

Victorian Submission to the OHS Model Laws Review

Foreword

The recent history of OHS reform in Australia has been regularly described as one of missed opportunity. Any consideration of the facts must support this view.

Since the Productivity Commission first recommended the development of a national OHS framework in early 2004, few concrete gains have been made in harmonising OHS laws throughout Australia. While some national standards have been developed and adopted to varying degrees in different states, on the ground benefits for business and workers have been minimal.

Where successes did come, such as the bilateral Victoria-NSW 10 point-plan for administrative reform (later adopted by all states and territories), it was under the leadership of the states, not the Commonwealth.

Some responsibility for this lack of outcomes must be placed at the feet of the Howard Government and the idealistic yet flawed Australian Safety and Compensation Council. The unilateral drive to reform was undertaken with little regard for the needs of workers, the requirements of regulators and the consideration of social partners. More than in any other way, this unilateral approach was reflected in the ill-advised expansion of Comcare – which left thousands of workers and employers exposed to regulatory confusion and an ill-equipped OHS compliance regime.

Victorian Labor has long been committed to supporting sustainable economic reform that benefits the entire Victorian community. From then Premier Bracks' 2005 blueprint ***A Third Wave of National Reform*** to Premier Brumby's recently released 10 point-plan on ***Next Steps in Australian Health Reform***, Victoria is constantly exploring ways to deliver a seamless national economy.

The reform of myriad OHS laws governing workers and employers in Australia is an important step in this process.

Yet this reform must not come at the expense of workers. While the Howard Government followed its unilateral path, Victoria fought hard in multilateral forums on behalf of both workers and employers.

The resulting four principles were forced upon a reluctant Howard Government and adopted by COAG. These principles are:

- the use of a **tripartite approach** – where the concerns and suggestions of the States, unions and employer groups are properly considered;
- a considered analysis of the **implication for compliance efforts** required to ensure any increased consistency extends to enforcement of standards;
- proper consideration be given to the **resource implication** for States and the Commonwealth in administering any increase in uniform laws, and
- that there be **no reduction in safety standards** or current levels of support for injured workers.

In short, the principles underpinning OHS harmonisation must result in effective laws that improve safety outcomes for workers, provide for clarity and flexibility in implementation by employers and duty holders, and enable appropriate enforcement by regulators.

It is with these goals in mind that Victoria has developed this submission to the National Review. It has done so on the basis that Victoria's OHS legislation is essentially sound and working as intended, and that it generally attracts the support of key stakeholders as tested through a number of significant public review processes over the last five years, including:

- a review of the *Occupational Health and Safety Act* 1985 by then Mr Chris Maxwell QC, which formed the basis for key policy directions in the OHS Act 2004;
- an extensive two-year review and consolidation of regulations under the OHS Act 2004 and *Equipment (Public Safety) Act* 1994, and
- an administrative review of the OHS Act 2004 conducted by Bob Stensholt MP.

The submission has also been developed taking into account the support provided for the Victorian OHS model in Gary Banks' 2006 report on reducing the regulatory burden, entitled *Rethinking Regulation*. Banks' report on identifying areas for reducing regulatory constraints on Australian economic growth aligns closely with the Victorian Government's national reform agenda and its efforts to reduce the regulatory burden.

Victorian Labor has taken extensive steps towards reducing the regulatory burden in Victoria, with a view to enhancing growth opportunities and enabling Victorian business to get on with doing what it does best – contributing to the Victorian community.

The Victorian Government has considered closely regulatory requirements in the area of OHS, most significantly during the consolidation of 13 regulations into the *Occupational Health and Safety Regulations* 2007, which came into effect from 1 July 2007.

Significantly, the Victorian Government took the opportunity to remove mandatory risk assessments from the OHS regime, moving from a model of risk assessment to risk mitigation – from a focus on documenting risk to a focus on eliminating or controlling risk.

The removal of mandatory risk assessment might once have been considered a bridge too far for OHS reform, yet in Victoria it was generally agreed to be in the best interests of improved safety outcomes.

A similar pragmatic approach must also be taken in the National Review. The Victorian Government considers that the Victorian OHS legislation provides a model upon which a national model OHS law can be built. It considers that a national model OHS law is vital for sustainable reform in this important area of workplace law.

Yet, in championing its own legislative model and the potential benefits of the national OHS reform process, the Victorian Government is also aware that in developing a national model law, some elements of Victorian OHS legislation may be discarded, while other elements may be deemed necessary to adopt, over and above the current law.

Such give and take is necessary in any reform process, and the Victorian Government expects such a view will be adopted by all Australian Governments.

In developing its submission, the Victorian Government has taken into account the request of the National Review Panel that submissions be supported by evidence wherever possible. Victoria has in recent years been successful in reducing the incidence of injury and illness in the workplace to historic lows, and remains focused on meeting its targets under the National OHS Strategy 2002-2012 for reducing workplace injuries and fatalities. Attachment 4 to the submission provides clear evidence of Victorian OHS improvement in recent years.

This improvement is in no small part the result of the Victorian OHS framework and the compliance, enforcement and community engagement efforts of WorkSafe Victoria.

It is also the result of an ongoing conversation and engagement with stakeholders that began with the Maxwell review and has continued ever since. Stakeholders will at times disagree with each other, and will at times disagree with the regulator and the government,

but an open and continuous dialogue is vital for OHS improvements. The Victorian Government is dedicated to promoting this dialogue both locally and nationally.

Consistent with the above, this submission contends that:

- the Victorian OHS Act 2004 provides an appropriate, balanced and proven basis for the national model Act, particularly in comparison to principal OHS legislation in other jurisdictions that is widely regarded as lacking balance;
- there is a case for the national model Act to be broad in scope, including the mining industry and dangerous goods legislation;
- the duties of employers, employees and others under the national model Act should be framed to the extent that they are reasonably practicable;
- OHS offences are criminal offences, and as such should be heard in the criminal courts, with provision for indictable offences to be heard by judge and jury, and an onus of proof on the prosecutor to prove all elements of the offence;
- the national model Act should allow only regulators to prosecute OHS offences, and that consistent with the principles of natural justice, accountability and transparency, a person should have a right to seek review of prosecutorial discretion to a Director of Public Prosecutions;
- the national model Act should enshrine authorised union right of entry to assist in the resolution of OHS issues consistent with Victorian laws;
- the national model Act should prescribe how, when and with whom consultation is to occur, with provisions for establishing representative arrangements that are broad and flexible to account for changing workplace circumstances, and
- the national model Act should provide for the making of material to assist duty holders to understand how the regulator will interpret key issues and provisions of the national model Act and model regulations.

Model OHS laws also require a model OHS regulator; and all the transparency, consistency, effectiveness and accountability of performance this entails.

The Victorian Government trusts this submission will be of assistance to the National Review Panel and other interested stakeholders as the development of national model OHS laws continues throughout 2008 and into 2009. It also commits to working with its federal and state counterparts to seize the opportunity that the National Review process presents for delivering lasting OHS reform.

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CHAPTER 1: LEGISLATIVE APPROACH

1.1 Regulatory Structure

- Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?
- Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

Background

All Australian jurisdictions have adopted a three tier approach to health and safety regulation, influenced by the findings of the Robens Report.¹ This regulatory approach is generally considered a sound structure for regulating health and safety. Academic literature has also discussed the benefits and disadvantages of the different types of legislative formulation, and whether prescriptive or flexible formulations are more effective in regulating health and safety.² Case studies can show the pitfalls of over-reliance on one type of legislative formulation, or highlight successes of others, but whatever regulatory framework is used, it can only be effective if it is administered appropriately.

Victoria's health and safety regulatory structure has recently been reviewed.³ The 2004 Maxwell review considered the extent to which the 1985 legislation required change and involved extensive consultation with stakeholders. The review concluded that the legislative framework was structurally sound, but needed some enhancement to make it work better. A new OHS Act was introduced in 2004, and revised and consolidated regulations were made in 2007 to align with the updated primary legislation.

The OHS Act was further reviewed in 2007, to assess how it has been administered since its introduction and whether it is operating as intended.⁴ The Stensholt review identified areas for improvement, but found that Victoria's regulatory structure and approach to implementation is well accepted by stakeholders and generally considered to be operating effectively.

Analysis & Evidence

Victoria's health and safety regulatory structure conforms to the guidelines for regulation making set by both the Victorian and Commonwealth government. In general:

- the primary Act contains broader, overarching principles and policy, intended to be durable over time, to avoid the need for frequent legislative change
- more detailed requirements are set out in subordinate legislation, and performance-based and process-based formulations are generally favoured over prescriptive formulations
- the Act and regulations are supported by subordinate instruments like compliance codes (which replaced codes of practice) and interpretative documents (made under s12 of the Act), and non-statutory guidance intended to provide practical examples of how to comply with the general duties

This regulatory structure enables changes in the state of OHS knowledge to be accommodated quickly, without changing the legislation. The broad formulation of the duties

¹ Lord Robens, *Safety and Health at Work, Report of the Committee 1970-72*.

² For example, Bluff, E. and Gunningham, N. (2004) 'Principle, Process, Performance or What? New Approaches to OHS Standards Setting,' in Bluff, E., Gunningham, N., and Johnstone, R. (eds) *OHS Regulation for a Changing World of Work*, Sydney, Federation Press.

³ Maxwell, C, *Occupational Health and Safety Act Review*, March 2004.

⁴ Stensholt, B, *A report on the Occupational Health and Safety Act 2004, administrative review*, December 2007.

in the Act makes them applicable to all workplaces, and allows duty holders flexibility in how they comply. The regulations provide more detail on particular high risk hazards and industries, and guidance can be customised for different types of duty holders and workplaces.

Victoria's Position

Victoria believes that, within the overall three tier approach to OHS regulation, the following are matters to consider in determining which legislative formulation to use or the level of detail for each tier of OHS model laws:

- Duties articulating the responsibilities of parties (such as employers) who can affect workplace health and safety should set out the principle or outcome to be achieved rather than prescribe the manner in which the principle or outcome is to be achieved. General duties should protect workplace health and safety while giving duty holders freedom to develop their own solutions. These general duties should be enshrined in primary legislation.
- A prescriptive approach is suitable for important administrative or procedural matters. Matters which have a significant impact on individual rights and liberties (such as inspector powers and provisions for legal proceedings) should be included in the principal legislation and not in subordinate legislation. Duty holders require absolute certainty as to the powers conferred and the limitations imposed upon, the regulator and the courts by the legislation.
- Provisions for consultation and workplace representative arrangements (such as election of HSRs and formulation of health and safety committees) are all important policies that should be enshrined in principal legislation rather than subordinate legislation; and
- It is not appropriate for industry and hazard specific matters to be addressed in the principal legislation. Rather, these matters should properly be dealt with in regulations, codes and other guidance.

The level of detail in the OHS Act compared with the subordinate legislation and codes of practice will depend on the individual issue that is being regulated. The decision to regulate will depend on the level of risk that is presented and the health and safety outcomes that can be achieved by regulating. However, in general, the model OHS Act should set out general principles and matters of policy, which can be expanded further in subordinate legislation, while codes of practice/compliance codes can provide practical examples of how to comply for different duty holders' situations.

Given the breadth of matters that must be covered in the model OHS Act, Victoria's position is that several approaches will need to be taken. For example, primary legislation should articulate key duties relating to health and safety, so they are applicable to all workplaces and are capable of adapting to change and changing workplace arrangements; however, prescriptive formulations also have a place in primary legislation, for example, those setting out inspector powers.

While subordinate legislation or other guidance can be used to provide the detail of a legislative scheme, this does not mean it must be overly detailed or prescriptive in nature. As noted above, performance-based and process-based formulations are generally favoured over prescriptive formulations. That is, where regulations are generally applying to a diverse range of situations, performance-based or process-based obligations can provide duty holders with flexibility as to how to comply. On the other hand, if a regulation is to apply very narrowly or where there are generally accepted means of compliance, prescription may be appropriate. As is the case for principal legislation, administrative matters being dealt with in regulation will usually be prescriptive (e.g. making application for licences).

