

AUSTRALIAN MANUFACTURING WORKERS' UNION



Submission to the OHS Model Law Review 2008

INDEX

Introduction.....	3
Legislative Approach	6
Scope, Application & Definitions.....	9
Duties of Care – Who owes them and to whom?	14
Reasonably Practicable' & Risk Management.....	17
Consultation, Participation and Representation	21
Regulator Functions, Powers & Accountability.....	31
Compliance, Enforcement and Prosecution:	33
Other Issues	46
Annex 1	48
Annex 2	65

Introduction:

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission to the OHS Model Law Review.
2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU has a membership of 120,000 members who work in every State and Territory of Australia. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.
3. The AMWU supports the submission of the Australian Council of Trade Unions (ACTU) to this Review.
4. The AMWU regards OHS as paramount with regard to its members. Current Australian OHS laws were enacted as a result of significant campaigning and lobbying by workers and their trade unions generally including very actively by the AMWU.
5. The ILO recognises the importance of tripartitism and the role of workers and their trade unions as essential to the creation and maintenance of healthy and safe workplaces.

SUMMARY

6. This submission is designed to lay out the fundamental principles for the achievement of the highest standards in model OHS laws.
7. The primary objective of this paper is to state an AMWU position on the key issues raised in the Review Panel's Paper.

8. The AMWU's position is based on AMWU policy which has guided our union participation in OHS for many decades. The policy positions are most recently re-stated in the ACTU Charter of Workplace Rights for OHS and Workers Compensation. Informing the AMWU's position are the overarching principles that OHS law must deliver:
 - a) The right of all workers to be represented by unions at all levels in regard to all health and safety matters;
 - b) The right of all workers to the highest level of effective protection to prevent injury, illness and disease;
 - c) Persons who control and manage workplaces must have responsibility for providing and maintaining a safe and healthy workplace by eliminating
 - d) hazards at the source;
 - e) All workers have the right to elect health and safety representatives who have rights and powers to seek resolution on health and safety issues and are protected by the law from discrimination and harassment;
 - f) No worker shall suffer discrimination, harassment or detriment in their employment due to raising health and safety issues
 - g) Unions have a recognised role in improving OHS and must retain the right to enter workplaces on health and safety issues, obtain information and the right to prosecute employers who breach OHS law;
 - h) All workers have a right to take collective action over any health and safety matter including the right to cease unsafe and unhealthy work

9. Informing the AMWU position is also the overarching principles that OHS law is:
 - a) Legislation designed to achieve a social outcome
 - b) About protecting all workers, including the precariously employed, the self employed, those employed in large and small enterprises, across gender and ethnicity
 - c) Based on the principles of democracy which include the right of workers to collectively bargain
 - d) Not about the cost cutting of government or business

10. The AMWU recognizes that OHS law is rights based law. The ACTU Charter sets out the rights and responsibilities we believe all workplace parties should have in the provision of decent and fair health and safety practices in Australian workplaces. The Charter is attached.

11. Two key principles from the Charter are worth noting:
 - a) that changes to occupational health and safety law must improve OHS for all workers and not result in a diminution of the rights and entitlements of any worker.
 - b) all occupational health and safety laws are to be developed in a tripartite manner.

12. The AMWU submits that these two principles are fundamental to a successful transition to model national OHS laws for Australia. OHS laws must be designed to provide a safe and healthy work environment. This is essential to ensure that the exposure to hazards is eliminated so that workplace deaths, illness injury and disease are eliminated. An estimated 1.5 million Australian workers are currently exposed to carcinogenic substances in the course of their work. With nearly 690,000 workplace injuries or illnesses occurring at work each year¹ and up to an estimated 8,168 work related fatalities every year², it is clear that much remains to be done. The fundamental outcome sought from this review is that Australia must achieve the highest standards of protection in the world. This can be achieved at the same time as employers receiving considerable benefit from the move to one framework model OHS law and regulation.
13. The importance of a tripartite approach to occupational health and safety cannot be overstated. Tripartism has a long history in Australia and is widely recognised as being advantageous to improving OHS standards³. It is a principal recommendation coming out of the influential British Robens Report⁴ 1972 and is recognised by the United Nations International Labor Organisation (ILO) through Occupational Safety and Health Convention, 1981 No.155⁵; a convention Australia has ratified. In fact, tripartism underpins the whole structure of the ILO. A strong and robust health and safety framework must be built on a tripartite approach to health and safety.
14. The total costs of workplace injury and illness to the Australian economy (for the 2000-01 reference year) was estimated to be \$34.3 billion. This is equivalent to 5 per cent of Australia Gross Domestic Product (GDP) for the 2000-01 financial year. In terms of the burden to economic agents, only 3 per cent of the total cost is borne by employers, 44 per cent by workers and 53 per cent by the community. The cost of pain, suffering and early death could conservatively add a further \$48.5 billion to the total cost figure (net of human capital costs already included in total costs), leading to a total cost estimate of \$82.8 billion.⁶
15. The real cost of failing to provide healthy and safe workplaces both in terms of human life and economically is overwhelmingly borne by workers, their families and the community, not employers.

¹ Australian Bureau of Statistics 6324.0 –Work Related Injuries, Australia 2005-06

² Access Economics Pty Ltd –Review of Methodology & Estimates of Workplace Fatalities for NOHSC Sep 2003 p.8

³ Johnstone, R, Occupational Health and Safety Law and Policy, Text and Materials, 2nd Ed., Thomson Legal, P. 131 & South Australia, Report of the Occupational Safety, Health and Welfare Steering Committee, Volume 1, The Protection of Workers' Health and Safety (1984).

⁴ Lord Robens, Report of the Committee on Safety and Health at Work 1970-1972.

⁵ ILO Occupational Safety and Health Convention, 1981 No.155, Article 4 & Article 15

⁶ NOHSC, The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community, August 2004, p.2-3.

Legislative Approach:

REGULATORY STRUCTURE

16. Since the 1972 Lord Robens Report, written over 35 years ago, we have accumulated international research, experience and practice offering an enormous base of knowledge and successful responses to health and safety issues. It is now time for Australia to codify that knowledge in law and, through a harmonised tripartite approach, continue to adopt higher standards of protections into the future.
17. In the post-Roben's era, Australia's health and safety laws must reflect community expectations (see: Pearce & Geddes 2001)⁷. Families want certainty that their loved ones will be kept safe and healthy while at work but at the moment Australia's system is failing Australian families.
18. The AMWU believes that the law must be
 - a) Transparent: using words with well-defined and universally accepted meanings within the regulated community
 - b) Accessible: applicable to concrete situations without excessive difficulty or effort
 - c) Congruent with underlying policy objective: the substantive content must produce the desired behaviour
 - d) Broad principles of safety stated clearly
 - e) Containing sufficient statutory content to make powers of enforcement bodies, prosecution powers and penalties clear and beyond doubt.(see: Johnstone, R, Occupational Health and Safety Law and Policy: A Comparative review, ACTU OHS Seminar 2008.)
19. Laws (including the Act and Regulations and other subordinate legislative instruments including Standards and Codes) should be clearly and simply expressed in plain English in both *prescriptive* and *process* terms. Plain, clear English also reflects the fact that perhaps uniquely in the field of legislation, OHS law is only effective when it can be easily understood and applied at the workplace level by the parties.
20. This approach would provide workers and their representatives with certainty about their rights and duty holders with certainty about their rights and obligations under the Act. This would also give detail to duty holders about how to meet those obligations and compliance costs can be easily calculated (see: Johnstone, 2004, p. 155).

⁷ The courts must bear in mind that statute reflects "the changing ideas of justice and increasing concerns with safety in the community" see: Bankstown Foundry Pty Ltd v Braistina [1986] 160 CLR 301, Shannon v Comalco Aluminium Ltd [1986] 19 ir 358.

TITLE, OBJECTS AND PRINCIPLES

21. It is important a modern OHS law reflects the issues confronting the contemporary Australian workplace. Therefore the title of the new Act should include the words "Occupational Health, Safety and Welfare".
22. The Act should contain separate objects and principles. Objects set out the goals of a piece of legislation. Principles provide guidance in how objects are interpreted and achieved. Objects should be clear and broad, including roles for employer and worker organisations. Principles of consultation and effective issue resolution, participation and representation, anti-discrimination, elimination of hazards, risk control, the precautionary principle, and enforcement penalties.
23. Objects should be along the lines of the NSW OHS Act 2000⁸ and Principles should be based on the Victorian OHSA 2004⁹ and the Swedish Work Environment Act.
24. Objects:
- a) to secure and promote the health, safety and welfare of workers and other people at work,
 - b) to protect workers and other people at a place of work against risks to health or safety arising out of the conduct of an undertaking ,
 - c) to provide a safe and healthy work environment for people at work that protects them from injury and illness that is adapted to their physiological and psychological needs,
 - d) to provide for consultation, participation, and involvement between employers and employees, and organisations representing those persons, in achieving the objects of this Act,
 - e) to ensure that the hazards and risks to health and safety at a place of work are identified, assessed and eliminated at the source, or controlled,
 - f) to develop and promote community awareness of health and safety issues
 - g) to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,
 - h) to protect people (whether or not at a place of work) against risks to health and safety arising from the use of plant that effects health and safety.
 - i) to provide timely and effective processes for the resolution of OHS issues by the workplace parties.

⁸ Based on the NSW [Occupational Health and Safety Act 2000](#).

⁹ These are a combination of the Victorian *Occupational Health and Safety Act, 2004* and the Swedish *Work Environment Act*

25. Principles:

- a) The importance of health and safety requires that workers, other persons at work and members of the public be given the highest level of protection against risks to their physical and psychological health, safety and welfare.
- b) Persons who control or manage matters that give rise or may give rise to risks to health, safety or welfare are responsible for eliminating or reducing those risks
- c) Employers and self-employed persons should be proactive, and take all practicable measures, to ensure health, safety and welfare at workplaces and in the conduct of undertakings.
- d) Working conditions shall be adapted to people's differing physical and mental aptitudes, and the worker shall be given the opportunity of participating in the design of their own working situation and in processes of change and development affecting their own work.
- e) Employers and workers should exchange information and ideas about, and reach agreement on, the risks to health, safety and welfare and measures to take to eliminate or reduce those risks.
- f) Workers are entitled, and should be encouraged, to be represented in relation to health and safety issues.

Scope, Application & Definitions:

SCOPE OF MODEL OHS LAW

26. The AMWU strongly believes all workers in Australia should be protected by a single minimum set of standards and rights in relation to OHS law. Any specific mining, maritime or electrical laws that remain must meet this standard as a minimum.
27. The AMWU recommends specific industry regulation to address the need for specific and enforceable protections for health and safety hazards in industries that are of a high risk nature.
28. Any worker currently not covered by state or territory OHS law, such as police, should be covered by the model OHS laws'
29. It is also absolutely critical that jurisdiction-shopping is not permitted in a way which (like the current arrangements regarding moving to Comcare) effectively enables employers to adopt regulations entailing a lower standard. This has already occurred, for example, with regard to transport companies moving into the Comcare scheme and the AMWU is concerned about similar developments in construction and other industries. It should also be noted that the movement of employers into Comcare, far from actually rationalizing legislative coverage, often results (with employers using multi-tiered subcontracting arrangements as is common in construction, road transport and the like) in dual inspectorate coverage (Comcare and state/territory) of the same work-site. This is a more complex situation with implications for OHS management and worker involvement as well as inspectoral effectiveness. Joint ventures (common in construction and also found in other industries) and complex corporate structures can further complicate the question of jurisdiction as well as providing avenues to manipulate or limit union access to the workplace.

RESPONDING TO CHANGE

Work Organisation

30. Over the past 25 years the organisation of work has undergone profound changes in Australia and internationally.¹⁰ These changes include:
 - a) The growth of more attenuated production/service delivery systems based on elaborate subcontracting networks or supply chains, franchising or licensing agreements;
 - b) Repeated rounds of downsizing and related forms of organizational restructuring resulting in a reduction in staffing levels, job tenure and job security;

¹⁰ For a recent summary of the labour force in Australia see Australian Bureau of Statistics (2008), *Forms of Employment, Australia, Nov 2007*, Canberra

- c) Use of more intensive work regimes, including 'lean production', 'business process re-engineering' and the like.
- d) Increased use of both direct hire and indirect hire (labour hire) temporary, fixed-term contract, on-call and casual workers; and a commensurate decline in permanent employees.
- e) Increased use of independent contractors and micro-businesses often as a result of outsourcing and franchising arrangements as well as the deliberate 'conversion' of employees to self-employed contractors;
- f) A growth in part-time employment (both temporary and permanent);
- g) Growing relocation of work activities to the home (on both a part and full-time basis) or transient locations (including vehicles or temporary workplaces such as temporary call centers);

31. The workforce itself has also undergone important changes in the same period, including:

- a) Increased female participation in the workforce raising issues about work/family balance including childcare;
- b) Growth of young workers (including children) undertaking part-time (and overwhelmingly casual) work.
- c) An ageing population (raising issues about changes to work ability especially in the context of work intensification and where older workers made redundant having to take on temporary jobs or self-employment).
- d) A growing use of overseas workers, both permanent migrants and temporary foreign born workers (foreign students studying in Australia, backpacker/tourists and guest workers under the s457 visa scheme).

32. There is evidence that a number of these changes, and perhaps most, present challenges for OHS. For example, there is now extensive international evidence that job insecurity/downsizing and contingent work arrangements are associated with a significant deterioration in OHS.¹¹ A growing body of evidence also indicates that these same changes are undermining OHS laws.¹²

33. The changes just described require more explicit recognition in modern OHS legislation and associated guidance material so that employers and other duty-holders better understand their obligations.

34. For example, research carried out for WorkCover NSW¹³ indicated that most employers failed to appreciate that downsizing or organisational restructuring commonly entailed changes to work processes (staffing levels, workloads, range of job tasks, communication, training and supervision) that could affect OHS, and as such required risk assessment

¹¹ This evidence is summarised in the submission of Johnstone, Bluff and Quinlan to this review.

