequately reflect the importance of those duties.

Should there be a separate provision for workplace death in the OHS legislation?

- 11.41 CSR submits that separate provisions for workplace death in the OHS legislation are entirely inappropriate. Corporate managers do not set out to hurt their employees and to suggest so is offensive.
- 11.42 In New South Wales, and Victoria, the OHS legislation contains separate offences for reckless conduct causing death. In South Australia, section 59(1) of the *Occupational Health Safety and Welfare Act 1986* (SA) to breach the general duty knowingly or with reckless indifference, seriously endangering the health and safety of another person is an aggravating offence.⁹⁸
- 11.43 In 2005, New South Wales adopted Section 32A of the *Occupational Health and Safety Act 2000* (NSW) which states that a person is guilty of an offence if their conduct causes the death of another person at work, to whom they owe a duty under the OHS Act, through their reckless conduct. The offence in New South Wales attracts a maximum penalty of \$1,650,000 for corporations and \$165,000 and/or five years imprisonment for individuals.
- 11.44 Under section 32 of the *Occupational Health and Safety Act 2004* (Vic), the offence is characterized as recklessly engaging in conduct that places or could place a person at a workplace in danger of a serious injury, without reasonable excuse.
- 11.45 It is interesting to note that the Australian Capital Territory has had corporate manslaughter provisions⁹⁹ which have operated since 1 March 2004 and there has not been a single prosecution under those provisions.
- 11.46 The criminal law in operation in all Australian jurisdictions (outside of the OHS jurisdiction) contains adequate offences for any situation which would arise where a death occurs in a workplace which could be characterised as manslaughter. It is entirely unacceptable to water down the elements of manslaughter and call something that is not manslaughter, manslaughter.

⁹⁸ See Michael Tooma, *Safety, Security, Health and Environment Law* (2008) 158-159 for discussion of the elements of the "recklessly", "serious injury" and "lawful excuse".

⁹⁹ see sections 49A - 49E of the *Crimes Act 1900* (ACT).

11.47 No provision for workplace death should be included in the model OHS legislation.

Is the current approach to sentencing adequate?

11.48 The current approach to sentencing does not provide enough incentives for improved safety performance following an alleged breach of OHS legislation.

11.49 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 assessment of the objective and individual subjective factors, with the appropriate weight given to each factor¹⁰⁰.

11.50 In the High Court case of *Markarian v R* (2005) 215 ALR 213¹⁰¹, 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.”

11.51 The approach to sentencing in the OHS jurisdiction in NSW 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.”*

¹⁰⁰ *Markarian v R* (2005) 215 ALR 213.

¹⁰¹ *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.

- 11.52 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.
- 11.53 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%;
 - (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%.
- 11.54 This seems unreasonably limited.
- 11.55 CSR 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. Companies should be encouraged as much as possible to put remedial actions in place. In our submission, 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?

- 11.56 The right to bring prosecutions under the OHS legislation in NSW¹⁰², ACT¹⁰³, Victoria¹⁰⁴, Northern Territory¹⁰⁵, and Commonwealth¹⁰⁶ jurisdictions is generally limited to the OHS regulators in states and territories and in some cases, for example NSW, through the union.
- 11.57 The union right to prosecute is not subjected to any scrutiny. Such organisations may have vested interests and do not have a clear set of impartial rules of operation. Nor are they appropriately trained in investigative processes as are OHS regulator inspectors. Union representatives do not have the requisite ongoing exposure to legislation and its interpretation to adequately exercise prosecutorial functions.

¹⁰² *Occupational Health and Safety Act 2000* (NSW) s 32.

¹⁰³ *Occupational Health and Safety Act 1989* (ACT) s 95.

¹⁰⁴ *Occupational Health and Safety Act 2004* (Vic) s 28.

¹⁰⁵ *Work Health Act 1986* (NT) s 34.

¹⁰⁶ *Occupational Health and Safety Act 1991* (Cth) s 79.

11.58 Legislation in Queensland¹⁰⁷, South Australia, Western Australia and Tasmania¹⁰⁸ does not contain a provision which excludes civil liability and in the case of South Australia¹⁰⁹, contains a provision which does not limit civil rights or remedies outside the OHS legislation. 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 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.”

11.59 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, the latter being the most usual outcome. 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 (such as a contractor) is essentially hollow.

11.60 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. It is our view that such ability acts as a ‘safety valve’¹¹⁰.

11.61 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.

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ *Occupational Health, Safety and Welfare Act 1986* (SA) s 6(2).