It is widely recognised that the disadvantage of principle or performance-based methods of regulation is a lack of certainty about compliance and what it looks like. This can be addressed through codes of practice/compliance codes or non-statutory guidance.

Victoria also supports the inclusion of a provision allowing for the making of interpretative documents in the model Act. This provision could be based on section 12 of the Victorian OHS Act for example. Victoria is the only jurisdiction in Australia that contains provisions that allow for the making of such documents, to provide transparency and certainty as to how the regulator will apply the law.

1.2 Title, Objects and Principles

- Q3. What is an appropriate title for the model OHS Act?
- Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?
- Q5. Should the model OHS Act include a set of principles of health and safety protection?
- Q6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?

Background

All jurisdictions apart from the Northern Territory, the Australian Capital Territory and Tasmania contain objects in their principal Acts, but these objects vary considerably.

Victoria is currently the only jurisdiction whose OHS legislation also contains 'Principles of Health and Safety Protection'. These principles are contained in section 4 of the OHS Act 2004 and were included in the Act based on recommendations by Chris Maxwell in his review.

Objects

As noted above the objects of the Act are important in highlighting what the law is set up to do. Principles explain how the law should be administered and understood by the courts, duty holders and the regulator itself.

Objects should be drafted as a statement of intent, rather than create strict statutory obligations. Therefore, the model OHS Act should contain objects that provide a high level statement of intent that gives meaning to the rest of that Act's operations. It should not have, for example, highly detailed and prescriptive objects, such as providing for the development of accredited training programs, collecting statistical data, spelling out the need for inspectors, authorised representatives, and workplace health and safety officers, among others, which are better suited to functions and powers. Nor should it mix the objects up with principles such as 'promoting community awareness', and 'specifying the highest levels of protection from injuries and illnesses', as these are less about the intent of the Act than about how duty holders and regulators should apply the law. These are better expressed as separate principles.

Principles for health and safety protection

Principles which underpin the legislation are important as they provide real guidance on how the OHS regulator will administer the laws and the expectations of the legislature as to how duty holders should conduct themselves to ensure compliance with the OHS Act. The principles enshrine the aspirations of the community concerning workplace health and safety and assist users in understanding the legislation.

Victoria believes that both the objects and the principles for health and safety protection as stated in the Victorian OHS Act provide an effective framework for enshrining the key elements, ensuring the highest standards of protection are maintained for addressing health and safety in the workplace.

The Issues Paper seeks consideration of principles similar to those currently enshrined in public safety legislation such as the Victorian *Environment Protection Act 1970* and the *Public Health and Wellbeing Bill 2008*, namely, the precautionary principle, and the principles of shared responsibility, enforcement, systematic risk management, and principles on collaboration and eliminating risk at the source.

Analysis & Evidence

The principles set out in s4 of Victoria's OHS Act, reflect notions of prevention, equity, participation, co-operation and acceptance of responsibility. The inclusion of principles has been beneficial in that it serves to enhance WorkSafe's accountability and transparency, and enshrines in the legislation accepted OHS principles which have not been fully articulated in the Act (e.g. the purpose of employer and employee general duties, the reasoning for consultation and the right to be represented on OHS matters). Further, these principles could be used by local regulators as a point of reference to support a case concerning, for example, the liability of officers of a body corporate, or where a person has recklessly endangered others at workplaces. (See figure 1 setting out the principles enshrined in s4 of the Victorian OHS Act 2004.)

The principles were drafted so they would not in any way contradict the general duties or cause confusion about the operation of the Act.

Whilst these principles are relevant to the administration of the Act as set out in its objects (section 2(2)), they are not intended to be relevant for the purposes of sentencing for OHS offences (as this is covered by the principles within the Victorian *Sentencing Act 1991*).

There have been several interpretative decisions regarding the Victorian OHS Act, that is, decisions where a court, such as the Victorian Civil and Administrative Tribunal (VCAT) interprets the meaning of a provision (see, for instance, Kellam J in VCAT re Kellogg and Brown (interpretation of work cessation provision), *AB Oxford* (Court of Appeal) *Mildura City Council* (interpretation of internal review power), and *Horsham Rural City Council* (interpretation of scope of duties to others). Since it commenced operation on 1 July 2005, the courts are yet to rely on the 'principles' in s 4 of the Victorian OHS Act expressly, as a guide to their reasoning.

Victoria's OHS Act does not contain principles based on the concepts of precaution, 'shared responsibility', systematic risk management, or enforcement. A discussion of these principles is set out below.

Precautionary principle

This principle is defined in the Intergovernmental Agreement on the Environment 1992 (the source document for the definition of the principle in the Victorian EPA):

'Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In applying the principle public and private decisions should be guided by:

- (i) careful evaluation to avoid serious damage etc
- (ii) an assessment of the risk-weighted consequences of various options.'

Inclusion of the principle in the model OHS Act would mean that duty holders (and the regulator) would need to take preventative action in the face of uncertainty. The duty holder would need to explore a range of actions to deal with the threat of the risk.

The proposed principle introduces a new concept and terminology into the OHS framework.

If included in the model act, the 'precautionary principle' may have application in situations where there are known ways of controlling the risk (falling short of eliminating the risk at source). For example, the principle could apply with regard to fatigue. Although comprehensive scientific evidence might not be available to show the exact contribution of fatigue in a workplace incident, enough evidence exists to indicate that fatigued workers are at greater risk of injury. Ways of controlling fatigue are also known, (e.g. shorter breaks, shorter hours). Therefore, applying the precautionary principle, an employer would be compelled to control this risk.

However, the use of the principle would be more contentious where there is no known way of controlling a threat of a risk. Does this mean that an employer would be obliged to eliminate the threat of risk and stop a particular workplace activity (because they don't know how to control the threat of risks in other ways) even though there is no conclusive scientific evidence and it might not be 'reasonably practicable' to reduce the risk (e.g. the possible health risks posed by nanotechnology)?

Chris Maxwell and Garry Banks affirmed in their respective reviews the need for certainty in what it takes to comply with the law. This is especially important in the case of the general duties and places a particular onus on the regulator to establish a credible state of knowledge. The precautionary principle appears to dilute this.

Other concerns regarding the application of the precautionary principle are that:

- the principle can be criticised for being overly vague and without a firm operational definition
- reviews in the past on public health caution against its overuse⁵. Importantly, if it were to be contained in the model OHS Act, the principle has the potential to impact on other statutory duties in the Act in that, where there is a statutory duty in another part of the Act, it may impose a higher duty of care if precaution has not been applied, and
- Similar questions might be raised about the impact of the principle on the OHS regulator and on the general duties elsewhere in the Act, (i.e. it may create a positive duty on the regulator to take precautionary action).

In Victoria's opinion, the principles of health and safety protection as enshrined in the Victorian OHS Act provide the highest forms of OHS protection to employees and other persons and make the addition of a precautionary principle unnecessary and redundant.

⁵ Government of Canada, 2001, *A Canadian Perspective on the Precautionary Approach/Principle, Discussion Document*, Government of Canada.

Further, Victoria has concerns about the potentially adverse impact that the introduction of such a principle may have regarding its interaction with the general duties, and believes further clarity is required to assist an informed discussion.

Principle of shared responsibility

The principle states that a person's level of responsibility is determined by the extent to which the person has influence or control over the matters that give rise to the OHS risk. If a person has control then they have a duty to eliminate or reduce the risk so far as is reasonably practicable. Such a principle is captured by s4(2) in Victoria's OHS Act, and reinforced by the need for workplace parties to exchange information and ideas about eliminating or reducing health and safety risks (s4(4)).

This principle seems to overlap with the general duties provisions and could create confusion about the respective general duties of employers, employees, and other duty holders. While the Victorian Act gives no primacy to one duty or the other it is not necessarily a shared responsibility.⁶

Indeed, rather than a principle of 'shared responsibility', Victoria believes the principle would be better expressed as one of OHS duties being concurrent, overlapping and non-delegable.

Principle of systematic risk management

Maxwell's review of the Victorian OHS Act concluded that while the Act should support a systematic approach to workplace health and safety, it should not go so far as to impose an obligation to implement an OHS management system in all workplaces.⁷ A principle such as the one stated might be viewed as suggesting a mandated management system. Given this interpretation, Victoria would not support this proposal (see Victoria's position on a systematic approach to controlling health and safety risks under 4.2 of this paper).

Principle of enforcement

Were such a principle to be incorporated into the model OHS Act, it would need to enunciate the key aspects of the regulators' compliance and enforcement policies. While such a 'principle' may be useful as the basis for the eventual development of consistent enforcement and compliance policies as envisioned in the Inter-Governmental Agreement for Regulatory and Operational Reform of OHS, it is important to note that how a regulator enforces the model OHS Act is more about the functions of the regulator rather than a principle *per se*. Therefore, Victoria believes that it is not appropriate to include this principle in the model Act, but instead it should be dealt with through the development of a consistent or uniform national compliance and enforcement policy. Enforcement is a function or means of achieving the objects or principles; it is not an end in itself, as a specific principle would imply.

Victoria's Position

Victoria supports a title for the model OHS Act that explicitly refers to the notions of work and contains the terms 'health' and 'safety'. In the event the Panel accepts Victoria's submission regarding the importance of consolidating OHS, dangerous goods, and equipment and public safety legislation in the model Act (see section 2.2), Victoria would support the Act's title being one which contemplates the inclusion of these other matters.

The model OHS law should clearly state its objects and enshrine a set of health and safety principles to guide regulators and duty holders. The concepts of prevention, equity,

⁶ Maxwell, *op. cit.*, para 721

⁷ Maxwell, *ibid.*, para 701

participation, representation, co-operation and acceptance of responsibility should be reflected in these principles.

Victoria also supports the inclusion of a principle that OHS duties are concurrent, overlapping and non-delegable.

Victoria does not believe the inclusion of a precautionary principle is necessary, and believes there is little understanding of how its inclusion may impact on those statutory duties contained in a model OHS Act.

Victoria does not support the inclusion of the principle of shared responsibility, systematic risk management, or the development of a principle supporting the concept of enforcement.

Figure 1 The principles of health and safety protection

The Victorian *Occupational Health and Safety Act 2004*

Section 4. The principles of health and safety protection

- (1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
- (2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
- (3) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
- (4) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
- (5) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

CHAPTER 2: SCOPE, APPLICATION AND DEFINITIONS

2.1 Industry Sectors

- Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?
- Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g. could industry specific issues be dealt with in regulations, codes of practice and guidance material under the model OHS Act)?
- Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

Background

Victoria administers OHS in a number of industries, including earth resources, major hazard facilities and construction. General duties are contained in the OHS Act 2004 and industry specific requirements are contained in regulations, with non-statutory guidance material supporting WorkSafe's focus on achieving compliance (see chapters on *Regulatory Structure, Regulation Making Powers and Codes of Practice*).

There is one inspectorate in Victoria to administer the OHS Act, the *Dangerous Goods Act 1985* (DG Act) and the *Equipment (Public Safety) Act 1994* (EPS Act) and associated regulations. Inspector investigation and enforcement powers in all Acts are aligned with those of the OHS Act 2004.

In Victoria, as in most states, there is cross-over of health and safety regulatory responsibility between local agencies in some industries, which may cover workplaces or other places. In the main, WorkSafe has entered into memoranda of understanding (MoUs) with these agencies in relation to the appropriate administration of health and safety. While these agreements provide a degree of accountability and transparency for workplace parties and the general community about how agencies will agree to cooperate and assist each other on the administration of OHS (they are published on WorkSafe's website), they are not legally binding and depend on compliance by the parties to the MoUs to work.

At present in Victoria (and in other states), there is legislation administered by other agencies which regulates elements of health or safety. Victoria would seek to have any OHS specific or workplace-focussed provisions under a single legislative regime and administered by a single agency, but acknowledges the consolidation of OHS and other laws may present significant legal, technical and public policy challenges, particularly where the administration of the laws is separate from that for OHS.