¹² *Ibid.*

¹³ Quinlan, M. (2003), Developing strategies to address OHS and workers' compensation responsibilities arising from changing employment relationships, Research Report to the WorkCover Authority of New South Wales.

and appropriate management. Indeed, there is now a considerable weight of international evidence to suggest downsizing and job insecurity result in adverse effects on OHS.¹⁴ Similarly, misunderstanding of duties under OHS laws is common in relation to subcontracting, franchising, labour hire and analogous relationships (such as share farming or the activities of registered training providers).

35. As a result, model legislation and the attached explanatory notes should make it clear, for example, that in subcontracting and labour hire arrangements, there are multiple duty holders. It is also important to identify the broad scope of activities that fall under the rubric of work organization and indicate that employers and other duty holders need to recognize the changes to work organization that commonly arise from downsizing, restructuring and the like. Employers also need to be made aware of their obligations to younger workers, short tenure workers and older workers.
36. In a similar vein the legislation also needs to clarify the duties of employers and others in relation to home-based work (including home-care as well as cases where the home is an adjunct location to normal work activities or the centre of work), remote, mobile and transient workplaces. These types of work arrangements are no longer exceptional and require explicit recognition especially given evidence of misunderstanding/confusion amongst those responsible.¹⁵
37. The growing use of temporary foreign workers also raises critical issues because these workers often appear less well-aware of their OHS rights and there is evidence they are more vulnerable to exploitative practices that can expose them to great risk.¹⁶ There is evidence that guest workers under the s457 visa scheme are in a particularly vulnerable position because their position depends on the nomination of an individual employer (who may revoke this at any point and has additional power in terms of their capacity to influence prospects of obtaining permanent residency) and some recruitment (including that by some overseas labour hire firms) appears to have less than scrupulous in ensuring the workers have the requisite skills.¹⁷ To this can be added illegal immigrants who

¹⁴ Bohle, P., Quinlan, M. and Mayhew, C. 2001 'The Health and Safety Effects of Job Insecurity: An Evaluation of the Evidence', *Economic and Labour Relations Review* 12(1):32-60.

¹⁵ Quinlan, M. (2003), Developing strategies to address OHS and workers' compensation responsibilities arising from changing employment relationships, Research Report to the WorkCover Authority of New South Wales.

¹⁶ Guthrie, R. & Quinlan, M. (2005), "The Occupational Health and Safety Rights and Workers Compensation Entitlements of Illegal Immigrants: An Emerging Challenge" *Policy and Practice in Safety and Health*, 3(2): 69-89.

¹⁷ Toh, S. & Quinlan, M. (forthcoming), "Protecting a new class of guestworker: The occupational health and safety rights and entitlements of s457 visa holders in Australia" *International Journal of Manpower*. See also a recent Victorian prosecution with regard to serious breaches of OHS laws affecting s457 visa holders (with further cases pending) *Herald Sun* 18 June 2008, p12 and Worksafe Victoria website.

are, if anything, in an even more difficult situation when it comes to accessing their rights under OHS laws.¹⁸ The AMWU has addressed a number of tragic cases involving both s457 visa holders. Our capacity to do this has been inhibited by some employers who have used s457 guest workers as part of a union avoidance strategy as well as restrictive rules relating to right of entry in a number of jurisdictions (such as the federal jurisdiction).

38. The s457 scheme is currently the subject of a federal review. At the same time, there is a proposal to establish a similar scheme for bringing in temporary workers from the Pacific – also the subject of a review. The AMWU views with concern the expansion of the s457 visa scheme without sufficient consideration being given to evidence of abuse of the scheme and problems of workers securing protection under OHS, workers' compensation and other laws. Special measures are required to ensure these workers enjoy the same level of protection under OHS laws as other workers. These measures should include a requirement for rigorous and targeted monitoring of OHS law compliance and (in conjunction with federal immigrant law) severe penalties for those abusing the scheme by placing s457 workers at risk. These concerns also need to be resolved as part of any scheme to introduce guest workers from the Pacific

Emerging Hazards and Risks

39. Changes to work organisation (including those affecting psychosocial risks) and other changes, such as the proliferation and use of chemicals in industry, new technologies (such as nanotechnology), increased reliance on foreign born workers (including temporary guestworkers), and ageing population and the increased use of elaborate supply chains bring with them new hazards and risks. Emerging hazards and risks have been the subject of recent reports in the European Union, New Zealand¹⁹ and elsewhere as governments try to assess and grapple with these challenges. As noted elsewhere in this submission it is vital that Australia has the infrastructure and research capacity to scope the extent of problems to guide the development of new standards and other policy interventions.

¹⁸ Seixas NS, Blecker H, Camp J, Neitzel R. (2008) Occupational Health and Safety Experience of Day Laborers in Seattle, WA. *Am J Industr Med*; Cho, C., Oliva J, Sweitzer E, Nevarez J, Zanoni J, and Sokas RK A workers' center approach to rights, health & safety. *Journal of Occupational & Environmental Medicine* 2007. 49(3):275-281.

¹⁹ Bohle, P. Cooke, A. Jakubauskas, M. Quinlan, M. and Rafferty, M (2008) The Changing World of Work and Emergent Occupational Disease and Injury Risks in New Zealand: A benchmark review prepared for National Occupational Health and Safety Advisory Committee (NOHSAC), Wellington.

40. These changes require consideration of new standards and regulatory measures as well as resourcing. For example, the proliferation of small and even mobile or transient workplaces requires not only recognition in general duties but also changes to resourcing of enforcement practices. Supply chain regulation (discussed elsewhere) provides another device to aid this process. For example, in the European Union new regulatory devices have been introduced with regard to hazardous chemicals that try to address subcontracting networks and smaller workplaces (REACH). These initiatives warrant attention in the Australian context.
41. The AMWU is also very concerned at the recent estimates of 1.5 million workers exposed each year to carcinogens in the course of their work (ASCC). AMWU members are working in some of the most heavily exposed industries. The AMWU believes Australia should investigate the introduction of toxic use reduction style legislation that would complement existing legislation, along the lines of the very successful US Massachusetts Toxic Use Reduction ACT 1989.

SHIELD OF THE CROWN

42. There should be no Crown immunity provision in the Law. The approach taken in section 118 of NSW OHSA 2000 is recommended.

WORK

43. It is a matter of principle and a common sense response to the changing nature of work that all workers (and others including the general public) be protected by the health and safety law regardless of the type of work they perform or where they perform it. It is not enough that the law be flexible enough to incorporate these workers, it must ensure their inclusion and protection.
44. The AMWU recommends work is defined without reference to where that work occurs (e.g. Victoria OHSA 2004 Part 1 s. 5 Definitions). The definition of worker must embrace all persons performing work regardless of “employment relationship” and regardless of industry/sector. An example is that proposed in the Exposure Draft for the ACT Work Safety Bill 2008
45. Worker means an individual who carries out work, whether for reward or otherwise -
- a) Under an arrangement; and
 - b) for someone conducting a business or undertaking.

Examples – workers, employee, independent contractor, outworker, work experience student, volunteer

Duties of Care – Who owes them and to whom?

EMPLOYER DUTIES

46. Duties and duty holder obligations cannot be delegated. In some instances duties between duty holders operate concurrently and overlap. The employer must be the primary duty holder at work. It is the employer who has responsibility, as they control the budget, gives directions and allocates resources in the workplace. The employer/employee relationship remains the predominant employment relationship in Australia with 61%²⁰ of workers in traditional full-time or part-time work and a further 22% in casual employment. It is appropriate to recognise this in law; to do otherwise would have the effect of abrogating the employer's obligations to other duty holders.
47. While duties and duty holder obligations must operate concurrently and overlap (that is they can not be delegated), the primary duty to ensure worker health and safety is protected must reside with the employer.
48. OH&S duties should be broad and applicable in a modern labour market without decreasing the protection afforded to all types of employment categories. In terms of duties owed to contractors, labour hire personnel, volunteers, outworkers, apprentices/trainees and other persons performing work – all should be afforded the same protections as conventional workers. This is best done using the Victorian OHS Act 2004 section 21(3), 23 and 24.

Duties on the employer must include:

- a) to ensure the health, safety and welfare of all workers; and others affected by the work
- b) Providing and maintaining a safe and healthy work environment
- c) Providing and maintaining safe systems of work in all operations in the workplace and under the control and management of the employer
- d) Providing and maintaining safe plant and systems of work in relation to its use, handling, installation, storage and transport .
- e) Providing and maintaining safe systems of work in relation to the use, handling, storage and transport of substances
- f) Providing adequate facilities for the welfare of workers
- g) Providing adequate information, instruction, training and supervision to ensure health, safety and welfare.

²⁰ In November 2007, there were 10.4 million employed people, aged 15 years and over. Of these, 61% (6.3 million) were employees (excluding owner managers of incorporated enterprises (OMIEs)) with paid leave entitlements, that is, they were entitled to paid sick and/or paid holiday leave. Of the remaining employed people: 2.2 million were employees (excluding OMIEs) without paid leave entitlements (a proxy for casual employees), 1.2 million were owner managers of unincorporated enterprises (OMUEs), 674,100 were OMIEs in ABS 6359.0 - Forms of Employment, Australia, Nov 2007

- h) Providing adequate monitoring of health and safety
- i) Systematically addressing hazards
- j) Embedding OHS in the management of work
- k) To consult with HSR's and workers on all matters effecting Health and safety
- l) To notify regulatory authorities and HSR's of all incidents

CONTROL

49. The AMWU rejects the need for definition of "control" within the Act. The determination of what is or is not within a duty holder's "control" is best left to the courts to decide. (see Victoria OHS Act 2004 section 21(3) and ss 24,23) Defining or placing a test on "control" within the Act could have the perverse safety outcome of focusing duty holders on eliminating their "control" to avoid liability, rather than the positive safety outcome of eliminating hazards. The most effective approach is to prescribe obligations for a broad range of duty holders and, through the Act and Regulations, provide duty holders with ways to meet their obligations.
50. As stated previously in this submission, duty holder duties must overlap and run concurrently. The type of work relationship between the duty holder and person whom a duty is owed should not matter. The focus must remain on the duty holders obligations and responsibilities as specified by the law not the extent to which that duty is owed.
51. For example, an employer may owe a duty of care to a worker, a contractor and an apprentice at the same time. If the Act specifies the employer's obligation to ensure the health and safety of all persons, then that duty is to be discharged no matter what the employment relationship or otherwise between the employer and the person.

WORKER DUTIES

52. Worker duties should be limited to:
- a) taking reasonable care and
 - b) not knowingly endangering others (or themselves) (eg Victorian OHS Act section 25)
53. The worker duties must include the right of workers to remove themselves from unsafe and unhealthy work.(eg Tasmanian ACT section 17).
54. Workers duties are rightly limited because the employer is the one in effective control of the workplace, and therefore bears the obligation to provide a safe and healthy workplace.

55. The performance of work throughout contemporary market economies increasingly occurs in the context of extensive contract networks, such as supply chains. These supply chains are regulated by means of private contractual “governance structures” in contrast to the more traditional public regulation by way of “legislation”.
56. Vulnerable workers are often engaged in precarious employment within these supply chains, in situations which risk their health, safety and welfare such as where client pressure or completion bonuses cause unsafe systems of work.
57. Duties must be imposed upon the effective business controllers (and other powerful participants) in these supply chains for the purpose of appropriately harnessing these private contractual ‘governance structures’ in order to improve occupational health and safety for these vulnerable workers.

OTHER DUTY HOLDERS

58. A Duty of Care is also owed by:
- Controllers, designers, manufacturers, importers and suppliers of: goods and substance, plant and premises, directors, principal contractors and up the supply chain including purchasing, hire and procurement.
59. All duty holders will have concurrent and overlapping duties and they must not be able to abrogate or delegate their duties under the Act.

Reasonably Practicable and Risk Management:

REASONABLY PRACTICABLE

60. Duties should **not** to be limited by the phrase 'so far as reasonably practicable' in the model law. This defense appropriately remains open to an employer in a court.

61. The AMWU supports the inclusion of the NSW *Occupational Health & Safety Act* 2000 provision, s 8 in regard an approach to General Duties, for the model OHS law which state:

(1) Employees - An employer must ensure the health, safety and welfare at work of all the employees of the employer. That duty extends (without limitation) to the following:

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

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

62. This is also reflected in the NSW OHS Act s 3 - Objects:

Section 3(e) states:

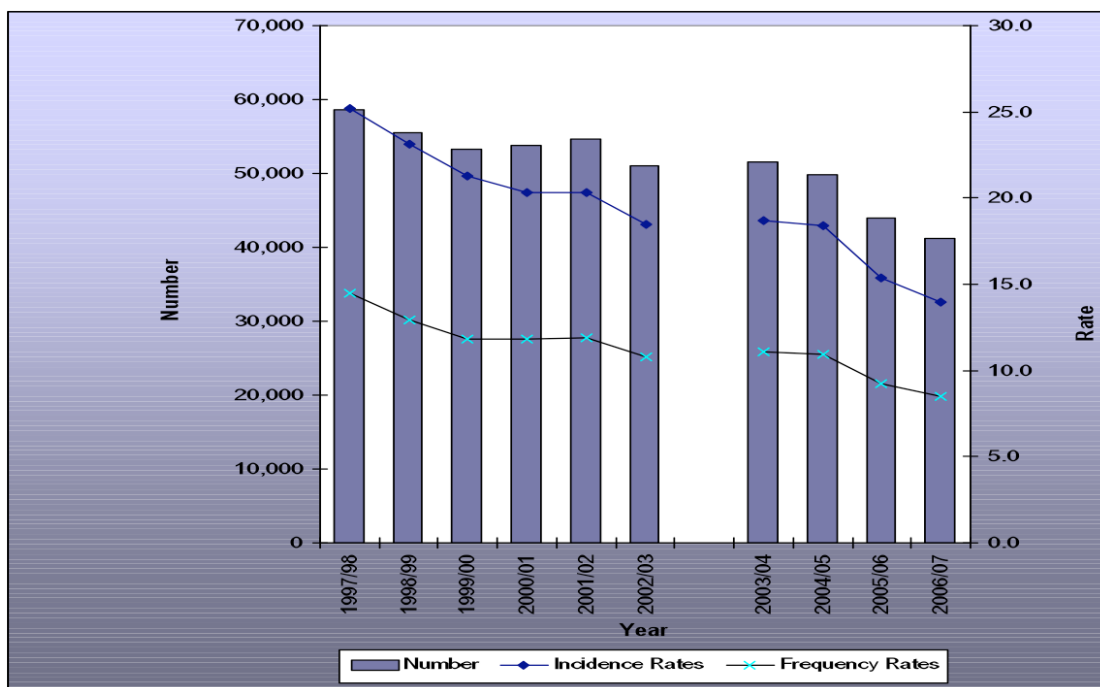
“(e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,”

63. This absolute duty is of course qualified by the defence available to employers under clause 28 of the existing NSW OHS Act , that it may not be reasonably practicable to do so.

