

# UNIONS NSW SUBMISSION

## FOR THE NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

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11<sup>th</sup> July 2008

# **UNIONS NSW SUBMISSION FOR THE NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS**

The Unions NSW submission is structured to respond to the Issues Paper on a Chapter by Chapter basis; however in some instances reference is made to particular questions posed in some Chapters.

This submission by Unions NSW is supplementary to and supports the submission of the ACTU.

The submission is also based on the following general principles of Occupational Health & Safety ('OH&S') legislation in that the legislation is:

- Social legislation
- Promotion of the highest possible OHS standards for workers
- The right of all workers to the highest level of effective protection to prevent injury, illness and disease
- Persons who control and manage workplaces must have responsibility for providing and maintaining a safe and healthy workplace by eliminating hazards at the source
- About protecting ALL workers, including the precariously employed, the self-employed, those employed in large and small enterprises across gender and ethnicity
- That no worker shall suffer discrimination, harassment or detriment in their employment due to raising health and safety issues
- Based on the principles of industrial democracy which include the right of workers to be involved in all decision making processes.
- That all workers have a right to take collective action over any health and safety matter including the right to case unsafe and unhealthy work.

Please note for the purposes of this submission, a general reference to an 'inspector' also means an 'investigator' and, general reference to a 'Regulator' also means the 'Commission'. Both 'investigator' and 'Commission' are terms defined in the *Occupational Health and Safety Commonwealth Employees Act 1991*.

Unions NSW strongly believes that employers will benefit from having one set of model OHS Laws to comply with. However, with this the primary objective of harmonisation as set by COAG, it must follow automatically that there should be no diminution of workers' rights and OHS protections for such workers.

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## CHAPTER 1. LEGISLATIVE APPROACH

In a model OHS Act, Unions NSW supports a three tier model similar to that which has been adopted in, for example, New South Wales ('NSW') and South Australia ('SA') involving;

- A principal Act, such as the *NSW Occupational Health and Safety Act 2000*. The Act must contain, as minimum requirements, the general duties applicable to all persons who have direct and/or indirect legal responsibilities in relation to OH&S at a workplace, the powers and functions of Inspectors and other persons, Court Proceedings (and related matters), Issuing of Notices, Regulation making powers and Sentencing Guidelines. This approach conforms to the principles based standard
- For Regulations, Unions NSW preference is a single or principle Regulation (as currently in force in NSW, South Australia ('SA'), Queensland ( Q'land), Western Australia (WA) and the Northern Territory (NT) ). These State and Territory Regulations contain provisions whereby the persons who have direct and/or indirect responsibilities for OH&S at a workplace, can meet the responsibilities described in the principal Act. The Regulation(s) must have identical legal status as the Act, in that a breach of the Regulation(s) is a breach of the principal Act.
- Codes of Practice and Guidance Notes which contain information on the steps or measures to be taken to comply with a particular provision of the Act or Regulation. The legal status of a Code of Practice in any Court proceedings should also be clearly defined in the principal Act. Part 4 – Industry Codes of Practice in the *NSW Occupational Health and Safety Act 2000* clearly describes the general purpose of Codes of Practice and in particular, the role of Codes of Practice in relation to prosecutions contained in the *NSW Occupational Health and Safety Act 2000* at s.46.

Unions NSW support for an approach similar to the current NSW approach is based on the following reasoning:

- The Act clearly sets out the legal obligations to be met by the persons described in the Act in addition to other relevant matters. This approach has been successfully applied in NSW for 28 years.
- The Regulation clearly states the processes to be followed by persons in order to meet the Act's legal obligations. It is also a feature of this legislative framework that the relationship between Act and Regulation, as well as the activities prescribed to meet compliance requirements, is clear and unambiguous.
- Codes of Practice and Guidance Notes are also consistent with the requirements of the Act and Regulation, but do not have the same legal status as the Act and Regulation.

The *NSW Occupational Health and Safety Act 1983* was followed by a large number of individual Regulations, made after this Act came into force and did not always have a

clear relationship with the Act. This fact was instrumental in the adoption of a single 'one stop shop' *NSW Occupational Health and Safety Regulation 2001*.

Unions NSW also supports the single Regulation approach as an effective means of regulating compliance with OH&S Acts, providing the Regulation has the same legal status as the Act. The *NSW Occupational Health and Safety Regulation 2001* has been an effective mechanism in NSW to accommodate relevant sections of Factories, Shops and Industries, Construction Safety and Dangerous Goods legislation into mainstream OH&S legislation. Previously this legislation operated independently of the *NSW Occupational Health and Safety Act 1983*.

Even with each State, Territory and the Commonwealth having an OH&S Act covering all employees, there are still a number of related Acts operating in these jurisdictions. The most common OH&S legislation outside a principal OH&S Act generally is legislation regulating mine safety. In some cases the Government regulating agency for mine safety is not the State or Territory agency regulating the principal OH&S Act.(e.g. In NSW the Department of Primary Industry is the responsible Agency.)

Unions NSW notes that there is a possibility for conflict of interest to arise if the Regulator for mine safety is also the Government Agency with overall responsibility for the industry, which is the case in NSW.

While Unions NSW acknowledges that the development of a model OHS Act is challenging in itself, 'harmonising' each jurisdiction's regulatory provisions and other OH&S related legislation into a model OHS Act and Regulation(s) may be a far greater challenge.

The principal model OHS Act should be as far as possible, **based on** principles-based and prescriptive standards, or a suitable combination of standards aimed at ensuring compliance with the provisions of the Act.

Examples of all the standards described in the Issues Paper are contained in current OH&S legislation operating in all jurisdictions but, as a general principle, they all have adopted principles-based standards particularly, the general duties of care applicable to employers, employees and other defined persons.

The *NSW Occupational Health and Safety Act 2000* contains the most obvious principles-based standard in Part 2-Division 1 at s.8, which states.

**Part 2 Duties relating to health, safety and welfare at work**

**Division 1 General duties**

**8 Duties of employers**

**(1) Employees**

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

*That duty extends (without limitation) to the following:*

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

(e) providing adequate facilities for the welfare of the employees at work.

**(2) Others at workplace**

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

A further example of this approach is at S 28-30 of the *Queensland Health and Safety Act 1995* which states:

**S.28 Obligations of persons conducting business or undertaking**

(1) A person (the **relevant person**) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

(2) The obligation is discharged if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking.

(3) The obligation applies—

(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and

(b) whether or not the business or undertaking is conducted for gain or reward; and

(c) whether or not a person works on a voluntary basis.

**29 What obligations under s 28 include**

Without limiting section 28, discharging an obligation under the section includes, having regard to the circumstances of any particular case, doing all of the following—

(a) providing and maintaining a safe and healthy work environment;

(b) providing and maintaining safe plant;

(c) ensuring the safe use, handling, storage and transport of substances;

(d) ensuring safe systems of work;

(e) providing information, instruction, training and supervision to ensure health and safety.

**30 Obligations of persons in control of workplaces**

(1) A person in control of a workplace has the following obligations—

(a) to ensure the risk of injury or illness from a workplace is minimised for persons coming onto the workplace to work;

(b) to ensure the risk of injury or illness from any plant or substance provided by the person for the performance of work by someone other than the person's workers is minimised when used properly;

(c) to ensure there is appropriate, safe access to and from the workplace for persons other than the person's workers.

The *Tasmania Workplace Health and Safety Act 1995* ('Tasmania Workplace Health Safety Act 1995') S.9 states

**PART 3 - Duties and Obligations Relating to Workplace Health and Safety**

**S9. Duties of employers**

(1) An employer must, in respect of each employee employed by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular, must –

(a) provide and maintain so far as is reasonably practicable –

(i) a safe working environment; and

(ii) safe systems of work; and

(iii) plant and substances in a safe condition; and

(b) provide facilities of a prescribed kind for the welfare of employees at any workplace that is under the control or management of the employer; and

(c) provide any information, instruction, training and supervision reasonably necessary to ensure that each employee is safe from injury and risks to health.

Other States and Territories have adopted a similar approach. Generally, these approaches are also consistent with the Robens Committee recommendations, reflected in the employer's general duty of care provisions, (a principles-based standard), contained in the United Kingdom's *Health and Safety at Work Act 1974*.

A variation to this approach is contained in Northern Territory legislation, when describing the statutory duty of employers, uses a combination of principles and prescription based standards. The *Northern Territory Work Health and Safety Act 2007* at s.55. s.55 (1) establishes a principle-based standard, while s.55 (3) details prescriptive standards the employer has a statutory duty to comply with.

#### **SECT 55**

##### **Employer's general statutory duty of care**

(1) *An employer has a duty (the **employer's general statutory duty of care**) to ensure, as far as reasonably practicable, that workers and others are not exposed to risks to health or safety arising from the conduct of the employer's business.*

(2) *If the employer is a natural person working in the employer's own business, the employer is to be regarded as a worker to whom the general statutory duty of care is owed by the employer him/herself.*

(3) *An employer carries out the general statutory duty of care by proceeding, in a systematic way, to:*

- (a) *identify hazards; and*
- (b) *identify, and assess the seriousness of, risks resulting from the hazards; and*
- (c) *determine appropriate risk management measures:*
  - (i) *to eliminate, as far as reasonably practicable, avoidable risks; and*
  - (ii) *to minimise, as far as reasonably practicable, unavoidable risks; and*
- (d) *carry the risk management measures into effect; and*
- (e) *monitor and review the effectiveness of the measures.*

(4) *An employer who fails to comply with the employer's general statutory duty of care is guilty of an offence*

A similar but more prescriptive approach is taken in the *NSW Occupational Health and Safety Regulation 2001* in Chapter 2-Clause 9

#### **Chapter 2 Places of work—risk management and other matters**

*This Chapter also applies to self-employed persons (see definition of **employer** in clause 3).*

##### **9 Employer to identify hazards**

(1) *An employer must take reasonable care to identify any foreseeable hazard that may arise from the conduct of the employer's undertaking and that has the potential to harm the health or safety of:*

- (a) *any employee of the employer, or*
- (b) *any other person legally at the employer's place of work,*  
*or both.*

(2) *In particular (and without limiting the generality of sub clause (1)), the employer must take reasonable care to identify hazards arising from:*

- (a) *the work premises, and*
- (b) *work practices, work systems and shift working arrangements (including hazardous processes, psychological hazards and fatigue related hazards), and*
- (c) *plant (including the transport, installation, erection, commissioning, use, repair, maintenance, dismantling, storage or disposal of plant), and*
- (c1) *dangerous goods (including the storage or handling of dangerous goods), and*
- (d) *hazardous substances (including the production, handling, use, storage, transport or disposal of hazardous substances), and*

- (e) the presence of asbestos installed in a place of work, and
- (f) manual handling (including the potential for occupational overuse injuries), and
- (g) the layout and condition of a place of work (including lighting conditions and workstation design), and
- (h) biological organisms, products or substances, and
- (i) the physical working environment (including the potential for any one or more of the following:

- (i) electrocution,
- (ii) drowning,
- (iii) fire or explosion,
- (iv) people slipping, tripping or falling,
- (v) contact with moving or stationary objects,
- (vi) exposure to noise, heat, cold, vibration, radiation, static electricity or a contaminated atmosphere,
- (vii) the presence of a confined space), and
- (j) the potential for workplace violence.

(3) An employer must ensure that effective procedures are in place, and are implemented, to identify hazards:

- (a) immediately prior to using premises for the first time as a place of work, and
- (b) before and during the installation, erection, commissioning or alteration of plant in a place of work, and
- (c) before changes to work practices and systems of work are introduced, and
- (d) before hazardous substances are introduced into a place of work, and
- (e) while work is being carried out, and
- (f) when new or additional information from an authoritative source relevant to the health or safety of the employees of the employer becomes available.

S.55 of the *Northern Territory Work Health and Safety Act 2007* prescribes what the employer is required to do, but does not describe an outcome, whereas in Cl. 9 of the *NSW Occupational Health and Safety Regulation 2001*, the employer has a statutory duty to identify whether any of the described hazards exist ( without limiting the generality of the hazards identified) and when the hazards are to be identified. The NSW Regulation prescribes a similar duty on the employer to assess risks (Cl. 10) and control risks (Cl.11) but is similar to s. 55 of the Northern Territory Work Health Act 2007 in that there is no described outcome.

In the *NSW Occupational Health and Safety Act 2000*, a combination of principles-based and prescriptive standards is used in Division 2- Duty to Consult in s. 13-15

### **13 Duty of employer to consult**

*An employer must consult, in accordance with this Division, with the employees of the employer to enable the employees to contribute to the making of decisions affecting their health, safety and welfare at work.*

### **14 Nature of consultation**

*Consultation under this Division requires:*

- (a) the sharing of relevant information about occupational health, safety and welfare with employees, and
- (b) that employees be given the opportunity to express their views and to contribute in a timely fashion to the resolution of occupational health, safety and welfare issues at their place of work, and
- (c) that the views of employees are valued and taken into account by the employer.

### **15 When consultation is required**

*Consultation under this Division is required:*

- (a) when risks to health and safety arising from work are assessed or when the assessment of those risks is reviewed, and
- (b) when decisions are made about the measures to be taken to eliminate or control those risks, and
- (c) when introducing or altering the procedures for monitoring those risks (including health surveillance procedures), and
- (d) when decisions are made about the adequacy of facilities for the welfare of employees, and
- (e) when changes that may affect health, safety or welfare are proposed to the premises where persons work, to the systems or methods of work or to the plant or substances used for work, and
- (f) when decisions are made about the procedures for consultation under this Division, and
- (g) in any other case prescribed by the regulations.

Finally, the *NSW Occupational Health and Safety Regulation 2001* in Clause 5 is a combination of process and prescriptive standards (Cl. 5 (1) (a)-(e) and (3)) the use of which is to result in the outcomes described in Cl.5 (2).

### **Meaning of “control” of risks**

(1) For the purposes of this Regulation, an obligation to **control** a risk to health or safety (in any case in which the elimination of the risk is not reasonably practicable) is an obligation to take the following measures (in the order specified) to minimise the risk to the lowest level reasonably practicable:

- (a) firstly, substituting the hazard giving rise to the risk with a hazard that gives rise to a lesser risk,
- (b) secondly, isolating the hazard from the person put at risk,
- (c) thirdly, minimising the risk by engineering means,
- (d) fourthly, minimising the risk by administrative means (for example, by adopting safe working practices or providing appropriate training, instruction or information),
- (e) fifthly, using personal protective equipment.

(2) A combination of the above measures is required to be taken to minimise the risk to the lowest level reasonably practicable if no single measure is sufficient for that purpose.

(3) Any obligation in this Regulation to control a risk by taking specific risk control measures, or by taking specific risk control measures in a particular order, is in addition to the obligations referred to in subclasses (1) and (2).

From the above examples, it would appear that the development of ‘best practice’ health and safety provisions (supported by Unions NSW) in a model OHS Act will require a judicious use of standards either singly, or in combination. Ideally, the general duties of care should mirror the present practice in all States and Territories (with the exception of the Northern Territory) based on largely principle-based standards.

It is the Unions NSW position that as far as possible, the final model OHS Act be developed in a manner similar to the approach taken in NSW for the *NSW Occupational Health and Safety Regulation 2001*.

The approach taken in NSW in the development of the *NSW Occupational Health and Safety Regulation 2001* during 1998-2000 was via tri-partite negotiation involving Unions NSW representatives and affiliates, WorkCover NSW representatives, with employer association and industry representatives. The resulting Regulation was largely achieved through consensus between the parties.

It was also worth noting that during the tripartite negotiations, Unions NSW affiliates and industry representatives would change from time to time to involve union/industry representatives familiar with the industries which were under discussion in a proposed regulatory provision. Outside experts on particular OH&S matters, were also used to advise or assist in the negotiation process.

As a result, with a very few exceptions, the resulting Regulation (and *NSW Occupational Health and Safety Act 2000*) received bi-partisan support in the NSW Parliament when they were enacted.

At the time the legislation was enacted in 2000, Unions NSW and affiliates were generally satisfied with, and fully supported, the regulatory structure (including the standards adopted) of both the Act and the Regulation and, to the best of our knowledge, employer associations representing industry and business, irrespective of size, were also generally satisfied and supportive of the regulatory structure (including the standards adopted) of the Act and Regulation at the time.

In conclusion, Unions NSW supports a regulatory structure which is multi-faceted and may not rely on any one standard to achieve compliance with any single provision of occupational health and safety legislation. The examples provided in this section of the submission are sufficient, in our opinion, to justify this approach in future model OH&S legislation.

Unions NSW also strongly supports the future development of a final model OHS Act and Regulation(s) through extensive negotiation with the Australian Council of Trade Unions (ACTU), and in turn State Trades and Labor Councils and Trade Union Affiliates, National employer and Industry Association representatives, Federal and State OH&S Regulator representatives, and independent OH&S expert advisors (when required).

This approach is consistent with the principles outlined in Articles 4 (1) and (7) of International Labour Organisation ('ILO') Convention 155. The Australian Government is a party to this Convention.

The model OHS Act Review Panel should also note that the Review of the *NSW Occupational Health and Safety Act 2000* in 2006 was carried out following an invitation by the NSW Regulator for interested parties to submit written submissions following an initial briefing of Unions NSW affiliates by the Regulator's officers. This briefing advised that the Review was for the purpose of addressing minor matters. However, the actual recommendations, which went far beyond 'minor matters' contained in the Review document, did not result from subsequent tripartite negotiations. The recommended changes to the *NSW Occupational Health and Safety Act 2000*, as a result, were developed unilaterally and the process used was contrary to Articles 4(1) and (7) of ILO Convention 155.

To date, the recommended changes have not been enacted, but in fact rejected by the NSW Government who in turn commissioned an inquiry into the NSW OHS Act by Mr. Paul Stein SC. As at the date of writing this submission, NSW Unions have not been privy to the contents of such report.

Unions NSW also strongly supports a model OHS Act which contains sufficiently detailed provisions so that each and every stakeholder can readily identify their legal responsibilities. The detail, in the Unions NSW view, should contain detailed provisions on the following. (The *NSW Occupational Health and Safety Act 2000*, has been partly used as a model for this purpose.)