Victoria believes that public policy considerations should decree that the model OHS Act has primacy in addressing workplace health and safety in *all* Australian workplaces (including in air, sea and offshore), and that the model Act should have all the necessary powers to deal with OHS matters related to areas of operation currently under other local regulators. In short, related laws should not seek to vary or contradict OHS laws, in particular those regarding OHS obligations and duties - the model OHS Act should have primacy. The model Act should provide that other related industry legislation cannot:

- be in conflict with the model Act's health and safety duties and obligations, and
- cannot exempt, exclude or displace over-arching OHS legislation nor diminish or limit its obligations, duties or rights.

This position, if adopted in the model Act, would resolve the primacy of OHS legislation in those workplaces where other Acts seek to regulate health or safety issues (for example, legislation made as part of the National Mine Safety Framework).

Analysis & Evidence

Industry and hazard specific legislation

The arguments in favour of bringing industry legislation under one regime of OHS law include:

- The continued existence of industry specific OHS law may result in inconsistent OHS outcomes for affected workers and runs the risk of undermining the principles of OHS which the model OHS legislation is attempting to introduce nationally. Efforts should be made to minimise such an outcome.
- There is a general perception in Australian workplaces that workplace hazards should be addressed in the same way. Workplace parties rarely make a practical distinction in addressing hazards on the basis that they are addressed through different legislation.
- There is an emerging international trend to consolidate chemical safety into one scheme that is applicable across a broad range of industries and workplaces. Work is already underway through the Australian Safety and Compensation Council to implement (via a national standard) the UN's Globally Harmonised Scheme (GHS) for unifying the classification, labelling and safety communication of DG and hazardous substances.
- Employers are likely to derive economic benefits and greater confidence in their ability to comply by establishing approaches to health and safety management that deal with *all* hazards in the workplace.
- The National Mine Safety Framework (NMSF) was set up as a mechanism for developing a consistent mine safety regime across Australia. Strategies in developing this national approach included a legislative framework. Victoria supports its development on condition that it does not conflict with or displace overarching OHS legislation.
- The efficacy of OHS regulation in Victoria's earth resources industry was examined in 2006 by an independent inquiry (the Pope Inquiry).⁸ The Victorian Government supported the Inquiry's recommended option to transfer all safety inspection and audit functions to WorkSafe, which came into operation on 1 January 2008. The Pope Inquiry's basis for this recommendation was to ensure:
 - the resources sector is treated no differently from other Victorian industries when it comes to safety regulation, and avoids actual or perceived conflicts of interest of an industry-dedicated regulator in administering their programs, and
 - that it follows the trend in other jurisdictions where safety regulation has been removed from those agencies responsible for facilitating development in the industry, and transferred to centralised agencies or bodies with a distinct safety mandate.

⁸ Pope, N, 'Report into the regulation of occupational health and safety in Victoria's earth resources industries', Melbourne, DPI, 2006

Coordination between regulators within jurisdictions

WorkSafe currently has a series of Memoranda of Understanding (MoUs) outlining co-operative arrangements with relevant agencies in dealing with health and safety issues in particular industries. The MoUs in place are summarised as follows:

Figure 2 MoUs between WorkSafe and other agencies on OHS

Government Department/Agency	Jurisdictional OHS issues
Department of Primary Industries	<ul style="list-style-type: none"> • Earth resources
Department of Infrastructure	<ul style="list-style-type: none"> • Investigations into railway incidents
Australian Maritime Safety Authority	<ul style="list-style-type: none"> • Shipping
Marine Board of Victoria	<ul style="list-style-type: none"> • Recreational and fishing vessels
Energy Safe Victoria	<ul style="list-style-type: none"> • Major hazard facilities • Investigations into electrical incidents
Environment Protection Authority	<ul style="list-style-type: none"> • Major hazard facilities
Emergency services (MFESB/CFA)	<ul style="list-style-type: none"> • Major hazard facilities
Department of Human Services	<ul style="list-style-type: none"> • Environmental tobacco smoke in the workplace
Industrial Relations Victoria	<ul style="list-style-type: none"> • Child employees and children in workplaces
National Offshore Petroleum Safety Authority	<ul style="list-style-type: none"> • Petroleum industry
Police	<ul style="list-style-type: none"> • Incident investigations / notifications

WorkSafe has plans to develop other MoUs with Victoria Police and Vic Roads (road safety and fatigue management), the Department of Human Services (legionella, pandemic planning, zoonoses, and radiation safety), and the Victorian Registration and Qualifications Authority (on training requirements for licensing/registration for high-risk work).

All of the MoUs currently in force are with agencies which have a significant statutory role in regulating aspects of health and safety. However, there is a range of health and safety related legislation administered by Victorian agencies where MoUs are currently not in place.

The following list of Victorian statutes, while not exhaustive, indicates the extent of health and safety related laws and is indicative of the situation in all jurisdictions which have similar arrangements:

- *Community Services Act 1970*
- *Education Act 1958*
- *Electricity Safety Act 1998*
- *Environment Protection Act 1970*
- *Extractive Industries Development Act 1995*
- *Gas Safety Act 1997*
- *Health Act 1958*
- *Marine Act 1988*
- *Petroleum (Submerged Lands) Act 1982*
- *Petroleum Act 1998*

- *Pipelines Act 1967*
- *Prostitution Control Act 1994*
- *Transport Act 1983*

Victoria's Position

Victoria supports the model OHS Act applying to all workplaces, and for any industry specific OHS issues to be addressed (where necessary) via subordinate instruments. This would ensure a uniform standard of protection is afforded to all people at work.

Victoria supports the model OHS Act having primacy in dealing with workplace health and safety in all Australian workplaces. The model Act should:

- provide the regulator with all the necessary powers to deal with OHS matters related to its areas of operation
- if required, enable the regulator to enter into agreements with other agencies to ensure effective co-operation with another agency that has complementary and/or overlapping jurisdiction
- ensure related safety legislation (for example the *Victorian Marine Act 1958* or the *Transport Act 1983*) does not exempt, exclude or displace the OHS Act or in any way diminish or limit its obligations, duties or rights.

2.2 Workplaces and Non-Workplaces

Q10. Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?

Background

While there are differences in wording of the provisions and the definition of 'workplaces' across Australian OHS statutes, in general the OHS duties apply in any place, whether or not it is a building or structure, where people work. This includes non-traditional workplaces, private residences, vehicles or temporary workplaces such as public places. The courts have supported this broad approach to interpreting what is meant by 'workplace'.⁹

The general principle adopted by Australian statutes is that OHS legislation should focus on health and safety at work and that 'a workplace' should be broadly defined and include any place where work is done rather than being limited to certain types of workplaces or occupations.

Analysis & Evidence

The employer duties in s21(1) of the Victorian OHS Act 2004 impose a duty to, so far as is reasonably practicable, provide and maintain for employees of the employer a *working environment* that is safe and without risks to health.

Maxwell noted that 'working environment' included all aspects of the circumstances in which work is being performed. It is not restricted to the physical environment or characteristics of the workplace and extends to include processes that might give rise to risks and the obligation to control not just discrete tasks or hazards but also the systematic management of all workplace hazards and risks.¹⁰

⁹ Johnstone, R, *Occupational Health and Safety Law and Policy* (2nd ed, 2004), p119

¹⁰ Maxwell, op. cit., p141, para 614

In Victoria, the term 'working environment' in s21(1) of the OHS Act 2004 together with ss23, 24 and 26 make it clear that the employer (and self-employed) duties are focused on adopting a systematic approach to controlling the risks arising from not just the physical environment but the processes in the workplace as well.

The Victorian Act defines 'workplace' in s5 as 'a place, whether or not in a building or structure, where employees or self-employed persons work'. This definition makes it clear that the duties apply in any place where people work whether or not it is a building or structure.'

'Workplace' is referred to in specific duties in the Victorian OHS legislation where the physical environment is the defining aspect of the duty, such as the duties on owners and others in s26. Where the defining aspect of the duty is the undertaking of the employer or self-employed person rather than the physical environment then the provision refers to the 'conduct of the undertaking', such as the duties on employers and the self-employed to others in ss23 and 24.

Victoria's Position

Victoria supports the inclusion of provisions in the model OHS Act which reflect our approach to workplaces as follows:

- the broadest duties in the model Act should hinge on the 'working environment' to ensure that duty holders control the risks arising from workplace processes as well as the physical environment
- where the physical environment is the defining aspect of the duty, that duty should refer to 'workplace'
- 'workplace' should be defined to make it clear that it includes non-traditional workplaces and any place where employees or the self-employed work, and
- the concept of 'conduct of the undertaking' should also be included to clarify that the duties extend to the systems of work and what is done, not just the physical environment.

This approach will provide the highest level of OHS protection as work evolves and is best suited to a modern economy.

Public Safety

Q11. Should general duties of care under the model OHS Act be extended to members of the public? If so, how?

Background

There are variations in OHS laws as to what and where OHS duties to the public are owed, the coverage of plant and dangerous goods in relation to public safety, and the boundaries between OHS and public safety legislation and industry specific legislation (e.g. mining, dangerous goods/explosives).

In Victoria there are currently three Acts which secure the protection of the public from risks to their health and safety arising from workplace hazards:

- *Occupational Health and Safety Act 2004 (OHS Act)*
The Victorian OHS Act 2004 covers public safety in sections 23 and 24, where persons other than employees (in the case of section 23) are protected from risks to

their health or safety arising from the conduct of the undertaking of the employer (or self-employed person).

- *Equipment (Public Safety) Act 1994 (EPS Act)*
The EPS Act mirrors the OHS Act 2004 and specifically provides for safety in relation to the design, construction, manufacture, installation, erection, alteration, maintenance, repair and use of 'prescribed equipment' and equipment sites. The type of equipment prescribed is primarily designed for use in workplaces (e.g. cranes) however its use in other places is regulated.
- *Dangerous Goods Act 1985 (DG Act)*
The DG Act promotes the safety of persons and property in relation to the manufacture, storage, transfer, transport, sale, purchase and use (primarily in workplaces) of dangerous goods and the import of explosives. This Act operates in workplaces and non-workplaces.

Victoria has one inspectorate to administer the three Acts and associated regulations. Inspector investigation and enforcement powers have been aligned under all three Acts and the WorkSafe inspectorate often relies on the OHS Act to secure safety of dangerous goods in workplaces.

At present there is no uniform standard of protection which applies to all people whose health and safety is affected by activities at workplaces. Providing uniform protection would mean changing the relevant Acts to bring them into line, or repealing the dangerous goods and equipment and public safety legislation and rationalising them under the model OHS Act.

The consolidation of OHS and DG law (and to a lesser extent equipment and public safety) may present significant legal, technical and public policy challenges, particularly for jurisdictions where the administration of DG is separate from that for OHS (including Victoria). In Victoria's view it is important that this consolidation occurs.

Broadening the scope of the model OHS Act to include DG and workplace type equipment used in public places could compromise the timing of the delivery of model OHS law within the timeframes agreed by WRMC and COAG. It would be preferable that the consolidation of public safety provisions of OHS and DG and equipment (public safety) be scheduled in the first drafting phase for the model Act, but this will depend on the extent of the similarity and differences between them.

Analysis & Evidence

The arguments in favour of consolidating OHS and DG law (including the transport of DG) have been part of the OHS policy debate for some time now (see chapter 2.1 *Industry Sectors*). Arguments that support consolidation specifically for the enhancement of public safety include:

- Reducing the number of statutes to one will provide simpler, clearer law. It will stop the current replication and overlapping obligations of the different Acts and establish a uniform standard for protection of public safety from risks arising from the conduct of work.
- Workplace parties rarely see a practical distinction in addressing hazards on the basis they are currently addressed through either OHS or DG legislation.
- It makes no sense to treat some chemicals as hazardous substances under OHS legislation while treating other chemicals as dangerous goods under separate legislation.
- The safety outcomes to the Australian community for dangerous goods are primarily delivered through duties on workplace parties as is the case for OHS. Simplifying the

duties in one Act should assist better understanding of those duties and therefore enhance compliance.