64. A Report on the Review of the Occupational Health and Safety Act 2000 done in NSW reports that work related injury and fatality rates have declined for several years in NSW and during 2004/2005 reached the lowest levels recorded in more than 18 years.²¹

65. A recent Workcover NSW Statistical Bulletin 2006/7,²² backs up this trend with figures on injury frequency and incidence rates dropping to the lowest level since the scheme commenced in 1987. This decline reflects the effectiveness of the existing OHS regime, although there is of course general agreement that OHS standards in NSW could still be improved.

Figure 1 – NSW Employment Injuries: Number of claims, incidence and frequency rates 1997/98-2006/07



66. Reversing the onus of proving "Reasonable practicability"

67. The existing section 28 of the NSW OHS Act provides two defences to offences under the Act, being:

- a) That it was not reasonably practicable to comply with the OHS Act;
- b) That the commission of the offence was due to causes over which the defendant had no control and against the happening of which it was impracticable for the defendant to make provision.

²¹ Report on the Review of the Occupational Health and Safety Act 2000 at p.12.

²² NSW WorkCover Statistical Bulletin 2006-2008.

68. Currently the not "*reasonably practicable*" test is a defence that the employer can run and the burden of proving it is on the defendant employer, not the prosecutor.²³
69. The onus under the existing section 28 of the OHS Act is a civil onus, that is, the defence must be proven on the balance of probabilities.
70. The existing defence of reasonable practicability arises only after the elements of the offence have been proven by the prosecution.²⁴
71. While the Courts have recognised that it is necessary to interpret the existing section 28A defence narrowly to give effect to the objects of the Act²⁵, reasonable practicability does not, as some employers would have us believe, go so far as to require the defendant to have done everything physically possible.
72. The existing defence of "*reasonable practicability*" already implies that an assessment be made where the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other. If it is shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice, the defendants will discharge the onus on them.²⁶
73. The Chief Industrial Magistrate in NSW, where prosecutions for most OHS breaches are heard, considered the meaning of the phrase in the decision of *Southam v Petersville Limited* (1988) 24 IR 186 at 193, where His Honour summarised the test as:
- "*A duty to weigh up the risks, both as to its likelihood and as to its severity if it occurs, as against the cost in terms of money, the production and the effort of providing against the risk.*"
74. The courts have consistently applied the reasonably practicable defence in a way which provide balances.

²³ See *Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358; *Drake Personnel v WorkCover Authority (NSW)* (1999) 90 IR 432.

²⁴ *ABB Power Transmission Pty Ltd v WorkCover Authority* [1997] NSW IRComm 60, per Fisher P Bauer and Hungerford JJ at [6].

²⁵ As set out in Section 3 of the OHS Act 2000

²⁶ See for example *WorkCover Authority (NSW) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182 per Walton, VP at 206 to 207, and *Bultitude v Grice Constructions Pty Ltd* [2002] NSW IRComm 20 per Wright P, Walter J, VP and Hungerford JJ.

RISK MANAGEMENT

75. The object of ensuring health and safety is to eliminate the hazard, and if that is not possible, control it and require the duty holder to be proactive utilising a systematic process as distinct from an ad hoc reactive response.
76. The risk management clause in the model Act must prescribe the hierarchy of controls.
77. Consultation must be part of the process at every stage and HSR's and their union have access to risk management records. The Risk Management process must be legally enforceable to ensure it is activated. E.g. Queensland s 27a

Consultation, Representation & Participation:

78. Consultation is not a one-way flow of information or merely an exchange of information. There must be a duty on the employer to consult and to take into account those consultations when making decisions that effect health and safety.
79. A SafeWork SA review of consultative arrangements found that effective workplace representative arrangements lead to improved OHSW as determined by the cost of workers' compensation.²⁷
80. It is crucial that legislation specifically prescribe the structure of consultations. Consultations should be structured as follows:
- a) Relevant unions must be consulted.
 - b) Elected Health and Safety Representatives (HSR) must be consulted. They are the elected worker representative's best placed to make recommendations about improvements in OHS.
 - c) The workplace OHS Committees are to be included in consultations. Elected HSRs must automatically become the worker representatives on the joint OHS Committee. If the numbers of HSRs in a workplace are so great as to make a potential OHS Committee unwieldy, it is the HSRs in consultation with the workers they represent, who shall determine the HSR nominations to the committee.
 - d) Workers are to be consulted. This is done by empowering HSRs to consult with the group of workers they represent and for HSRs and the relevant trade unions to call worker meetings to discuss health and safety issues.
 - e) The model laws must state that consultations should occur on any matter that may effect the health and safety of workers, at the earliest possible time prior to changes or decisions being made or after an incident or injury.
81. There must be a duty on the employer to consult and to take into account those consultations when making decisions which affect health and safety. The model OHS laws must extend worker consultation, participation and representation rights.
82. Employers must not be able to:
- a) Choose whom they will or will not consult with,
 - b) Run HSR elections or select HSRs,
 - c) Determine the makeup of work groups (if applicable),
 - d) Determine the worker representatives on OHS Committees
 - e) Determine the number of HSRs that are elected by workers at a workplace

²⁷ SafeWork SA, Working Together - A review of the effectiveness of the health and safety representative and workplace health and safety committee system in South Australia, December 2001

83. These issues should be solely determined by the workers and their HSRs, with advice from and in conjunction with their relevant unions. Where there is failure to reach agreement on issues after consultation, the issues resolution procedure is initiated.
84. Concerns are often raised about the protection of the “unrepresented”, which is usually code for workers who are not members of trade unions.
85. Trade unions are an essential feature of representative democracies. Trade unions have a role in addressing the power imbalance at the workplace level, by using their collective resources to provide assistance, training and education to working people. There are no other representatives and the overwhelming evidence in health and safety research is that trade unions create environments that support all working people, not just those who are their members. In other words, trade unions through their work raise the standard for all, not just their members.
86. There is regular discussion about the difficulties for small workplaces, their owners and workers, to access advice and assistance to improve their health and safety performance. Despite numerous reports, regulators persistently ignore suggestions and fail to pilot programs that provide VERBAL advice and access to information for these workplaces. Such programs and trials include:
- a) Roving health and safety representatives e.g. various European initiatives, both legislated and industrial agreements
 - b) Workplace safety advisors e.g. HSE UK, Spain
 - c) Business collaboration e.g. Club Zero in Western Sydney
 - d) Regional based occupational health services e.g. Scandinavian countries (implementation of ILO Convention on Occupational Health Services)
 - e) Information services providing verbal, in person advice from skilled personnel who are able to visit workplaces. This service must be separate from the inspectorate, as the inspectorate’s role must be focussed on compliance (information help-lines or web based services are useful adjuncts but cannot replace personal assistance).
87. These programs would be independent from the regulators, but require funding and resourcing. The model OHS law needs to include requirements on the regulator to provide such resources to workplaces, groups of workers and employers. As our labour market becomes more reliant, on the “informal economy”, access to these services increases in importance.

HEALTH AND SAFETY REPRESENTATIVES

88. Elected workplace health and safety representatives are fundamental to achieving improvements in health and safety. The WA government stated:

“Recognising, valuing and supporting the role played by elected workplace health and safety representatives is the key to improving workplace safety...”²⁸

89. Elected HSR’s are the essential line of communication between management and workers, integral to the Roben’s approach, and in the AMWU’s view any Model law for Australia going forward. HSR’s must have primacy over committees in regard issue resolution, issuing notices and directing cease works.

90. Elected HSRs are workers who put themselves forward to their peers for election to what can be a difficult and challenging role. Their role is to represent workers in improving health and safety at the workplace, and in resolving any issues that may arise in the course of this multi-faceted goal. They do not by virtue of their election become the person in effective control of the workplace, and it would therefore be inappropriate for them to become subject to any additional duties beyond their duties as an employee.

91. The legislation should explicitly state that nothing in the Act should be taken to impose a duty or a function on an HSR acting in that capacity. To do any less would in effect discourage workers from seeking election to this critical role.

92. Elected HSRs must have clearly defined strong and detailed rights and powers.

93. There should be provision for Elected Deputy HSR’s to provide representation in the event the HSR is absent on leave. Deputy HSR’s should be entitled to same training rights as HSR’s.

²⁸ WA Government Media Office – Ministerial Media statements “Elected Workplace Health & Safety Representation Key to Workplace Safety Minister’

94. Provisions guaranteeing access to ongoing and regular training with the provider of their choice for HSRs must be mandated by the legislation. The importance of regular training to ensure that HSRs understand and can apply the Act at the workplace level, and can stay abreast of the latest developments in OHS cannot be overstated. The AMWU recommends at least 10 days paid HSR training for new HSRs and 3 day refresher courses per year for existing HSRs.
95. Elected health and safety representatives should be able to (in addition to regular face to face and mass meetings) have electronic and other contact with members of the workplace or Designated Work Group they represent, confidentially from the employer. As Ian Bell H&S representative in the ACT explains;
- 'I am the Health and Safety Representative for my Designated Work Group, as the name implies I represent my fellow workers. I am their voice when it comes to any Health and Safety concerns they may have. Having various trades within the DWG means that it is not possible to communicate face to face or by telephone on all occasions, e-mail being the only practical way for these workers to raise issues with me so I can then carry out a risk assessment and raise the issue with management. The workers that inform me of risks in our workplace do so knowing that they do so as a nameless staff member, confidentially. If employers are allowed to access workers e-mails then this ability to report risks to their and others health and safety, without risk of being identified, is gone'.
96. Model OHS laws should specify that HSRs be democratically elected by a process determined by workers, in conjunction with their union and without input or interference from the employer, be empowered to:
- a) Utilise legal rights and powers to represent workers on health and safety matters
 - b) Inspect the workplace
 - c) Access relevant information and be informed of all incidents
 - d) Be consulted by the employer before any workplace decisions that may affect health and safety
 - e) Issue notices when breaches are detected
 - f) Call in government Inspectors
 - g) Direct workers to cease work where there is a belief of immediate risk to health and safety
 - h) Participate in the resolution of health and safety issues
 - i) Perform all OHS activities on paid time and have adequate facilities
 - j) Be assisted by any person at any time
 - k) Be protected by law from discrimination, harassment, bullying, intimidation and prosecution for exercising their rights and powers
 - l) Access to ongoing mandated training, being able to choose their own training provider, in paid work time

- m) Appeal any decision of a regulator regarding a health and safety, matter
- n) Have a term of office no longer than 3 years and are able to be re-elected
- o) Automatically become the worker representatives on the joint OHS Committee. If the numbers of HSRs in a workplace are so great as to make a potential OHS Committee unwieldy, it is the HSRs in consultation with the workers they represent, who shall determine the HSR nominations to the committee.
- p) Be notified of accidents/incidents/injuries
- q) Be notified when inspectors enter the workplace by both the inspector and the employer and take part in any inspections, enquiries or investigations
- r) Receive all relevant information from the employer
- s) Investigate OH&S complaints
- t) Investigate systemic causes of injury or disease
- u) Meet with workers during working hours without loss of pay to either workers or the HSR
- v) Meet with other HSRs on paid time
- w) Not be financially disadvantaged as a result of performing their duties including attending meetings or training. - and are paid for work done outside usual hours
- x) Initiate monitoring and reviews of OHS at the place of work
- y) Exercise their rights and powers across multiple employers, employment relationships and work groups (to take into account the nature of work arrangements eg labour hire, subcontracting, multiple employer sites – e.g. Northern Territory provisions (NT s 33))
- z) recommend the initiation of public enquiries into OHS issues through the tripartite Commission;
- aa) initiate prosecutions with unions acting as their agent.
- bb) have the right to attend OHS meetings, networks and seminars authorised by either their union or the regulator without loss of pay
- cc) Access medical information relating to OHS at the workplace without hindrance or obstruction from privacy requirements, subject only to the consent of the employee(s), or to the provision of information in a way that does not allow for individual identification e.g. Vic OHS Act 2004 s 69

97. The size of the place of work must not limit workers ability to elect an HSR. Workers must have the ultimate right to determine how many HSRs they need in each workplace. The overall objective must be to ensure that each worker has easy and convenient access to a HSR at all times

59. Mirror clauses specifying the employer's obligations in relation to HSR rights and powers must be included.

60. Examples in existing law:

- Vic OHSA 2004 – s.58, 67 & 68
- SA OHSWA – s.34(1)(h) – employer obliged to inform HSR of an injury
- ACT OHSA 1989 – s.67-70 – Provisional Improvement Notices

61. Johnstone, Quinlan and Walters (2005, 110-112) researched ways of promoting OHS in small enterprises and argued that there are benefits of legislative measure for roving or regional health and safety representatives that are organised by trade unions²⁹. Such arrangements exist in Italy, Sweden and Norway and “Checkies” are used in the NSW and Queensland mining industry. The AMWU supports the inclusion of roving reps in model OHS law. There must be an obligation on employers to negotiate these arrangements.