- Definitions applicable to the Act.
- General Duties of employers, self-employed persons and other persons who;
  - have responsibility or control over premises used for work and the design, manufacture and supply of plant or substances used for work.
  - via contractual or other arrangements exercise control on how work is undertaken.
  - have responsibility for the design and construction of premises used either fully or in part for undertaking work, and work environments.
  - have responsibility for the design of Occupational Health and Safety Management Systems (OHSMS) used at places of work
- Duty of employers to consult with employees.
- Duty of employees
- Duty of persons attending workplaces or work premises
- Related duties of employers in relation to
  - Unlawful dismissal of employees.
  - Injury to employment and/or discrimination.
- General Duty of employers to consult and consultation arrangements.
- Offences by individuals and Corporations, including multiple offences

- Defences
- Statute of limitations to commence proceedings
- Power to make Regulations, and administrative arrangements re- licences etc.
- Industry Codes of Practice.
- Appointment/Powers of Inspectors
- Role, powers and functions of a Health and Safety Representatives ('HSR') and OH&S Committees.
- Entry and inspection powers of authorised employee representatives
- Notification of accidents, incidents, non-disturbance of plant.
- Investigation notices, Improvement and prohibition notices
- Criminal proceedings
- Proceedings against the Crown and Government Agencies
- Sentencing.
- Savings and Transitional Arrangements

The matters identified are not necessarily complete, but for the purposes of this submission, highlight the most important headings that Unions NSW believes must be provided for in a model OHS Act. The examples described are also not dissimilar to a number of provisions contained in the OH&S Acts of other States, Territories and Commonwealth.

In addition, any Regulation(s) and/or Codes of Practice should make reference to the Section(s) of the model OHS Act which are relevant to a Regulation or part of a Regulation, and Code of Practice by way of margin notes. Alternatively, such references could be contained in a detailed introduction to the Regulation, or part of a Regulation, or as an introduction to a Code of Practice. This is important to establish a clear nexus between the Act with the Regulation(s) and Codes of Practice.

Unions NSW envisages that a future model OHS Act would cover a number of categories of workers covered by State and Territory legislation, e.g. Defence and Australian Federal Police ('AFP') personnel. Unions NSW would therefore anticipate that the model OHS Act would include specific provisions for various Commonwealth employees. Unions NSW would strongly oppose, in principle, the exclusion of any category of worker from the protection of a model OHS Act.

Unions NSW also strongly supports a 'plain English' approach to the language contained in a model OHS Act and the accompanying Regulation(s) and Codes of Practice.

It would be fair comment on our part, without going into the specific examples contained in legislation, to note that each State and Territory's OH&S Act and Regulation(s) contains numerous examples of language use which is difficult for a lay person to interpret.

This can be a significant problem if a Section or Clause in an Act or Regulation gives rise to any conflicting legal interpretation or confusion. Similarly, if it does, it could be also difficult to identify the nexus between a part of the Act with a supposedly complimentary part of a Regulation.

Unions NSW is concerned that non-legal persons can find interpreting legal provisions at the workplace level confronting, even when they have a good command of written

English. For persons with limited English skills, or as in many cases where English is a second language, the challenge of interpreting legal provisions can be almost impossible. However, this should not be seen as an argument put forward by some duty holders for not seeking legal advice on their OH&S legal obligations.

Unions NSW supports the use of the title 'Occupational Health, Safety and Welfare Act' as the most appropriate. This would be consistent with the 'welfare' provision contained in existing State, Territory and Commonwealth and legislation as part of the employer's general duty of care contained in:

- *NSW Occupational Health and Safety Act 2000* at s.8(1)
- *Victoria Occupational Health and Safety Act 2004* at s.21 (2) (d).
- *South Australia Occupational Health Safety and Welfare Act 1986* at s. 19(1) (b).
- *Tasmania Workplace Health and Safety Act 1995* at s.9(1) (b)
- *ACT Occupational Health and Safety Act 1989* at s.37(1)
- *Occupational Health and Safety (Commonwealth Employees) Act 1991* at s. 16 (2) (a) (ii).

Unions NSW notes that 'welfare', meaning – good fortune, happiness or well-being (ref. Oxford Dictionary) implies that an employer has an obligation to ensure the above, which is consistent with the general duty of care obligations of an employer.

However, none of the above Acts mentioned, specifically defines what 'welfare' means in a practical sense for the purposes of the legislation or, do these Acts detail in any way how an employee's 'welfare' should be addressed. These failings should be appropriately addressed in a model OHS Act.

Alternatively, the title 'Occupational Health and Safety Act' would be Unions NSW second choice.

Unions NSW strongly supports the inclusion of objectives, or objects, in a model OHS Act. Clearly, legislative instruments and, in particular an Act regulating OH&S (and welfare), should specify clear and unambiguous objects which define the purpose or intent of the legislation.

Specifying objectives, or objects of a model OHS Act, would also be consistent with the approach taken in all States and Territories OH&S legislation, including the *Occupational Health and Safety (Commonwealth Employees) Act 1991* . The only exception to this approach is Tasmania whose Act specifies the purpose of the legislation; however, this is not inconsistent with an objective.

It could be said that in all jurisdictions, OH&S Acts either specify objects or objectives (Queensland) or purpose (Tasmania) which define the intent of their respective Acts.

It would therefore be consistent for a model OHS Act to adopt a similar approach.

On the second part of this question on 'how and what should they be', Unions NSW supports the terminology of either 'Objects' or Objectives' to specify the purpose of the model OHS Act.

Unions NSW support the inclusion of a set of Objects/Objectives in the model OHS Act. However, from our perspective, Unions NSW preferred Objects/Objectives should clearly signal what a model OHS Act is aiming to achieve. The following are Unions NSW preferred Objects.

1. To secure the health, safety and welfare of workers and other persons at work.
2. To ensure that the health and safety of members of the public is not at placed at risk by the work carried out at, or in the close vicinity to, an employer's or self-employed person's work premises, or; by other persons who control work premises, including access to and egress from the work premises.
3. To promote safe and healthy work activities and work environments for workers that protects them from injury and illness and is adapted to meet their physiological and psychological needs.
4. To ensure that risks to health and safety at a place of work are identified, assessed, eliminated or controlled by the proactive management of health and safety at places of work.
5. To provide for cooperation, consultation and consultation arrangements between employers and employee associations representing employers and workers at places or work, in order to achieve the objects of this Act, and; to ensure the participation of employers and employees and associations representing employers and employees in the formulation and implementation of health, safety and welfare standards for places of work.
7. To develop and promote community awareness of occupational health and safety issues.
8. To provide a legislative framework that allows for progressively higher standards of occupational health, safety and welfare that takes into account ; changes to plant and other technology and their use at work and; changes to substances or dangerous goods to be used at work and; foreseeable changes to working environments, work practices and work organisation.
9. To ensure that relevant and up to date information on health, safety and welfare is made available to employers, workers and self-employed persons.'

The proposed Objects fall into three categories ;

• **Identical or similar to objects which are present in existing State or Territory OH&S Acts.**

For example, the proposed Object 1 is similar or identical to Objects contained in the Victorian, South Australian, ACT, Western Australian, NSW and Commonwealth OH&S Acts. The only exception is that Unions NSW prefers the use of the term 'worker' as opposed to 'employee'.

The proposed Object 2 is identical to Object 2 (1) (c) of the *Victoria Occupational Health and Safety Act 2004*. Some other States and Territories have a similar object, but not as

well defined as the Victorian Act. Other States and Territories Act's Objects are silent on this subject. Unions NSW strongly believes that public safety at, or in the vicinity of work places should be an important objective of any OH&S legislation.

Object 5 is dealt with in existing State, Territory and Commonwealth legislation, with the exception of Tasmania. The proposed Object 5 is to a large extent a combination of the existing Objects, reflecting both consultation and participation of workers, employers, trade unions and employer associations.

Object 7 is identical to the NSW Occupational Health and Safety Act 2000 Object, and is not dissimilar to Objects contained in the current Western Australia Occupational Health Safety Act 1984 and Northern Territory Work Health Act 2007. Other States, Territories and Commonwealth OH&S Acts are silent on this subject.

Unions NSW support the inclusion of this Object as a necessary social part of the model OHS Act in order that the public is continuously made aware of the importance of OH&S in the workplace.

- **Existing Objects which have been amended or extended.**

Object 3 is currently addressed to some degree in the NSW, ACT, Western Australian and Commonwealth Acts, but not to the level Unions NSW proposes.

Unions NSW proposed Object 4 is currently only partially addressed in the Objects of the Western Australia Occupational Health Safety Act 1984, which states:

*to reduce, eliminate and control the hazards to which persons are exposed at work;*

However, risk management is now a Regulatory provision of the NSW, WA, SA, Tasmanian, and NT legislation. Given the emphasis placed on risk management in these Regulations, it is unusual that only one State (WA) identifies this process as a legislative object.

Health and Safety Management, using an OHSMS, is a contemporary method for securing improved OH&S outcomes for a number of organizations as well as being a proactive means of managing OH&S. The use of OHSMS is prescribed in some OH&S legislation (e.g. NSW Coal Mines & Mine Safety legislation). Unions NSW believes that it would be appropriate to include such a provision within a model OHS Act Objects.

Object 8 is an extension of the NSW Object of:

*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,*

Other jurisdictions are silent on this subject.

Unions NSW supports the proposed Object as a means of ensuring that OH&S legislation remains up to date and is proactive in dealing with changes to plant, substances, work arrangements, work practices and work environments

Unions NSW believes that the object of 'promotion of safe and healthy work activities' is equally important as 'work environments', and that 'physiological and psychological needs' are integral to good occupational health in contemporary OH&S legislation.

Unions NSW notes that recent research has identified emerging and significant occupational health hazards affecting white collar workers. These hazards have been identified as by-products of organisational change, particularly mergers and acquisitions and increasing work intensification resulting in longer working hours. These changes have led to stress related disorders and premature cardiovascular problems.<sup>1</sup>

Changes in employment arrangements and types of employment have contributed to increasing OH&S risks for some workers in a number of industries, which have either been either ignored or addressed in a limited way by some Australian jurisdictions (i.e. Victoria and NSW).<sup>2</sup>

**• New Objects which reflect Unions NSW position on what the model OHS should be aiming to achieve.**

The Unions NSW proposed Object 9 is not found in any existing OH&S legislation. The reason for the inclusion of this Object is to encourage Regulators to ensure that OHS and welfare, guidance and other material, is updated to reflect new and relevant OH&S information when the Regulators becomes aware of this information.

All existing State, Territory and Commonwealth Acts place a general duty of care on employers to provide their workers with 'information, instruction, and training'. This applies to available information on hazards, risks to health and safety, safe work practices etc. some of which may not be available at the workplace level.

It is therefore essential that Regulators play a role in the gathering and dissemination of such information and should be an important Object of a model OHS Act, as well as providing for updating the Act (and Regulation(s)) to reflect relevant new information and appropriate risk management procedures.

In relation to the other matters dealt with in this Chapter, Unions NSW supports the inclusion of a set of principles. The principles should ideally summarise what the major Objects of the OHS Act and what the Act is designed to achieve.

An example of a set of principles could be;<sup>3</sup>

- The importance of health and safety requires workers, other persons and the public to be given the highest level of protection against risks to their physical and psychological health, safety and welfare.

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<sup>1</sup> S.Cartwright & C.Cooper –*HR Know-How in Mergers and Acquisitions, Inst.Personnel & Development. London (2000)*  
H.Cieri & R.Kramer –*Human Resource Management in Australia (2<sup>nd</sup>.Ed), McGraw- Hill Irwin Boston (2005)*

<sup>2</sup> HSE Publication. *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* Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London. P.18-19

<sup>3</sup> Adapted from the Swedish Work Environment Act, Victorian Occupational Health and Safety Act 2004, NSW Occupational Health and Safety Act 2000.

- Persons who control or manage matters that rise, or may give rise to risks to health, safety or welfare are responsible for eliminating or minimizing those risks.
- Employers and self-employed persons should be proactive in ensuring the health, safety and welfare of employees or other persons at work and where work is undertaken.
- Working conditions should be adapted to a worker's differing physical and mental aptitudes, and a worker shall be given the opportunity of participating in the design or their own working situation and the processes of change and development affecting their work.
- Employers and workers should exchange information in order to reach agreement on the steps or controls to be taken to eliminate or minimize the risks to health and safety at work.
- Workers are entitled, and should be encouraged, to be represented in relation to health, safety and welfare issues.

Any further issues which should be considered in the legislative approach to the Act shall be addressed in our General Comments at the conclusion of this submission.

## **CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS**

### **2.1 Industry Sections**

Unions NSW is presently totally opposed to any change to the status of industry specific safety legislation operating in States and Territories.

The only reason for any consideration of a change to the current arrangements at this time would be if the legislation in question is not effectively safeguarding the OH&S of workers and other persons. There is no evidence provided in the Issues Paper, or from what we have been advised of by NSW affiliates, to indicate that any change to the status quo is required.

It is noted that the National Mine Safety Framework is aiming at national consistency. This activity is supported by Unions NSW. However, for the purposes of this review it would be premature to deal with other industries that have specific OH&S legislation, in addition to a jurisdiction's principal OH&S Act, prior to the conclusion of this review, and the development of a model OHS Act.

The arguments supporting a single national OH&S Act, outlined in the Robens Report *Report of the Committee on Safety and Health at Work 1972*, are logical and persuasive. However, the United Kingdom ('UK') is not a federation of States and Territories, with a national Government. In addition, all Australian jurisdictions have independently introduced their own principal OH&S Acts, and Regulations over the past 28 years without any consideration of harmonisation. By comparison, 'harmonisation' in the UK involved one jurisdiction. If at some future time there is incorporation of mining and other industry specific OH&S legislation within a model OH&S Act framework, it would have to be done with emphasis on retaining the highest OH&S standards within this framework.

It is Unions NSW opinion that any interference with industry specific OH&S legislation at present would most likely have a negative impact on those industries identified as high risk. Furthermore, harmonisation processes already occurring may be jeopardised and possibly have a negative affect on existing high safety laws and standards.

On the question of the model OHS Act containing provisions for the coordination of safety regulators, Unions NSW believes that this is a political question. How this occurs should be determined by the States, Territories and the Commonwealth. In principle, the coordination of safety regulators would need to be approached on the proviso that the present Regulators remained within their existing jurisdictions.

## **2.2 Workplaces and Non-Workplaces**

Unions NSW believes that the current definitions for workplaces and/or conduct of work in OH&S legislation are insufficient to some degree for the application of the general duty of care obligations of an employer. It is noted that in some jurisdictions, Acts are silent on the subject, while others use varying descriptions.

Unions NSW strongly supports the position that the employer's general duty of care is applicable to both work and the workplace.

Accordingly, Unions NSW supports the need for appropriate Definitions for 'places of work' (workplaces) 'premises', to be included in the model OHS Act.

Current Definitions on the above could be modelled from the *NSW Occupational Health and Safety Act 2000* and the *Victoria Occupational Health and Safety Act 2004*, with some important additions.

The NSW Definition, for example, states:

**place of work** means premises where persons work.

**premises** includes any place, and in particular includes:

- (a) any land, building or part of any building, or
- (b) any vehicle, vessel or aircraft, or
- (c) any installation on land, on the bed of any waters or floating on any waters, or
- (d) any tent or movable structure.

The *Victoria Occupational Health and Safety Act 2004* Definition defines:

**"place"** includes a car, truck, ship, boat, airplane and any other vehicle;

**"workplace"** means a place, whether or not in a building or structure, where employees or self-employed persons work.

The current NSW Definition is far broader than the terms used in other OH&S Acts. The term 'includes any place' embraces virtually all situations where and how work is performed. However, the Victorian definition of 'workplace' is superior to the NSW 'place of work'.

Unions NSW also supports the inclusion of appropriate duty of care provisions in a model OHS Act that covers public safety, both in and in the vicinity of premises used for work or workplaces.

#### **Duties of persons who have control of workplaces**

- (1) A person that has, to any extent, control of —
  - (a) a workplace where persons who are not employees of that person work or are likely to be in the course of their work; or
  - (b) the means of access to and egress from a workplace,

*shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that persons who are at the workplace or use the means of access to and egress from the workplace are not exposed to hazards.*

With this exception, the remaining jurisdictions cover public safety either directly or indirectly (depending on the terminology used) in their general duty of care provisions.

However, Unions NSW believes that this definition requires expansion to cover supply chain arrangements. This issue will be dealt with later in this submission.

### **2.3 Responding to change**

Unions NSW supports the view that a model OHS Act should be 'sufficiently broad and flexible to accommodate new and evolving types of work arrangements.' We believe that a model OHS Act should also accommodate the responsibilities in relation to 'new and evolving work arrangements' as part of the general duty of care obligations for employers and other relevant persons with duty or care obligations.

The labour market arrangements described such as temporary and casual work, use of agency labour, home workers and the use of migrant workers, should not be a reason or grounds for a model OHS Act (or other jurisdiction's Act) to contain diminished OH&S obligations or responsibilities for employers. The model OHS Act should adopt the

highest possible duty of care provisions for all workers to ensure the health, safety and welfare of these persons.

Unions NSW strongly believes that the strict liability of employers, contractors, and labour hire or franchise organizations, be enshrined in a model OHS Act in order that they meet their legal obligations in a similar the manner as they are currently required to do so in the legislation mentioned (i.e. NSW, Q'land and Victorian OH&S Acts)

To take an alternative approach would seriously undermine the OH&S of all workers and persons who the legislation is designed to protect.

In view of contemporary changes to relationships between employers and other persons and the impact of these changes on workers, the scope of a model OHS Act should also capture employers, persons in control of workplaces and work premises, self –employed persons, manufacturers and suppliers.

Obligations should also identify the obligations of other persons such labour hire organizations, designers of workplaces, plant and substances. Particularly persons who operate through a supply chain including purchasing agents, hirers and procurers whose decisions or operations can directly or indirectly impact on the OH&S of workers who are in the main not in such a person's employment. These matters are also mentioned later in this submission.

The obligations in relation to these matters are only partly covered in the *NSW Occupational Health and Safety Act 2000*.

If there is on-going uncertainty on the part of employers, self-employed persons, contractors and sub-contractors, franchisers and labour hire agencies in regard to the obligations under OHS legislation, Unions NSW believes that greater support and information should be provided by Regulators to assist these persons meet their legal obligations.

In some instances, and particularly in response to changing work arrangements, OHS legislation will need to have broad enough provisions to deal with employer relationships, the control of workplaces and/or the conduct of work, when these matters are controlled by persons who do not fall into the normal employer and employee definitions.

There have been two recent successful examples of a regulatory response to this type of relationship. First, the *NSW Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*.

This Regulation places obligations on a range of persons whose operations, using powerful non-legal sanctions, have had a direct impact on the OH&S of long distance truck drivers. These include obligations on retailers of goods to provide full details of contracts to relevant trade unions so that the OH&S issues which may arise out of the contractual arrangements can be effectively managed.

Secondly, the purpose of the *NSW Occupational Health and Safety (Clothing Factory Registration) Regulation 2001*, is to ensure the protection of vulnerable workers within clothing supply chains, especially in relation to the working conditions of sweatshop

workers and out workers. Legal protections for these vulnerable workers interact with this Regulation to ensure that the locations ('premises') where work is performed can be identified and appropriately regulated for OH&S Purposes.