- Major hazard facilities represent the greatest workplace risks from dangerous goods to the community and are regulated principally through the OHS Act with residual property protection being covered by the DG Act.
- Consolidation would enable local regulators to provide a more flexible regime for the administration of DG that relies principally on outcome-based duties alongside OHS. This would result in the rationalisation of the current detailed regulatory requirements and produce some simplification of duties and the resultant subordinate law.
- The case for incorporating equipment and public safety under a model OHS Act is similar to that for DG. The designer, supplier and operator duties mirror those of the OHS Act and could readily be included in a model OHS Act. The type of equipment subject to equipment public safety law is usually designed and manufactured primarily for use in a workplace. However, as it can be supplied for use in non-workplace settings an appropriate level of legislative coverage is required.
- A person who is not an employer, but who has prescribed plant, should have some general duties.

Victoria's Position

Victoria supports provision being made in the model OHS Act to simplify and clarify the public safety aspects found in current local OHS legislation.

Victoria does not support provisions in the model OHS Act that seek to take responsibility for public safety issues which are currently not within the remit of State/Territory OHS/DG/EPs laws (for example, the Victorian *Health Act 1958* or the *Transport Act 1983*). The focus of the model Act should be principally health and safety issues that arise from workplaces.

Victoria supports the scope of the model Act allowing for the consolidation of legislation for dangerous goods and equipment/plant in non workplaces, provided this does not result in any delay in the delivery of the model Act in accordance with the timeframes agreed by COAG and WRMC. In the event that such consolidation would result in a delay, Victoria supports provision being made to allow for consolidation of DG and EPs legislation as part of the model Act during a later, but not distant, phase of the national OHS reform agenda.

2.3 Responding to Change

- Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?
- Q13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

Background

New hazards and risks are emerging as a result of changes to the economy, technology, work organisation and population demographics. As well, Australia has experienced growth in casual, part-time and temporary work, outsourcing, job-sharing and the use of agency labour and home workers.¹¹

Analysis & Evidence

Work Organisation

Maxwell noted that major economic, political and social change had occurred since 1985 when the Victorian OHS Act was first introduced. Maxwell stated:

'In days gone by, the typical workplace was controlled by a single employer, with whom each member of the workforce had a contract of employment. It is now common, especially in larger undertakings for workers in a given workplace to be engaged under a range of different employment arrangements with different employers.'¹²

In these new arrangements, parties outside the employer/employee relationship may have significant control over the work performed, conditions of work, methods of work organisation, time pressures etc, all of which have significant implications for OHS. Examples include contractors/sub-contractors, franchisor/ee arrangements, host employer/labour hire workers and the self-employed. These relationships are multiple and overlapping between those with real control over working life and those exposed to risk.¹³

There has been a significant increase in forms of 'non-standard' employment and a relative decrease in standard employment in the last three decades in Australia and in similar societies in Europe and the Americas.¹⁴

'Non-standard employment' covers employment forms deviating from the 'standard employment relationship', which is described as 'a stable, socially protected dependent full-time job...the basic conditions of which (maximum working hours per day and week, rest times, pay, social transfers etc) are regulated to a minimum level by collective agreement or by labour and/or social security law'.¹⁵ Workers in non-standard employment are generally¹⁶

¹¹ Michael Quinlan, Claire Mayhew and Philip Bohle, 'The Global Expansion of Precarious Employment, Work Disorganisation and Consequences for Occupational Health: A Review of Recent Research', *International Journal of Health Services*, Vol. 31, No. 2, pp. 336-337. While employees make up 81.5% of the Australian workforce, only 61.1% of these had paid leave entitlements. See ABS 6359.0 *Forms of Employment*, November 2006, p.10

¹² Maxwell, op. cit., para 444.

¹³ Bluff, L, Gunningham, N, Johnstone, R. *OHS Regulation for a changing world of work*, Federation Press, Sydney, 2004, p 14.

¹⁴ .Michael Quinlan, Claire Mayhew and Philip Bohle, loc cit

¹⁵ Iain Campbell and Robyn May, 'Precarious Employment and Trade Unionism in Australia', unpublished paper, Centre for Applied Social Research, RMIT University, prepared for JIST (*Journées Internationales de Sociologie du Travail*)

not entitled to the range of protections and conditions available to workers in a standard employment relationship, such as paid holidays, sick leave, leave loadings, and long service leave.¹⁷

According to Quinlan, Mayhew and Bohle, there are a number of factors which link non-standard employment to negative health and safety outcomes. These are greater job insecurity,¹⁸ economic and reward pressures,¹⁹ imbalance of demands and control,²⁰ disorganised work processes or settings and lack of induction and training, and regulatory 'failure'.

Maxwell noted a rapid increase in flexible and insecure forms of employment and used the term 'precarious employment' when referring to self-employed subcontractors, temporary and on-call works and labour hire or fixed term contract workers.²¹ His review also cited evidence that the trend toward precarious employment has resulted in a worsening of OHS outcomes with 86% of 159 studies finding an adverse association between precarious employment and work-related injury and disease.²²

The model OHS laws must provide protection to all workers regardless of the form of their employment relationship, working from the principle that those with real control over OHS in the workplace should be responsible for eliminating or reducing OHS risks.

Maxwell focussed particular attention to contemporary forms of work and the 2004 Act was drafted to ensure it captured a wide range of work arrangements. For example:

- contracting out and principal contractors are explicitly addressed in s21(3)
- host employer/labour hire agencies are dealt with by ss21, 23 and 26 in combination
- franchisors/franchisee arrangements are captured under s26, and
- proprietors of a business or entity who do not have employees but who to any extent have management or control of a workplace have duties under s26.

Important elements of the duties in Part 3 of the Victorian OHS Act 2004 are that they:

- apply across all workplaces
- deem independent contractors and their employees as employees regardless of the form of employment
- create a duty towards non-employees. This offers protection to the public and also to workers who are not 'employees' in the strict sense of the word
- create shared, overlapping and non-delegable duties. The fact that one party has a duty to protect the worker does not relieve the other party of its burden and this provides the best measure of protection for labour hire workers
- place responsibility for eliminating and controlling OHS risks on those who have management and control of a workplace that may give rise to health and safety risks, and

Conference, London, 20-22 June, 2007, p. 3; J Fudge, 'Precarious Employment in Australia and Canada: The Road to Labour Law Reform', in *Australian Journal of Labour Law*, Vol. 19, No. 3, November 2006, p107.

¹⁶ Many employees in non-standard employment may have protected conditions, e. g. permanent part-time employees.

¹⁷ John Mangan, *Work Without Traditional Employment: An International Study of Non-Standard Employment*, Edward Elgar, Cheltenham UK, 2000, p171.

¹⁸ Job insecurity has been linked to an increased incidence of physical and psychological ill health, stress, and high levels of exposure to risks and hazards.

¹⁹ Because casual and non-standard workers are likely to be under greater pressure in terms of competition for work, they are likely to take work which leads to work intensification (working longer hours because of low pay), or taking on too much work. Risky work is often outsourced to labour hire companies.

²⁰ Casual workers are less likely to have control over such matters as working hours, compared to permanent workers, due to their weak labour market position and tenuous employment. The combination of high work intensity, variable and unpredictable working hours, and consequent work-life imbalance, can lead to a range of health problems associated with diet, lack of exercise and poor sleep habits

²¹ Maxwell, op. cit., para 57

²² Quinlan, M., Mayhew, C. & Bohle, P., cited in the Maxwell report on the Occupational Health and Safety Act, March 2004 at paragraph 72, p29.

- place duties on persons who manage or control workplaces.

To ensure they capture all forms of contemporary work arrangements and emerging risks, some jurisdictions are creating new types of duties and duty holders along a 'chain of responsibility.'

Increasing the numbers of duty holders and duties in the Act as such issues arise can cause confusion about who has the duty and the extent of this duty. There is no evidence that the current legislation in Victoria is failing to capture all forms of work arrangements or the parties who control or manage workplaces.

The preferred approach is to continue to focus on a relatively few broad duties and duty holders and to use interpretative documents and guidance to explain in greater detail what respective duty holders can do to comply with their OHS obligations. (See further discussion in chapters 3.2 and 3.7 of this submission.)

Emerging Hazards and Risks

Maxwell noted that the key features of the new economy are the increasing prevalence and recognition of work-related psychosocial hazards including stress, fatigue, bullying and occupational violence and new physical and health hazards that might arise out of advances in information, communications and technology. A further complication is growing evidence that psychosocial hazards may also interact and compound the more traditional physical risk factors such as musculoskeletal disorders.

The Maxwell review concluded that the Victorian Act, framed around general duties, was basically sound and able to deal with emerging issues.²³

Placing general duties on a range of duty holders spanning designers, manufacturers and suppliers through to employers and persons who have control over workplaces also allows the risks associated with new technologies to be addressed at an early stage.

WorkSafe has an emerging issues program which aims to identify those OHS issues that arise from new and changing workplace conditions not necessarily identified through claims data.

The program recognises that emerging issues may arise for many reasons including changing employment relationships, economic and political priorities, the development of new technology, changing social expectations and shifts in the industrial and commercial mix.

The aim is to identify key issues that could affect workplace health and safety and to strategically deal with these issues before they result in injury, disease, fatalities or claims statistics. The process uses various information sources to identify issues including environmental scanning and stakeholder engagement.

Numerous topics are under consideration including pesticides and Parkinson's Disease, pervasive computing, emerging biological risks and magnetic fields and cancer. In undertaking this process WorkSafe has been able to conclude that new technologies such as nanotechnologies, robotics and the hydrogen economy are able to be accommodated within the existing OHS legislative framework.

²³ Maxwell, op. cit., para 141

Victoria's Position

New OHS hazards will continue to emerge due to the changing nature of work and technological advances; the model OHS law should be drafted in such a way to effectively deal with these issues.

The model OHS Act should be based on broad general duties which are easily understood, flexible and able to deal with issues that may arise in the future.

Victoria believes that the current provisions in the Victorian OHS Act 2004 are sufficiently broad to deal effectively with both the changing nature of work and emerging hazards and risks. The OHS Act's provisions have proven adaptable and able to address new work relationships and issues.

The duties in the model Act should be similarly broad and flexible and should enshrine the following principles:

- all workers and others in the workplace should be protected from risks to health and safety arising from workplace activities regardless of the form of work relationship with the employer
- employers having control over budget and OHS resources in the workplace are best placed to control the health and safety of their employees and others affected by their undertaking
- general duties on employers should apply to a wide range of workplace arrangements and should make it clear that the duties are concurrent, overlapping and non-delegable in nature to ensure that there are no gaps in health and safety protection in the workplace
- upstream duty holders such as manufacturers, suppliers and designers have a role to play in controlling the risks arising from new technologies, and
- 'health' includes psychological health.

The general duties should include a range of duty holders who have control over hazards and risks at different times during the production process. Retaining duties on designers through to manufacturers, suppliers and employers should encourage duty holders to address new and emerging issues at an early stage.

Some Australian OHS jurisdictions are creating new statutory duties and duty holders (such as principal contractors, project managers etc) in an attempt to capture new work arrangements. Victoria believes this is an unnecessary duplication of the existing duties in the Victorian OHS Act and does not support this approach. Victoria believes the current general duties are effective in dealing with non-traditional employer/employee arrangements. The preferred approach is to have relatively few duties, expressed in plain English and broad enough in their scope so as to be capable of addressing evolving work relationships.

2.4 Definitions

Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?

Background

The terms in the model OHS Act most significant for national consistency revolve around duty holders and persons owed duties.

The exact drafting of the definitions will be context specific—that is, they must be read in the context of the draft model OHS Act, its structure and the framing of its duties. However the definitions in the model OHS Act should not operate to diminish the level of protection currently provided to workplace parties.

Analysis & Evidence

Employee/worker

Victoria supports the framing of duties in the model OHS Act around the well understood and accepted definition of ‘employee’, or a person employed under a contract of service or a contract of training.