OHS COMMITTEES

98. Workplace OHS Committees play an important role addressing issues such as developing policies and procedures, planning OHS improvements, engaging consultants etc. Functions need to be broad, with day to day issue resolution relating to hazards and risks dealt with through more immediate mechanisms i.e HSR's and consultation with workers.
99. At least half the OHS Committee must be elected worker representatives and employer representatives must be drawn from senior management with decision-making powers.
100. The OHS Committee should have the power to set their own procedures except that:
- a) The Chair of the OHS Committee should be drawn from amongst the worker representatives on the Committee.
 - b) The committee should meet at least every 2 months, with extraordinary meetings being able to be called at any time by a least half of the members of the committee.

²⁹ Johnstone, R., Quinlan, M. and Walters, D. (2005) 'Statutory occupational health and safety workplace arrangements for the modern labour market', *Journal of Industrial Relations*, 47(1): 93-116.

RIGHT TO CEASE WORK

101. The AMWU supports the right of HSRs to direct workers to cease work when there is a belief of or actual threat to workers' health or safety. This is an important power to protect fellow workers at immediate risk, without censorship from the employer, if conducted in good faith.
102. Consultation between the employer and the HSR must occur in this situation as soon as all steps have been taken by either or both parties to ensure that no workers health or safety is at risk. In cases of emergency it is accepted that this consultation may be as soon as possible after the action has been taken by the HSR. This right should be backed up by strong protections against HSR victimisation for taking this action. Workers are entitled to cease work on full pay. e.g. ACT OHS Act 1989 s 72
103. Ancillary to a HSRs right to order the cessation of unsafe work, a workers common law right to refuse unsafe work should be codified. The AMWU supports a legislative right of workers to refuse unsafe or unhealthy work without penalty.

PROTECTION FROM DISCRIMINATION AND VICTIMISATION

104. Further to the protections detailed in the *ACTU Charter of Workplace Rights*, HSRs must be protected with easily enforceable law against discrimination, bullying, harassment or intimidation, - or the threat of any of these. e.g. Victorian OHSA Section s76 - 78

In this context:

- a) A breach of the law must lead to a timely regulatory response including prosecutions and redress
- b) There must be meaningful penalties against employers for breaches of the law,
- c) The onus must be on the employer to prove there was no breach
- d) A government inspector can intervene to cease discrimination,
- e) Unions/employees must be able to lodge an injunction on employers in the event of a threat or probable threat to discriminate against or victimise an HSR or worker.
- f) The definition of prohibited discriminatory behaviour should expressly include bullying, harassment and intimidation, and should not be restricted to a narrow interpretation which requires the worker or HSR who is alleging the discriminatory behaviour to have suffered a quantifiable or material loss such as termination, loss of promotion or wages.

ISSUES RESOLUTION

105. The AMWU supports the inclusion of mandatory issue resolution procedures in the model legislation. This would give certainty to all workplace parties by setting minimum standards and ensuring fairness and equity across industry sectors and workplaces. It would prevent a plethora of procedures that may in effect cut across other rights and powers of parties to the process.

At a minimum, such procedures must:

- a) Apply to any health and safety issue in a workplace(s).
- b) Require the employer to nominate a management representative with appropriate seniority to be able to resolve the issue with the HSR
- c) Provide that resolution must be sought with the HSR, and with employees directly only in the absence of an elected HSR, or their union if employees and/or the HSR require their assistance.
- d) Allow for employees to leave their place of work to report a hazard or an issue to their HSR as a right and obligation.
- e) Require that the employer address the issue with the HSR in a timely and effective manner.
- f) Require the employer to put the details of the resolution of the issue in writing to the satisfaction of all the parties.
- g) Make clear that nothing in the procedure prevents a HSR from exercising any of their powers at any stage of the process.”

For example Issues Resolution Vic OHSA 2004 s.73 with OHS Regulations Part 2.2 2007

106. Should an issue not be resolved it should be referred to the Tribunal for conciliation and arbitration.

RIGHT OF ENTRY

107. The ILO highlights the crucial role of unions in securing safer, healthier work and “argues strongly for a strengthening of collective voice as the primary means of improving working conditions, and protecting workers’ health.”³⁰

108. The AMWU supports union right of entry for OHS matters, at all work sites, irrespective of union membership - not just for suspected breaches. (e.g. NSW OHSA 2000 – s 76-85). In the case of a union investigating an incident where there is reason to believe that a prosecution may be initiated, or a prosecution has been initiated, an authorised representative must be able to enter any relevant premises that the representative believes is a place of work for the purpose of investigating the incident.

³⁰ Economic Security for a better world, ILO Socio-Economic Security Programme, International Labour Office, 2004. 50 Swiss francs. ISBN 92-2-115611-7.

109. Union right of entry for trained officials plays an essential role in identifying and articulating health and safety concerns amongst employees in those states that currently have this provision. They provide an accessible point of contact for employees who wish to raise concerns about OHS issues that affect them in their workplaces.
110. Many unsafe work practices are only ever brought to light because of trade unions and the watchful eye of their representatives.
111. Unions must have the powers of an HSR at the place of work, but particularly be able to issue notices, inspect workplaces and systems, copy documents, make audio/visual recordings for education and information gathering purposes. Union right of entry on OHS grounds should not be subject to additional limitations by state or federal industrial relations laws.
112. An Australian Chamber of Commerce and Industries (ACCI) 2004 pre-election survey of Australian businesses showed that union OHS inspections caused greater concern amongst employers than industrial action.³¹ Government research shows unionised workplaces in Australia are three times as likely to have a health and safety committee and twice as likely to have undergone a management occupational health and safety audit in the previous 12 months.³² It is therefore curious that some Australian businesses were concerned about union OHS inspections. We believe some employers are concerned about union inspections because they are effective: they give workers a voice, they identify health and safety breaches and they can result in employers being forced to improve standards.
113. At present an estimated 1,000 Union officials hold written authorities under the New South Wales legislation entitling them to enter workplaces. To date, however, only a small number of applications to the New South Wales Industrial Relations Commission for the revocation of such an authority have been made and even fewer have been successful.
114. If the existing powers of Authorised Representatives in NSW had been misused, this would have been reflected in a far higher number, and frequency, of applications for revocation of authorities to enter.

³¹ ACCI, Modern Workplace: Safer Workplace – An Industry Blueprint for Improving OHS in Australia, April 2005

³² Hawke, Anne & Wooden, Mark (1997), The 1995 Australian Workplace Industrial Relations Survey., The Australian Economic Review 30 (3), 323-328, doi: 10.1111/1467-8462.00032

115. In the early stages of the right of entry provisions within the Qld Act, major issues arose in terms of the enforcement of rights of authorized representatives (union officials) to enter workplaces to perform their function. It is submitted that the Act must contain penalty provisions and a dispute resolution procedure to deal with these matters, including conciliation and arbitration. Moreover, the inspectorate must be provided with appropriate powers and resources to ensure it is able to enforce union right of entry.

TRIBUNALS AND COURTS

116. Breaches of general duties should remain criminal offences. However the AMWU supports a conciliation and arbitration Tribunal to assist in the resolution of workplace health and safety issues. The Tribunal should be made up of persons knowledgeable in health and safety matters in each jurisdiction (e.g. Western Australia OSHA amend. 2006 Part VIB s.51f-k).

117. The Tribunal is to assist the parties to reach agreement. If the dispute cannot be resolved the Tribunal may determine the issue. It should be a cost free jurisdiction. The Tribunal must have the ability to hear grouped/industry wide claims and make industry wide rulings. The Tribunal must also have the capability of hearing bullying claims, one of the fastest the growing hazards in Australian workplaces.

118. Unions must have standing before Tribunal and must be able to lodge claims.

119. Appeals against Inspectors decisions should be heard by the Tribunal.

Regulator Functions, Powers & Accountability:

REGULATOR FUNCTIONS

120. The AMWU supports regulator functions remaining within each Jurisdiction and increasing resources to enable proactive enforcement of the model OHS laws and cooperation between regulators.
121. Any promotion of good health and safety must include mechanisms to improve occupational health outcomes separate to safety. Occupational health that does not receive the same attention from the community, government or regulators as industrial safety performance and it is as an integral part of the ILOs Decent Work agenda. Advice from occupational health experts would be of assistance in addressing this recurrent lapse in addressing occupational health.
122. Currently Australian OHS regulators measure their performance using workers compensation data. The shortcomings of insurance data (workers compensation claims) as a reliable and accurate measure of health and safety performance are as well known as they are ignored.
123. Regulators persist in comparing their performance using this data, base the bulk of their projects on such data and have generally ignored or perverted attempts of redress e.g. the National OHS strategy. The ABS has conducted the second self reported work-related injuries survey in 2005-6.³³ Both the 2000 and 2005/6 data indicate that workers compensation is a poor measure of self reported work related illness and injury, yet the jurisdictions measure their performance for the National Strategy by insurance data. In fact, jurisdictions heavily promote lower workers compensation claims in their interactions with the social partners and business plans e.g. “11 in 07”, 11 standard claims per 100,000 employees as a performance targets in 2007.

INSPECTORS

124. The AMWU supports inspectors having a full range of powers from issuing notices through to investigating and prosecuting breaches of the Act and being well resourced to use these powers.
125. The inspectorate should reflect the diversity of the workforce and have direct industry experience.
126. The focus of an inspector’s duties must be enforcement of the Act and Regulations.

³³ ABS 6324.0 Work related Injuries Australia, 2005-06 and Sept 2000

127. The inspector should inform the relevant HSR that they are entering the place of work and be subject to and respect the consultative structures. The HSR should be entitled to accompany an inspector during an inspection/investigation.

128. An Inspector must immediately issue written reasons if overriding an HSR on an OHS matter.

129. Examples in existing law:

- Vic OHSA 2004 – s.102-103 – entry to workplace
- NSW OHSA 2000 – s.50-75 - powers
- NSW OHSA 2000 – s. 89-95 - notices
- Vic OHSA 2004 – s.63-66 – attendance after an improvement notice and inspectors notices
- SA OHSWA 1986 – s.37(1) – requirement to act within a certain timeframe on HSR cease work order

Compliance, Enforcement and Prosecution:

COMPLIANCE

130. The Model OHS Law must include the ability for the regulator to provide resources and assistance, through services, educational material and advice etc, to *all those involved* in work. This must be independent from and not compromise the role of the Inspectorate in the enforcement of the OHS law.
131. Regulators in Australia have not used multiple mechanisms dissemination of information on duties, rights and risks encompassed by OHS law. The model OHS law must provide obligations and scope on the regulators to act beyond the limitations of workers compensation data which currently informs and is consistently used by regulators in their benchmarking and reporting of health and safety performance.

PROSECUTIONS

132. The AMWU strongly believes it is imperative that the principal offences under occupational health and safety legislation be criminal in character. The criminal sanctions currently available for offences under occupational health and safety legislation in all Australian jurisdictions are essential in ensuring that occupational health and safety is treated as the serious social and economic concern that it is.
133. The history of the regulation of occupational health and safety in Australia and around the world has been one of a continuous and ongoing struggle, substantially taken up by trade unions, to convince regulatory authorities and the courts of the seriousness with which the issue of health and safety in the workplace must be taken. Despite the horrific consequences of breaches of occupational health and safety legislation, such offences were frequently treated as quasi-criminal and of lesser seriousness than other criminal offences.
134. Any consideration of a change from the current approach of considering offences under health and safety legislation as criminal in nature would have the effect of trivialising the issue of health and safety in the workplace and constitute a most retrograde step. Such an approach would fail to express the community's moral condemnation of lapses in safety standards that place workers and their families at risk. The community would not accept any dilution of the seriousness with which occupational health and safety offences are treated.

135. For example, the United Kingdom Health and Safety Executive concluded in a recent report surveying international approaches to occupational health and safety regulation that:³⁴

Although administrative penalties may appear to be a low-cost and expedient alternative to criminal penalties, their role in creating a climate of compliance is probably not comparable to prosecution ... It is ... not surprising that differences in the form and effect of prosecution and administrative enforcement action have a significant effect on their relative capacity to produce compliance with the law. Society signifies seriousness of social harm through the criminal law. There is a greater loss of social standing and prestige associated with a criminal indictment and, all things being equal, criminal prosecution is a generally more newsworthy process. The effect is that criminal prosecution performs a far more powerful role in reinforcing social norms as is achieved with administrative enforcement action (which is a far less powerful medium of social signification).

136. The criminal nature of offences under occupational health and safety legislation, applying to employers and directors/managers of corporate employers serve a most important deterrent and symbolic function. The stigma of a criminal conviction serves as a crucial incentive, in addition to the quantum of the monetary penalties that may be imposed, for employers and persons involved in the management of corporate employers to become proactively involved in health and safety management and address risks to health and safety arising in their operations.
137. A prosecution for a breach of OHS laws should not be subject to a statute of limitations.
138. The AMWU considers that prosecutions for offences under occupational health and safety legislation should be heard in specialist courts having expertise and experience in dealing with occupational health and safety and industrial regulation generally. Accordingly, the prosecution of offences should be heard in industrial courts or by industrial magistrates where such jurisdictions exist.
139. Specialist industrial courts have the necessary expertise and experience in dealing with workplace disputes and have the perspective which permits focus upon systemic failings in a workplace or across industry generally. Conferral of jurisdiction on specialist industrial courts is likely to improve the consistency of approaches to the duties imposed by occupational health and safety legislation and consistency in sentencing outcomes. The AMWU recommends, in jurisdictions where there are no specialist industrial courts, that a specialist court be established with appropriately skilled and knowledgeable judges.

³⁴ UK Health and Safety Executive, *International Comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences* (2007) at p51.