Further reference will be made to the two Regulations mentioned in this submission.

In other jurisdictions the scope of legislative provisions has been broadened to largely encompass all domestic Australian supply chains involved in the production of goods and the performance of clerical work. Amendments to ss.4 and 5, together with a new Chapter 3, of the *SA Fair Work Act 1994* are relevant examples.

To cover these new arrangements, the term 'persons who have control of premises' will need to be expanded to persons who have any control over supply chain arrangements by way of contractual arrangements, the operations of which may impact on the OH&S of workers who are not employed by the person(s) responsible for the supply chain arrangements.

Unions NSW has sufficient information to believe that some types of persons mentioned above, would strongly support a model OHS Act that allows them to escape existing and future OHS obligations because they believe that OH&S legislation generally, is an impediment to their business practices and, that they allegedly find the legal provisions too difficult to meet and, that the provisions are a 'regulatory burden'. This is a mantra that has been sustained for some years.

Unions NSW believes that the concept of a single, national, OHS Act would be a major step in resolving what some people believe is a 'regulatory burden'.

Unions NSW believes that current and emerging hazards and risks are in the main addressed in OH&S Acts such as the NSW and Victorian Acts. The *NSW Occupational Health and Safety Regulation 2001* in particular, provides an effective model for dealing with current and 'foreseeable' (emerging) hazards and associated risks.

However, Unions NSW believes that Regulators and other parties such as manufacturers and suppliers also have a duty to ensure that any emerging hazards or risks are brought to the attention of employers, workers and their unions, together with effective risk management strategies.

While it could be said that Australian OH&S Regulators' response to new OH&S hazards has not been marked by any significant national achievements and the ability of employers to respond to emerging hazards in Australia has been worse. Judith Chapman notes '*....New hazards continue to emerge in every workplace making risk assessment difficult. Unfortunately, it can take years for hazards to be recognized for what they are, either because the association between the hazard and attendant risks has not been made, or the will to deal with it is lacking....*'<sup>4</sup>

It is unfortunate that effective and proactive risk management for some hazards occurs after the hazard is introduced into a workplace and in response to a fatality or injury.

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<sup>4</sup> *Safe workplaces: a key issue in the quality of working life*.p.2 Judith Chapman – Assoc. Prof. Judith Ann Chapman PhD Associate Professor of Management. Sydney Graduate School of Management, University of Western Sydney p.2

Relevant examples of this are new workplace substances, of which many thousands may be introduced each year into Australian workplaces.

Unions NSW experience and awareness of a less than proactive approach in managing emerging hazards and risks is that Regulators are largely reactive and tend to focus on safety matters and observable risks rather than occupational health matters which can be far more subtle and often not observable to the naked eye. This matter is further mentioned in our response to Chapter 7.

Unions NSW sees the development of strategies to combat new and emerging OH&S hazards and risks as a primary responsibility for the Regulator to address.

Effective management of occupational health issues that may be adequately addressed in the broad terms of OH&S legislation, but not effectively managed at workplace level, other than in general terms, requires alternative strategies.

For example, figures attributed to the NSW Regulator suggest that between 1998 and 2004 some 8,000 young workers were left permanently disabled ( 1 in 6 of the total of workplace injuries reported). In NSW between 1996 and 2006 some 500 young workers were fatally injured at work. There are obvious reasons for these frightening statistics, namely; young workers are clustered in casual and part time jobs; they are also far less likely to report OH&S problems and personal injuries; they are generally not protected by unions and are unaware of their employment rights or, where to seek assistance.<sup>5</sup>

Unions NSW concludes that similar problems would occur in other jurisdictions, but the response to deal with this significant OH&S and social problem by any level of Government has been generally minimal and reactive particularly, when a fatal injury to a young and inexperienced worker receives media publicity.<sup>6</sup>

We note that this Review aims to develop a model OHS Act that will not be a cost burden to business, however we must ensure that the model OHS Act aims to improve OH&S and reduce workplace fatalities, injuries and disease. Accordingly, the outcome of the Review should be to pick up on the highest possible standards from each jurisdiction, with no diminution of workers rights. This submission will return to this issue at a later stage.

## **2.4 Definitions.**

Unions NSW supports the inclusion of terms in a model OHS Act's section on 'Definitions' to achieve national consistency.

The terms that should be addressed would include, but not necessarily limited to, the following:

'Associated OH&S legislation' describing any separate OH&S legislation to which the model OHS Act has application.'

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<sup>5</sup> *Ibid* p.3

<sup>6</sup> *Ibid* p.6

'Employer.' (The range of potential employers should ideally be described to minimize any potential confusion e.g. Single employers, Partnerships, Companies, Corporations, Labour Hire organizations).

'Controller of premises' (e.g. controllers could also be described as a person, partnership, company or corporation whose workers undertake work or related activities at the work premises or, a person who hires, rents or leases premises to an employer as a place of work.)

'Controller of work' This definition, or other appropriate definition could be applied in this instance to the supply chain scenario previously described

'Worker'. (Defined as a person employed under a contract of employment in any capacity (casual, temporary, permanent, day-labour.)

'Person'. Depending on the terminology used in the model OHS Act, the definition of a person could be limited to a 'member of the public', or be broad enough to describe any other person, irrespective of whether these persons are defined elsewhere in a Definitions Section.

'Self- Employed person.' The definition should include reference to such a person may also be, for the purposes of the Act, be contracted or sub-contracted for services by another person.

Terms such as 'Outworker', 'Contractor', 'Labour Hire' and 'Import' should be suitably defined.

'Place of Work' (or 'Workplace ') and 'Premises' the NSW OHS Act 2000 and several other jurisdictions have similar definitions on these terms.

'Health and Safety Representative' and 'OH&S Committee'

'Consultation'. This term should be defined in much the same terms as described in s.14 of the *NSW Occupational Health and Safety Act 2000*.

'The Crown' Crown liability under a model OHS Act should be defined. It is noted that the exemptions for certain Commonwealth employees in the Occupational Health and Safety (Commonwealth Employees) Act 1991 are not mirrored in State and Territories OH&S Acts in regard to similar classes of employees ( e.g. Police) Unions NSW would oppose any diminution of liability on the part of the Crown in the States and Territories as a consequence of harmonisation.

'Investigation, Improvement and Prohibition Notices' The status of such notices should be defined, or the section of the Act in which the notices are fully described.

'Inspector' The regulatory role of an Inspector should be summarized in the Definitions Section.

'Plant and Substances' The definition of 'plant' should make reference to the fact that plant can be (without limitation) any machinery, equipment, appliance or thing owned, leased, or rented by;

- an employer for use by the employer's workers for carrying out work, or;
- a worker for carrying out work (with the employer's knowledge and authority), or;
- a self-employed person, or;
- a controller of a workplace.

which is either used in an employer's undertaking, or; installed at premises used for work.

'Welfare' (given the name Unions NSW supports for the Act, this term should be included and suitably defined.)

'Occupational health' (without limiting the generality) relates to safeguarding a worker and other persons from disease or illness, including psychological or physiological disease or illness, resulting from an employer's undertaking or working environment. The *Victoria Occupational Health and Safety Act 2004* contains a good definition of 'health'.

'The Regulator or 'Regulators.'

'Regulation and Industry Code of Practice'

'Hazard and risk'. It is important that definitions for these terms are included in a Definitions section.

'Designer' To include persons who design premises used for work, substances and plant, and; persons who design OHSMS.

Unions NSW is opposed to the term 'reasonably practicable' being included in the Definitions Section of a model OHS Act. We take the view that this term has been the subject of OH&S Case Law in all jurisdictions and, in NSW, that has been 25 years.

Please note that the terminology used above is not definitive and are examples only. Unions NSW reserves the right to comment further on the terms and terminology used in Definitions for the model OHS Act at the draft stage.

Unions NSW also reserves the right to comment further on any other issues relating to the scope and application of the model OHS Act when it appears in draft form.

## CHAPTER 3. DUTIES OF CARE –WHO OWES THEM, AND TO WHOM?

### 3.1 The Current Approach – 3.8 Activities Which Impact on Health and Safety.

Unions NSW has approached the matters dealt with in this Chapter ‘en bloc’ .

Unions NSW believes that the matters dealt with in this Chapter are the most important and are fundamental to ensuring a ‘best practice’ approach to OH&S legislation and in the development of a model OHS Act.

In all respects, Unions NSW response to the issues raised in this Chapter is further influenced by the provisions and application of the *NSW Occupational Health and Safety Act 2000*, the previous *NSW Occupational Health and Safety Act 1983* and other relevant legislation.

Primarily, the general or statutory ‘duty of care’ rests with an employer whose responsibilities must include:

- Ensuring the health, safety and welfare of his/her workers and other persons in the workplace.
- Providing safe and healthy work practices, systems of work, and the working environment.
- Providing and maintaining safe plant and substances ( including the use, handling and storage)
- Providing information, instruction, supervision and training to ensure each worker’s health, safety and welfare.

Unions NSW believes that these duties are absolute. We note a recent NSW judgment in relation to the employer’s duties, where the presiding Judge stated:<sup>7</sup>

*Such duty ‘to ensure’ is to be construed as meaning to guarantee, secure or make certain.*

*The duty imposed on an employer to ensure the health, safety and welfare at work of employees is absolute.*

*The duty so created is directed at obviating ‘risks’ to safety at the workplace, even absent any actual incident causing injury; that is, where the circumstances create a potential danger to the health and safety of employees at the workplace*

*The duty cast on an employer is both preventative and remedial in nature and is not necessarily satisfied by carrying out what ought to be done by a reasonable or prudent person in the circumstances.*

*The duty so created is directed at obviating ‘risks’ to safety at the workplace, even absent any actual incident causing injury; that is, where the circumstances create a potential danger to the health and safety of employees at the workplace*

Unions NSW strongly supports the interpretation of the ‘duty of care’ obligations so described and believe that it is imperative that a model OHS Act fully embraces these obligations.

While employers have the scope to delegate responsibility for the management of OH&S to workers who are employed in management or supervisor positions, the ‘duty of care’

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<sup>7</sup> *WorkCover Authority of New South Wales (Inspector Keelty) v Crown in Right of the State of New South Wales (Police Service of New South Wales) (No 3) [2002] NSWIRComm 1 [IRC 5721 1997]*

of workers employed in such positions is still limited to provisions of the duty prescribed in each jurisdiction's OH&S Act governing 'employees'.

Unions NSW particularly notes the statement in the Issues Paper '*...Although intrinsic to OHS legislation 'control' has not been defined or explained in legislation, resulting in a re-examination of the fundamental meaning of the term whenever such an issue arises.....*'

While Unions NSW does not necessarily dispute some aspects of this statement, it cannot be considered as a failure on the part of the *NSW Occupational Health and Safety Act 2000* (or the 1983 Act), or other OH&S Act because 'control' is not defined or explained.

The *NSW Occupational Health and Safety Act 2000* establishes strict liabilities in relation to employers responsibilities for OH&S outcomes including 'control', which has been the subject of numerous legal decisions since 1983, a number of which have clearly established precedents on the issue of 'control' which have been relied upon by both prosecutors and defendants in later proceedings.

Unions NSW believes that a diligent employer who exercises control over a work place, be it a company or corporation, employer or other person, will have the foresight to seek appropriate legal or other appropriate advice, in relation to the issue of 'control' and act accordingly to ensure they meet their legal obligations.

Breaches of OH&S legislation are also ,in the most part, not a single breach of any section of a particular Act, but often amount to several breaches which involve different sections (or sub-sections) of an OH&S Act, of which 'control' may only be one matter taken into consideration.

In NSW, which with Queensland has the highest legislative standard, a prosecutor in proving their case still has to satisfy the criminal standard of proof of 'beyond reasonable doubt'. The defences under s. 28 of the *NSW Occupational Health and Safety Act 2000* of 'not reasonably practicable to comply with a provision', and/or '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 ' are more than sufficient for this purpose.

Recommending that a definition of 'control' be further determined with what is 'reasonably practicable', as suggested in the review of the *Victoria Occupational Health and Safety Act 2004*, has, in Unions NSW view, the potential to have an extraordinarily negative effect on future OH&S outcomes for workers.

Unions NSW strongly believes that including a definition of 'control' will only be used by some employers, particularly corporations, as an escape route to successfully evade legal responsibilities. Corporations, in particular will devolve OH&S responsibility to managers below the corporate level which will give scope to successfully defend themselves by placing the 'duty of care' responsibility on a manager.

Once a legal 'escape route' is opened and exploited, compliance with OH&S legislation will then be damaged for all time.

The inclusion of a definition on control, and subsequent erosion of strict liability would result in what was described by the English Court of Appeal, in reference to the *Health and Safety at Work etc. Act 1974*<sup>8</sup>

*'...it would be particularly easy for large industrial companies engaged in multifarious hazardous operations to escape liability on the basis that the company through its 'directing mind' or senior management was not involved. That would emasculate the legislation. (at 1362H)...'*

This judgment is also applicable to the 'chain of responsibility' established to manage OH&S in an organisation.

Inclusion of a definition of 'control' is also likely to become a legislative obstacle, or create legal confusion in proceedings. This can only benefit defendants as a consequence because of changes to work practices and work organization which evolve over time may not be adequately covered in a definition. Therefore, reliance on a rigid definition could be inherently unfair in some circumstances to both prosecutors and defendants, but the greater onus would be on a prosecutor.

Unions NSW believes that this is another strong argument for not including a definition for the term. We therefore reject any consideration of the use of a definition.

Unions NSW also notes that a number of jurisdictions allow for the appointment of a person who takes responsibility in some way for managing OH&S.

Unions NSW would not support this approach within a strict legal framework, as it has the potential to undermine the strict legal liability of employers, should a definition for 'control' is used in a model OHS Act.

This does not mean that an employer cannot employ a person, be it a manager or OH&S Officer, who is delegated to carry out certain OH&S activities on behalf of the employer. However, such delegation does not abrogate strict legal liability on the part of an employer. In the event of a breach of OH&S legislation which may be caused by an omission on the part of a manager or other worker, any subsequent prosecution may involve both the employer and worker.

However, the degree of guilt of either party will not only be dependent on their individual level of control, but also focus on other alleged omissions which caused the offence. In addition, both parties can utilise the available defences prescribed in OH&S legislation. However, the 'directing mind' or 'control' and, the degree of control should be left to a Court to determine.

Unions NSW has seen no compelling evidence in the past 28 years to convince us to believe that a change to the current arrangements would be fairer to all parties

Sharing of 'control' or other responsibilities, is a significant issue in the building and construction industry. The appointment of a 'Principal Contractor' as described in NSW

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<sup>8</sup> *English Court of Appeal in R v British Steel PLC [1995] 1WLR 1356*

and other OH&S legislation, is the one method of achieving a coordinated response to ensure that a number of duty holders meet their OH&S obligations under the direction of a single person. Unions NSW believes that we have seen no evidence to make a change to this approach. We believe that it is still the preferred method for dealing with this issue. However, this approach does not completely devolve responsibility on the part of the person who exercises a form of control on the premises where the work is carried out.

Unions NSW also believes that the *NSW Occupational Health and Safety Act 2000* is an excellent model in the provision of protection to persons other than an employer's workers. The use of the term 'person' in this legislation provides sufficient scope to cover situations such as labour hire persons, volunteers and members of the public who may be affected by the omissions of employers, other workers and persons in charge of workplaces.

There have been notable prosecutions conducted by the NSW Regulator which have involved control arrangements:

- Serious injuries of persons engaged through a labour hire organization by the person in control of the workplace (an employer). The labour hire organization and employer were both prosecuted.<sup>9</sup>
- A serious injury to an employee, employed by a company as an electrician, who fell through the roof of a building owned by another company while undertaking electrical work. Both companies were prosecuted.<sup>10</sup>
- A fatality at a food outlet franchised to an employer of the fatally injured worker. ... The franchiser had ownership of and was responsible for the plant which had an electrical fault, causing a fatal electrical shock to an employee of the employer. Both the franchise organization and employer were prosecuted.<sup>11</sup>

These cases are also examples of the varying types of control and control relationships that can exist in contemporary business undertakings at the time of the offences. It is noted that while s. 28 of the *Queensland Workplace Health and Safety Act 1995* is quite specific in its content, the generality of the NSW provisions (set out on p.26) does not exclude prosecutions being pursued involving multiple defendants

Unions NSW have also yet to identify a better and fairer system in this country.

Unions NSW also believes that the *NSW Occupational Health and Safety Act 2000* provides an adequate legal framework for the proper exercise of a duty of care for employers, self-employed persons (s.8 & s.9) . However, we also support an expansion of the present provisions as contained in s.10 of the *NSW Occupational Health and Safety Act 2000* for the model OHS Act to ensure that there is adequate provision to deal with other contemporary work and contract relationships, as described on p.20-21 –

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<sup>9</sup> *WorkCover (Inspector Peter Ankucic) v Drake Personnel Ltd. [1997] NSW IRC 157*

<sup>10</sup> *WorkCover Authority of New South Wales (Insp. Hopkins) v Red Lea Chickens Pty Ltd and Magg Transport and Packing Pty Limited [2003] NSWIRComm 71*

<sup>11</sup> *WorkCover Authority of New South Wales (Inspector Peter Ankucic) v McDonald's Australia Limited and Another [2000] NSWIRComm 277*

Definitions, of this submission, to include other persons who 'control work' either directly or indirectly. The existing provisions of the *NSW Occupational Health and Safety Act 2000* are described below.

#### **8 Duties of employers**

*(1) Employees*

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

*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.*

*(2) A person who has control of any plant or substance used by people at work must ensure that the plant or substance is safe and without risks to health when properly used.*

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

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

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

*(1) A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.*

*(4) In this section, a person who has control of premises, plant or substances includes:*

*(a) a person who has only limited control of the premises, plant or substances (in which case any duty under this section applies only to the matters over which the person has control).*

All of the existing sections directly establish a 'duty of care' in relation to places of work within a framework of strict liability. This framework has been successfully applied in NSW for 25 years, but Unions NSW acknowledges that there is scope to make additions along the lines proposed.

To summarise the position in relation to the duties of employers, Unions NSW strongly supports the inclusion of the general obligations set out in Part 2, Division 1 of the *NSW Occupational Health and Safety Act 2000*, (partially previously described) and that they be adopted, without amendment, for inclusion in the model OHS Act.

We further support the inclusion of duties to extend to the other persons identified earlier in our response to this Chapter.

Unions NSW supports the inclusion of provisions in a model OHS Act whereby workers also have a duty of care. These duties should be limited to:

- Cooperation with an employer (e.g. following reasonable instructions) for ensuring OH&S.
- Ensuring that they, and other workers or persons, are not knowingly placed at risk by their actions.
- Removing themselves from any working environment or work practice where there health and safety could be jeopardized.