A definition of ‘worker’ which addresses all forms of employment relationship has been suggested in the issues paper. Under the Victorian OHS Act duties are owed to employees and others. This approach offers protection to employees, as well as contractors, sub contractors, labour hire workers, franchisees, volunteers and the public.

Employer

For the reasons outlined above, the definition of ‘employer’ should parallel the definition of employee by referring to the employment of persons under contracts of service or training.

Officer

Victoria considers that the officer provisions should apply to persons who make, or participate in making decisions that affect a substantial part of the business or who have the capacity to significantly affect the corporation’s financial standing. The definition at section 9 of the *Corporations Act 2001* (Cth) achieves this. Detailed discussion is contained in section 8.6 of this submission. This definition would include all directors of a corporation, chief executive officers, members of boards of management of public authorities, all partners in a partnership and all office holders of unincorporated associations, and heads of government departments and statutory authorities.

Workplace

The definition of ‘workplace’ in OHS legislation has evolved to mean any place where work is performed. (See discussion in section 2.2 of this submission.)²⁴

²⁴ There are two classes of workplaces exempted from the Victorian OHS Act within the Victorian jurisdiction: Commonwealth workplaces (for example, the Australian Taxation Office) which are covered by Commonwealth OHS legislation and, more recently, certain self insurers who have sought coverage under the Comcare scheme and the Commonwealth OHS legislation.

Health

The Victorian OHS Act defines 'health' to place it beyond doubt that the general duties also extend to psychological health, capturing issues such as work-related stress, fatigue, bullying and occupational violence.

Control

Victoria has consistently rejected a definition of 'control', taking the view that general duties under OHS law should be concurrent and overlapping, and are likely to be adversely affected by a definition of control being contained in the principal Act. See discussion on 'control' in section 3.2, 3.7 and 4.1 of this submission.

Hazard and risk

For the most part OHS jurisdictions rely on the ordinary dictionary meanings of the terms.

'Hazard' and 'risk' are well understood in the OHS context and have been the focus of extensive jurisprudence. Detailed discussion is contained in section 4.2 of this submission.

Victoria's Position

Victoria considers that in order to achieve national consistency the model OHS Act must define the terms 'employee', 'employer', 'officer', 'workplace', and 'health'.

Victoria does not support the model OHS Act defining 'control', 'hazard', or 'risk'. (See discussion in section 4.2 of this submission.)

Workplace

Victoria considers that the general duties in the model OHS Act should be tied to the conduct of work and extend to any places where people work (regardless of the legal nature of that employment or the type of workplace). This should also include any place where an undertaking is conducted, including where the person conducting the undertaking is self employed, a proprietor without employees, or a franchisor.

Employee and Employer

Victoria supports the framing of duties in the model OHS Act around the well understood and accepted term 'employee' (a person employed under a contract of service or contract of training) and a parallel definition of employer. This would ensure the protection of all persons at a workplace, while acknowledging that employer duties need to reflect both the degree of control and the proximity of the workplace relationship.

Control

Victoria does not support a definition of control. (See discussion in sections 3.2, 3.7 and 4.1 of this submission.)

Hazard and risk

The model OHS Act should not define 'hazard' and 'risk'. The terms should only be defined in other elements of the model national OHS compliance framework (such as in regulations or codes) and then only in relation to specific circumstances and where clarification is warranted.

CHAPTER 3: DUTIES OF CARE – WHO OWES THEM AND TO WHOM?

3.2 Control

- Q16. Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?
- Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?
- Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?
- Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

Background

Australian OHS statutes reflect the well-established principle that parties in control of work processes have responsibility for controlling the hazards and risks in the workplace. These duties are overlapping and concurrent. A key person in this process is the employer who controls budget and OHS resources.

Analysis & Evidence

The concept of control is expressed differently in the various local Acts. Victoria extends the duties of employers to independent contractors and their employees in relation to matters over which they have control (s21(3)). There is also a duty on persons who manage or control workplaces (s26 and also see s4). The Queensland and NSW statutes provide a defence that a duty was breached due to causes outside the control of the duty holder. A consistent approach is required for the purpose of the model OHS Act.

Some jurisdictions take the view that the general duties in their Act adequately capture new forms of work organisation such as contracting, franchising and labour hire, as they arise. However, other jurisdictions have imposed new duties to address and capture these new forms of employment. For example, the Western Australian Act has specific provisions to cover labour hire arrangements and employment-like arrangements. Other statutes place duties on persons in control of fixtures, fittings or plant, owners of specific high risk plant, persons in control of buildings, persons conducting a business or undertaking, and on volunteers.

Control Test

It is a fundamental principle of OHS legislation that OHS duties are concurrent and overlapping. The panel queries whether 'control' should be defined and included in the list of factors to determine what is 'reasonably practicable'.

Victoria believes that including 'control' in the 'reasonably practicable' test is likely to shift the focus of the test from risk control to a consideration of whether a duty exists at all. Such a change in focus of this well-established test could result in poorer OHS outcomes and would not clarify who has control. This will always depend on the situation in the workplace at the time. (See discussion about the 'reasonably practicable' test in chapter 4.1 of this submission and Creighton, B, '*Reasonable Practicability and the Reverse Onus*', A discussion paper prepared for WorkSafe Victoria, 24 June 2008 in Attachment 1.)

The question then becomes whether 'control' should be defined elsewhere in the model Act. Victoria believes that defining 'control' may lead to the creation of 'gaps' in the OHS regime, particularly in multi-employer scenarios where parties assume they have no 'control' and therefore no duties.

The Victorian OHS Act 2004 contains a number of provisions that deal specifically with control. See for example, s4, s21(3) and s26. The Act makes it clear that those persons who control or manage matters that give rise to risks are responsible for eliminating or reducing these risks. The Act also makes it clear that the duties are limited to the degree of control. As Stensholt in his recent review of the Victorian OHS Act 2004, pointed out:

'Attempts to quantify control through legislation could be problematic and may lead to great confusion among the workplace parties in the labour hire sector as to who is responsible for safety in the workplace. It could also undermine the fundamental principle that the duties are shared and overlapping.'²⁵

Stensholt did not support amending the Act to further quantify control. He concluded that the key issue with regard to the labour hire industry was to clarify what the host employer and the labour hire agencies are expected to do to meet their OHS obligations. He noted that the duties, while shared and overlapping were not identical and recommended that WorkSafe use interpretative documents and industry specific guidance to provide practical advice to both parties.

Chain of Responsibility

The concept of the chain of responsibility is to some extent implicit in the current OHS legislation. This chain begins with the designer, passing to manufacturers, suppliers and then to employers, the self-employed and others in control of workplaces.

The benefits of this approach are obvious in that the key persons in control of issues that can affect workplace health and safety have obligations to ensure health and safety at the point when they can influence events. There is no issue of overlap or confusion about where the responsibilities of the upstream duty holders begin and end. The role of each party is very clear.

However, the issues paper proposes that when dealing with employer duties the 'chain of responsibility' concept should go one step further and place duties on others such as employees and contractors as well.

The proposal to place duties on 'persons in control' or 'persons with control' of 'work' or a 'workplace' has already been considered at the national level. WorkSafe notes that the Australian Safety and Compensation Council's Interim Core Elements Document, which provides a framework for progressing the development of National Standards and codes, does not include these new concepts.

There are a number of risks with such an approach in any event.

Currently, most OHS laws in Australia impose different duties on persons depending on their relationship with the likely source of risk. These duties are concurrent and overlapping. Changing the framework of the duties to 'persons with control' is likely to adversely impact on the joint and overlapping nature of the duties.

This would be a major departure from the current OHS laws established over the last 20 years. Occupational health and safety law in Victoria has developed to a point where the nature of an employer's obligations are well understood and it is settled that the duty covers

²⁵ op. cit., p47

a broad range of non-employees including independent contractors and labour hire workers. It is also important to note that the consultation and representation provisions of all statutes hang off the employer/employee nexus. To remove that relationship calls into question how the consultation and representation provisions would operate under this new framework.

It would undermine the Robens principle on which the Australian OHS law is based, namely that the employer has the duty to provide a safe working environment because it has management and control of the workplace and the ability to control OHS risks that arise. Any chain of responsibility between the employer and its employees or contractors must acknowledge this fundamental principle. While employees have a role to play in ensuring health and safety, this duty is quite different from the employer's duty. To introduce the concept of 'person in control' would mean a fundamental shift in the allocation of responsibilities from employers to employees such as supervisors or managers and may result in a shifting of responsibility that is not commensurate with the level of control they each exercise.

A proposal to shift to a focus on persons in or with control should be based on evidence of manifest failings in the current framework and should not confuse duty holders about who is in control and who has the duty.

Assigning duties to persons in control of a work item or an area where people who are not their employees work, is already adequately covered and enforced under the Victorian legislation. For further discussion see chapters 3.4, 3.6 and 3.7 in this submission.

Shared Responsibilities

All OHS statutes reflect the well-established principle that general duties may fall on more than one person, that persons may be subject to more than one duty, and that these duties are limited to the extent that the person has control. In this way, the duties are overlapping and concurrent.

The duties in the legislation are broad in application, allowing the legislation to adapt and evolve to changing workplaces and work arrangements without the need for constant legislative change. Regulators, through interpretative documents and non-statutory guidance, can explain the standards that apply in particular industries and what is expected of different duty holders.

Victoria's Position

Victoria does not support defining 'control' in the model OHS Act, creating new duty holders in a chain of responsibility or 'clarifying' the responsibilities of multiple duty holders through the Act.

Victoria believes that the approach taken in most Australian OHS Acts of placing broad duties on those persons who control or manage matters that may give rise to OHS risks is well understood and offers effective protection to employees and a broad range of non-employees, including independent contractors and labour hire workers.

The model OHS Act should adopt the approach to control already adopted in most states' OHS laws.

Interpretative documents and non-statutory guidance produced by local regulators and/or the new national body, once established, should be used to provide further explanation about what duty holders need to do to comply with their respective duties.

3.3 Work Relationships

- | | |
|------|---|
| Q20. | Is primary reliance on employment relationships a valid basis for framing safety obligations? |
| Q21. | How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work? |
| Q22. | Is there a broader concept that more effectively covers the various work arrangements? |

Background

Duties in all jurisdictions hinge on the employment relationship. General duties are commonly couched in terms of the duties that employers owe to their employees. The jurisdictions all distinguish to some degree between different classes of employers and employees or independent contractors and the circumstances under which duties are owed.

Most jurisdictions that use the term 'employee' in their legislation use the definition of a person employed under a contract of service. This distinguishes an employee from a contractor, who is a person engaged under a contract for services. The definition of employee is sometimes extended to include trainees and apprentices. To provide protection to a broader class of workers as well as for members of the public, all OHS laws contain a duty of care of employers to 'others'.

Most jurisdictions make a distinction between an employer and a self-employed person. The self-employed person's primary OHS duty is to ensure the health and safety of others. Some jurisdictions also require self-employed persons to take reasonable steps to ensure their own health and safety at work.

Jurisdictional approaches vary in relation to independent contractors and subcontractors who are engaged under contracts for services. Some jurisdictions treat the contractor as an employee through the use of 'deeming' provisions. This obligation to protect contractors is limited to matters over which the employer has control or would have had control if not for any agreement claiming to remove the control. Other jurisdictions rely on provisions for the protection of 'others'. Alternatively, the contractor may be understood as someone who is self-employed.

Analysis & Evidence

The Victorian OHS Act protects all persons in the working environment by placing various duties on employers and self-employed persons. These protections are contained in s21 (employer duties to employees), 21(3) (independent contractors deemed to be employees), 22 (employer duty to monitor employee health), 23 (employer duties to others) and section 24 (self-employed persons' duties to others). It also requires employers to consult with employees and independent contractors (sections 35 and 36).

Victoria believes the focus of health and safety protection should be to protect each person whose safety is put at risk in a working environment. For the period during which a person is in that environment, their health, safety and welfare should not be put at risk by hazards present there, and nor should the work create health and safety risks for others.