UNION RIGHT TO PROSECUTE

140. The AMWU believes that an essential aspect of effective systems for the prosecution of offences (whether criminal or civil proceedings) under occupational health and safety legislation is trade unions - having a legitimate interest in the circumstances of an offence - be permitted to prosecute. It is critical that the entitlement to prosecute extend beyond regulatory authorities.
141. The right of trade unions to prosecute offences under occupational health and safety legislation serves important functions:
142. The independent right to prosecute optimises the efficient use of resources by permitting trade unions - having extensive experience in a particular industry or workplace - to deploy resources in a manner calculated to bring about organisational and cultural change and healthier and safer workplaces.
143. The independent right to prosecute can assist in addressing circumstances in which resource constraints experienced in a number of jurisdictions inhibit the capacity of regulators to effectively prosecute difficult cases.
144. The independent right of a third party to prosecute allows the prosecution of offences that regulators are reluctant to prosecute for reasons other than the prospects of achieving a conviction, such as cases giving rise to political sensitivities or in which there is the appearance or actuality of a conflict of interest on the part of the regulator.
145. The independent right to prosecute further encourages trade unions to be actively involved in occupational health and safety management and has the potential to encourage employers to actively involve trade unions in the management of occupational health and safety concerns.

146. New South Wales is, at present, the only jurisdiction that makes provision for trade unions to commence prosecutions from breaches of occupational health and safety legislation. Section 106(1) of the *Occupational Health and Safety Act 2000* (NSW) permits proceedings for an offence under the Act to be instituted by any person with the written consent of a Minister of the Crown or a prescribed officer, by an inspector, or by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the prosecution relates.³⁵
147. The NSW legislation strikes an appropriate balance between the interests of the promotion of workplace safety, the encouragement of participation in occupational health and safety management in the workplace and appropriate protection of defendants. A trade union may only institute proceedings if a member or members of the union were concerned in the circumstances to which the prosecution relates. The legislation does not permit unions to act as mere busybodies in commencing proceedings in which they or their members have no proper concern.
148. The experience in New South Wales has been that the capacity of unions to commence prosecutions under occupational health and safety legislation has worked well and has enabled prosecutions to occur in circumstances in which regulators have been unable or unwilling to prosecute. In particular, trade unions have been able to assist in bringing forward cases that promote healthier and safer workplaces and aid the development of the law relating to occupational health and safety to recognise emerging areas of concern such as psychological injuries, repetitive strain injuries and the commission of criminal acts in the workplace.
149. 'The AMWU NSW Branch has initiated one prosecution being:

Paul Bastian V James Hardie Australia Pty Ltd 2006 NSWID201

James Hardie was prosecuted under section 8 of the Occupational Health and Safety Act 2000. It was found the company had contravened the Act in its failure to ensure a system of work used by employees when removing blockages from plant used to recycle cement sludge were safe and without risk to health and safety.

³⁵ Some other jurisdictions permit prosecutions to be brought by third parties where consent is given by a Minister or other designated officer: *Workplace Health and Safety Act 1995* (Qld), section 164(5); *Occupational Safety and Health Act 1984* (WA), section 52(1). The *Occupational Health, Safety and Welfare Act 1986* (SA) permits an employee suffering an injury as a result of a contravention to bring proceedings if the Minister, the Director of Public Prosecutions or an inspector has not commenced proceedings within 1 year of the alleged offence (section 58(7)).

“As a result of regular blockages workers had been exposed to cement sludge at temperatures above 100° c when as part of their job they were required to disassemble the plant to remove the blockage. The employer was aware of the risks as it was uncovered during the unions’ investigation that 5 workers had sustained injuries from carrying out similar tasks previously.

WorkCover NSW investigated an incident that involved the unblocking of cement sludge from plant that occurred to an AMWU member in February 2005 which resulted in the worker been hospitalised for a considerable period of time and unable to return to work in any capacity for many months. The worker was never able to fully return to his duties and as a result left the company some months later. WorkCover NSW concluded that the worker who was a fitter/ machinist by trade should have known better and as part of their conclusions made the assumption that the worker would have been trained regarding aspects of the plant as part of his apprenticeship. This effectively would establish a precedent that tradespeople were exempt from the States OHS legislation as effectively their apprenticeship would have covered all aspects of their work (regardless of where the apprenticeship was done) and effectively an employer could delegate their duties in relation to tradespersons undermining the legislation. It was upon this basis of the legislation been undermined by the regulator and allowing this poor precedent that the union decided to commence it own prosecution.

The company’s attitude to health and safety was one of control, with all safety decisions made by management and decisions conveyed to the shop floor through the OHS Committee. Many of the issues raised by committee members were reported never to have been minuted. Consultation with workers was all but non-existent with workers kept in the dark about safety issues and simply handed edicts. The relationship with the union was cool at best, with the company believing that anything the union did was part of a hidden agenda. As a result of this, issues raised by the union were not dealt with the priority they deserved and workers were unnecessarily exposed to hazards in the workplace.

Some months following the conclusion of this successful prosecution the AMWU’s NSW OHS Officer was asked to attend the James Hardie Rosehill site (November 2006) in relation to asbestos contamination concerns. Whilst the relationship had not warmed and the reception of the investigation hostile by local management, a result of the investigation and a report provided by the Officer was that senior management decided to close the site for approximately 2 weeks whilst industrial hygienists were engaged to provide a comprehensive report and recommended actions for the company.

During this period the union was invited to participate in meetings with the hygienists and the company in formulating a way forward. James Hardie also conducted briefing sessions with their employees in regard to the asbestos contamination and kept them informed.

Whilst the reception by local management never really improved it is clear that the effect of a prosecution via the union had a meaningful impact on senior management and possibly some directors, who recognised the role the union had to play with health and safety. As a result of this recognition workers were removed from a potential hazard that existed on the site and unprecedented measures taken by the company". David Henry AMWU NSW OHS Officer

150. There is absolutely no evidence to suggest that the capacity of trade unions to bring prosecutions in NSW has been abused in any way. Trade unions have been able to prosecute breaches of occupational health and safety legislation in New South Wales since the 1940s. The number of union initiated prosecutions has been reasonably small and limited to circumstances in which the regulatory authority has declined to prosecute and the union involved felt strongly that important questions of principle were involved.

151. Prosecutions under occupational health and safety legislation are frequently difficult to prepare and expensive to conduct. It is inherently unlikely that trade unions or other third parties able to bring prosecutions would commence or maintain proceedings lacking in merit. Prosecutions commenced by unions under the NSW legislation over the last 10 or 15 years have without exception been successful.

152. The Union role in prosecuting is to represent an 'affected party' and particularly where the regulator doesn't initiate a prosecution. This independent right to prosecute allows a union with experience of an industry and its standards to bring about organisational and cultural change in that industry.

153. The experience in NSW is that unions have used this right judicially which has led to industry wide improvements particularly where the regulator was unwilling to tackle systemic OHS issues.

WHO CAN BE PROSECUTED?

154. The complete supply chain involved in any incident should be open to prosecution including employers, manufacturers, suppliers, component suppliers, labour hire providers, designers of; plant, substances, workplaces - and up through the supply chain including purchasers, hirers and procurement. Duties should apply concurrently and overlap and multiple prosecutions should be able to be initiated against different duty holders.

BURDEN OF PROOF

155. The AMWU strongly believes that in any national OHS laws the burden of proof in relation to defences must reside with the defendant to ensure the health, safety and welfare of all workers and others affected by the employer's undertakings. (e.g. NSW OHS Act section 8 and section 28). Any other approach would significantly compromise the prospects of the effective enforcement of the general duties imposed by occupational health and safety legislation and inhibit the achievement of the objectives of that legislation.
156. Under the NSW OHS Act, the duties imposed upon employers and others are absolute and require, for example, employers to ensure the health, safety and welfare at work of all the employees of the employer.³⁶ The Act provides, however, a defence if the defendant is able to prove it was not reasonably practicable for the person to comply with the provision or the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.³⁷
157. The onus of proof on the employer has a long history in the UK *Health and Safety at Work Act* and has been operating well there for more than thirty years.³⁸
158. In NSW, the prosecutor (regulator/union) has to show "beyond reasonable doubt" (a criminal onus) that there was a breach of the Act (that is: harm was caused at work) but the defence (the employer) has the capacity to prove on the "balance of probability" (a civil onus) that they took reasonably practicable steps or that the relevant actions weren't within their control.
159. The absolute duty onus has enabled NSW duty holders in some instances to defeat prosecutions (see, for example, *Workcover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182; and *WorkCover Authority of New South Wales (Inspector Belley) v Australian Inland Energy Water Infrastructure t/as Inland Energy and Water* [2003] NSWIRComm 408³⁹ because they were only required to prove, on the balance of probabilities, that they took reasonably practicable steps to prevent the breach.

³⁶ *Occupational Health and Safety Act 2000* (NSW), section 8(1).

³⁷ *Occupational Health and Safety Act 2000* (NSW), section 28.

³⁸ Prof. Ron McCallum AO, Submission to the Inquiry into New South Wales Occupational Health and Safety Legislation, 14 December 2006

³⁹ Prof. Ron McCallum AO, Submission to the Inquiry into New South Wales Occupational Health and Safety Legislation, 14 December 2006

160. Neil Foster, a lecturer in OHS law at Newcastle University, cites a number of legislative situations where the so-called “reverse onus” applies. He cites ⁴⁰ a number of provisions involving important public safety considerations in the areas of motor traffic, drug trafficking, the environment, public health and workplace safety that have for many years included a reversal of the burden of proof. Such provisions, where offences are defined so as not to require proof of a “guilty mind” (*mens rea*) have been upheld by the High Court of Australia,⁴¹ and specifically held not to be in breach of human rights obligations by the English Court of Appeal.⁴²
161. Absolute duties should not to be limited by the phrase in the legislation ‘so far as reasonably practicable’. This appropriately remains as a defense for an employer in court.

LIABILITY OF OFFICERS AND MANAGERS

162. Responsibility for the management of health and safety of persons in the workplace falls principally on corporate employers, designers, suppliers or manufacturers or corporations in control of premises. A critical component of an effective regime for the enforcement of the duties imposed by OHS legislation is that those natural persons in control of the operations of a corporation must be made subject to offences committed by that corporation. This promotes vigilance and proactive responses to OHS. Personal liability on the part of managers and officers should extend to all persons having responsibility for the overall management of an organisation. e.g. NSW OHSA 2000 s26

INDUSTRIAL MANSLAUGHTER

163. The AMWU supports the criminal offence of industrial manslaughter or equivalent as the appropriate charge where negligent behavior of Directors and Corporate Officers that led to the death (or serious injury or illness) of a worker or other persons in relation to work. Directors and Corporate Officers found guilty of Industrial Manslaughter should receive the harshest penalties, including imprisonment equivalent to the maximum sentence handed down, for example, for negligent/reckless driving causing death or injury. The AMWU supports the adoption of the existing law in the ACT, the Crimes (Industrial Manslaughter) Amendment Act 2003

⁴⁰ Neil Foster, IPA Seminar, 16 May 2007

⁴¹ *He Kaw The v The Queen* (1985) 157 CLR 523; 60 ALR 449.

⁴² *Davies v Health & Safety Executive* [200] EWCA Crim 2949, rejecting the proposition that the reversal of onus provision in UK safety law was in breach of Art 6(2) of the European Convention on Human Rights.

SENTENCING OPTIONS

164. Given the potentially grave consequences of breaches of OHS law in terms of loss of life and injury and illness, the highest sanctions for breaches of any corporation related law should be available under the model OHS laws. Breaches of corporate governance laws, the Trades Practices Act and environmental laws attract currently higher penalties than any of the current OHS laws.
165. The AMWU considers that monetary penalties should be imposed on all offences under occupational health and safety legislation. Given the grave consequences which can flow from contraventions of occupational health and safety legislation, the AMWU firmly believes that the highest sanctions for breaches of any corporation related law should be available under the model occupational health and safety legislation and that in an appropriate case a pecuniary penalty calculated as a proportion of a corporation's turnover be able to be imposed.
166. The maximum penalties for breaches of occupational health and safety legislation vary from \$180,000 to almost \$1,000,000 (or up to \$1,650,000 for causing death) and between \$10,000 and \$250,000 for an individual. Currently, in all jurisdictions, breaches of corporate governance laws, the trade practice legislation and environmental protection laws (among others) attract higher penalties than any of the current occupational health and safety laws.
167. For example, offences under the *Trade Practices Act* 1974 (Cth) involving false and misleading representations in connection with the supply of goods or services, bait advertising, pyramid selling and failure to comply with product safety standards attract penalties of up to \$1.1 million.⁴³ Contravention of restrictive trade practices and price fixing provisions can result in the imposition of pecuniary penalties of up to \$10 million, the value of the benefit attributable to the breach or 10% of turnover (whichever is greatest).⁴⁴
168. Undertaking development without consent may attract a maximum penalty of \$1.1 million.⁴⁵ Offences of dumping industrial waste without authorisation attract maximum penalties of up to \$550,000 plus daily penalties of up to \$275,000 per day for continuing offences.⁴⁶ Offences of handling food in an unsafe manner, selling unsafe food and falsely describing food attract maximum penalties of \$550,000 for a corporation and \$110,000 for an individual.⁴⁷

⁴³ *Trade Practices Act* 1974 (Cth), Part VC.

⁴⁴ *Trade Practices Act* 1974 (Cth), sections 45A-45C.

⁴⁵ See *Environmental Planning and Assessment Act* 1979 (NSW), section 126.

⁴⁶ See *Environment Protection Act* 1970 (Vic), section 27A.

⁴⁷ See *Food Act* 2003 (NSW), sections 13-15. Similar penalties are imposed in the *Food Act* 1984 (Vic), sections 8-10A.