Unions NSW believes that these provisions are largely mirrored in the *NSW Occupational Health and Safety Act 2000* at s. 20, described below. Furthermore, the imposition of any further duties, other than those described, would be beyond the worker's control.

### **Duties of employees**

(1) *An employee must, while at work, take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.*

(2) *An employee must, while at work, co-operate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that is imposed in the interests of health, safety and welfare on the employer or any other person.*

Similar provisions can also be applied to persons who are not workers but who are legally at a workplace, or have a legal right to be present at a workplace as a contractor, or as a worker employed by another person.

In noting the Issues Paper's comments in relation to outworkers, Unions NSW agrees that previously, some classes of workers may have been excluded from the protection of OH&S legislation. Unions NSW does not believe that this was an intention of the legislators. It is our contention that all Robens-based legislation recognized the social necessity of applying OH&S protection to all forms of employment. Unions NSW believes that a model OHS Act should also adopt this approach and, to this end, this submission strongly supports the inclusion of appropriate definitions for these persons in a model OHS Act.

Unions NSW also supports a model OHS Act containing identical provisions to the NSW OHS Act 2000, establishing responsibilities for persons who supply plant and substances to employers that are to be used by workers in the employer's undertaking.

The statutory obligations of manufacturers and suppliers in respect to these matters is generally covered in existing OH&S legislation across all jurisdictions and Regulations have been developed to assist with compliance.

However, there are no obligations placed on the designers of plant, substances, and premises used for work. In Unions NSW view, this is a major shortcoming in OH&S legislation and should be appropriately addressed in the model OHS Act.

The safe design of premises used for work is a significant oversight and a model OHS Act should include provisions requiring a 'duty of care' on the part of persons responsible for designing, constructing, and modifying premises to be used for work.

Unions NSW also notes and supports for the purposes of the model OHS Act, the recommendations contained in the recent administrative review of the *Victoria Occupational Health and Safety Act 2004*, in which the author (Bob Stensholt) recommended:

*'... I believe that there is a prima facie case for amending the scope of the duty of designers of buildings or structures to cover in the Act the construction phase of the building or structure. I therefore recommend that WorkSafe consults with affected parties on, the scope of such an amendment and reports back to the Minister with specific recommendations....'<sup>12</sup>*

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<sup>12</sup> *A Report on the (Victorian) Occupational Health and Safety Act 2004. Administrative Review-Bob Stensholt MP (Member for Burwood) Chair Public Accounts and Estimates Committee.*

Unions NSW also supports the inclusion of a definition for 'import' in a model OHS Act to give certainty to the term. We further urge that the definition should apply to plant and substances that are rented, leased or purchased from another country or from across Australian State or Territory borders.

On p.19, this submission makes reference to the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* as a Regulatory response to the impact on workers' OH&S who are involved in the supply chain and agree that the term may not be easy to define, but is not insurmountable. An example is previously provided in response in Definitions.

However, Unions NSW believes that it is extremely important for a model OHS Act to recognize that through the operation of contemporary market economies, many workers are now subject to OH&S risks which arise from the operation of unregulated private contractual governance structures, that do not necessarily involve traditional employer/worker arrangements.

Unions NSW further notes that in support of the NSW OH&S legislation, it should be noted that the *NSW Occupational Health and Safety Act 1983* was the subject of a number of inquiries in recent years, all of which continued to recommended the existing NSW model (now reflected in the *NSW Occupational Health and Safety Act 2000*) as the preferred legislative model.

These inquiries included the *1995 Federal Industry Commission Report (Vol.1 pp 55-56)*; the *Review of the Occupational Health and Safety Act 1983: Final Report of the Panel of Review-Recommendation 14* (This tri-partite panel was chaired by Professor Ron McCallum, Emeritus Professor of Law, University of Sydney who was the author of the Final Report), and; the NSW Legislative Council Standing Committee on Law & Justice, *Report on the Inquiry into Workplace Safety: Final Report* (November 1998) see para 5.5.7. This last Committee was composed of representatives of all political parties represented in the NSW Legislative Council.

## CHAPTER 4: 'REASONABLY PRACTICABLE' & RISK MANAGEMENT

### 4.1 Concept of 'Reasonably Practicable'

For the purposes of Australian OH&S laws Unions NSW notes that the use of the term 'reasonably practicable' varies between jurisdictions, as described in the Issues Paper.

Unions NSW, irrespective of the provisions contained in the OH&S Acts of the Commonwealth and other States and Territories believes that the term 'reasonably practicable' should only be used as a defence together with other appropriate criteria as a matter of consistency.

However, Unions NSW also believes that absolute liabilities should not be limited to 'so far as reasonably practicable'. A Court should still have a right to determine liability.

S. 28 of the *NSW Occupational Health and Safety Act 2000* is an excellent example of Unions NSW preferred approach, stating;

#### **Defence**

*It is a defence to any proceedings against a person for an offence against a provision of this Act or the regulations if the person proves that:*

*(a) it was not reasonably practicable for the person to comply with the provision, or*

*(b) 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.*

Unions NSW strongly opposes any 'test' or 'definition' for 'reasonably practicable' to be included in a model OHS Act.

Unions NSW strongly believes that the defendant's evidence on the issue of 'reasonably practicable' should (like 'control') be weighed by a Court in any OH&S proceedings. There are more than sufficient judgments made in all jurisdictions for the legal profession, employers, unions and other persons who have duties described in OH&S legislation, to determine the OH&S measures to be adopted to satisfy a defence based on 'reasonable practicability', particularly where other defences, such as described in s.28 of the *NSW Occupational Health and Safety Act 2000* can be used.

To introduce a test or definition of the term is also likely to introduce further uncertainty and confusion over the meaning of the term as the nature of work arrangements, work premises, work environments and other related issues evolve and change.

Unions NSW further notes the comment in this section of the Issues Paper which states '*...Concerns have also been expressed at the need for duty holders to obtain legal advice to gain a clear understanding of what is meant by 'reasonably practicable' and how to apply it. ...*'

In response to this statement, Unions NSW believes that any diligent duty holder (with emphasis on 'diligent') would have the good sense to seek legal or expert advice from appropriate sources on this matter in the normal undertaking of their business. After all, ignorance on the part of duty holders about an obligation is not a defence against

prosecution. In addition, generic advice should be available from the Regulator as a matter of course.

It should be noted that Unions NSW has known of several affiliates seeking the same course of action, not out of concern, but to determine whether there are sufficient legal grounds to prosecute an employer for an alleged offence, based on having satisfied the 'reasonably practicable defence' in the light of evidence obtained. It is not unknown for the NSW Regulator to take similar steps for the same reasons.

The meaning of 'reasonably practicable' for the purposes of OH&S law has also been well described by a number of authorities, the most notable being the High Court decision of *Silvak v Lurgi (Australia) Pty.Ltd. [2001] 205 CLR*.

The limits of proving what is reasonably practicable is also very well explained in s.40 of the *UK Health and Safety at Work Act 1974*, which states:

*'In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as it is practicable or so far as it is reasonably practicable( as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.'*

Consideration should therefore be given to adopting this provision in the Defences section for the model OHS Act if it were to assist duty holders, but our preference is that the Courts should be left to determine this matter.

It is also impossible to separate the issue of what is 'reasonably practicable' from the Chapter 8 –Prosecutions: 8.5 The Burden of Proof and Defences. The reason for this is quite simple, as the burden of proof, which in criminal matters is proving 'beyond reasonable doubt', and a burden that is carried by the prosecutor in OH&S matters in the NSW jurisdiction, is balanced by the 'reasonably practicable' defence, in addition to other defences (for Corporations). These defences further advantage a defendant, to the extent that if they can demonstrate to a Court that a prosecutor's evidence was insufficient to satisfy the criminal test of 'reasonable doubt'.

Unions NSW also believes that the alleged concern by 'duty holders' about legal advice is in reality, a reaction to the consistent failure of defendants to prove a 'reasonably practicable' defence. This would indicate, in our view, that both the level of compliance and management of OH&S in the affected defendants' workplaces was poor or non-existent. Even if Regulator's are successful in 90% or more of the prosecutions, this does not necessarily mean that the law is harsh, unreasonable, or difficult to comply with.

In Unions NSW view, the success rate of prosecutions is more a reflection of the fact that employers, expose themselves to action by the Regulator by their deliberate on going non-compliance with the law.

However, Unions NSW have very real fears that a model OHS Act will contain provisions similar to s.20 of the *Victoria Occupational Health and Safety Act 2004*, which states, under the heading 'The Concept of Ensuring Safety'.

1) *To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person-*

(a) to eliminate risks to health and safety so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

(2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety-

(a) the likelihood of the hazard or risk concerned eventuating;

(b) the degree of harm that would result if the hazard or risk eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

Unions NSW have significant problems with this particular provision of the VIC Act, which we believe runs contrary to the employer's general duty and obligations, as described in the *NSW Occupational Health and Safety Act 2000*. In addition, these provisions if adopted in a model OHS Act would not only place an additional burden, or 'onus of proof' on the prosecutor, but the provisions would put the 'onus of proof' required in a model OHS Act in potential conflict with other regulatory legislation.

First, s.20 (1) (b) of the Victorian Act, in Unions NSW opinion, places a lower emphasis on risk elimination as compared to Cl. 5 of the *NSW Occupational Health and Safety Regulation 2001*, which at Cl.5(1) states (in part):

**Meaning of "control" of risks**

(1) For the purposes of this Regulation, an obligation to control a risk to health or safety (in any case in which the elimination of the risk is not reasonably practicable) is an obligation to take the following measures (in the order specified) to minimise the risk to the lowest level reasonably practicable:

This Clause also goes beyond the 'concept of ensuring safety' to the reality of stating what 'control of risks' actually means for the purpose of both the Regulation and by inference the NSW Act.

Unions NSW believe that '...to minimise the risk to the lowest level reasonably practicable...' is a more significant duty compared to '...if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable...' as the former provision places an emphasis on the duty to minimise the risk 'to the lowest level'. This is not a requirement under the Victorian Act.

The additional burden or 'onus of proof' arising from the above, or similar provisions to s.20 of the Victorian Act, in a model OHS Act, would require a prosecutor to prove beyond 'all reasonable doubt', that:

- The employer knew about, was aware of, or should have known about, the hazard or risk that gave rise to the alleged offence and the means of eliminating or minimising the risk 'as far as reasonably practicable', and;
- The employer knew about, or should have known about, the hazard which caused an OH&S risk.

Placing the onus on the prosecutor in having to prove that an employer failed to satisfy the above requirements is, in Unions NSW opinion, a departure from the principle that the onus is on the employer to prove they satisfy the ‘reasonably practicable’ defence.

The reverse onus has been tested in the English Court of Appeal, where the appellant employer argued that the ‘reasonably practicable’ onus of proof on a defendant was incompatible with the presumption of innocence contained in the European Charter of Human Rights. The Court found that the legal burden of proof on employers was justified and appropriate given the social and economic purpose of the *Health and Safety at Work Act 1974*.<sup>13</sup>

The judgement in this matter made a significant observation in the context of the onus of proof, stating:

*‘...If the false advertiser, corporate polluter and the manufacturer of noxious goods are to be effectively controlled it is necessary for them to show on the balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society....’*

Equally important, was this judgement found that the onus of proof resting on the defendant to prove that they took ‘reasonably practicable’ steps to prevent the offence occurring does not contravene the ‘presumption of innocence’.

In Unions NSW view, the onus, or burden, of proving a contravention of s.20 of the *Victoria Occupational Health and Safety Act 2004* extends the presumption of innocence to a level above that required in other social legislation and has the potential to:

- Provide equal protection to employers who either identify the wrong risks, or; have identified actual risks, or;
- Provides equal protection to employers who due to their own limitations are capable of identifying only a limited number of risks, or; are diligent in identifying all foreseeable risks.

In addition, to the English Court of Appeal decision, the High Court have also upheld the onus of a defendant having to prove that they have satisfied the civil standard of proof, as opposed to the prosecutor having this responsibility. The presiding Judge in *He Kaw The v R 157CLR 523 at 595* stated that in effect such a reversal of onus has been accepted as a valid and necessary part of laws dealing with industrial safety.

In view of Unions NSW experience with OH&S legislation in this State since 1983, we have seen no evidence or data to suggest any change occur in the current burden or onus of proof in relation to s.28 of the *NSW Occupational Health and Safety Act 2000* for the purposes of a model OHS Act. We are also yet to hear a valid argument to support a definition for ‘reasonably practicable’ being included in a model OHS Act.

In view of the above Unions NSW see no reason to change these long standing and well established legal arrangements and precedents for the purposes of a model OHS Act.

## **4.2 Risk management**

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<sup>13</sup> *Davis v Health and Safety Executive [2002] EWCA Crim 2949*

Unions NSW support the current approach on risk management adopted in the *NSW Occupational Health and Safety Regulation 2001*, that places a mandatory obligation on an employer and other designated persons to identify hazards and subsequently assess, eliminate or control risks. It is worth noting in the context of the previous part of this submission that, the control of risks is required if elimination is not 'reasonably practicable'.

We support the inclusions of the current NSW provisions (Chapter 2) of this Regulation or similar provisions, within a model OHS Act as a general duty. This provision would also need to include the 'Hierarchy of Controls' (see p.7- Meaning of Control of Risks).

It should be noted that the Queensland OHS Act also has a strong emphasis on Risk Management which is included directly within their Act as compared to the Regulation in NSW.

## CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

### 5.1 DUTY TO CONSULT – 5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION

Unions NSW has also approached the matters dealt with in this Chapter as a block, and responded accordingly.

Unions NSW fully supports the inclusion of mandatory provisions in a model OHS Act that require an employer to consult with employees and their representatives on OHS and welfare matters.

The current provisions contained in the *NSW Occupational Health and Safety Act 2000* at s.13-15 (see p.6) and Part 7 of the *Victoria Occupational Health and Safety Act 2004* are examples of mandatory consultation provisions involving employees and/or health and safety representatives (HSRs), and/or OH&S Committees. The consultation obligations on the part of the employer described in both Acts is both broad and extensive.

In Commonwealth, State and Territory OH&S legislation, only the ACT has limited mandatory consultation provisions.

For a model OHS Act, Unions NSW strongly support the inclusion of provisions covering the following:

- Employers must be required to have a 'OHS and welfare (OH&SW) consultation arrangement' with their workers
- Defining the nature of OH&SW consultation and how it should take place.
- How employee input into OH&SW consultation will occur, and who will be involved, and how these inputs will be reflected in outcomes.
- What employers have a statutory obligation to consult on, including when and how.
- Representation of workers in consultation on OH&SW matters must be based on the HSR elected by a workgroup. If only one HSR is elected at a workplace, the employer is obliged to consult with the HSR on OH&SW matters.
- The minimum role, functions and powers of an HSR should be prescribed in a model OHS Act. (e.g. s.18 *NSW Occupational Health and Safety Act 2000*, Cl.30 *NSW Occupational Health and Safety Regulation 2001*)
- If more than one HSR is elected, the HSRs have a right to request an OH&SW Committee. However, minimum requirements on the role and function of an OH&SW Committee should be prescribed in a Model OHS Act. The powers of the OH&SW Committee should be determined by agreement between the employer and HSRs and documented in the 'consultation arrangement'.
- Any additional functions for HSRs and OH&SW Committees can be negotiated with the employer and included in the 'consultation arrangement.'

- HSRs and the workgroup they represent must be allowed to meet (as required) during paid work time to discuss/make decisions on OH&SW issues on which the employer, HSR or workgroup members wishes to consult. (e.g. Cl. 22(2) (g) *NSW Occupational Health and Safety Regulation 2001*)
- HSRs have a right to attend appropriate Regulator accredited training, of their choice, in order for them to carry out their roles, functions during paid work time. (e.g. Cl. 31 *NSW Occupational Health and Safety Regulation 2001*). The length and content of the training course to be subject to minimum provisions.
- Direct employer involvement with an HSR in OH&SW consultation, or alternatively, a person delegated to act in the same capacity as an employer on OH&SW matters, irrespective of whether the 'employer' is a company or corporation.( i.e. and extension of Cl.24 (j) *NSW Occupational Health and Safety Regulation 2001*).
- The 'OH&SW consultation arrangements' in the organization, including dispute resolution procedures, must be documented and signed of by the HSR(s) and the employer.(e.g. Cl. 27(1)(a) *NSW Occupational Health and Safety Regulation 2001*).
- The employer must make provision to ensure appropriate OH&SW consultation arrangements are in place to ensure the participation of workers who suffer from an incapacity, or; have literacy and/or English comprehension difficulties.

In addition, Unions NSW strongly supports the 'workgroup' concept (as defined in Cl.23 of the *NSW Occupational Health and Safety Regulation 2001*), with the exception that a workgroup should be only be represented by a HSR, namely:

***Workgroups represented by OHS committees or OHS representatives***

*(1) The relevant workgroups to be represented by OHS committees or OHS representatives are to be determined in a manner that ensures that they are able to represent effectively the employees in each workgroup and, in particular, in a manner that enables them to undertake regular meaningful communication with the employees in each workgroup.*  
*(2) The diversity of the employees and their work must be taken into account when determining the relevant workgroups. In particular, the following must be taken into account:*

- (a) the hours of work of employees (including the representation of employees on shift work),*
- (b) the pattern of work of employees (including the representation of part-time, seasonal or short term employees),*
- (c) the number and grouping of employees,*
- (d) the geographic location where the employees work (including the representation of employees in dispersed locations such as those in the transport industry or working from home),*
- (e) the different types of work performed by employees and the different levels of responsibility,*
- (f) the attributes of employees (including gender, ethnicity, age and special needs),*
- (g) the nature of the occupational health and safety hazards at the place of work,*
- (h) the interaction of the employees with the employees of other employers.*

*(2) It is not necessary to establish separate workgroups for different categories of employees, places of work or other matters referred to above.*

Ss. 43-47 of the *Victoria Occupational Health and Safety Act 2004* are equally definitive on the 'workgroup' concept.

The 'workgroup' must also be the subject of agreement between the workers and their union representatives and not determined by an employer. The workgroup

arrangements would need be included in a documented 'OHS&W consultation arrangement'.

Unions NSW believes that the *NSW Occupational Health and Safety Regulation 2001* described above also encompasses the vast majority, if not all, workplaces and work arrangements which are described in Q.46 of the Issues Paper

The model OHS Act should also contain provisions so that employers recognize the right of workers to involve their representatives in all aspects of OH&S consultation and the arrangements to facilitate consultation. Furthermore, the model OHS Act should contain appropriate provisions to ensure that employers cannot:

- Choose the workers they will or will not consult with.
- Run or interfere with the election of a HSR.
- Interfere with, frustrate, discriminate against, damage the employment, or dismiss a HSR exercising any role, function or power prescribed in a model OHS Act.