Self-employed Persons

Victoria considers that employers and self-employed persons, as the persons with management and control of the work, are the appropriate primary duty holders with

responsibility for health and safety matters under OHS law, and this should be reflected in the model OHS Act. While the Victorian OHS Act ensures the protection of all persons whose safety is put at risk in a work environment it also acknowledges that employer duties need to reflect both the degree of control and the closeness of the work relationship. As a result the highest level of obligation is to an employer's own employees, including duties to monitor employee health. All general duties, including consultation, apply to independent contractors, to the extent that the employer has control. A general duty of care is owed to others, such as the customers or members of the public.

The Treatment of Workers in OHS laws

Victoria considers the model OHS Act should also ensure protection for all persons whose safety is put at risk in a working environment.

This is particularly significant in relation to precarious and contingent workers, such as labour hire, outworkers and seasonal workers, where there are sound evidential reasons for ensuring they are adequately protected. These groups are particularly vulnerable to risks of injury and occupational diseases. Studies in Australia, Europe and North America have identified a clear link between high levels of subcontracting and elevated levels of injury and ill-health. For example, Francois and Lievin found that labour hire and fixed-term contract workers in 85 French enterprises experienced both a higher incidence and a greater severity of injury than employees in permanent employment.²⁶

These findings were supported by Underhill in her 2002 report for WorkSafe Victoria. Consistent with the study by Francois, she found that in 2000–2001 Victorian claims data showed that labour hire workers accounted for 0.53 claims per \$1 million remuneration, compared to 0.46 claims for direct hire employees. Her research also pointed to a shift in the occupational distribution of labour hire employees to higher risk occupations, such as store persons, forklift drivers and construction labourers.²⁷

Eighteen percent of labour hire claimants analysed were less than 25 years of age, compared to only 10% of direct hire claimants. Labour hire claimants appeared much less likely to make minor claims involving fewer than ten days lost (33% of labour hire employee claims compared to 50% of permanent employee claims) but were over-represented in longer-term claims. Labour hire workers appear to sustain more serious injuries or are less willing to lodge minor claims.²⁸

A definition of 'worker' which addresses all forms of employment relationship has been suggested in the issues paper. Under the Victorian OHS Act duties are owed to employees and others. This approach offers protection to employees, as well as contractors, sub contractors, labour hire workers, franchisees, volunteers and the public.

Victoria considers that using 'workers' in this way creates further issues with drafting. These could only be solved by creating classes of employers (as in the Queensland example), classes of 'workers' (the option implicitly rejected in the issues paper), or by reducing the duties owed to employees, those potentially most exposed to hazards at the workplace. None of these solutions are administratively simpler or maintain the level of protection offered by the Victorian OHS Act.

²⁶ Francois & Lievin (1995) and Storrie (2002) cited in Underhill, E., 'Changing Work and OHS: The Challenge of Labour Hire Employment', 2002, pp 7-19

²⁷ Underhill, p101

²⁸ *ibid.*, p5

Victoria's Position

Employers and self-employed persons, as the persons with overall management and control in a workplace, are the appropriate primary OHS duty holders and Victoria considers that this should be reflected in the framing of the general duties of the model OHS Act.

Victoria supports the framing of duties in the model OHS Act around the well understood and accepted terms 'employee' (a person employed under a contract of service), 'independent contractor', (a person engaged under a contract for services), and 'other persons'. This would ensure the protection of all persons at a workplace, while acknowledging that employer duties need to reflect both the degree of control and the proximity of the workplace relationship. Consistent with Victorian Government policy, contract and employee outworkers, and others working in precarious forms of engagement, should be afforded the same level of protection under the model Act as employees.

3.4 Duties of Employers

Q23. How and to what extent should the model OHS Act specify an employer's duty of care?

Q24. To whom should these duties be owed?

Background

Australian OHS Acts place general duties on employers to ensure the health and safety of employees and others and to varying extents set out what employers must do to meet their duty of care.

Analysis & Evidence

Duty of Care

Most Australian jurisdictions already give prominence to the employer general duties which are seen as the key to achieving safe and healthy workplaces. This is based on the principle, established by Robens, that those who have control of workplaces are best placed to control the risks to health and safety that arise in that workplace.

In summary, employer responsibilities in Victoria are:

- to protect the health and safety of people at the workplace and the public by:
 - providing and maintaining a safe working environment (s21)
 - not recklessly endangering a person at a workplace (s32)
 - monitoring the health of employees, keeping records and getting advice (s22)
 - protecting other people from risks arising from the business (s23), and
 - holding licences, registrations or permits as required (Part 6).

- to involve the workplace parties by:
 - consulting with employees on OHS issues (Part 4)
 - negotiating with employees to establish designated work groups on request (Part 7) and health and safety committees (s72)
 - allowing HSRs to attend approved training on request and with pay (s67 & 69) and various other things (ss 70-72), and

- not discriminating against those involved in health and safety (s76).
- to deal with health and safety issues by:
 - attempting to resolve OHS issues (s73)
 - directing that work is to cease (s74)
 - reporting incidents to WorkSafe (Part 5)
 - complying with provisional improvement notices ('PINs') issued by HSR and PINs affirmed by inspectors (ss62,63)
 - displaying notices and bringing them to employees' attention (s115(2))
 - cooperating with WorkSafe inspectors (Part 9), and
 - cooperating with authorised representatives (Part 8).

Victorian courts have construed the meaning of the employer's duties in both the 1985 Act and the 2004 Act, and the law has developed to a point where the nature of an employer's obligation is well understood. See for example, *Chugg v Pacific Dunlop Ltd* [1988] VR 411, *R v Australian Char Pty Ltd* [1999] 3 VR 834, and more recently *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181 and observations made by the High Court of Australia: *Chugg v Pacific Dunlop Ltd* (1991) 170 CLR 249 and *Slivak v Lurgi* (2001) 205 CLR 304.

Other Australian OHS jurisdictions deal with the same themes but in differing ways. For example, s22 of the Victorian Act places specific duties on employers to monitor the health and conditions in the workplace, to provide information and to get advice. In Queensland, monitoring is picked up under a risk management provision (s27A) and getting OHS advice is dealt with under s93 where certain sized workplaces must employ a workplace health and safety officer to provide advice.

An important difference between Australian OHS jurisdictions is that while Victoria and other states and territories have general duties qualified by 'reasonably practicable' or its equivalent, the New South Wales and Queensland provisions are absolute duties with a defence. General duties that are limited by what is 'reasonably practicable' make it clear to duty holders what is the extent of their duties. This approach offers a greater degree of transparency about the intent of the law than absolute duties which then include defences. (See further discussion in chapters 4.1 and 8.5 of this submission).

In his review of the Victorian OHS Act 1985 Maxwell concluded that the scope of Victorian general duties provisions was basically sound and should remain a focal point of the legislation²⁹. He also recommended that the legislation should, wherever possible, clarify the duties and provide enough specificity for duty holders to know what was expected and how they might comply. As a result, the 2004 OHS Act introduced a number of clarifications such as:

- the principles of health and safety protection were stated (s4)
- the 'practicability' test was refined and the Act makes it clear in s20(1) that ensuring health and safety means eliminating risks at the source, where reasonably practicable
- defining 'health' to specifically include psychological health, and
- creating a duty to consult employees (Part 4).

Persons owed a duty

Employer duties in OHS statutes extend to a wide range of persons and include not just the employees of the employer but other workers, the public and volunteers. In Victoria, s21(3) extends the employer's duty to workers who are not in a traditional employee/employer relationship with the employer such as contractors, subcontractors, and labour hire workers. The underlying premise is that employers who have ultimate administrative and financial

²⁹ op. cit., para 602

control over their workplaces have a duty to ensure the workplace is without risks to health and safety, and that duty extends to anyone who might be exposed to risks arising from the conduct of their undertaking (see also ss 23 and 26).

The effectiveness of the Victorian provisions has been noted by Maxwell and others. For example, Richard Johnstone has observed that:

'the Australian OHS statutes are, however, well placed to regulate the health and safety of workers falling outside the traditional employment relationship. This is because, in addition to some provisions (for example s21(3) of the OHS Act (Vic)) which deem contractors to be employees for the purposes of the employer's general duty, the Australian OHS statutes include provisions imposing duties upon employers and self-employed persons in relation to 'others', that is persons other than employees.'³⁰

OHS jurisdictions have differing definitions of 'worker' and 'employee'. (See discussion of these definitions in chapter 2.4 of this submission).

Victoria's Position

Victoria believes that the employer general duty provisions in the model OHS Act should provide enough specificity for employers to know what is expected and how they might comply while providing freedom to develop their own solutions. Consultation with employees and employee representation should be central to the process of achieving health and safety.

In principle, Victoria considers that the employer general duties in the model OHS Act should:

- ensure the highest level of health and safety protection by requiring employers where practicable to eliminate risks at the source
- be qualified by reasonably practicable rather than be absolute duties
- be concurrent, overlapping and non-delegable to ensure there are no gaps in health and safety protection
- include provisions requiring the employer to:
 - provide/maintain plant or systems of work that are safe
 - make arrangements to ensure the safety and absence of risks to health in connection with the use, handling, storage or transport of plant or substances
 - maintain each workplace under the employer's management or control in a safe condition
 - provide adequate facilities for the welfare of employees at any workplace under the employer's management or control
 - provide such information, instruction, training or supervision to employees of the employer as is necessary to enable employees to perform their work safely and without risks to health
- make it clear that monitoring health and conditions, keeping records and obtaining advice are sometimes required to ensure compliance, and
- make it an offence to recklessly endanger people (see also discussion in section 8.8).

The model law should also make it clear that it applies to the Crown in all its capacities, including that of employer.

³⁰ Johnstone, R., *Enforcement of occupational health and safety statutes: Issues and Future Directions*, University of Queensland, page 3. Paper delivered at an enforcement seminar, Brisbane 17 October 2000.

Victoria considers that employers should owe duties to their employees and to any other person who may be affected by the conduct of their undertaking. Other persons may include the public, volunteers and workers who are not in an employee/employer relationship with the employer.

3.5 Duties of Workers and Others

- Q25. How and to what extent should the model OHS Act specify workers' duties of care?
- Q26. Should the model OHS Act include duties of care for persons who are not performing work (eg visitors to a workplace, members of the public)? If so, what should the duties be?

Background

All Australian OHS statutes place duties on employees/workers to contribute to workplace health and safety. The extent of these duties varies across jurisdictions.

Analysis & Evidence

The Robens report concluded that employees as well as employers have a role to play in health and safety in the workplace and that the acts or omissions of employees may affect their own and others' health and safety. Placing a duty on employees to take care for their own health and safety also empowers employees who may have little real power or control in their workplace to refuse work that is dangerous.

Some Australian OHS statutes place duties on 'workers' and other people while other statutes place duties on 'employees'. Most jurisdictions use the term 'employee' meaning a person employed under a contract of service. This distinguishes an employee from a contractor who is a person engaged under a contract for services.

In Victoria, s25 of the OHS Act 2004 places the duty on 'employees' i.e. a person employed under a contract of employment or a contract of training. See section 2.4 of this submission for a discussion about the definition of 'worker' and 'employee' in the model OHS law.

Recognising that employees have significantly less control over matters in the workplace than the employer, the scope of the duty is not equivalent to the employer's duty. Details vary but generally speaking Australian OHS statutes require employees or 'workers':

- to take 'reasonable' or 'appropriate care' to ensure their behaviour does not place themselves or others at risk
- to cooperate with their employer in his or her efforts to make the workplace safe, and
- not to intentionally or recklessly interfere or misuse plant or equipment.

Section 20(2) of the Western Australian OHS Act also specifies particular acts or omissions that would cause an employee to contravene their employee duty including:

- failing to comply with instructions
- failing to use PPE and equipment
- misuse or damaging any equipment, and
- failing to report hazardous situations or any injury or harm arising in connection with work.

The advantage of this approach might be that it provides greater clarity to employees on what they need to do to comply.