¹¹⁰ 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).

- 11.62 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.
- 11.63 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.”¹¹¹

Should there be a union right of entry?

- 11.64 While we acknowledge that all our employees have a valuable role in raising safety and health issues within the work place, CSR submits that there should not be provision in the OHS legislation for union and employee association right of entry into workplaces.
- 11.65 Currently, there are union/authorised representatives right of entry provisions in relation to OHS legislation in New South Wales, Victoria, Northern Territory, Queensland, Australian Capital Territory and Western Australia.¹¹²
- 11.66 South Australia and Tasmania on the other hand do not provide a right of entry to unions for OHS purposes. The South Australian legislative approach allows a health and safety representative at a workplace to be accompanied by an approved OHS consultant when undertaking an inspection of a workplace and allows the health and safety representative to discuss any matter affecting health, safety and welfare with an employee of the workplace.¹¹³ In our view, this is a preferred approach.
- 11.67 Allowing OHS employee representatives to be able to bring approved OHS consultants to the workplace where there is a particular risk to health and safety involved is a more balanced approach that would lead to greater safety outcomes. This clearly recognizes the principle of not having partisan people in impartial roles.
- 11.68 Historically, unions have not been particularly interested in improved health and safety outcomes. There was a time when the union’s idea of a good safety outcome was to obtain “danger loading” for unsafe work.

¹¹¹ 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.

¹¹² *Occupational Health and Safety Act 2000* (NSW) s 77; *Occupational Health and Safety Act 2004* (Vic) s 87; *Workplace Health and Safety Act 1995* (Qld) s 90; *Occupational Health and Safety Act 1989* (ACT) s 77; *Industrial Relations Act 1979* (WA) s 49I allows unions to investigate suspected breaches of the *Occupational Health and Safety Act 1984* (WA) and the *Mines Safety and Inspection Act 1994* (WA); *Workplace Health and Safety Act 2007* (NT) s 53.

¹¹³ See *Occupational Health Safety and Welfare Act 1986* (SA). s 32, particularly 32(2) and 32(3).

- 11.69 Having a union right of entry to investigate breaches of health and safety legislation can cause risks to health and safety rather than assist in improving safety outcomes. CSR has experienced behaviours where a considered and deliberate breach of safety matters was used to pursue industrial ends.
- 11.70 CSR submits that none of its workers, whether employed in management or otherwise should be subjected to bullying and intimidatory behaviour (as it creates a risk to health and safety in and of itself) and there is a need to ensure there are no union right of entry provisions and associated powers for unions contained within the model OHS legislation. There is no room for industrial relations in the safety agenda.

Should there be offences for authorised representatives?

- 11.71 If the Panel takes the view that there ought to be a union right of entry, CSR submits that there must be provisions included in the OHS legislation which create offences for authorised representatives in circumstances which involve the improper use of their powers.
- 11.72 These powers must be contained within the OH&S Act and not provide for the issues to spill into industrial tribunals, where a common defence is victimisation.
- 11.73 Section 91 of the *Occupational Health and Safety Act 2004* (Vic) for example provides that an authorised representative must not intentionally and unreasonably hinder or obstruct any employer or employee or intentionally intimidate or threaten any employer or employee. The section also creates offences in relation to intentionally using or disclosing information acquired for purposes outside the exercise of their powers under the OHS legislation and intentionally exercising or purporting to exercise their powers under the legislation for a purpose other than enquiring into a suspected contravention.
- 11.74 Section 54 of the *Workplace Health and Safety Act 2007* (NT) provides that a person may claim compensation against the relevant employee organisation if an authorised union OHS representative, acting in the exercise of the purported exercise of powers under the OHS legislation, interferes improperly in another's business or affairs in circumstances where the person suffers loss or expense as a consequence of that interference.
- 11.75 CSR is of the view that offences for intentionally and unreasonably hindering, obstructing, intimating or threatening persons at a workplace required in the model legislation to ensure that any powers granted to unions, employee representatives or authorised representatives are exercised in a reasonable way and only in circumstances where there are genuine concerns in relation to the health and safety of workers at a particular workplace.

What happens to fines obtained in an OHS prosecution?

- 11.76 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.
- 11.77 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.
- 11.78 We recommend the abolition of moiety for prosecutors in the OHS jurisdiction.
- 11.79 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?

- 11.80 Currently, there are no legislative statements as to costs in relation to a successful defence.
- 11.81 CSR takes the view that 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.