Unions NSW also strongly supports the inclusion in the model OHS Act, provisions identical to Division 5 of the *Victoria Occupational Health and Safety Act 2004* which detail the powers of HSRs to issue Provisional Improvement Notices (PINs) in certain circumstances.

A model OHS Act should also contain provisions for an HSR to have the power to direct the cessation of work, without loss of pay. An appropriate model for this provision is contained in s. 74 of the *Victoria Occupational Health and Safety Act 2004*.

For a number of related administrative issues associated with OHS and welfare consultation, which cannot be or, is not adequately addressed in existing legislation, Unions NSW is of the view that:

- Contractors, and/or volunteers who are carrying out work within a workgroup could participate as observers with the members of a workgroup in OHS and welfare consultation. Not being 'employees' of the person who controls the workplace, they have no legal right to be elected as a HSR.
- Voting rights in any election of a HSR by a workgroup should be limited to those workers in the workgroup who do not have management responsibilities.
- 'Other Agreed Arrangements' for OH&SW consultation have to be supported by a majority vote of workers (as previously defined) and provided that an agreed number of workers attend the accredited Regulator training course available for HSRs. Other Agreed Arrangements must also be covered by a written 'OH&SW' consultation arrangement', including a dispute resolution procedure.
- The Regulator (Inspector) may direct an employer to recognize a workgroup or workgroups within his or her undertaking, and; order the election of HSRs, in the event of the absence of an OH&SW consultation arrangement at the employer's undertaking, or, in the event that the 'Other Agreed Arrangement' fails to adequately address OH&SW matters at the employers undertaking.

Unions NSW notes that in a recent international study, the current NSW consultation provisions were regarded as the most superior compared to provisions contained in UK, European, USA, Canadian and Victorian arrangements.<sup>14</sup>

The benefits of consultative and participative arrangements are improved OH&S outcomes and reduced workers' compensation premiums and cost.<sup>15</sup>

Federal Government research has arrived at similar conclusions, finding that unionised workplaces are three times as likely to have an OH&S committee, and that unionised workplaces are twice as likely to have undergone an OH&S audit in the previous 12 months.<sup>16</sup>

This should be a primary consideration reflected in a model OHS Act, particularly when recent data has revealed that:<sup>17</sup>

- 8,168 fatalities occur each year either at work, or as a result of work.
- 690,000 workplace injuries or illnesses are recorded each year.
- Up to 1.5 m. Australian workers are exposed to carcinogenic substances at work.

It has been further suggested that 5% of the Australian workforce is injured every year.<sup>18</sup>

On the question of right of entry for authorised union representatives, Unions NSW strongly supports the inclusion of the existing provisions contained in Part 5, Division 3 of the *NSW Occupational Health and Safety Act 2000* without amendment.

We believe that this Division of the Act adequately describes the circumstances under which the right of entry has been exercised, including the right of entry to workplaces, where non-union members are employed. S.77 states:

***Powers of entry of places of work***

*An authorised representative of an industrial organisation of employees may, for the purpose of investigating any suspected breach of the occupational health and safety legislation or the Coal Mine Health and Safety Act 2002, enter any premises the representative has reason to believe is a place of work where members of that organisation (or persons who are eligible to be members of that organisation) work.*

Since these provisions have operated in the NSW Occupational Health and Safety Act 1983 since approximately 1997, and the subsequent 2000 Act, Unions NSW is not aware of, or has the NSW Regulator advised of any incident where a union official has abused this authority.

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<sup>14</sup> HSE Publication. *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 Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London. P.76

<sup>15</sup> SafeWork SA: *A review of the effectiveness of the HSR and workplace OH&S Committee system in South Australia,* December 2001

<sup>16</sup> Hawke, Anne & Wooden, Mark (1997) *The 1995 Australian Workplace Industrial Relations Survey.* Australian Economic Review 30 (3) 323-328 doi: 10.1111/1467-8462-00032.

<sup>17</sup> Access Economics Pty.Ltd. *Review of methodology and estimates of workplace fatalities for the NOHSC September 2003.* p. 8

<sup>18</sup> H.De Cieri & R.Kramer *Human Resource Management in Australia (2<sup>nd</sup>.Ed.)* McGraw-Hill Irwin, Boston (2005)

Unions NSW is aware of one case where an employer did commence proceedings against a Union on the grounds that the right of entry was exercised by an authorised union official under false pretences. Another case involved obstruction of two authorised union officials who were ejected by an employer from premises in the course of an investigation. In both instances the Union involved was successful in the proceedings.<sup>19</sup>

Unions NSW supports the inclusion of the following additional powers and provisions in a model OHS Act to eliminate a significant anomaly in *NSW Occupational Health and Safety Act 2000* Part 5, Division 3 at s. 77 which can in some instances, frustrate an investigation.

This anomaly is the exclusion in s.77 of the *NSW Occupational Health and Safety Act 2000* of the following sub-section in s.59 (b), which, in detailing a range of Inspectors' powers states:

*take for analysis a sample of any substance or thing which in the inspector's opinion may be, or may contain or be contaminated by, a substance (or a degradation product of a substance) that is a risk to health,*

The provisions of s.59 are mirrored in s.81 of the *NSW Occupational Health and Safety Act 2000*, and detail a union official's powers, with the above major exception.

Unions NSW believes that this implies that union officials exercising their right of entry for OH&S purposes have a significant effect on OH&S compliance. Workers are effectively represented in voicing their OH&S concerns, and employers will respond by resolving OH&S issues out of fear that the union will either involve an Inspector from the Regulator, or (in NSW) initiate proceedings against the employer in the event of a significant breach.<sup>20</sup>

Unions NSW further believes that in exercising their right of entry, a union official should have the same powers as a HSR, and be able to issue PINs, carry out workplace inspections and review existing work arrangements and practices and, in certain circumstances, direct the cessation of work. The Victoria Occupational Health and Safety Act 2004 (s.74) provides a useful model Clause for this purpose.

Unions NSW strongly supports the training of union officials so that they are competent to discharge their rights and powers before they are granted a right of entry card for OH&S purposes. This training should also include topics on inspection and investigation.

Unions NSW strongly supports the inclusion of provisions in a model OHS Act that effectively protect workers from discrimination, intimidation, harassment, dismissal, or any damage or alteration to their employment (irrespective of their type of employment) as a consequence of the following:

- The worker making a 'bona fide' complaint about an OH&S matter for which the worker has expressed concern to:
  1. The employer,
  2. A HSR

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<sup>19</sup> *WorkCover NSW (Inspector Sutcliffe) v OurCorp Pty.Ltd. [2006] IRC 202.5342705/2 & Transport Workers Union NSW Branch (A. Sheldon) v Fletcher Insulation (NSW) Pty.Ltd. 200140714/07/02*

<sup>20</sup> *ACCI Modern Workplace: Safer Workplace – An Industry Blueprint for improving OHS in Australia, April 2005*

3. A Regulator's Inspector.
4. The worker's union.
5. Any other worker, including a supervisor or manager.

irrespective of whether an actual OH&S risk exists, or not.

- Exercising any role, function or power vested in the position of a HSR contained in the model OHS Act, or otherwise documented in the 'OHS&W Consultation Arrangement'

The Regulator, or the worker's (and HSR's) union should be able to commence proceedings against an employer in the event of any alleged victimization, discrimination or dismissal as a matter of urgency.

The onus of proof, in the event of an alleged breach against such provisions should lie with the employer. The *NSW Occupational Health and Safety Act 2000* provides a useful example of this approach at s.23 (2), stating:

*In proceedings for an offence against this section, if all the facts constituting the offence other than the reason for the defendant's action are proved, the onus of proving that the dismissal, injury or alteration was not actuated by the reason alleged in the charge lies on the defendant.*

Offences of this nature should be subject to criminal proceedings, and the model OHS Act should include provisions for a Court to make specific orders in relation to the employer's future conduct towards the worker (HSR), and any other orders the Court deems appropriate to deter future offences. These orders may include regular inspections on the part of an Inspector.

In the event of a proven offence, Unions NSW believes that the worker(s) involved should be made an award ( to the worker) by the Court, in addition to the prosecutor costs being met by the employer. The award/penalty should be sufficient to act as a deterrent to any future discrimination or victimization, with additional penalties if a Judge/Magistrate finds that the employment relationship cannot be restored. (e.g. Up to the equivalent of 12 months salary for a 1<sup>st</sup>. offence with an additional six months pay if the employment relationship cannot be restored.)

Resolution of a matter, other than for criminal proceedings, may be initiated by the worker's (HSR's) union, in the event of an imminent risk of dismissal, with the Court. The Court should then determine to choose whether the matter should be dealt with as an unfair dismissal claim, or an alleged breach of OH&S legislation.

In NSW, Inspectors have the power to intervene in matters of alleged discrimination or victimisation; however, it has been Unions NSW experience that a number of the NSW Regulator's Inspectors are reluctant to intervene in this matter, often citing that the worker should employ internal grievance procedures to deal with the matter. In reality, it is more likely that Inspectors are not trained to deal with discrimination matters.

While Unions NSW agree 'in principle' to external intervention, from a practical perspective it is not always successful to conciliate with complaints of this nature.

It would be far more practical, as suggested in Q. 75, for the Regulator to provide protection from ongoing discrimination or victimization pending proceedings, by an

Inspector issuing a prohibition notice which specifies the conduct expected of the employer. This action should not preclude the worker (through the Regulator or a union) lodging an injunction against the employer if discrimination or victimization continues or is threatened.

## **CHAPTER 6. REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY**

### **6.1 Role and Function of Regulators.**

All existing Commonwealth, State and Territory OH&S Acts have explicit provisions detailing the jurisdiction's functions, powers of the Inspectorate (including the specific role of Inspectors within each jurisdiction) and how the Regulator is made accountable to each jurisdiction.

Unions NSW strongly supports the maintenance of the existing Regulatory bodies within each jurisdiction. However, this does not mean that 'harmonising' of the Regulatory bodies to aid consistency in their operations could not happen within this framework.

The questions posed in Q.79-82 are, in the main covered by existing OH&S legislation.

However, Unions NSW view of the question posed at Q.79 cannot be answered in the absence of an independent, tripartite 'in depth' review of each jurisdiction's current arrangements and operations, in order to examine their operations. However, the terms of reference for any such review should be framed to assist existing Regulators to implement 'best practice'.

Unions NSW supports the points made in Q.81-82, and supports the view that Inspectors should have the power and authority not only to exercise the function and powers of the Regulator, but to also exercise specific powers in the exercise of their regulatory duties.

Finally, in response to Q. 83 Unions NSW does not support the separation of the advisory and enforcement functions within the organisational structure of a Regulator. We strongly believe that any such separation has the potential to raise 'conflict of interest' concerns. This would be a particular concern if the advisory function did not include enforcement, or if the advisory staff or the Regulator, were not permitted to inform the enforcement staff of a breach of OH&S legislation on the part of a 'client' who they were advising.

If an Inspector, for example, is called to give advice to a 'client', he/she should have the power, as part of the advisory role, to issue an infringement notice on a 'client' if the circumstances require this action. Separation of functions could also raise the potential for significant judicial criticism of the Regulator if an Inspector were to investigate and prosecute an employer, following a fatal injury, injury or illness of a worker. This criticism could arise if the employer was a former 'client' of the advisory arm, and more so if the employer failed to act on advice given, which then contributed to an offence.

'Conflict of interest' concerns arose within the NSW Regulator, approximately 17 years ago, as a result of the then advisory function (providing advice on a fee for service basis) coming into conflict with the enforcement role. This resulted in the fee-for-service advisory function being abandoned.

Unions NSW supports consistency in the appointment, qualifications (including competencies), training and authorization of any other person involved in OH&S enforcement. This also applies to unions officials. (see P.42 of this submission) Inspector training should also be directed at the understanding of particular industries and work environments and, the hazards/ risks associated with the industries and working environments. While it is important that each Inspector has generic skills, it is

equally important that they either have, or acquire, experience in working in particular industries and with specific working environments.

Additional qualifications should also be encouraged in specialist areas such as industrial hygiene, ergonomics, engineering, science and occupational health.

Currently, Unions NSW does not believe that the number of Inspectors employed by Regulators in all jurisdictions, is sufficient to encourage a proactive management of OH&S by employers. It is fair to say that some large employers have attempted to proactively manage OH&S with degrees of success but, the same cannot be said for small business which generally regards OH&S as another regulatory imposition by Government.

The current average national ratio of Inspectors to workers in all jurisdictions is 1.1 per 10,000 workers.<sup>21</sup>

It is Unions NSW view that this low inspector/worker ratio is largely the reason that jurisdictions are reactive rather than proactive. Whilst this ratio is maintained, Unions NSW does not believe that it is possible to ensure any effective balance between proactivity and reaction or that Regulators will be able to effectively respond to new and emerging hazards. Unions NSW believes that the current Inspector/Worker ratio is in itself a impediment to achieving good OH&S outcomes in workplaces. A similar observation was made by Bob Stensholt in his review of the *Victoria Occupational Health and Safety Act 2004*, where he states:

*'...In my opinion, deterrence is essential to effective compliance and the likelihood of prosecution for a breach of the Act or regulations is a powerful incentive to comply with the law. I am concerned, given the numbers of claims, fatalities and serious injuries, that WorkSafe addresses what I regard is a comparatively low level of prosecutions. I believe WorkSafe needs to seriously re-consider whether its policy of guidance and incentives, coupled with an arguably conservative deterrence approach is sufficient to achieve its OHS outcomes. If a 'deterrence' approach is to be more actively embraced by WorkSafe, it should be resourced sufficiently (in terms of inspectors, investigators, prosecutors and others engaged in the enforcement and prosecution process) to ensure this can occur. ...'*<sup>22</sup>

Unions NSW believes that it is imperative for a Regulator to have an Inspectorate of adequate size with the skills and knowledge to be able to implement proactive and reactive intervention and, at the same time, achieving the Regulator's stated OH&S objectives of prevention of work related injuries, disease and fatalities.

If this issue is not dealt with, any discussion on the future role and functions of a Regulator becomes redundant.

A matter of great concern, is that the HSE's recent research ( which involved the NSW and Victorian Regulators) found that:

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<sup>21</sup> Extract from 'The Comparative Performance Monitor 2006-2007 Workplace Minister's Council.

<sup>22</sup> A Report on the (Victorian) Occupational Health and Safety Act 2004. Administrative Review-Bob Stensholt MP (Member for Burwood) Chair Public Accounts and Estimates Committee.

*'... Notwithstanding some examples of good practice, none of the regulatory authorities we reviewed have systematically addressed the specific problems associated with either labour market transformation or the considerable changes in work organisation over the last thirty years....'*<sup>23</sup>

This issue has been previously identified and addressed in this submission at P.13, and PP. 18-20

It should be noted that the NSW Regulatory reforms described on PP18-20, enacted to protect outworkers employed in the clothing and textile industry and long distance truck drivers, were not a Regulator initiative. The two Unions whose members were employed in each industry were instrumental in the development and implementation of the reforms.

In doing so, it should be noted, the TWU in particular, identified significant change in the normal employment relationships which has major impact on the OH&S of a large group of their members.

Unions NSW supports the current scope and nature of Inspector powers and functions, identification and right of entry provisions, described in Part 5, Division 2 - Powers of Inspectors and, also described in the provisions of Division 4- General provisions relating to Notices, contained in the *NSW Occupational Health and Safety Act 2000*.. However, Unions NSW strongly supports an extension of the scope and powers for Inspectors in all jurisdictions to effectively deal with the changes to employment relationships and supply chains described in p. 16 (para.6) and p. 17 (paras. 3-5).

In utilizing these powers, across State and Territory lines, each jurisdiction will need to have identical 'Memorandums of Understanding' (MOUs) or similar arrangements for an Inspector to pursue a person, or persons, operating through a company or corporation, for breaches of OH&S law across jurisdictions, if and when necessary. Alternatively, Inspectors in each jurisdiction could have powers to investigate alleged offences by such persons on behalf of other jurisdictions. Unions NSW is confident that such arrangements can be accommodated in provisions covering both the general scope of the Act and, the scope of an Inspector's powers in a model OHS Act and, also by reference to the proposed expansion in the meaning of the phrase 'control of risks' as described previously on P.19 (so that an inspector in one jurisdiction can be contractually authorized to inspect supply chain locations in another jurisdiction).

Unions NSW also supports the proposition that the recommended scope of powers be extended to cover Improvement, Prohibition, and Infringement Notices

In addition, the scope of the model OHS Act should allow provision for these types of offences to be pursued by Federal Branches of Unions, either by co-opting, if necessary, a State based union official with appropriate right of entry qualifications for this purpose or, a similarly qualified Federal Branch official.

Unions NSW also supports the current review methods contained in the *NSW Occupational Health and Safety Act 2000* for Inspector decisions, as a preferred model for adoption in the model OHS Act. The *NSW Occupational Health and Safety Act 2000*

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<sup>23</sup> HSR Publication. *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* Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London. P.xxiii

describes the matters that are subject to internal and external review and the required processes to be followed. We do not believe, at this stage that any other appeal mechanisms are necessary.

## **CHAPTER 7 – COMPLIANCE & ENFORCEMENT.**

### **7.1 Enforcement Measures- 7.3 Measures exercised beyond the Workplace**

Unions NSW supports the inclusion of enforcement measures in order of escalation in a model OHS Act. We do not support enforcement matters being dealt with separately in a Regulation or in other guidance material.

However, Unions NSW is not opposed to guidance material on enforcement being provided to assist persons to comply with the provisions on enforcement being contained in the model OHS Act.

The model illustrated (p.29 –Issues Paper) is a useful model, provided that the hierarchy of measures, particularly the order, does not have to be strictly observed in all situations by the Regulator (HSR or Union Official). If the opposite was to apply, and ‘safety directions, warnings and cautions’ took precedence over an improvement notice, proper deterrence to offend and enforcement of OH&S legislation would likely be greatly affected.. The Regulator could be further exposed to liability if it failed to exercise ‘due diligence’ in response to a OHS hazard or risk by taking enforcement action.

Accordingly, NSW Unions supports the following enforcement measures, in the order identified.

1. Improvement Notices (issued by Inspector, PIN issued HSR or Union Official) which could be accompanied by, or include within the notice, an appropriate direction, warning or caution.)
2. Prohibition Notices (issued by Inspector. Cessation of Work notice issued by HSR or Union Official)
3. Investigation Notice. (Authorising an Inspector to stop plant operation for the purposes of conducting an investigation.)
4. Infringement Notice (On the spot fine determined by Inspector for minor offences-appealable by defendant. An infringement notice can be issued in response to non-compliance with 1,2 or 3, depending on the circumstances.)
5. Prosecution. (Inspector or Union Official)
6. Fines and other Punitive Action (including enforceable undertakings ordered by a Court)
7. Fines and other Punitive Action (By Appeal to a Higher Court)
8. Incapacitation. (By the Regulator with the authority of the Minister or Court).