In determining whether an employee failed to take reasonable care, the Victorian OHS Act 2004 applies an objective test based on what the employee knew at the time.

In Queensland, failure to take reasonable care is not enough to cause a breach; the person must *wilfully* have placed others at risk or caused injury to themselves. Wilfulness requires a level of intent that is intractable and determined and would be more difficult to prove.

The New South Wales and Queensland provisions are absolute liability offences with defences.

The Queensland statute goes further than other jurisdictions and imposes duties on 'a worker or anyone else' at a workplace. This raises the question whether all persons (such as members of the public, customers, and volunteers) should have a similar duty of care under the model OHS Act.

In Queensland, volunteers owe the same duty of care as 'workers'. This is not the case in Victoria, the premise being that volunteers make a significant contribution in many areas of the community and imposing a fear of criminal prosecution under the OHS law might discourage their valuable work.

OHS risks arise mainly because of issues concerning systems of work and workplace exposures to hazards and substances, rather than the behaviour of the public. Circumstances do arise where members of the public may create significant risks in the workplace, for example, persons under the influence of drugs in a hospital emergency ward who threaten hospital staff. It is not customary, however, for regulators in the exercise of their discretion to prosecute such persons for OHS offences.

The Victorian OHS Act imposes an additional duty on any person not to recklessly engage in conduct that places others in a workplace in danger of serious injury. This provision would apply to the reckless conduct of any person, including members of the public, employers, the self-employed, workers or volunteers, and highlights that reckless behaviour is criminal behaviour and deserves imprisonment if serious enough. As well as this provision, the general criminal law containing offences such as negligently causing serious injury and reckless conduct endangering the life of a person which apply to all in the community should be sufficient.

The Victorian Act does not impose OHS duties on self-employed persons to themselves. Under s23, the self-employed have a duty to ensure so far as is reasonably practicable that other persons are not exposed to risks to their health or safety arising from the conduct of their undertaking. They also have a duty not to recklessly endanger persons at the workplace (s32). These provisions seem to adequately cover the potential risks associated with self-employed persons in workplaces. Imposing an additional obligation on the self-employed to take care of themselves might expose governments to criticism they are being overzealous in seeking to protect people from themselves in the absence of risks to others. Accordingly, Victoria believes such a provision should not be included in the model Act in the absence of evidence that such a provision will contribute to improved OHS outcomes, and an ability of regulators to enforce it.

In South Australia and the Northern Territory there is an additional duty to ensure that the consumption of drugs and alcohol does not endanger safety. The general duties as outlined above already capture this type of behaviour. Particularising certain behaviours in the model law may be interpreted as saying that the general duty was not intended to cover all types of behaviour and may narrow the scope of the duty. The preferred approach is to impose general principle-based duties in the primary legislation and use industry/hazard specific regulation, interpretative documents or non-statutory guidance to explain the finer details.

Victoria's Position

To achieve the highest levels of health and safety protection, employees should be required to exercise due care for their own health and safety and that of others affected by their actions.

Some OHS statutes impose specific duties on particular behaviours. Victoria believes that in keeping with performance based principles, the provision should be broad enough to capture all types of behaviour while making the extent of the duty clear. Specific behaviours (such as the use of drugs and alcohol) are best dealt with in guidance material or subordinate legislation.

Victoria does not support absolute liability provisions or a standard of care that requires wilfulness.

When determining whether an employee took reasonable care, the model OHS Act should make it clear that any determination should be based on what the person knew about the situation.

This general duty should apply to employees and include requirements:

- to take reasonable care of their own health and safety
- to take reasonable care that their acts or omissions in the workplace do not affect the health and safety of others
- to cooperate with the employer in their efforts to achieve safe workplaces, and
- to not intentionally or recklessly interfere or misuse plant or equipment provided in the interests of health of safety.

Victoria does not support a duty on self-employed persons to exercise care in relation to themselves.

3.6 Appointed Persons and Officers

- Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?
- Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?
- Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?
- Q30. Should the model OHS Act include positive duties for officers of body corporates?

Background

Some OHS laws require the appointment of an individual to hold responsibility for OHS at the workplace. All Australian jurisdictions impose duties on certain corporate officers.

The Issues Paper refers to Queensland provisions creating the position of 'Workplace Health and Safety Officers' (WHSO) who provide expert advice to employers.

Other provisions go a step further and create positive duties on persons other than the employer. For example, the Queensland statute places duties on principal contractors in

construction works (s31) and a Tasmanian provision places duties on ‘responsible officers’ who are responsible for performing the duties of the employer at the workplace.³¹

Analysis & Evidence

Under s93 of the Queensland Act, employers (and principal contractors) must appoint a qualified person as a WHSO to provide OHS advice if more than 30 workers are employed.

The Victorian OHS Act captures the same principle but is not so prescriptive. Under s22(2)(b), where reasonably practicable, employers are required to employ or engage a suitably qualified person to provide advice on health and safety matters. Large employers usually employ a person with OHS qualifications to provide ongoing advice, while small and medium sized enterprises are more likely to engage a consultant or an expert on a needs basis. Section 73 of the Victorian Act enables an employer to nominate a representative with an appropriate level of seniority and competence to attempt to resolve OHS issues that arise. However, the Victorian provision does not require this representative to fulfil the employer’s duties and does not include penalties against the responsible officer as occurs in Tasmania.

Sections 22(2)(b) and s73(2)(b) of the Victorian Act in combination appear to provide sufficient mechanisms to ensure that employers seek appropriate advice to ensure health and safety in their workplaces.

The OHS statutes are performance-based standards. The advantage of this approach is that the law creates duties and allows duty holders flexibility when deciding how they will meet these duties. Victoria believes the current requirements in ss22(2)(b) and 73(2)(b) have proven to be adequate and that there is little basis for inserting a more prescriptive approach into the model Act.

The Queensland WHSO provisions do not place positive duties on the WHSO to ensure the employer meets its OHS obligations. However, other Queensland provisions do place positive duties on certain persons. (See for example, principal contractor obligations in ss31 and 167 which place a positive duty on executive officers to ensure a corporation complies with the Act).

In the Tasmanian statute, s11 places a duty on a ‘responsible officer’ to perform the duties of his or her employer, and penalties apply.

The ‘responsible officer’ performs the duties of the employer as set out in the Tasmanian Act. The Act also states that the appointment of a responsible officer in no way diminishes the liability of an employer. Tasmanian guidance explains that ‘the responsible officer concept is a powerful tool, helping the organisation delegate workplace health and safety matters effectively’.³² Workplace Standards Tasmania recommends that the position be given to the chief executive or the most senior manager.

This approach seems in conflict with a fundamental principle of OHS legislation that the duties are non-delegable, and to some extent duplicate officer liability provisions in Australian statutes which place positive duties on officers. See section 8.6 of this submission for a discussion on officer liability.

Creating another tier of duty holders such as ‘principal contractors’ is unnecessary as they are already captured under the current duties. For example, under the Victorian OHS Act a principal contractor owes a duty to its direct employees under s21(1) and (2). On the authority of *The Queen v A.C.R. Roofing Pty.Ltd* (2004) 11VR 187 any of the company’s

³¹ s10, *Workplace Health and Safety Act 1995* (Tas)

³² WorkCover Tasmania, *A guide to the workplace health and safety legislation*, p7.

sub-contractors and sub-sub-contractors and their employees will be protected by s21(3). Section 23 offers protection to all others such as the public, volunteers etc. Also, see discussion in chapter 3.2 and 3.7 of this submission.

The inclusion of principal contractors as duty holders seems to have arisen from the National Standard for Construction Work which places obligations on principal contractors who have management and control of the workplace. Jurisdictions adopted the National Standard in different ways. One option was to amend the principal Act to place duties on principal contractors as occurred in Queensland.

An amendment to the Victorian OHS Act 2004 was not considered necessary or desirable as 'principal contractors' who manage and control workplaces are already captured under ss 21, 23, 24 and/or 26 of the Victorian Act. The only gap was the specific requirement in the Standard that this person be responsible for preparing and maintaining health and safety coordination plans. The concept of 'principal contractor' was included in the new Victorian construction regulation to assign responsibility for the health and safety plan to this person or corporation.

Victoria's Position

Victoria does not support provisions in the model OHS Act requiring that employers of a certain size appoint a Workplace Health and Safety Officer. Victoria believes that the less prescriptive approach in s22(2)(b) and s73(2)(b) of the Victorian OHS Act 2004 achieves a similar end.

Victoria does not support the creation of another tier of duty holders such as responsible officers, principal contractors or appointed officers in the model Act. The general duties in the model Act should focus on those parties with ultimate management and control of workplaces, that is, employers, the self-employed, persons to any extent in control or management of workplaces and upstream duty holders.

Victoria supports officer liability for offences by corporations and supports the definition of officer which adopts the same definition as the *Corporations Act (2001) (Cth)*. This creates a positive duty qualified by reasonably practicable and is based on an objective standard; and considers state of knowledge generally and the subjective knowledge of the particular officer. See section 8.6 of this submission for a detailed discussion of officer liability.

3.7 Duties of Persons in Control

- Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?
- Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

Background

Australian OHS statutes place duties on persons who control workplaces where people, who are not their employees, work.

Analysis & Evidence

The Victorian OHS Act recognises that there will often be a range of duty holders whose health and safety duties apply simultaneously in the same workplace and that these duties are concurrent and overlapping. Control is a principle of health and safety protection and underlies particularly the duties on occupiers, employers/subcontractors, manufacturers, among others. In the Victorian OHS Act, ss23, 24 and 26 place duties on these persons.

In his review of the Victorian OHS Act 1985 Maxwell recommended that the Act should also include a term of 'proprietor' to deal with persons (natural, as well as corporations) who carry on business undertakings but have no employees. Maxwell used the example of a private company that buys land and contracts out all administration and building works. The directors of the company are not employers, employees or self-employed for the purpose of the OHS Act yet they have effective management and control of the undertaking.³³

This business arrangement is now captured by s26 of the Victorian Act which places a duty on *any person* (whether as owner or otherwise) who *has to any extent*, the management or control of a workplace to ensure that so far as reasonably practicable the workplace and exit and entry to it are safe and without risks to health.

The drafting of this provision is intentionally broad to ensure it covers owners and occupiers and a wide range of contemporary business arrangements such as franchising, contracting out and 'proprietor' arrangements.

The provision makes it clear that any person who has to any extent management or control of a workplace has a duty. Keeping the provision broad in scope avoids the need to create specific duties in the Act for every conceivable business arrangement. Statutory interpretative documents (see s12 of the Victorian OHS Act which allows their making) and non-statutory guidance can further explain the types of persons and undertakings that might be subject to this provision.

Assigning duties to persons in control of a work item or an area where people, who are not their employees work, as suggested in question 32 is not desirable. It could effectively reduce the general duties to delegable duties and create confusion in the workplace about who actually has the duty. See further discussion on the concept of control in chapter 3.2 of this submission.

Victoria's Position

Victoria considers that its current legislative provisions regarding control have demonstrated a capacity to impose obligations and provide protection from risks to health and safety. It would be a step into the unknown to introduce new concepts into the model OHS Act at this time in place of well-established concepts in current OHS legislation.

Further explanation of the extent to which different duty holders have control and exactly what is expected of them should be dealt with in industry specific guidance and regulations.

Victoria does not support creating a duty holder of persons in control of items or areas.

³³ op. cit., paras 592-598

3.8 Activities Which Impact on Health and Safety

- Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (ie., conception to disposal)? If so, what should the duties be in relation to these activities?
- Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?
- Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?
- Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

Background

Eliminating hazards at the design stage ('safe design') is concerned with controlling risks to health and safety as early as possible in the planning, design and creation of items that comprise a workplace, or are used or encountered at work. These items, broadly defined as 'designed products', include work premises (buildings), structures and other construction projects, plant and equipment and substances.

Safe design or 'upstream' duties are placed on key persons in the supply chain such as people who control and manage workplaces, designers, manufacturers and suppliers of plant and substances to be used in workplaces, and designers of buildings.