169. Offences under trade practices, environmental protection and corporations legislation are properly regarded as serious. However, offences under occupational health and safety legislation are more serious resulting as they do in the deaths of thousands of workers each year. Penalties at least of the magnitude available under the other legislation discussed must be available under occupational health and safety legislation.
170. Studies concerning the level of penalties imposed under occupational health and safety legislation have consistently demonstrated that the level of fines imposed by courts is very low. For example, in 2002/2003 the average fine imposed in Victoria was 7.18% of the statutory maximum.⁴⁸ In New South Wales, 23% of defendants were fined less than 5% of the maximum penalty, 48% were fined less than 10% of the maximum penalty, 75% were fined less than 20% of the maximum penalty and only 9% attracted a penalty of 50% or more of the maximum penalty.⁴⁹
171. An increase in the maximum penalties cannot in itself remedy the low level of fines that have historically been imposed for offences under occupational health and safety legislation. However, courts will probably have regard to the maximum penalty as the “public expression” by Parliament as to the seriousness of the offence and, in particular, will take into account the actions of Parliament in increasing the level of maximum penalties for a particular class of offences. Robust guidance should be provided to courts by government as to the sentencing range expected.
172. As monetary penalties are likely to remain the principal sanction for offences under occupational health and safety legislation, it is essential the model occupational health and safety legislation contain effective monetary sanctions. Substantial monetary penalties are likely to have a general deterrent effect. However, the specific deterrence achieved for a particular defendant will depend upon the financial resources it has to meet any fine imposed.
173. Monetary penalties inherently have difficulty in deterring the conduct of large, wealthy corporations that are able to easily absorb any fines imposed. For example, in *DPP v Esso Australia Pty Limited* [2001] VSC 263, Esso was fined \$2 million. Although this was then the largest fine to be imposed in Australia for a workplace offence, media reports indicated that the company’s Bass Strait operations generated the same income each day.⁵⁰

⁴⁸ Maxwell, *Occupational Health and Safety Act Review*, March 2004 at para 1799.

⁴⁹ UK Health and Safety Executive, *International Comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences* (2007) at p368-369.

⁵⁰ UK Health and Safety Executive, *International Comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences* (2007) at p126.

174. Ensuring appropriate standards of health and safety for workers can be difficult and expensive. The approach of prescribing flat maximum penalties may cause some employers to form the view that it is more expedient to simply take their chances of being fined rather than implement appropriate safety measures.
175. In order to provide a credible deterrent, the model occupational health and safety legislation should include provision for the imposition of pecuniary penalties calculated as a percentage of the turnover or profits of a corporation. A model for such provisions is to be found in the *Trade Practices Act 1974* (Cth) permitting the imposition of penalties up to three times the value of the benefit attributable to the breach or 10% of turnover if greater than the fixed maximum penalty that would otherwise apply.⁵¹
176. It is considered that an increased maximum penalty should apply in the event that a defendant has prior convictions under occupational health and safety legislation. Such provisions exist in New South Wales and Victoria. The courts must have the capacity to impose increased penalties in the event that recalcitrant offenders repeatedly contravene the legislation.

APPROACH TO SENTENCING

177. The principles to be applied in sentencing of occupational health and safety offences are well established in most jurisdictions. It is not necessary for the model occupational health and safety legislation itself to dictate the approach to be adopted in relation to sentencing. However, the legislation should include provision for the making of guideline judgments setting guidelines to be taken into account when sentencing persons for offences.⁵² Guideline judgments provide an effective mechanism for addressing the failure of the courts to impose appropriate sentences for particular offences.⁵³
178. Subject to what has been said above in relation to offences causing death or serious injury or illness, the focus of sentencing should be upon the objective seriousness of the offence. The objective seriousness of the offence involves consideration of the degree of culpability of the defendant in permitting a risk to health and safety to arise in the workplace. The seriousness of an offence is not equated with “recklessness” as is suggested in the Issues Paper.

⁵¹ *Trade Practices Act 1974* (Cth), section 76(1A).

⁵² See, for example, *Occupational Health and Safety Act 2000* (NSW), section 124-131.

⁵³ See, for example, *R v Jurisic* (1998) 45 NSWLR 209 (concerning dangerous driving causing death or serious injury); *R v Henry* (1999) 46 NSWLR 346 (concerning armed robbery); *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 56 NSWLR 146 (concerning high range PCA).

179. In addition, the following should also be included as sentencing options for these types of matters:

- a) enforced donation orders;
- b) victim surcharge (compensation) orders;
- c) orders for the confiscation of offence related profits;
- d) organisational reform orders;
- e) community service orders;
- f) publicity orders;
- g) orders for reparation, restitution and restoration;
- h) corporate probation orders;
- i) revocation orders;
- j) disqualification orders;
- k) prohibition orders;
- l) training orders;

180. In addition to monetary fines there should be

- a) good behaviour bonds;
- b) judicial supervision;
- c) dissolution orders (the liquidations of an offending organisation or part of the organisation);
- d) tender disqualification;
- e) share prohibition.

181. The Sheriff's Office in each jurisdiction should be charged with the responsibility of collecting penalties to ensure companies do not avoid payment. The Australian Securities and Investments Commissions (ASIC) prosecute corporations or directors who evade payment through company closures.

ENFORCEMENT

182. The model OHS law must be easy to enforce. The law must include a hierarchy of enforcement approaches that provide a broad range of options, not limiting the regulator's flexibility to seek sanctions.

ENFORCEABLE UNDERTAKINGS

183. The AMWU does not support enforceable undertakings as an alternative to prosecutions. The use of enforceable undertakings must not limit the right to pursue a prosecution. Enforceable undertaking can only be considered where the defendant admits guilt.

ENFORCEMENT OF PENALTIES

184. The AMWU considers that monetary penalties imposed for offences under occupational health and safety legislation should in the first instance be enforced in the same manner as fines imposed upon the general criminal law. For example, in New South Wales, fines imposed upon the *Occupational Health and Safety Act 2000 (NSW)* are enforced by the State Debt Recovery Office under the *Fines Act 1996 (NSW)*.
185. The AMWU is gravely concerned by evidence that a significant number of fines imposed for offences under occupational health and safety legislation remain unpaid.⁵⁴ This often occurs as a result of a corporation becoming insolvent and there are certainly instances in which companies have rearranged their affairs in order to avoid fine payment and continue operating through other corporate entities.
186. It is appropriate that model occupational health and safety legislation include specific provision permitting prosecutors to re-open proceedings in the event that fines are not paid and seek alternative orders including publicity orders, orders against directors, managers or shareholders or orders against new corporate entities who are successors, assignees or transmitters of the business of the insolvent company.
187. The Sheriff's Office in each jurisdiction should be charged with the responsibility of collecting penalties to ensure companies do not avoid payment.
188. The Australian Securities and Investments Commissions (ASIC) should be empowered to investigate corporations or directors who evade payment through company closures.

⁵⁴ Reports in NSW have indicated that, in 2006, there were 89 unpaid fines for serious workplace safety breaches totalling almost \$5 million and that 34 of the companies were unlikely to ever pay because they had become insolvent: "Plan to Shame Defaulting Firms", *Sydney Morning Herald*, 25 April 2006, p10.

Other Issues:

REGULATION MAKING POWERS

189. The AMWU opposes dropping items from the Act (the principle statutory instrument) down the legislative hierarchy to the Regulations, Code and Guidance Material.
190. The ASCC prior to the establishment of this review began the process of coordinating the development and harmonisation of Regulations. The ASCC tasked the ASCC OHS tripartite working group with the role but terms of reference for the group had not been developed.

NOTIFICATION OF INCIDENTS AND REPORTING

191. The AMWU seeks substantial improvements in the type of data collected; and the broadening and improving of the data sources. This data should include exposure data gathered by employers in relation to hazardous exposures in the workplace.
192. Exposure by occupation is particularly important, as is an active, well-resourced register for mesothelioma and other occupational disease. Further the AMWU supports harmonising data reporting across the jurisdictions and for data to be provided in a timely fashion.
193. The legislation should impose a duty on employers and other duty holders in effective control or management of workplaces in relation to the reporting and notification of incidents to the regulator. Such a provision must contain prohibitions on disturbance of the scene of a notifiable incident, as well as an obligation to allow an HSR to be directly notified of all incidents in a timely manner and to be involved in all aspects of any investigations
194. The AMWU supports the incorporation of the Medicare system, Coroners Court and ABS Surveys into the collection system for work related injuries and diseases to ensure that all workers have their data collected. This should also allow proper identification and evaluation ting of work related injuries and disease.

TRIPARTITE MECHANISMS

195. The AMWU defines tripartite to mean equal representation of unions, employers and regulators. This is consistent with principles outlined in ILO Convention 155.
196. In addition to the tripartite national body to replace the Australian Safety and Compensation Council, each jurisdiction should have an independent statutory tripartite commission to oversee the

implementation of the harmonised scheme and report to the relevant Minister. The WA Commission (Western Australia OSHA amend. 2006 Tripartite Commission s.6, 9, 14) provides a good basis for this, with some modifications as outlined in Chapter 5 Tribunals and Courts.

197. The functions could be determined by the body and should include but not limited to:

- a) Assisting in the implementation of any National OHS Strategy
- b) Inquiring into and report to the Minister upon any matters including those referred to it by the Minister;
- c) Making recommendations to the Minister with respect to:
 - 1. the model OHS Act;
 - 2. any law or provision of a law, relating to occupational safety and health that is administered by the Minister and any law or provision of a law relating to occupational safety and health that is prescribed for the purposes of this paragraph; and
 - 3. subsidiary legislation, guidelines and codes of practice proposed to be made under or for the purposes of any prescribed law;
- d) Examining, reviewing and making recommendations to the Minister in relation to the administration of existing and proposed registration or licensing schemes relating to occupational safety and health;
- e) Providing advice to Government departments, public authorities, trade unions, employer organisations and other interested persons in relation to occupational safety and health;
- f) Formulating or recommend standards to the national tripartite body;
- g) Promoting education and training in occupational safety and health as widely as possible;
- h) Co-operating with educational authorities or bodies to advise on courses in relation to occupational safety and health;
- i) Having regard to the criteria laid down by the replacement body for the Australian Safety and Compensation Commission, to advise persons on training in occupational safety and health and accredit training courses in occupational safety and health;
- j) Recommending the conduct of public enquiries into any matter relating to occupational safety and health;
- k) Collecting, publishing and disseminating information on occupational safety and health;
- l) Formulating reporting procedures and monitoring arrangements for identification of workplace hazards, and incidents in which injury or death is likely to occur in an occupational situation; and
- m) Commissioning and sponsor research into occupational safety and health.

Annex 1

Summary Matrix - AMWU OHS Model Law clauses Preferred examples and Rationale

Provision ILO Convention i.e. wide governing principle	Brief Rationale	Preferred Example
<p>GOVERNANCE Model for tripartism</p> <p>Convention # 155 Art 4(1) and (7) Enshrines employer and workers orgs in the development of OHS policy</p> <p>Convention 187 Promotional Framework for Occupational Safety and Health Convention, 2006</p>	<p>The principles outlined in ILO Convention 155 refer to the participation of employer and worker organisations in the <i>“formulation of its national policy,and in consultation with the most representative organizations of employers and workers, shall promote basic principles such as assessing occupational risks or hazards”</i>.</p> <p>The provisions in WA are the preferred example as it establishes an H&S Commission with representatives from the social partners, outside experts and for the appointment of a Commissioner.</p> <p>The functions of the WA commission are broad ranging and ensure active participation of the social partners in the making and delivery of ohs law (regulations, codes, guidelines etc).</p> <p>Any tripartite body must have the ability to conduct an inquiry; this is of particular importance in the investigation of new or emerging hazards or events that require investigation that the regulator has failed to address eg fatigue, nanotechnology, precarious employment and its impact on behaviour of the regulator.</p> <p>In many other jurisdictions the role of advisory bodies are circumscribed, advisory only or answerable to a Board. These later arrangements are not in line with the principles of the ILO Convention.</p> <p>Currently health and safety regulators monitor their performance by the use of workers compensation statistics, i.e. insurance data. For most diseases, this is inadequate.</p>	<p>WA OSHA 2006 s6: Formation of Commission s9: Appointment of Commissioner s14: Functions of the Commission</p> <p>A Tripartite Commission which reports to the Minister.</p>

<p>Separation from workers compensation</p>	<p>Explanation and discussion of this can be in numerous Australia research publications e.g. asthma, occupational cancer, mental health, occupational dermatitis.</p> <p>The Model law needs to be constructed such that health and safety regulators are required to measure health and safety performance comprehensively and are not solely reliant on insurance data. Such a population health approach requires that data collection is a prime responsibility of a national system which uses a multitude of data sources eg ABS, coronial reports, population health surveys etc.</p>	<p>Health and Safety regulator independent of the workers compensation agency.</p>
<p>Coverage Consistent with Robens Report the reach of legislation to be broad and cover all those who work</p>	<p>Definition of workers embracing all persons performing work regardless of “employment relationship” and regardless of industry/sector etc</p> <p>Given the labour market, the Model Act must cover all workers including the precariously employed, the multitude of contractor arrangements including obligations on the self employed not to endanger others and themselves.</p>	<p>Vic OHSA 2004 s.5 and sections 21 including 21(3), s23 and s24.</p>
<p>Shield of the Crown</p>	<p>Coverage needs to extend to the Crown</p> <p>(if the NSW model is not adopted then Vic OHS 2004 s6 is preferable to Qld as Victoria, makes it clear that the Crown is to be regarded as a corporation)</p>	<p>NSW OHSA 2000 s 118</p>
<p>Objects and principles</p>	<p>Objects broad, including roles for employer and worker organisations</p> <p>OHS principals which are used as a bench mark when interpreting the Act.</p> <p>Provides for consultation between employers and workers (NSW OHSA 2000 s 3.d.)</p>	<p>NSW OHSA 2000 s3. with addition of</p> <p>Vic OHSA 2004 s.4 health and safety principles include welfare in title as in SA</p>

Scope, Application & Definitions:

<p>Scope ILO Convention #155 Art 1 and 4(2)</p>	<p>Inclusion of all industry and work scenarios i.e. all workers, mines, quarries, major hazard facilities, high risk work, off shore etc.</p> <p>There seems to be no justification for workers/employers in different industries to be covered by different laws.</p> <p>The Model laws should apply to ALL work.</p> <p>Administrative arrangements and specific regulations for particular working arrangements and high risks e.g. mining, off shore etc.</p> <p>All health and safety i.e. physical and psychological</p>	<p>Vic OHS 2004 s2 Vic OHS 2004 s5. For definition of employee, work, definition of health or NSW OHS 2000 s3 which encompasses the adaptation of work to worker NSW OHS 2000 s.3(c) that is adapted to their physiological and psychological needs</p>
--	---	---

Duties of Care – Who owes them and to whom?:

<p>EMPLOYERS</p> <p>General Duties: Concept of ensuring health and safety #155 Broad duties Art. 16 and note the 1995 Industry Commission supported Qld approach which is based on the NSW approach</p>	<p>General duties to be broad, applicable in a modern labour market without decreasing the protection afforded to ALL types of employment categories, noting the fragmentation of the labour market. Currently ALL jurisdictions have absolute duties. The debate is rather over where the onus of proof lies during the prosecution phase.</p> <p>The UK Act and NSW OHS 2000 place the onus on the defendant to prove that the measures were not reasonably practicable. This model is supported. For detailed argument, including case studies, please refer to published work by Neil Foster, Newcastle University.</p> <p>Additionally, to enhance and provide clarity, the hierarchy of control to be needs to be included in the legislation, noting that this supplements and reinforces the principles of health and safety. Employers' duties are generally consistent across jurisdictions. Organisations and individuals (e.g. workers) to have (or have access to) knowledge and capacity commensurate with responsibility and risks</p>	<p>NSW OHS 2000 s.8(1) and s28 grounds for defence including practicability</p> <p>a provision based on Vic OHS 2004 s20.</p>
--	---	---

Self Employed	<p>Persons in control</p> <p>Responsibility may be shared between different persons with responsibility, to the extent of their control. Responsibilities overlap such that each party with responsibility must comply regardless of other's compliance.</p> <p>The broader Vic provisions have not been difficult for the courts to interpret and allow for a wide variety of relationships, which otherwise can be restricted by more prescriptive or detailed provisions.</p>	<p>Vic OHSWA 2004 s24 which could be supplemented by Qld provisions of s28(3)</p> <p>with deletion of the words "so far as is reasonably practicable" as the NSW approach is recommended</p>
Non workers	<p>The provisions imposes a hierarchy of non-delegable, overlapping and complementary responsibilities on the different levels of contracts and subcontractors and cover all types of workers and the public</p> <p>H&S must not to be jeopardised by the conduct of undertaking, noting that broad duties allow flexibility to cover franchises etc.</p> <p>(NSW OHSWA 2000 s8(2) is of no use as it limits the duty to <i>place of work</i>)</p>	<p>Qld WHSA s 28</p>
Specific employer duties	<p>Specific Employer Duties which require employers to monitor health, conditions of workplace and safeguard access and egress to the work site.</p> <p>SA OHSWA is preferred as it includes provisions for those whose first language is not English.</p>	<p>SA OHSWA s 19 (excluding (d) as this refers to hazardous work which is a definition under the SA law)</p> <p>and</p> <p>Vic OHSWA 2004 s26</p>

Persons in control are responsible	Liability of officers of company: To provide certainty that an individual manager may also be liable to an offence as the corporate employer: noting that corporations law shields individuals from liability in many cases	Vic OHSA 2004 s.143-145 as a back up if NSW approach not adopted
Defences	To be consistent with the lack of a limitation “ <i>so far as reasonably practicable</i> ”, employers must be able to defend themselves against charges. There are a number of erudite legal explanations of the NSW OHSA 2000 approach eg Neil Foster, Richard Johnstone, Andrew Hopkins	NSW OHSA 2000 s28
Occupational health and safety services ILO C161 Occupational Health Services Convention, 1985 and R	A significant shortcoming for all Australian jurisdictions is the lack of easily accessible OHS advice and support from professionals and centres of excellence. The Scandinavian approach is preferred. This could also have the longer term effect of workplaces and regulators paying more attention to work related illness. This would be a welcomed reform and contribute to improving overall population health. See brief discussion in general comments.	
Designers, Manufacturers Suppliers Installers etc Designer of Buildings ILO Convention No. 155 Art. 12 Broad duties	Risks are eliminated or controlled in the planning, design/development, manufacture/construction, implementation/ installation, ongoing use/operation etc through to decommissioning/disposal of workplaces, work equipment, materials and systems of work Need to ensure that the provisions do not allow the manufacturer etc to abrogate their duty of care, by the words “use as intended” i.e. the Model law should not to include this qualifier of the duty. Need to link with consultation rights for HSRs for structures etc in the design phase not confined to the end of the process. Need to make sure that obligations apply to, construction and manufacture as well as the end users of the building.	SA OHSWA s 23A, s24 & s24A re upstream duties, as clearer and concise than other examples

Workers ILO Convention No155 Art. 13 Art. 19 (not to return to unsafe work)	Broad Duty of Care to ensure all types of workers are in scope eg managers etc. Vic OHSA 2004 requires workers to take reasonable care without reference to obligation to follow employers instructions which could be erroneous and therefore exposing workers to undue harm eg see example page 107 Johnstone et al 2005	Vic OHSA 2004 s.25 plus s32 , which refers to recklessly endangering others (this is broader than NSW OHSA 2000 s20 and SA HSWA 21 (2))
	Worker rights are covered by employer obligations : provision of information training and supervision	NSW OHSA s8 and Vic OHSA 2004 s22
	Culturally and linguistically Diverse communities Needs to refer to provisions of Language Other Than English Code in Victoria	

Right to cease work ILO Convention 155 Art. 13 Art. 19 (right not to return to unsafe work)	Worker right to cease unsafe work WA s26 includes provisions for workers to refuse unsafe work, however the provision is qualified and not clearly stated. WA s27 and 28 refer to work being entitled to pay and to continue in safe work. This needs to link with right not to be discriminated against for taking action over health and safety risks and is supported by the power of worker representatives to order unsafe work to cease.	Tas WHSA s.17 gives workers the right to refuse unsafe work. Workers are to be paid as if continuing to work, obligation to work in alternative safe work and WA s27/s28
---	--	---

'Reasonably Practicable' & Risk Management:

<p>Risk Management</p>	<p>Enable positive, proactive and systematic preventive effort to establish organisational capacity for continuous improvement in OHSW standards at work (as distinct from ad hoc responses or reactive approaches when something goes wrong).</p> <p>This is reflected in court decisions and should be one of the principles of any OHS Act.</p>	<p>Qld WHSA s. 27A (1) (2)</p>
-------------------------------	--	---

Consultation, Participation and Representation:

<p>Consultation – recent OHS reviews have clarified the nature, structures and circumstances of consultation with workers and HSRs and HS committees.</p>	<p>Any provision needs to cater for ALL employment categories; there is support outside of the workplace for those involved in the consultative processes with a range of choices available especially given the nature of work and work arrangements; rights of workers are supported by internal and external mechanisms that recognise the dependant relationship of workers to their employer.</p> <p>Consultation cannot be dependant upon the employment arrangements or size of an employer. The duties on contractors etc must not be limited to the general duties; consultation, workers representation and support for those representatives from outside work eg regulators and trade unions are essential.</p> <p>Consultation Mechanisms: via HSR and for workers to be represented by HSR.</p> <p>Note there is generally a lack of primacy of HSR for consultation, however SA OHSWA places an onus on employers to consult with HSRs s34/32, but does not have general consultation provisions.</p> <p>Note: individually none of the current Acts are adequate as they were based on the work arrangements of 30 years ago, despite recent reforms.</p>	<p>Note the Model law needs to be constructed in a manner that incorporates all workers and all work in the consultation & representation provisions.</p> <p>NSW OHSA 2000 definitions and broad duties s.13 (modified) s14 &15 with an obligation to consult with HSRs as well as workers.</p> <p>HSRs consultation as per SA HSWA s34 (1)</p> <p>or</p> <p>Vic OHSA 2004 s 35 / 36, with modification of s36 to note that HSR to take primacy in the consultation process.</p>
--	--	---

<p>Worker Representation The participation and right of workers to be represented on H&S matters improves health and safety performance at the workplace</p> <p>eg Nth Ireland research that presence of safety rep improved safety more than the activity of Regulatory Authority inspectorate.</p> <p>Worker right to representation must include provisions that normalises the position of precarious workers, ensures coverage of all those who work at the workplace eg casuals, contractors etc and those from CALD communities.</p> <p>Worker right to representation Right to assistance Right to information Right to training Right to trade union support Representatives to have powers to act in the promotion and protection of health and safety. Employers NOT to be involved in the formation of work groups or selection of worker representatives (likewise HSR not to have a role in determining an employers representative for the purposes of managerial responsibility)</p>	<p>Johnstone et al have explained change is required in the structural arrangements for worker representation. The law needs to allow flexibility in arrangements which include a role for trade unions, when present, to train, elect and have access to support those representatives.</p> <p>Processes for negotiation for processes for election HSR needs to include access to Union if requested by workers. Unions to have the right to enter workplaces for this purpose.</p> <p>Qld allows Trade Union rights and includes s. 61(2) and (3) which mandate that employers CANNOT elect HSRs and that HSRs do not need any qualification to be a HSR.</p> <p>The process of negotiation and clear. It also includes obligations on employers regarding informing new workers re HSRs, and must inform HSR of certain events.</p> <p>(inadequate provisions allow for workers represent them; Vic OHSA 2000 s 41(1) & (2), who is to be included)</p> <p>Note: individually none of the current Acts are adequate as they were based on the work arrangements of 30 years ago, despite recent reforms</p> <p>HSRs need to be exempt from civil liability eg WA OSHA s33(3)</p>	<p>Qld WHSA definition of HSR s 67(2) & (3) & ss 71-80 (includes explicit re role for trade unions)</p> <p>WA OSHA s33(3)</p>
--	---	---

<p>Electoral grouping for HSR. Principle that the workforce decide on the numbers and the groupings of workers for election of HSR</p> <p>ILO Convention 155 All workers and all workers right to representation, irrespective of employment arrangements</p>	<p>This is an Australian invention which creates undue difficulties in temporary and small workplaces and in any arrangement where workers are not permanently employed in a fulltime capacity at a permanent and non changing place of work.</p> <p>Flexibility needs to be introduced eg workers right to decide how they are to be represented, employers and regulators to facilitate such arrangements.</p> <p>Therefore provisions such as roving health and safety representatives/workplace advisors.</p> <p>The SA HSWA provisions are clear and refer to the role of unions however the provisions for the election process from SA HSWA are NOT the best option, as the process is restrictive and bureaucratic.</p>	<p>SA HSAW s. 27 for worker groups and</p> <p>Qld WHSA s.71 (excluding subsections 2 and 3) - 80</p> <p>ACT OHSA 1989 Div 5.1 s 52 – s 56</p>
<p>Election process</p> <p>Right of workers to have their union processes as part of the election process, i.e. how election, who to conduct election preference is given to union structures if they exist, if not up to the workers to decide</p>	<p>Election process The Qld approach outlines a clear role for unions, allows unions to conduct elections and requires the employer to facilitate elections. However the time frames are not at all applicable for work which is not at a permanent site or with permanent employees.</p> <p>Victorian approach is self regulation by the workforce allowing them to determine the mechanism for their representation. The process of electing HSRs: i.e. the mechanism of the election that is not very prescriptive.</p> <p>This is consistent with self regulation and the broad principles of consultation (note other jurisdictions like SA can be quite prescriptive, secret ballots etc)</p>	<p>Qld WHSA preferred option see above</p> <p>(or Vic OHSA 2004 s.54 excluding (5))</p>

Deputy HSRs	<p>Deputy HSRs</p> <p>Representation when the elected HSR is on leave; this is so that the workers have access to representation ALL of the time.</p>	ACT OHSA 1989 s. 66
Multiple employers:	Multiple employers: the ability for HSR to work across employers is a mechanism for labour hire and small employers (WA, VIC and NT Bill). The provisions are relatively new and untested.	NT WHSA s 33
<p>Union role</p> <p>ILO Convention 155</p> <p>Art. 19</p> <p>Unions enquire and consult.</p>	Worker right to representation	<p>SA HSWA s. 27 for role of unions</p> <p>(or with modification Qld, see above)</p>
<p>Health and Safety Representative: Powers</p> <p>Essential line of communication with workers as per Robens and that maybe more useful than Committees as the later require “two to tango” (reference: Shaw Idea Review of NT Act)</p> <p>HSR: primacy within consultation and representation process, as have rights and powers and access to training and outside support, with complementary functions for HS Committees.</p>	<p>Generally SA HSWA and Vic OHSA 2000 are preferred.</p> <p>SA HSWA provision on HSR are ok except reference to outside consultants (which better covered in Vic</p> <p>ACT OHSA 1989 s 59 makes the HSR secondary to HSC for some powers of consultation, so therefore not preferred option</p> <p>Qld WHAS s81 is ok but Vic provisions overall are the most comprehensive and least restrictive.</p> <p>No need for limitation on size of workplace but could have limitation of no more than 1 for worksite less than 10 workers</p>	<p>Vic OHSA 2004 s.58 and</p> <p>SA HSWA s34(2) (i) as this includes obligations on employer to tell HSR about an injury in their DWG.</p>
Powers not limited to work group	Powers not limited to work group, if requested by worker in another work group and/or if there is an immediate risk.	Vic OHSA 2004 s59