Unions NSW also insists that these measures be included in a model OHS Act, not in separate legislation or regulations.

Unions NSW also envisages that PINS, Improvement Notices and Prohibition Notices will contain specific recommendations on how to achieve compliance, and that they should be subject to review, provided the operation of the notice applies until the review

is concluded. If this did apply, workers and others could be exposed to an ongoing or additional OHS risks.

Recommendations contained in a PIN, Improvement Notice or Prohibition Notice should not be limited to, depending on the alleged breach, a reference to the section of the Act or Regulation that is allegedly breached but as far as possible, should provide information on how the duty holder can eliminate or minimize an OHS risk or potential hazard and, how to comply with any other provision of the OH&S legislation.

Improvement notices should also contain a time frame to allow for compliance, but the time frame should be determined by the Inspector when issuing the notice, in consultation with the HSR for the affected workgroup. A specified minimum time frame contained in legislation could, in some instances, be an additional OH&S risk.

Provision for the issue of infringement notices and the administration of notices should be included in a model OH&S Act to cover minor breaches of the Act and Regulation. (e.g. when an improvement notice has not been complied with or, the breach of the Act/Regulation does not involve an injury or illness, or exposure to a risk to OH&S.)

The monetary penalties for minor breaches of provisions of the OHS Act/ Regulation could be set out in a schedule in the model OHS Act and accompanying Regulation.

Unions NSW supports the inclusion of provisions allowing for remedial orders, injunctions and enforceable undertakings. Interim injunctions should only be considered in the event that a Court is satisfied that no potential risk, or actual risk, to the OH&S of workers exists. This submission covers enforceable undertakings as a penalty option and are further discussed in response to sentencing options **at PP 60-61.**

The scope of the model OHS Act, on this issue, should not be limited to improvement or prohibition notices, but also apply if the Regulator (or Union) has grounds or evidence that a person is likely to re-offend. The question of evidence being provided or not, should rest with the Court only following a temporary injunction. The Court may then require the applicant and alleged offender may provide evidence to a Court for the granting of, or refusal to grant, a full injunction.

It is important to note that enforcement can only be successful if the measures and penalties are sufficient to bring about organisational change in a meaningful manner.

Unions NSW believes that overall, the number of prosecutions in Australia for OH&S offences is low.

When combined with a low enforcement and consequent low deterrence, discussion on this Chapter is somewhat academic. This is confirmed by recent research suggesting a number of relevant factors to be seriously considered by Regulators responsible for OH&S legislation, irrespective of how powerfully the legislation is framed.

The following extract needs to be read in conjunction with this submission's comments on Chapter 8.

Note that the prosecution levels referred to in this extract applied generally to all Regulators were part of the HSE study.

*'...First, given the low rate of detection, investigation and prosecution of health and*

*safety offences, optimising the general deterrent effect of court sanctions is essential to producing the highest return on resources devoted to prosecution.*

**Second**, *sanctions that produce moral, as well as deterrent, effects are likely to have a greater impact on firm decision-making.*

**Third**, *where firm reputation is unlikely to be greatly damaged by conviction and sentence, sanctioning policy should focus on increasing the moralising effect of court-based sanctions.*

**Fourth**, *although research strongly suggests that administrative penalties focus managerial attention on occupational health and safety, their impact in creating a climate of compliance through moralising responsibility is likely to be less than prosecution.*

**Fifth**, *given the capacity of large firms to absorb even ostensibly large fines and given that increasing the rate of CEO turnover among larger companies is being driven by the demand for higher performance from investors, the effectiveness of organisational sanctions is likely to be highly dependant on fines being linked to firm size.*

**Finally**, *given investors' passivity, sanctions which impose significant economic and reputational costs on firms are likely to be necessary to overcome the general inertia against direct intervention in firm management that has historically characterised institutional investing....'<sup>24</sup>*

It is fairly easy to predict some of the employer and corporate responses to these observations, such as: if OH&S legislation is prosecuted and enforced in this manner, it will be a disincentive to investment resulting in business failures and/or drive corporations off shore.

Other legislation affecting employers and corporations such as trade practices, corporate governance, taxation and environmental legislation all of which have significantly greater penalty provisions than Australian OH&S laws, does not seem to have resulted in a dramatic increase in business closures or a mass exodus of employers and corporations from the country.

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<sup>24</sup> *Ibid P.xxiv-xxv*

## CHAPTER 8: PROSECUTIONS

There are a number of matters that Unions NSW will include in this submission that are not adequately addressed in the questions contained in Chapter 8 of the Issues paper and which need to be addressed under this heading.

### 8.1 Criminal or Civil Liability

Unions NSW strongly believes in the principle that prosecution of breaches of OH&S legislation must be treated as criminal offences. Whilst we acknowledge that the scope for prosecutions in NSW in particular, can include breaches of the *NSW Crimes Act*, the discretion still remains for a Court to record a successful prosecution as a criminal offence. Unions NSW strongly supports the continuation of this legal discretion, and support the model OHS Act treating breaches as criminal offences. To take a differing course of action would undermine the seriousness of work related fatalities and injuries.

Under the *NSW Occupational Health and Safety Act 2000*, the burden of proof remains with the employer or other person, (including a worker) alleged to have committed an offence under the Act. This has been the case since 1983 following the commencement of the *NSW Occupational Health and Safety Act 1983*. It is also worth noting that the same onus of proof has rested with the employer, and other persons, in the *UK Health and Safety at Work Act 1974* for 34 years, on which the NSW and other Australian OHS jurisdiction is based.

Notwithstanding the strict liability of alleged offenders under the NSW system, the prosecutor still has to prove 'beyond reasonable doubt' (the criminal standard of proof) that an offence against the Act has occurred. This standard of proof is applied in offences involving workplace or work related fatalities, injuries or illness and in other offences where a fatality, injury or illness is not involved.

The employer's (or other person's) defence is based on the civil standard, which is less onerous than the criminal standard of proof, relying on 'the balance of probability', in the event of the alleged offender being a Corporation ( or the Crown), or a 'person'. These are distinguished in the *NSW Occupational Health and Safety Act 2000* at s. 26 and s.28, which state:

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

*(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:*

- (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or*
- (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.*

#### **28 Defence**

*It is a defence to any proceedings against a person for an offence against a provision of this Act or the regulations if the person proves that:*

- (a) it was not reasonably practicable for the person to comply with the provision, or*
- (b) 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.*

S.28 also applies to a defence by individual employees, who are alleged to have ( by act or omission) failed to exercise reasonable care in their work and thus causing a fatal injury or injury, or; as a failure to take comply with reasonable directions contributed to or caused a fatal injury or injury.

The defences previously described, have enabled employers to defeat prosecutions brought about by WorkCover NSW Inspectors. Significant examples are *WorkCover NSW (Inspector Byer) v Cleary Bros. (Bombo) Pty.Ltd. [2001]110IR 182* and *WorkCover NSW v Australian Inland Energy Water Infrastructure (trading as Inland Water and Energy) [2003] NSW IRC 408*. In both cases the defendants were able to prove that they had taken ‘reasonably practicable’ steps to prevent an OH&S breach.

Whilst it is generally accepted that the vast majority of prosecutions brought against offenders are successful, (e.g. The NSW Regulator claims a prosecution success rate in excess of 90%), there is no data available from the Regulators on the number of investigations into alleged breaches that have been initiated but which have not been the subject of legal proceedings. Nor does the data identify proceedings which have been withdrawn by the Regulator.<sup>25</sup>

Unions NSW also supports the inclusion criminal offences for the purpose of a model OHS Act to include offences by persons alleged to have failed to meet a regulatory requirement, involving an imposed standard set by OH&S legislation. An example of such an offence would be an offence against s.86 of the *NSW Occupational Health and Safety Act 2000*, which states:

**Notification of incidents**

(1) *The occupier of any place of work must give WorkCover notice in accordance with this section of any of the following incidents:*

(a) *any serious incident at the place of work (as referred to in section 87),*

(b) *any incident occurring at or in relation to the place of work that the regulations declare to be an incident that is required to be notified to WorkCover.*

s.87 describes the types of incident to be reported.

Unions NSW supports the current scope of the provisions of the *NSW Occupational Health and Safety Act 2000* applying to volunteers who exercise control over the work undertaken in a corporation. This provision applies in NSW, but note that the provision does not apply in Victoria.

## **8.2 Where should prosecutions be heard.**

We do note that this is an extremely important issue which requires significant judicial input from both Federal and State legal systems. Traditionally OH&S prosecutions have been heard in the NSW IRC or Industrial Magistrate’s Court. This is our preferred position but we do note that these avenues are not available or used in all jurisdictions.

## **8.3 Who may commence prosecutions and relevant procedures?**

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<sup>25</sup> *The Comparative Performance Monitor 2006-2007 Workplace Minister’s Council.* ‘

Unions NSW at various parts of this submission has stated strong support for a model OHS Act to include provisions whereby Unions can commence proceedings against employers for breaches of the Act. This is in addition to the powers vested in an Inspector acting for the Regulator, the Regulator in its own right or, when it is directed by the Minister.

S.106 of the NSW Occupational Health and Safety Act 2000 provides a model which, with some amendments, accommodates this issue.

**Authority to prosecute**

*(1) Proceedings for an offence against this Act or the regulations may be instituted only:*

*(a) with the written consent of a Minister of the Crown, or*

*(b) with the written consent of an officer prescribed by the regulations, or*

*(c) by an inspector, or*

*(d) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate.*

*(2) In proceedings for an offence against this Act or the regulations, a consent to institute the proceedings, purporting to have been signed by a Minister or a prescribed officer, is evidence of that consent without proof of the signature of the Minister or prescribed officer.*

The amendments in a model OHS Act would need to state that the ‘Secretary of a Federal or State Branch of an industrial organization of employees ‘ can commence proceedings under the Act.

Unions NSW believes that this amendment would be necessary for Unions to be able to prosecute across State and Territory borders. e.g. employers who are based in one State or Territory and have workers employed or undertaking work in another State or Territory. Alternatively, Union Officials in the State where an offence has occurred would be permitted to enter the affected worker’s employer’s premises

Unions NSW has more than sufficient evidence to support of this right being extended to Commonwealth employment and employment in all States and Territories.

The NSW experience has shown that unions who have undertaken prosecutions, fall into a number of categories, which in a number of cases, are different to the normal NSW Regulator type prosecution. A number of prosecutions by Unions have resulted from the Regulator’s failure or refusal to commence a prosecution.

In a number of instances unions have successfully pursued prosecutions which have involved illness related to an incident which has occurred while work was being undertaken. A number of these cases have set precedents in NSW OH&S Case law.

These include the following:

*Public Service Association and Professional Officers’ Association Amalgamated Union of NSW (Maurice Michael O’Sullivan) v The Crown in the Right of the State of New South Wales (Department of Education and Training) [2003] NSWIRComm 74*

The defendant defended the charges and unsuccessfully appealed against charges proven before the Court. This successful prosecution involved an assault on a member of the union employed as a Teacher’s Aide Special, employed at a School for students with intellectual and physical disabilities. The worker was assaulted by a school student and subsequently diagnosed with post traumatic stress disorder resulting from this and a subsequent assault, and was eventually medically retired from her employment.

The evidence presented proved that the Department did not undertake a risk assessment on the student, nor seek any information about the student from other organisations who had experience with him, which included other NSW Government Departments. Further evidence proved the absence of emergency personal communication devices which could have prevented the assault.

The case also established that staffing numbers were relevant to workplace OH&S, and that industrial action undertaken by one group of workers on the day the offence took place was not a defence within the meaning of s.28 of the NSW Occupational Health and Safety Act 1983.

*Public Service Association and Professional Officers Association Amalgamated Union of NSW (Janet Good) v Tourism NSW [1998] NSWIRC 2507*

The defendant pleaded guilty in the first prosecution undertaken in NSW involving an occupational overuse injury. The offence concerned a clerk who contracted the injury as a consequence of the employer's failure to provide adequate information on injury prevention. The defendant, prior to the injury, was informed of the risk and ways of improving the clerk's workstation but had not done so at the time of the offence.

*Public Service Association and Professional Officers' Association Amalgamated Union of NSW (Maurice Michael O'Sullivan) v Roads and Traffic Authority (RTA) of NSW [2002] NSWIRComm 214*

The defendant pleaded guilty to the offence. This successful prosecution involved a member of the union who suffered second degree burns to his upper body resulting from a Liquid Petroleum Gas (LPG) explosion at a site under the control of the RTA.

The RTA did not inform the worker of changes to the LPG powered public barbeque at the site, from a one to two cylinder unit, nor did it inform him on how to change over the dual cylinders. The RTA failed to conduct a risk assessment of the new arrangement. The worker could not communicate with his work depot for instructions and, after suffering 2<sup>nd</sup>. burns to his upper body drove for 80 kilometres before he was able to arrange for first aid or assistance. The communications equipment fitted to the work vehicle was out of range of his works depot, a fact that had been repeatedly reported to the RTA.

The RTA was found to have a comprehensive 'paper system' for managing OH&S, but it was not effective in a practical and operational sense. This case led to the RTA reorganising and properly resourcing its management of OH&S.

*Public Service Association and Professional Officers' Association Amalgamated Union of NSW (John Cahill) v State of New South Wales (NSW Police) No 2 [2005] NSWIRComm 400*

The defendant defended the charges brought by the Union. This successful prosecution involved a member of the Union being exposed to elevated sound pressure resulting in a traumatic injury to his hearing in one ear. The injury was caused by another worker as a consequence of a practical joke. This prosecution exposed a number of failures, and presented expert evidence that the current Regulatory measures safeguarding hearing in the workplace was deficient. This evidence was acknowledged by the Judge in his decision.

*Public Service Association and Professional Officers' Association Amalgamated Union of NSW (John Cahill) v State of New South Wales (Department of Education and Training and Department of Juvenile Justice) [2007] NSWIRComm 105*

Established the right to present certain evidence on the part of an expert witness called by the prosecutor. (This prosecution is still ongoing).

The Financial Sector Union (NSW Branch) ('FSU') has successfully brought prosecutions against three Australia's largest banking corporations for failing to adequately protect workers against OH&S risks resulting from armed robberies. The cases are:

*Financial Sector Union NSW Branch (Geoff Derrick) v ANZ Banking Group Ltd [2003] NSWIRComm 406*

*Financial Sector Union NSW Branch (Geoff Derrick) v ANZ Banking Group Ltd [2005] NSWIRComm 59*

*Financial Sector Union NSW Branch (Geoff Derrick) v Westpac Banking Corporation [2006] NSWIRComm 76*

*Financial Sector Union (NSW Branch) (P. Presdee) v Commonwealth Bank [2005] NSWIRC 389*

The background to these prosecutions, and the impact of the prosecutions is of considerable importance in supporting a Trade Union's right to prosecute employers for breaches of OH&S legislation.

In 1998 there were 180 armed robberies in NSW, and in 85% of these incidents bank workers were either molested or assaulted.

In all cases, the extent of the risk of exposure to armed robberies in each of the branches was known to the corporations and which in each case, failed to expedite measures to protect bank workers.

One prosecution followed after five similar incidents which had occurred at five separate branches of the same banking corporation.

In 2000, the FSU wrote to all NSW banking corporations requesting improvements to workplace design and in particular the installation of full-height Anti-Jump Barriers to bank counters. From 2000-2003, the average number of bank robberies per annum was 79.75, which is 7.9% of the total number of banks operated by all banking corporations.

In the FSU's experience, it is important to note that the NSW Regulator was informed of each of the incidents one of which resulted in a prosecution undertaken by the FSU, but The Regulator did not take any action against the banking corporations involved. In *Financial Sector Union NSW Branch (Geoff Derrick) v Westpac Banking Corporation [2006] NSWIRComm 76*, the presiding Judge observed that "...The (NSW) WorkCover Authority carried out an investigation into the robbery and did not take any action in relation to it. ..."

In response to the action taken by the FSU, In the period 2004-2007 the number of bank robberies had fallen to 28.75 per annum, a 64% reduction in these incidents with only 2.2% of banks being affected.

Of further significance, and despite the action taken by the FSU, the NSW Regulator, and other State and Territory Regulators, have yet to commence proceedings against a banking corporation for breaches of OH&S legislation. This is despite the fact that some 4016 workers were molested or assaulted during armed robberies between 1998 and 2005.

Another hallmark successful prosecution was initiated by the Maritime Union of Australia (MUA)

*Maritime Union of Australia (Robert Coombs) v Patrick Stevedores Holdings Pty Ltd [2005] NSWIRComm 56*

The charges were defended by the employer who employed expert witnesses in their defence. The successful prosecution involved occupational overuse injuries suffered by union members employed as straddle crane drivers.

On at least one occasion, following an investigation and issue of improvement notices by an Inspector of the NSW Regulator and subsequent additional offences at a workplace, the Union who had requested the Regulator inspect the workplace was advised that no prosecution action would be taken by the Inspector. The Union then informed the Inspector that if the Regulator withdrew the Union would prosecute the employer and call the Inspector as a witness. The Regulator subsequently reviewed their original decision and successfully prosecuted the employer for six breaches of the NSW Occupational Health and Safety Act 1983. The case in question is cited below.

*WorkCover NSW Inspector Keniry v The Crown in Right of the State of New South Wales (Department of Community Services) [2002] NSWIRComm 349.*

It should also be noted that the Public Service Association and Professional Officers' Association Amalgamated Union of NSW ('PSA') will commence proceedings against two Government Agencies following fatal injuries suffered by two workers when the NSW Coroner hands down a decision. In this instance Unions NSW is advised that the NSW Regulator would not initiate proceedings against the alleged offender. (*Before the Westmead Coroners Court, Inquest into the deaths of Benjamin McDonnell and Ross Mill*)

Unions NSW is very aware that a number of employer/industry associations are very opposed to Unions being empowered to prosecute employers for breaches of the NSW Occupational Health and Safety Act 2000, irrespective of the small number of prosecutions undertaken.

In the past 2 years a number of articles have appeared in the NSW media either questioning this power generally or suggesting that the prosecutions brought against employers are frivolous or unfair and, alleging that prosecutions pursued by Unions are little more than revenue raising exercises.

The NSW Regulator has also been the subject of similar, if less vindictive complaints, particularly from the small business lobby.

Unions NSW strongly believe that the legal right to prosecute employers is in fact an additional deterrent to employers who attempt to evade their OH&S legal responsibilities and *de facto*, it is an additional enforcement arm to the NSW Regulator's activities. In addition, the prosecutions have had positive effects resulting in significant improvements to the OH&S of workers in the defendant employment.

Unions NSW also wish to point out that the a decision on the part of a NSW Union to prosecute is not taken lightly because an investigation, the collection of evidence and the organizing of expert and other witnesses is a significant resource issue for the majority of NSW Unions who have taken this action. The evidence to date demonstrates that the current right to prosecute has not been abused by any Union since its introduction in 1983. Union prosecutions have clearly led, in a number of cases to significant reforms to OHS in those industries and/or employers effected by the prosecution.

However, Unions NSW do not underestimate the effectiveness of Union prosecutions (despite the media responses and criticism) which is of even greater significance given that the total number of prosecutions undertaken in the period 2001-2008 has been approximately 1% of the total number of prosecutions commenced by the NSW Regulator (2057) in a lesser period.<sup>26</sup>

Virtually all prosecutions undertaken have occurred since 1997.

Unions NSW, or our affiliates who have commenced proceedings against employers under the *NSW Occupational Health and Safety Act 2000* have never been given any formal grounds or reasons, or excuses for why the NSW Regulator did not take action against employers in matters which the Regulator investigated. We can speculate on this matter, but in the absence of any official reasons and, given the background to some of the cases quoted, it is difficult to offer further comment at this stage.

Unions NSW support the model OHS Act including provisions for Inspectors employed or appointed by the Regulator in each jurisdiction to have the power to bring proceedings against an offender. Part 7 of the *NSW Occupational Health and Safety Act 2000* is in Unions NSW view the preferred model provision.

Unions NSW is not opposed, in principle, to individuals commencing a prosecution on their own behalf. However, the practical implications for including such a provision would need to be considered, such as meeting the day to day legal costs involved in gathering evidence and preparing and presenting a case before the Court, irrespective of the fact that costs would be granted to the prosecutor if the defendant was found guilty of an offence.

If the defendant was found not guilty, the individual worker would be required to meet the costs of the defendant as well as their own costs.

In addition, if such a right was prescribed in a model OHS Act, other rights and powers may have to be vested on an individual or his/her agent (e.g. right of entry.) in order to obtain evidence.

Finally, Unions NSW point out that Regulators are also employers and their own workers should have a right to have their Trade Union take action against their employer in the

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<sup>26</sup> *NSW CaseLaw – Industrial Relations Commission Statistics. 2001-2008*

event of an alleged breach of OH&S legislation. NSW, at this stage is the only State where such action can occur. This poses the question, in other States, Territories and the Commonwealth, who prosecutes the Regulator?

Given that presently in all jurisdictions, the Regulator (plus Unions in NSW) can commence proceedings against a defendant at no cost to the person or persons who were the subject of an alleged breach of OH&S legislation, the only reason that Unions NSW could see that an individual would pursue a prosecution on their own behalf would be if the Regulator (or Unions NSW) were not prepared to initiate proceedings.

Provisions on the issue of time limits to initiate a prosecution vary quite significantly in those jurisdictions that provide for them.

The most flexible and broad provision is provided in the *Victoria Occupational Health and Safety Act 2004*, S.132 which states:

***Limitation period for prosecutions***

*Proceedings for an indictable offence against this Act may be brought—*

- (a) within 2 years after the offence is committed or the Authority becomes aware the offence was committed; or*
- (b) at any time with the written authorisation of the Director of Public Prosecutions.*

Unions NSW would support the inclusion of a similar section to the *Victoria Occupational Health and Safety Act 2004* in a model OHS Act provided it was amended to reflect the names of the Regulators in all jurisdictions and includes 'Secretary of the State or Federal Branch of a registered trade union', and further, delete 'Director of Public Prosecutions' in favour of 'Minister responsible for each Regulating Authority'. There would need to be some consideration given to appealing a Minister's decision.

By including this added scope to commence prosecutions, an Inspector, or Trade Union Secretary, subject to the normal rules of evidence and defences, could initiate proceedings for offences involving cumulative long term onset injuries (e.g. occupational overuse injuries), and/or long term onset diseases, such as occupational cancers and/or other diseases caused by long term chemical exposure.

This type of provision would also permit an Inspector or Trade Union Secretary to initiate proceedings after 2 years in the event of a workplace fatality where the Coroner is involved. A Coroner's Court, in many instances, can take in excess of two years to hand down a finding.

It should be noted for the purposes of these recommendations, that in the 25 years since the introduction of OH&S legislation in Australia, there has not been a prosecution against an employer or other person resulting from a worker contracting an asbestos related disease. Ironically, asbestos related diseases in Australia are acknowledged to be responsible for the majority of work related deaths.

**Evidence:**

Unions NSW do not believe it is necessary for specific evidentiary procedures for OH&S prosecutions to be included in the model OHS Act, other than what evidence is normally admissible for alleged criminal offences where rules of evidence apply. We believe that, subject to this provision, a Court should have the scope to accept what evidence it considers relevant to the proceedings on the basis of submissions made by the legal representatives for the prosecutor and defendant.

If evidentiary procedures were to be included in the model OHS Act, they could place limitations on admitting relevant evidence by either the prosecutor or defendant in proceedings before a Court. In most cases, it will potentially restrict evidence submitted by a prosecutor.

Similarly, in both charging an offender, and proving any element of an offence, Unions NSW believe that as a matter of course the specific provisions of a model OHS Act which have been alleged to be breached would be specified by the prosecutor when laying charges and by the Court when a judgment is handed down. This process is currently followed in NSW.

Unions NSW's position on the issue relating to expert witnesses, is that any report submitted by an expert witness must be subject to the scrutiny of the legal representatives for either the prosecutor or defendant.

It is therefore imperative that the legal representatives for both sides have a right to call an expert witness, either to give evidence in his/her own right, or to be examined on any report presented as evidence by either the prosecutor or defendant. The expert witness should be available either in person or via video link to a Court.

The Unions NSW submission at p.1 – Regulation(s) and Codes of Practice regarding the relevance and evidentiary status of Regulations and Codes of Practice, describes our position on the legal status of these instruments in legal proceedings.

#### **8.5 Burden of Proof – 8.6 Liability of Officers.**

This submission has previously outlined Unions NSW position on this matter. However, the comment contained in this section '*...Some stakeholders propose that a duty holder should be able to comply by relying on the expertise or conduct of another person. ...*'. If another person's expertise or conduct is involved, Unions NSW believe that in the event of a defence relying on such a fact would still fall within the scope of a s.28 and/or s.110 (*NSW Occupational Health and Safety Act 2000*) defence. However, 'the duty holder' would still need to satisfy a Court that they exercised 'due diligence' in determining the competence of the person of the person providing expertise.

An example of this would be that the 'expertise' of another person was used to assess and then develop controls to manage a particular risk. If the assessment and controls the person developed were deficient resulting in a fatality, injury or illness, it should still be left to a Court to determine whether an employer is, 'beyond all reasonable doubt' guilty of an offence when the Court has heard all the evidence.

In addition, if a duty holder, in the circumstances described above is prosecuted successfully, they would have grounds to sue the person whose lack of 'expertise or conduct' allegedly contributed to an offence. For that reason, we have proposed that 'designers of OHSMS' be included as duty holders for the purposes of a model OHS Act.

The *NSW Occupational Health and Safety Regulation 2001* does deal to a limited degree with some aspects of this issue at Cl. 13 (3), but in this instance the duty still rests with the employer in relation to the outcome and ensuring the competence of the employee involved.

### **13 Employer to provide instruction, training and information**

3) An employer must provide persons who have responsibilities with respect to the following under this Regulation with all available information necessary to enable them to fulfill those responsibilities:

- (a) identifying hazards,
- (b) assessing risks arising from those hazards,
- (c) eliminating or controlling those risks,
- (d) monitoring or reviewing risk control measures,
- (e) providing information.

## **8.7 Sentencing Options.**

Unions NSW believes that the model OHS Act should contain monetary penalties for offences. Unions NSW believes that none of the current Australian OH&S legislation penalties for major breaches is sufficient to act as an effective deterrent. As a matter of principle, Unions NSW supports a penalty structure in a model OHS Act which is as at least equal to, or in excess of the current penalties for breaches of Corporate Governance, Trade Practices and Environmental laws. These laws currently prescribe penalties greater than the highest penalties contained in any existing Australian OH&S legislation.

Even applying the penalties prescribed in the above legislation in some instances may not be sufficient to encourage deterrence. For example, In (Victoria) *DPP v Esso Australia Pty Ltd* the deaths of two workers and serious injuries to a number of others injured led to Esso Australia being fined \$2,000,000. This amounted to one day's income to the Esso Corporation.

Unions NSW also believes that the NSW OHS Act also contains a range of penalties that can be applied to the full range of offences, from minor to aggravated offences, which at least is a useful model.

We also believe that it is very important that the Courts impose a penalties for serious offences that are likely to act as deterrents to industry, corporations and employers generally.

In Victoria, the average fine imposed by the Victorian Courts during the 1980s and 1990s was just over 21 *per cent* of the maximum available fine. This situation has persisted to a large degree since 2000.<sup>27</sup>

Similarly, the New South Wales Judicial Commission's analysis of fines imposed in prosecutions involving fatalities under the *NSW Occupational Health and Safety Act 1983* found that in 75 per cent of cases, defendants were fined 20 per cent of the maximum penalty and that only 9 per cent of cases attracted 50 per cent or more of the maximum penalty. No case attracted 80 per cent or more of the maximum penalty.<sup>28</sup>

Between 2001 and 2007, 415 successful prosecutions were completed in Victoria with the Courts fining defendants a total of \$39,272,000, an average of \$39,272.00 per defendant. In NSW during the same period, 1866 successful prosecutions were completed with the Courts fining defendants a total of \$62,494,000 an average of \$33,490 per defendant.<sup>29</sup>

<sup>27</sup> HSE Publication. *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 Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London. P.125-126

<sup>28</sup> *Ibid* P.125-126

<sup>29</sup> Extract from 'The Comparative Performance Monitor 2006-2007 Workplace Minister's Council.'

In response to the matters raised in Q. 128-133 of the Issues Paper, Unions NSW position is as follows:

- A minimum fine should be provided for in the model OHS Act, and that a maximum fine be determined by a Court. Unions NSW do not believe there is an alternative approach that has a deterrent effect, other than a maximum fine based on a percentage of the annual turnover of an employer.<sup>30</sup>
- Monetary penalties should be applied for breaches of the Regulation(s), in accordance to a Schedule, and for breaches of any section or provision of the model OHS Act which involves a duty on a person. This should not preclude a Regulator as an employer being exempt from any penalty.

Unions NSW supports the proposition that the level of fines be different for various offences. However, the monetary amount should be determined by a Court when all factors are taken into account, (e.g. victim's impact statements, severity of the injury or illness, aggravating factors causing the offence, mitigating factors, and whether the defendant is a repeat offender). Unions NSW believes that these matters are better left to a Court, as a 'level' or 'formula', other than a turnover based fine may be difficult to assess in these circumstances.

- In relation to statutory minimum fines, Unions NSW believes that the model OHS Act should describe a set penalty of on-the-spot fines for Regulatory breaches. The penalty structure within the model OHS Act, on the lines previously described should remain unchanged.
- Unions NSW supports the concept that penalty levels be determined by, but not exclusively, matters such as proven recklessness and degree of negligence, death and repeat offences. A number of other matters such as the extent and affect of disability caused by injury/illness on a worker and his/her family, especially in relation to enjoyment of life and income earning capacity and other matters that need to be taken into account.
- Unions NSW believes that a national register of decided cases could facilitate consistent outcomes across jurisdictions. However, the usefulness of decided cases for this purpose would also be dependent on the final provisions of a model OHS Act. We would be concerned that any diminution of existing strict liability provisions could make a number of previous decisions redundant for the purpose of legal reference, or precedent setting.
- Unions NSW supports a range of penalty options for employers (including Companies and Corporations) but only in addition to monetary penalties. Further monetary penalties should be applied if a penalty option is not complied with. Penalty options should include the following:
  - Enforced donation orders.
  - Victim compensation orders.

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<sup>30</sup> HSE Publication. *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* Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London. P.xxiv-xxv

- Confiscation of offence related profits orders.
- Publicity orders (e.g. either publicizing the offence via the media, and or, notifying corporation shareholders of the offence.)
- Organisational reform orders.
- Corporate probation orders.
- Training orders
- Undertaking OH&S projects
- Orders for reparation, restitution and restoration.
- Community Service orders.
- Revocation orders
- Disqualification and Prohibition orders.
- Good behaviour bonds
- Incapacitation orders
- Judicial supervision
- Tender disqualification
- Share prohibition

### **8.8 Workplace Death and Serious Injury.**

In responding to this issue, Unions NSW notes that since the commencement of Robens based OH&S legislation in Australia, no person has been sentenced to a jail term for an offence committed under OH&S legislation where the legislation includes the scope for a Court to sentence a person to a term of imprisonment. In the event of offenders being found guilty of a second serious offence, irrespective of whether the first offence was the result of a fatality or serious injury, Unions NSW supports a mandatory jail sentence of between 1-5 years being imposed in addition to a monetary penalty. We believe that imposing jail sentences for these offences will have a significant deterrence effect and assist compliance.

Unions NSW therefore strongly supports 'in principle' the inclusion of provisions in the model OHS Act describing specific offences relating to workplace death and/or serious injury including repeat offences. Alternatively, if such offences can be addressed far more effectively in Crimes legislation, or in separate legislation similar to the *UK Corporate Manslaughter and Corporate Homicide Act 2007*, which could deal with industrial manslaughter and murder, Unions NSW may consider this approach.

Unions NSW supports the extension of such offences to include the death and/or serious injury of persons performing work in supply chain contexts so that those in effective commercial control of a supply chain can be held criminally liable for the death and/or serious injury of these persons.

The ACT Industrial Manslaughter legislation provides a practical example of this approach through its definitions of the affected 'worker' and an 'agent'.

Unions NSW supports the retention of the Industrial Manslaughter legislation and penalties, similar to those that exist in NSW and ACT.

### **8.9 Enforcement of Penalties**

Unions NSW notes that in NSW, in particular, that a significant number of penalty defaulters are not brought to account. These persons default by way of company closures and/or other methods. Regrettably, the fact that defaulters are not pursued with greater persistence does not assist in compliance or deterrence.

The extent of the problem is extreme in NSW, as a compliance figure of 20% has recently been suggested from the NSW Government sources.

A model OHS Act should provide for each jurisdiction's Attorney-General's Department be charged with the responsibility of penalty collection from an offender within a period determined by a Court. In addition, in the event of a person or organization defaulting on payment, a jurisdiction's Attorney-General's Department should be charged with the responsibility of pursuing alternative means of collecting penalty payments, including the seizure and/or sale of an offender's assets and property, and where appropriate including the intervention of the Australian Securities and Investments Commission (ASIC).

A model OHS Act should also include jail terms in some circumstances for penalty defaulters in lieu of debt collection, or bankruptcy.

These provisions will assist in promoting compliance and aid deterrence.

## **CHAPTER 9: OTHER ISSUES**

### **9.1 Regulation Making Powers.**

Unions NSW totally opposes the removal of provisions from a principle OH&S Act to a Regulation, Code of Practice, or Guidance Material.

Whilst Unions NSW support the concept of Regulations generally, that support is based on the structure of a model OHS Act and supporting legislation described on p.1 in our response to the questions raised in Chapter 1-Legislative Approach.

The Regulation making power of a model OHS Act must be wide enough to validly authorize the creation of Regulations capable of protecting the OH&S of all workers connected to supply chains, in line with current Regulations and proposals previously described on PP.18-19

Unions NSW is alarmed at information received concerning the current activities of the ASCC, which is currently coordinating the 'harmonising' of Regulations. We are further informed that the ASCC OHS tripartite working group has been requested to prepare 'terms of reference'. In view of this information Unions NSW must reserve its position in

responding to the questions posed on this issue until we receive further advice from the Australian Council of Trade Unions (ACTU).

## **9.2 Codes of Practice.**

Unions NSW has previously stated its position in relation to the legal status of Codes of Practice, and note the current variety of methods how Codes of Practice are approved in jurisdictions.

Unions NSW supports provisions in the model OHS Act giving power to the Regulator to prepare Codes of Practice, providing the development of the Code is subject to appropriate tripartite consultation.

It would be also appropriate for a Code of Practice to include a specific expiration Clause, providing that there is provision for the Regulator to review an existing Code in circumstances where the Code's content requires urgent variation or withdrawal of the Code prior to the expiration date.

## **9.3 Notification of Incidents and Reporting.**

The issue covered in this sub-section is important from several perspectives.

Unions NSW is somewhat surprised, due to the question posed, that obviously some stakeholders regards the notification and reporting of incidents as an 'unnecessary compliance burden', considering that as recently as 6-7 years ago compliance with the notification requirements of the NSW 1983 and 2000 Acts was reported by the NSW Regulator at approximately 25%.

Unions NSW envisages that other jurisdictions may have had similar compliance problems.

A 'compliance burden' suggests that some stakeholders have to devote considerable resources to this task, which in their view takes a significant amount of time to carry out.

The comment could also suggest that some stakeholders lack management competence on the incident reporting requirements or, that a large number of notifiable incidents may be occurring. An objective observer could possibly conclude that the management of OH&S by these stakeholders is extremely poor.

It well may be that a future national OH&S Act will reduce the so-called 'compliance burden' for organisations that have workers employed in several States or Territories by utilising a single uniform reporting system.

Notwithstanding these cynical observations on our part, it is important for a Regulator to operate an effective reporting system which at a minimum provides sufficient information about a notifiable incident for the Regulator (or on some occasions a Union in NSW) to act upon.

'On line' reporting mechanisms utilized by some Regulators are an extremely efficient and fast method of complying with the Regulator's notification and reporting requirements. If this is regarded as an 'unnecessary compliance burden', it will be impossible to satisfy any stakeholder holding this opinion in any aspect of OH&S compliance.

However, Unions NSW is concerned that in some instances an employer may complete a notification form supplying incorrect or false data.

We are aware of at least one occasion, in NSW, where the notification form was not followed up by the Regulator, but followed up by the Union who found that false information had been provided to the Regulator.

The resultant follow up by the Union resulted in a successful prosecution arising out of second degree burns to the injured worker. The notification to the Regulator had stated that the injuries suffered were 'minor burns'. The case in question has been previously cited, and cited again below.

*Public Service Association and Professional Officers' Association Amalgamated Union of NSW (Maurice Michael O'Sullivan) v Roads and Traffic Authority of NSW [2002] NSWIRComm 214.*

Unions NSW is aware that penalties apply for the failure to report to the Regulator of a notifiable incident, but to the best of our knowledge there is no penalty in instances where the information provided is found to be false, as was the case in this instance.

Unions NSW can only assume that there is no verification or audit procedures operated by the NSW Regulator and quite possibly other Regulators as well.