<p>Training</p>	<p>HSR: Training and reimbursements need to ensure that HSR have right to do their H&S training from a training provider of their own choice and that all costs are covered. Unions are able to conduct courses that are industry specific without interference from employers.</p> <p>Note: Initial health and safety training is to be for HSRs only. This is essential as the HSRs needs training on both the law and their roles in consultation and representation.</p> <p>Additional training can have the option of delivered jointly to those with roles other than the worker representative role eg hazard specific, health and safety committee functioning or post initial training</p>	<p>Vic OHSA 2004 s.67 & 68</p>
<p>Term of office resignation etc</p>	<p>Term of office resignation etc Qld very clear and without as many qualifications..</p>	<p>Qld: s. 82-85</p>
<p>Right to assistance.</p>	<p>Right to assistance. The Vic OHSA allows HSR to obtain outside assistance from any party <i>with the knowledge to assist.</i></p>	<p>Vic OHSA 2004: s 58(1)(f) and s70</p>
<p>Right to worker representation Which needs to include the right to consult with fellow workers i.e. their constituency</p>	<p>List of representatives to be kept</p> <p>And ability for HSR to consult and discuss matters with their representative group</p>	<p>NT WWSA s 44</p>
<p>Issue Resolution</p>	<p>Resolution of issues: Vic. OHS Regulation 2007 Part 2.2 clearly outlines the mechanisms for reporting, addressing and resolving H&S risks at a workplace i.e. obligations on employer to talk with H&S reps, for workers to report to HSRs.</p> <p>Vic OHSA 2000 includes reference to “agreed procedures” . This continues to create difficulties of interpretation for the regulator and at the workplace eg can the health and safety committee override the wishes or workers etc. These words need to be deleted and the Model Law to include the procedures in the Vic OHS Regulations</p>	<p>Vic OHSA 2004 s.73 with Regulations Part 2.2 2007 with deletion of “agreed procedure” in s73(1)</p>

	2007.	
Provisional Improvement Notice	<p>Provisional Improvement Notice: a formal mechanism that allows for workplace self- regulation with an option for inspectorate review.</p> <p>The experience in jurisdictions with this right (expressed in different names eg default in SA: safety notice in WA: PIN in ACT, Vic, Commonwealth, written notice in Tassie) show that it is used judiciously and that it ensures consultation and participation of HSRs in encouraging employers to meet their legal obligations. This is of particular importance when employers are slow to implement change.</p> <p>The best provision is for one that allows a timeframe that is applicable to the ever-changing nature of the construction industry eg ACT.</p>	ACT OHSA 1989: section 67-70
Right to order Cease work	<p>Right to order Cease work i.e. worker representative power to protect fellow worker at immediate risk without censorship by the employer, if conducted in good faith. Most jurisdictions require consultation with employer representative prior to issuing a cease work order. Given that that the circumstances in which this is used is often an emergency, this obligation prior to action is counter intuitive therefore ACT OHSA 1989 approach which requires consultation but not prior to action.</p>	ACT OHSA 1989 s72 Cease work

<p>Health and Safety Committees</p>	<p>Committees are a very useful structure in the workplace and their existence is linked with improved performance the functions need to be broad as well as ensuring that the day to day risks and hazards of a worksite are dealt with by more immediate mechanisms i.e. HSR and consultation with workers. HSC create overall policies and procedures but require “2 to tango” and are a cumbersome and ineffective place for dispute resolution for health and safety issues.</p> <p>These are best handled through the issues resolution approach of the Victorian or ACT Acts. The SA Act allows committee to look at return to work of people with injuries.</p>	<p>ACT Division 5.5 s85-88 but include SA OHSWA s33(1)(f)</p>
<p>Note: Primacy of direct representation (HSR) over HS Committees as Committees function on agreement and consensus. Must have a process for worker representation that increases the ability of employees to negotiate</p>	<p>NSW 2001 Regulation 23 (4) asserts primacy of Health and Safety Committee over HSR, this approach is not a preferred position: see discussion NT Review pages 11 -113</p>	

Regulator Functions, Powers & Accountability:

<p>Specific Hazards: Dealing with Bullying</p>	<p>Given the broad duties of the OHA Act there does not seem to be any reason why particular hazards need to reference in the Act; these all should be covered by regulation.</p> <p>Regulation making provision need to include the ability to cover all types of risks to health i.e. physical and psychosocial.</p>	<p>Vic OHS ACT 2004 Section 158 (1)</p>
---	--	--

Compliance & Enforcement:

Inspectors 1. Entry into workplace	Entry into workplace The Inspectorate in their day to day activity need to embody the principles of consultation and worker rights therefore must acknowledge consultative structures. Vic OHSA 2000 includes obligations on Inspectorate to notify and report to HSRs.	Vic OHSA 2000 s102 -103 Include NSW union reporting
2. Powers	Broad powers with regard to H&S, not just breaches therefore the NSW approach is better than Vic (note despite Maxwell recommended a change but this was not adopted) Right of Entry, non disturbance etc Ability to give directions Prohibition Notices	NSW OHSA 2000 s 50-75 Noting that s69 allows inspectors to be accompanied by union person NSW OHSA 2000 s86-88 re non disturbance for serious incidents NSW OHSA 2000 Part 6 Div 2 and 3
3. Instruments for exercise of powers	Dealing with Provisional Improvement Notice, issued by HSRs	Vic OHSA 2004 s.63-66
4. HSR cease work	Dealing with direction to cease work by HSR is clear in the SA HSWA as this requires the inspectorate to act within certain time period	SA OHSWA s.37(1)
Review of Inspectors decisions internally within the Regulatory Authority	Internal Review of Inspectors Decisions	Vic OHSA 2004 s. 127-129

<p>Appeal of Inspectors Decisions Processes external to workplace additional to the internal review process</p>	<p>Tribunal (not a body like VCAT in Vic)</p>	
<p>Disputes Processes external to workplace to properly constituted review structures with industrial and OHS expertise</p>	<p>WA provisions appear to offer a good appeal process. The WA requirements for the OHS Commissioner are preferred ie health and safety expertise and industrial relations experience.</p>	<p>WA OSHA amend. 2006 Part VIB s.51f-k</p>
<p>Union right of entry Health and safety literature acknowledges that workplaces often need outside assistance to improve health and safety. One mechanism for this is the right of union representatives to enter worksites (note employers already have this right as they are in control of the workplace)</p>	<p>To assist workplaces this should relate to all work sites, irrespective of union membership and all matters of OHS not just suspected breaches. Note: there is no current legislation that effectively meets these requirements. (Creighton and Rozen, page 291). The approach by Sweden etc for Roving HSR or UK Work Safety Advisors could have addressed some of these issues. The NSW approach is the best as it allows for Union right of entry; Union right to prosecute and Criminal proceedings; need to include right of union rep.</p>	<p>NSW OSHA 2000 s. 76-85</p>

<p>Regulation making Power Consultation with representative bodies during Regulation and code making</p>	<p>Ability to regulate high-risk work, classes of work or work arrangements vis increased permits or licensing arrangements eg Major Hazards, Mining, Confined Spaces etc.</p> <p>Note: none of the jurisdictions (to my knowledge) have used this approach for high risk work arrangements. There would appear to be no logical reason why this could not occur eg labour hire in major hazards facility or labour hire in the meat industry</p>	<p>Vic OHS 2004 section: 158 Reg 158(1.b.ii) allows for regulations for special classes of persons and s158 (2) allows for permits, licences etc.</p>
<p>Development of OHS standards from regulations to guidance material</p>	<p>Development, and enforcement policy and practice are evidence-informed. Stakeholder experience: OHS standards development, and enforcement policy and practice facilitate cooperation, consultation and exchange of information between stakeholders</p> <p>Ability to cover broad range of harm including physical and psychosocial hazards Standards Developed through consultative structures</p>	<p>WA OSHA amend. 2006 Tripartite Commission, functions of s.14</p> <p><u>Consultation on process:</u> SA HSWA s68 <u>Regulations:</u> Vic OHS 2004s158 <u>Codes:</u> NSW OHS 2000 s 33 , 40-46</p>
<p>Board of Inquiry</p>	<p>Ability for the Minister to establish a board of inquiry into any gazetted workplace incident</p>	<p>Qld WHSA 2006 sections 129 -147</p>

Prosecutions:

<p>Prosecution/ Penalties</p>	<p>Ability to prosecute etc</p> <p>Use of broad duty of care for breaches of the Act and regulations or non-compliance with Codes.</p> <p>No infringement notices due to questionable usage, inspectorate focus on lower levels of hierarchy of control Penalties to be consistent across jurisdictions and to have high maximum penalties (i.e. at the top of the pyramid)</p> <p>Ensure prosecutions do not just focus on fatalities etc, require prosecution guidelines that emphasis "pure risk"</p> <p>Include broad sentencing principles</p>	<p>NSW OHSA 2000 s.106 NSW OHSA 2000 s. 105-131</p>
<p>Range of sanctions</p>	<p>A broad range of sanctions from enforceable undertaking to jail sentences.</p> <p>Penalties commensurate with the conduct Privilege that individuals do not have to incriminate themselves, but not allowed to withhold information if a duty holder/representative of a company</p>	<p>NSW Part 6/7 Including ACT Industrial Manslaughter which related to the Crimes Act Vic OHSA s154 regarding self incrimination (if the ACT OHSA 1989 approach is not adopted then Vic OHSA s32, s 144-45 and s154)</p>

Occupational Health, Safety, Compensation and Rehabilitation Union Charter of Workplace Rights

Preamble

This Charter of Rights sets out the rights and responsibilities of all workplace parties in the provision of decent and fair health, safety, compensation and rehabilitation systems and practices within Australian workplaces.

Regardless of jurisdiction, no changes to occupational health and safety, compensation and rehabilitation law will ever result in a diminution of rights and entitlements.

Workers will not be adversely affected by any employer moving between jurisdictions in relation to their OHS and workers compensation entitlements. Any proposed move between jurisdictions will only occur following genuine consultation and agreement with workers and their representatives and a process of public review.

Any health, safety, compensation and rehabilitation framework will include the best of Australian laws, be consistent with ACTU OHS and Workers Compensation Policy and be consistent with the best international standards.

All workers have the right to join a genuine trade union. Union organised workplaces are safer workplaces.

1. Workers

Every worker has the right to:

- return home from work free of injury or illness
- enjoy retirement without suffering adverse consequences of workplace injury or illness
- enjoy the same level of protection, representation, compensation and rehabilitation, regardless of the jurisdiction within which they work.
- the highest level of protection to prevent injury illness and disease
- take collective action over any health and safety matter, including the right to cease unsafe or unhealthy work
- be consulted and involved in issues affecting their health, safety and welfare

2. Representation

Every worker has the right to be represented on health, safety, compensation, rehabilitation and return to work issues, by their elected Workplace Health and Safety Representative and their relevant Union.

Unions have the right to enter workplaces on health and safety issues, the right to investigate breaches of health and safety laws, to represent members and prospective members and to initiate prosecutions for occupational health and safety breaches.

Every worker has the right to elect health and safety representatives.

Representatives have the right to:

- Be democratically elected by a process determined by workers, in conjunction with their representatives.
- Utilise rights and powers to represent workers on health and safety matters, inspect the workplace, access relevant information, be informed of all incidents, be consulted by the employer before workplace changes occur that may affect health and safety, issue notices when breaches are detected, call in government inspectors, direct workers to cease work where there is a belief of immediate risk to health and safety, and seek resolution of health and safety issues.
- Perform all OHS activities on paid time and have adequate facilities
- Be assisted by any person at any time
- Be protected by law from discrimination, harassment, bullying, intimidation and prosecution
- Access to training of their choice in paid work time
- Appeal any decision of a regulator or court regarding any health and safety, compensation or rehabilitation matter.

3. Discrimination and Bullying

All workers (or prospective workers), including health and safety representatives, will be protected by law from discrimination, harassment, bullying or detriment to their employment because they have raised a health and safety issue or been involved in consultation on workplace health and safety matters.

4. Employer Responsibilities

Persons who control, manage or own workplaces have an absolute duty of care without limitation to provide and maintain safe and healthy work environments. Employers will not shift jurisdictions to attempt to avoid their OHS and workers compensation responsibilities and obligations.

5 Role of Regulator

OHS law must be effectively enforced by regulators in all jurisdictions. The regulator must provide information, support and advise to all workplace parties, ensure that workplace representatives are supported and protected and bring prosecutions in a timely, appropriate and courageous manner. Regulators will actively monitor self-insuring companies and ensure transparency of their workers compensation and return to work systems.

An inspectorate must be adequately resourced, pro-active and willing to fulfil an enforcement role as well as an advisory role.

6. Compensation

All workers have the right to a just and equitable compensation system, following a physical or psychological injury, which promotes the best medical and like support, the most effective rehabilitation for injured workers and facilitates a safe return to work that offers genuine job security.

Workers' compensation standards are to:

- be available to all members of the workforce
- provide compensation for all injuries that arise including travel and recreation breaks
- be available upon the death of a worker and for dependants of that worker
- be based on the 100% replacement of loss of income
- provide total cost of medical rehabilitation and other related expenses
- provide lump sum compensation for permanent disability
- ensure common law rights
- support rehabilitation and return to work
- ensure that workers are entitled to timely and effective claim determination and dispute resolution processes
- ensure the worker has access to the doctor of their choice
- not be eroded by companies seeking to self-insure in order to obtain lower OHS and workers compensation entitlements for workers

7. Rehabilitation

All workers have the right to a sustainable return to safe, suitable work, following the provision of quality rehabilitation services, commensurate to need

8. Penalties

Penalties must be commensurate with the degree of the breach, including recognition of gross negligence. Penalties should be sufficient enough to act as a deterrent. A range of penalties, including but not limited to infringement notices, fines, moiety, imprisonment, enforceable undertakings, and adverse publicity orders must be provided to allow for a range of penalties for breaches of health and safety and compensation laws to be actively applied.

9. Development of Laws

All occupational health and safety, compensation and rehabilitation laws are to be developed in a tripartite manner.

All laws must be developed incorporating but not limited to the ILO Conventions, Protocols and Recommendations concerning health and safety.