Regulator resources, and/or their internal management systems, are also a significant problem in some instances. In NSW, for example, the collection and collation of notifiable incidents is a clerical function and (with the exception of workplace fatalities) may take up to 4 weeks to reach Inspectors for the industry group responsible for the notifying employer.

Ideally, any harmonisation of the current notification provisions would need to include appropriate requirements setting out, e.g.

- The time frame between receipt of a notification, and receipt by an Inspector.
- Incidents that require immediate attention by an Inspector.
- Determination of what incident reports must be investigated.
- Action taken in response to false information.

Non-compliance to the current notification requirements is generally high, as a significant number of workers (particularly in non-union workplaces) are unaware of the employer's obligations in this area.

Generally, non-compliance is only addressed as a consequence of information being provided by a worker or other person to the Regulator. In these circumstances the offence may be prosecuted if an injury is involved.

Some of the concerns identified by stakeholders may be similar to what is expressed below concerning the Victorian Regulator:

*'...Employers are concerned that the definition in the legislation of what incidents are to be notified is not sufficiently clear. They do not believe the explanations in the Guide to Incident Notification provide sufficient clarification. They also assert that WorkSafe is not*

*providing sufficiently consistent advice as to what incidents need to be notified. They argue that some duty holders have been given incorrect advice by the WorkSafe Advisory Service as to whether an incident is required to be notified, and have not been provided with reference numbers to prove they did not notify on the basis of WorkSafe advice....<sup>31</sup>*

If this scenario is commonplace across jurisdictions, not only is an appropriate consistent reporting system required, common to all jurisdictions, but the management of reporting system requires equal attention, otherwise it may continue in the eyes of some stakeholders, with good reason, to remain a 'compliance burden.'

On the available evidence, under reporting of notifiable incidents remains a significant problem. The reasons for under reporting are also significant in terms of the compliance with OH&S legislation generally. Again, the HSR findings on this matter, and related issues, are of particular significance:

*'...**First**, reported data can exclude certain types of workers.*

***Second**, workers' compensation systems which use experience rating to set employers' premiums create incentives for employers to under report injury and disease by increasing costs for employers that show an increase in injuries.*

***Third**, employers seeking government contracts may fear being denied a contract if their injury rate is too high.*

***Fourth**, a reliance on reported injury rates (either direct to regulatory authorities or indirectly to worker's (compensation bodies) in targeting inspections and measuring performance creates a clear incentive for employers not to record injuries.*

***Fifth**, economic incentives can influence workers' reporting habits. Employer-implemented programs that offer prizes for individuals or departments for going a certain number of days without an injury discourage workers from reporting, either because they want the prize or because of peer pressure from co-workers who want the prize.*

***Sixth**, employees may be reluctant to report injuries for fear of being labelled accident-prone or, if applying for compensation, being labelled as 'slackers'.*

***Seventh**, in certain cases, employers implement programs that discipline workers when they report an injury, discouraging them from reporting.*

***Eighth**, many workers do not know how to use the workers' compensation system.*

***Ninth**, foreign born workers, whether in the country legally or not, face additional barriers to reporting: they may not know how or to whom to report the injury or they may fear being fired or harassed or being reported to the immigration authorities.*

*Given the voluminous English language literature on under-reporting and the difficulties this poses in assessing and targeting regulatory initiatives, it is unclear why regulatory authorities have not moved to different methods (relying more on epidemiological approaches or employee surveys) of assessing risk. ...<sup>32</sup>*

In Australia, Unions NSW also believe that the removal of the unfair dismissal provisions with the introduction of the *Workplace Relations Act* also allowed employers greater scope to dismiss workers, particularly casual workers, following a workplace injury, or

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<sup>31</sup> A Report on the (Victorian) Occupational Health and Safety Act 2004.p.6 Administrative Review-Bob Stensholt MP (Member for Burwood) Chair Public Accounts and Estimates Committee. P.40

<sup>32</sup> HSE Publication. 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 Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London p.35

alternatively the new employment relationships established by this legislation acted as a real disincentive to workers to report workers out of fear of reprisals.

Unions NSW believe that prior to the above legislation, workers generally ( even in workplaces with high union participation) were reluctant to report work related injuries out of fear of retribution such as loss of employment, even when retribution was non-existent and the employer actively encouraged injury reporting.

In the light of such facts, Unions NSW must reject the complaints concerning the 'compliance burden'. We believe that these complaints are spurious and unfounded. We also suspect that the organisations/persons making these complaints, if investigated by the Regulator, would be found to be under reporting notifiable incidents.

Unions NSW also support the extension of notifiable incidents to include exposure to hazardous substances. In support of such a provision, Unions NSW also support the implementation of an active, well resourced, national mesothelioma register.

Furthermore, Unions NSW support the incorporation of the Medicare data collection system and Coroner's Court data designed to accurately record and disseminate figures on the number of:

- a. Workers fatally injured at a work place or work premises.
- b. Non-workers fatally injured at workplaces, or work premises.
- c. Fatal injuries to workers and non-workers resulting from work.
- d. Work-related injuries and diseases affecting workers.

Unions NSW believe that collection of this type of data will greatly assist in the identification and evaluation of non-reported injuries and diseases resulting in a far more accurate picture of actual work, and work related fatalities, and work related injuries and diseases.

#### **9.4 External Appeals and Issue Resolution.**

Unions NSW support that the model OHS Act use the current, or similar provisions contained in the NSW Occupational Health and Safety Act 2000, whereby proceedings are conducted before a Court, in NSW this is now the NSWIRC, but formerly involved the NSW Supreme Court.

Our position is based on the fact that any provision of the Act can be subject to the legal interpretation of a Court and potentially, given the strict liability provisions, a person committing an offence may have committed a criminal offence. However, even in the context of criminal charges, particularly of a regulatory nature, there should be no restriction to a presiding Judge chairing a private conference between the parties, or their legal representatives as a form of conciliation, prior to arbitration.

Currently, decisions made in proceedings made in the NSW IRC are subject to Appeal before a Full Bench of this Court.

As previously stated, Unions NSW agree that a Court should have the discretion to record a criminal offence against a defendant.

Whilst we note that in Western Australia an OH&S Tribunal has a range of powers, Unions of NSW reserve the right to re-examine the suitability of a an OH&S Tribunal

system being utilised as a national initiative, as opposed to our current preferred position.

### **9.5 Tripartite Mechanisms**

Unions NSW fully supports in the affirmative the question posed on this subject.

In relation to structure, Unions NSW have had the opportunity of consultation with the ACTU and other State/Territory ACTU affiliates on this important question.

As a consequence, we are aware that the ACTU will address the question of tripartite mechanisms in detail in the ACTU submission. Unions NSW therefore wish to have recorded our full and unqualified support for the ACTU's submission on this matter.

### **9.6 Mutual Recognition.**

In response to the matters identified in this section of the Issues Paper, and the questions posed, Unions NSW support, in principle, mutual recognition on the issues identified, subject to future tripartite negotiations aimed at identifying priorities for mutual recognition and the appropriate implementation strategies.

### **9.7 Cross-Jurisdictional Cooperation.**

Unions NSW has previously dealt with this matter in our submission in response to questions contained in Chapter 6 of the Issues paper. Jurisdictional cooperation also raises cooperation at a regional and international level, which may be best addressed by means of the interlocking regulatory administrative measures described previously in P.44-46.

### **9.8 Interaction of Federal and State laws**

In response to the question posed in this heading, Unions NSW believe that if the first task of the Review Panel is to develop a draft model OHS Act, as their primary objective, framing this model Act is the first objective.

The second objective, once this has been achieved would be then to examine issues such as overlap between the OH&S legislation of all jurisdictions as a further step in the harmonisation process.

However, at this stage, Unions NSW are unaware of whether the aim of harmonisation is to achieve the highest, lowest or some other OH&S legal standard to protect Australian workers.

Until Unions NSW has the benefit of further involvement in the harmonisation process, via the ACTU, we will reserve our position on this matter.

## **UNIONS NSW ISSUES:**

Unions NSW is extremely concerned that without additional reforms to accompany a future national OH&S Act, particularly to dramatically improve compliance and enforcement of the Regulators.

The unpleasant truth is that currently employers run a very low risk of being prosecuted under OH&S legislation. Unions NSW also suspect that most of these complaints about compliance and 'regulatory burdens' are, in all likelihood, the voices of the few and vociferous employers who have been found to have committed an offence, and actually paid a penalty. Unions NSW believe that the the majority of employers pay lip-service to their legal obligations due to the fact that they run a very low risk of being caught by the Regulator.

This submission has included criticism of the Regulators. But, we are also aware that the majority of Inspectors employed by the Regulators in all cases are committed to enforcing OH&S legislation, and they will always enjoy the full and unqualified support of Unions when carrying out their enforcement and other functions.

However, Unions NSW believe that the Regulators are hamstrung to a large degree by their Governments. In contrast to this, Unions NSW note that the 'Report on the (Victorian) Occupational Health and Safety Act 2004 - Administrative Review carried out by Bob Stensholt MP (Member for Burwood) Chair Public Accounts and Estimates Committee.' while criticising the Victorian Regulator, is also a criticism of the Victorian Government in exercising its overall responsibility for the Regulator's operations.

Unions NSW, from our own observations, believe that in recent years Government generally has become timid in ensuring that OH&S legislation is policed effectively. In NSW, this is also borne out by the extraordinary reduction in proceedings commenced before the Courts in 2006-2007, compared to the period 2002-2006. The average number of proceeding commenced in the latter period was 213. In the former period the annual average number of proceedings commenced was 461. Victoria also showed a similar trend, i.e. 2006-2007 -107 compared to an annual average for 2002-2006 of 186. Only South Australia and Tasmania had a general increase in the number of proceedings commenced in the same period. By comparison, NSW, Victoria and Queensland generally peaked in the number of proceedings commenced in 2004-2005.<sup>33</sup>

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<sup>33</sup> *Ibid*

Given the degree of under reporting of workplace incidents, particularly injuries, and the injury rates amongst young workers, previously reported in the absence of any other statistics or objective evidence, Unions NSW can only assume that the drop off in prosecutions, particularly in the larger States, is due to other reasons which are not a result of a significant increase in compliance or the deterrent effect of OH&S legislation, or operations of a Regulator's Inspectorate.

In many respects, OH&S in Australia has arrived at a crossroads and the choice is really between going forward or backward.

In that respect a model OHS Act, if it does become Federal law, must advance the protection of OH&S for Australian workers. However, it can only achieve this if the legislation is powerful and uncompromising in its objectives and actual content. This is the reason why Unions NSW strongly support a model OHS Act based on the *NSW Occupational Health and Safety Act 2000*.

However, irrespective of the power of a future Act, it will become meaningless if it ends up as a 'paper tiger'. Unfortunately, there is a very real risk with our current OH&S laws, particularly in NSW and Victoria, are becoming 'paper tigers' due to a lack of will on the part of Government (via the Regulator) to adequately enforce what is essentially powerful legislation.

Eventually, if compliance is not adequately policed the law will be no deterrent, no matter how powerful the provisions may be.

In Unions NSW view, if a model OHS Act objects and provisions provide an acceptably high level of protection for Australian workers, it must be accompanied by consistent objectives to achieve high levels of OH&S protection called for in the Act.

Unions NSW clearly recall that when the then NSW Government introduced the *NSW Occupational Health and Safety Act 1983*, the primary objective of the Act was to protect workers OH&S. While wide scope for the prosecution of persons found guilty of offences was included, the purpose of the Act and the Regulator was to force compliance and act as a deterrent to offences. Unions NSW, irrespective of our views on the power for Trade Unions to prosecute employers for offences against the Act, and the reductions in prosecutions by Regulators, remain fully supportive of the original objectives and purpose of the NSW legislation.

If the Federal Government is to take responsibility for achieving these objectives, it will need to be satisfied that the States and Territories have the infrastructure, human resources and the will to achieve the objectives. This is a challenge for the Federal Government, but imperative in progressing national OH&S legislation and its introduction.

Moreover, Government has a moral and social responsibility to provide legislation aimed at the protection of its citizens from a range of threats, including OH&S risks.

There has now been considerable rhetoric over the past several years from both sides of the political spectrum about 'Australian working families', and in particular the protection of, or help for, Australian working families from a range of domestic and international cost pressures. Unions NSW acknowledge the importance of policies and initiatives to achieve these outcomes, but, equally important is the fundamental right for a member of a working family to arrive home after a days work without injury and in good health.

This Federal Government, to date, has been silent on this fundamental right and the means of achieving this.

Unions NSW are aware that the interests of employers of all sizes and industries need to be considered, and we are also aware that the extremists in these lobby groups will be pressing the usual arguments of 'cost burdens', 'over regulation', 'difficulties with compliance' and 'high penalties'. These arguments are also likely to be accompanied by not to subtle threats of 'business closures' 'increased unemployment' and 'moving offshore'. Unions NSW, and our Affiliates have been hearing these arguments and threats since 1983.

If these lobby groups are successful, with resulting 'employer friendly' OH&S legislation, the burden on 'Australian working families' and Australian society as a whole will be an unsustainable cost burden as well as an abrogation of each Australian working family's human rights.

We believe that a lot of these complaints and possible threats can be effectively addressed by a variety of means.

It is Unions NSW view that the development of a 'safety culture' in Australian workplaces, irrespective of their size, is an important objective which can only be achieved in the long term via the Regulators. It is Unions NSW experience that a number of employers believe it is only necessary to achieve the minimum requirements set by OH&S legislation. Management in such workplaces also have the philosophy that 'accidents will happen' and, accidents are caused by worker errors or incompetence. Management is reactive to managing risks.

At the other end of the spectrum, are what are referred to as 'zero tolerance cultures' where management take leadership in promoting a 'no accident, no injury to workers' objective and are proactive in identifying hazards and eliminating risks.

There has been significant research on management attitudes in their approach to risk management or minimisation, but the latter type of culture is significant in ensuring that OH&S objectives are not subsumed by 'efficiency' concerns or 'profit maximization'.<sup>34</sup>

These observations are of some significance given that a recent examination of thirty of the top 100 Australian companies revealed that only 7 of these companies had embraced 'zero tolerance' as their OH&S objective. This examination found that the companies studied took a wide range of approaches to managing OH&S but many could be doing considerably more than was evident.<sup>35</sup>

Unions NSW acknowledge that to achieve such outcomes can take time, but there must be continuous initiatives taken by Regulators to achieve these outcomes if Australia's OH&S performance is to be improved.

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<sup>34</sup> *Safe workplaces: a key issue in the quality of working life'.p.2 Judith Chapman – Assoc. Prof. Judith Ann Chapman PhD Associate Professor of Management. Sydney Graduate School of Management, University of Western Sydney*

<sup>35</sup> *.Chapman 'Building cultures for safer workplaces: How management views its role.' From proceedings of the Pacific Employment Relations Assoc. Conference. Adelaide November 2007*

Other initiatives to improve organisational OH&S performance should also be considered, for example:

*'...A number of European Countries operate either tax-break or loans to organisations to design, manufacture risk free machinery plant, environment monitoring devices, restructuring and structural changes to the work environment and the implementation of company management safety systems. In Germany regulators actively work with manufacturers and designers to redesign safer products. Many safe design initiatives in Germany are initiated by the country's accident insurance associations which use a variety of methods to change product and process design....'*<sup>36</sup>

Involving Australian Regulators within the scope of the local manufacturing industry in designing safer products could also have a flow on effect of promoting the manufacturers to Australian industry.

While this submission has previously made reference to the role of Unions in improving OH&S safety, Unions NSW believes that it is important within this part of the submission to consider the effectiveness of Unions on this matter.

In the HSE study of Victorian and NSW Regulators it is acknowledged that:

*'...Unions, in short, perform an important role in exploiting the potential of regulatory authorities to force through changes in the workplace, they decrease the risk of discrimination for workers who attempt to exploit this potential and work to ensure that their members are more knowledgeable about health and safety. Clearly, as such, the extent of collective negotiation, the degree to which regulatory authorities facilitate the involvement of unions within the work process and the strength of participatory mechanisms both across regulatory jurisdictions and within specific firms is highly relevant to the effectiveness of health and safety management systems....'*<sup>37</sup>

Some NSW Union achievements in these areas have been previously described at length in this submission, which support the above findings.

Accordingly, Unions NSW believe that in view of this evidence, and previous evidence contained in this submission, the model OH&S Act should include not only prosecution and entry rights for Unions, including provisions on the range of powers that can be exercised on entry. Unions NSW also support that a model OHS Act should include provisions allowing Unions to collectively bargain on behalf of members on OH&S issues above, or in addition to, the minimum provisions contained in a model OHS Act and Regulations, and that any Agreements reached between the employer and Union(s) can be registered as Collective Agreements for the particular organisation.

Finally, once again returning to the 'regulatory burden' question, Unions NSW are opposed to a model OHS Act being used as a legal means of lowering effective so called regulatory and enforcement burdens particularly relating to high risk work and any other form of work for the reasons previously expressed.

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<sup>36</sup> HSE Publication. *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 Dr Gary Fooks David Bergman Bethan Rigby Centre for Corporate Accountability, London p.59-60

<sup>37</sup> Ibid p.68

At this point of time, Unions NSW have seen no evidence or good reasons to support a lowering of OH&S standards for high risk work, or for that matter any other form of work. To take such a step, in our view, would unnecessarily increase the risk of all workers to fatal or serious injury.

To encourage any lowering of regulatory or enforcement 'burden', particularly in high risk industries, in Unions NSW view will also limit the scope to improve OH&S performance in these industries and encourage an 'accidents will happen' attitude to prevail. In such circumstances Unions NSW believe that employers who believe this 'burden' is too high should be requested to respond to the obvious question, if it is not possible to have a safe workplace, what level of safety is acceptable to business owners?

This attitude fits in with the views of Gary Brack, the Chief Executive of Employers First, who has been quoted as stating '*... It is not humanly possible to have a perfectly safe zero-risk free workplace...*' (Made in the context of the result of penalties imposed on small business resulting from workplace injury).<sup>38</sup>

Finally, Unions NSW believe that any attempt to deregulate compliance or enforcement requirements for any form of high risk work, or other work, is likely to meet with the most determined opposition from Unions NSW, our Affiliates and their members.

De-regulation of high risk industry and the inevitable increase in worker fatalities and injuries will also then be the subject of justified criticism of Government by the Courts. The Coroners Court in NSW, in particular has a long history in criticizing the lack of OH&S regulatory and enforcement practices in a number of high risk industries, particularly coal and metaliferrous mining.

In conclusion, Unions NSW trust that our submission will be given due and proper consideration. We regard the subject of OH&S as being prime importance to all Australian workers and commend our proposals and views to the Review Panel.

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<sup>38</sup> Saluzinsky I. 'Unsafe Practices' *The Australian*. 26 April 2006 p.13