Most jurisdictions have enacted duties of care for designers in relation to plant, but not all cover buildings and structures, or substances. Three jurisdictions (Queensland, South Australia and Western Australia) extend the designer obligation to the installation and erection of structures. By contrast, the Victorian OHS Act 2004 only requires the design of buildings and structures to be safe for persons using them as a workplace (section 28).

The duties of care for suppliers are also generally consistent in relation to plant and substances.

Some jurisdictions, including Victoria, exclude financiers (persons who finance the acquisition of plant, substances or structures) from the duties of a supplier and allocate the duties to those persons with knowledge and control of the items when supplying them, the original supplier.

All jurisdictions apply duties of care to manufacturers and importers of plant and substances, and persons installing and erecting plant for work.

Unlike other upstream duty holders, persons installing and erecting plant do not have a specific duty to test or examine plant, or provide adequate information with the plant. In South Australia, the plant must also be installed or erected so that it is safe when subjected to foreseeable forms of misuse and when maintained. In New South Wales, persons installing or erecting plant have the duties of a manufacturer, therefore they must ensure that the plant is safe when used and provide information about the way the plant is to be used.

Duties covering decommissioning of plant and disposal of substances do not currently feature in principal OHS Acts as a separate duty. However, the definition of 'use' in OHS Acts includes decommissioning of plant and disposal of substances, enabling items to be safely disposed of and decommissioned.

Analysis & Evidence

Upstream Duties

One of the objects of OHS legislation is to eliminate at the source risks to the health, safety or welfare of employees and other persons at work. This emphasises that a safe design approach begins in the conceptual and planning phases, with choices about the design, methods of manufacture or construction and materials enhancing the safety of the designed product. As the issues paper makes clear, there is a high level of agreement across Australian jurisdictions about the duty holders and the nature of upstream duties. Upstream duties have been part of the OHS legislative framework for over 20 years and have proven to be effective in ensuring that OHS responsibilities are placed on those parties who control the health and safety risk.

The coverage of upstream duties in all OHS legislation is comprehensive. The duties apply to designers of plant, buildings or structures, manufacturers of plant or substances, suppliers of plant or substances, and persons installing, erecting or decommissioning plant. In Victoria supplier duties apply when the plant or substance will be used at a workplace, whether by the person receiving, or anyone else. This ensures that jurisdictional issues around interstate and repeated supply are addressed.

In 2007 the Stensholt Review into the Victorian OHS Act found there was a *prima facie* case for amending the scope of the duty of designers of buildings or structures to include the construction phase of the building or structure.³⁴ This is commonly known as a 'buildability' duty.

Victoria is not convinced that the case for change in this area has been adequately made. However, on 17 June 2008 the Victorian Government announced it had directed WorkSafe Victoria to undertake policy analysis as well as stakeholder engagement to provide advice to the Minister for Finance, WorkCover and the Transport Accident Commission on the nature of such a legislative amendment. This analysis and stakeholder engagement is planned for 2009/10 when the Construction Part of the Victorian *Occupational Health and Safety Regulations 2007* has been in operation for 12 months.

Accordingly Victoria would be prepared to support the inclusion of a 'buildability' duty on designers in the model OHS Act, subject to there being evidence to demonstrate it has or will produce improved OHS outcomes in the design and construction of buildings and structures.

Victoria's Position

Victoria supports the inclusion of comprehensive upstream duties in the model OHS Act on designers of plant, buildings or structures, manufacturers of plant or substances, suppliers of plant or substances, and persons installing, erecting or decommissioning plant, to the extent that they do not diminish the standard of protection contained in Victoria's current OHS legislation.

³⁴ op. cit., paras 22-33

Victoria considers that extra jurisdictional issues and repeated supply can be addressed in the model OHS Act by placing duties on suppliers which apply when the goods being supplied will be used at a workplace, whether by the person receiving them, or anyone else.

Victoria supports the inclusion of a 'buildability' duty on designers in the model OHS Act, subject to there being evidence to demonstrate it has or will produce improved OHS outcomes in the design and construction of buildings and structures.

CHAPTER 4: 'REASONABLY PRACTICABLE' AND RISK MANAGEMENT

4.1 Concept of 'Reasonably Practicable'

- Q37. Should a test of 'reasonably practicable' be included in the model OHS Act?
- Q38. If not, what alternative standard should be included?
- Q39. How should the standard be defined? What level of detail should be provided?
- Q40. Should control be an element of the standard? (see Chapter 3)
- Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

Background

General duties

While 'duty of care' provisions are similar in practical effect across Australian OHS jurisdictions, there are variations in how the duties are framed and defined.

In Victoria, Western Australia, South Australia, Tasmania, Northern Territory and the Australian Capital Territory, the principal OHS statutes create general duties that are limited by what is 'practicable' or 'reasonably practicable'.

The formulation of the standard required is somewhat, unfortunately, inextricably linked to the 'reverse onus' created by the defences in both NSW and Queensland legislation.

The Victorian and Western Australian statutes set out the factors to be considered when deciding what is reasonably practicable. In New South Wales, Tasmania and South Australia the factors are not specified in the legislation and the courts decide the issue by considering similar factors to those set out in the OHS laws of other jurisdictions. This creates uncertainty for duty holders who ought to know what is required to comply with the law and against which standards they will be judged. This was a key finding of the Maxwell and Banks reports which place an onus on the regulator to transparently state what is required to comply with the law and to increase efforts at supporting and providing guidance to duty holders.³⁵

The words 'practicable' or 'reasonably practicable' in the OHS statutes are intended to limit the general duty to a realistic objective standard.

While the majority of Australian OHS statutes contain a series of general duties that are qualified by what is 'practicable' or 'reasonably practicable', the Queensland and New South Wales provisions are absolute duties without qualification. In New South Wales a defence is expressly provided for duty holders who are able to prove on the balance of probabilities (i.e. a civil burden of proof) that it was not reasonably practicable to comply, and in Queensland, a defence can be established where the person took reasonable precautions and exercised due diligence.

The Robens model of incorporating 'reasonably practicable' as a qualifier on the general duty provisions has influenced the development of OHS legislation internationally, beyond

³⁵ The review of the New South Wales legislation in 2004 recommended the inclusion of the reasonably practicable test in the general duty and the removal of the reverse onus of proof.

the common law states. Indeed the International Labour Organisation Convention on Occupational Health and Safety (adopted in 1981 and ratified by Australia in 2004) specifically provides for duties qualified by the concept of 'reasonably practicable'.³⁶

Analysis & Evidence

General duties that are limited by what is 'reasonably practicable' make clear to duty holders the extent of their duties and what is expected of them. This approach offers greater transparency about the intent of the law than absolute duties which contemplate defences.

'Reasonably practicable' is a well understood concept in common law countries and has been the subject of considerable guidance and case law.³⁷ It embodies an objective standard which has broad community acceptance.

Factors in 'reasonably practicable'

As discussed above, the general duties in OHS statutes are limited by the extent of control the duty holder has in the workplace and these duties are concurrent and overlapping.

For clarity and fairness, OHS law should set out the factors that need to be considered when deciding what is practicable. This in turn provides guidance to duty holders as to the considerations that should bear upon their decisions in relation to control of risk.

It is important that the test of what is required by the legislation in any circumstance is assessed on an objective standard. The notion of 'reasonably practicable' makes clear that the test to be applied is objective.

The relevant factors should include expected level of knowledge about hazards or risks and how to control them, based on what a reasonable person in the duty holder's position ought to know.

The cost of implementing a given control, while not the predominant factor, is a necessary component of what is practicable, along with the availability of means to control the relevant risk. The application of the test in practice in Victoria is consistent with the landmark decision in *Edwards v National Coal Board* [1949] 1 KB 704, that in calculating of what is reasonably practicable, the cost of implementing a given control should be grossly disproportionate to the protection provided by the control, before the cost would militate against the control.

'Control' as a factor

The labour hire industry in Victoria has proposed that 'capacity to control' be included in the list of factors in the 'reasonably practicable' test to provide more clarity about the extent of the duties. While this concept is dealt with more expansively in chapter 3.2 of this submission, there are considerable risks in this approach. The practicability test focuses on eliminating or reducing workplace risks by considering the likelihood and severity of the hazard or risk, the state of knowledge about the issue and ways of controlling it, and the cost of these measures. 'Control' on the other hand, deals with whether a duty exists at all.

Including 'control' in the 'reasonably practicable' test is likely to shift the focus of the test from risk control to a consideration of whether a duty exists at all.

Furthermore, it is difficult to see how including the factor 'capacity to control' in the test will assist a duty holder to decide whether it is reasonably practicable to exercise a particular

³⁶ International Labour Convention No 155: Occupational Safety and Health, 1981 Article 16

³⁷ See for example, WorkSafe Position on 'How WorkSafe applies the law in relation to reasonably practicable', 12 September 2007

control. In every case they must decide this issue, based on the facts in their particular circumstances. There appears to be no sound evidence base that this additional factor is required or would provide additional clarity. Indeed it is unrealistic to think the concept of 'control' could be defined in the model Act so as to give clarity of what duties are imposed in particular industries or circumstances. These matters are more appropriately dealt with by way of guidance. In the absence of jurisprudence on the issue it could paradoxically create more ambiguity and uncertainty. The risks of implementing such a factor include adding additional points of proof in prosecutions and creating a risk to the success of those prosecutions. Accordingly, Victoria's position is that 'control' should not form part of the test.

The general duties contained in OHS statutes are deliberately phrased in general language of broad application. As envisaged by Robens, this allows the legislation to adapt and evolve to changing workplaces and work arrangements without the need for constant legislative change. The duties therefore create a concomitant expectation that the regulator will produce guidance material which transparently articulates the standards that apply in particular industries or in relation to particular hazards or other circumstances. The extent to which such guidance is constructive and assists duty holders to comply directly affects the credibility that attaches to the enforcement of the general duties by the regulator and in the courts.

Victoria's Position

Victoria believes that an objective test of 'reasonably practicable' as set out in Victoria's OHS Act 2004 should form the basis of the model OHS Act. Victoria does not support the model OHS Act characterising the 'reasonably practicable' test as a defence which shifts the burden of proof to a defendant. This approach is the most effective way of meeting the following objectives:

- Employees and others should be given the highest level of protection so far as is reasonably practicable. The standards should be objective and the care required of the duty holder is that of a reasonable person.
- Eliminating risks at the source will ensure the highest level of protection.
- Health and safety can best be achieved by ensuring that persons who control or manage matters are responsible for proactively eliminating or reducing risks. In achieving this, employers and employees should exchange information and ideas about OHS risks, and employees should be encouraged to be represented in relation to health and safety issues.
- General duties protect workplace health and safety while giving duty holders freedom to develop their own solutions.
- Concurrent, overlapping and non-delegable duties ensure that there are no gaps in health and safety protection in the workplace.
- For clarity and fairness, the model Act should set out the factors that need to be considered when deciding what is reasonably practicable.
- The expected level of knowledge about hazards or risks and how to control them is based on what a reasonable person in the duty holder's position should know. It is an objective test.

For Victoria's position on 'control' see section 3.2 of this submission.

4.2 Risk Management

- Q42. Should 'hazard' and 'risk' be defined in the model OHS Act?
- Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so how?
- Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties or otherwise?

Background

The general concept of risk management is well known and widely accepted within the OHS framework as the standard approach to addressing risks in workplaces.

Key to the risk management principles are the terms 'hazard' and 'risk'. Only Western Australia and the Australian Capital Territory define the terms 'hazard' and 'risk' in their principle legislation; however, the definitions vary. Queensland defines 'risk' but not 'hazard' (see figure 4). For the most part, OHS jurisdictions rely on the ordinary dictionary meanings of the terms, which allows for flexibility so that legislation can evolve to accommodate new and emerging risks.

With the exception of Queensland, Australian OHS jurisdictions do not specifically make reference to a risk management process in their principle legislation (although the exposure draft of the ACT's *Work Safety Bill* defines 'risk'³⁸ and mandates 'duties to manage risk'.³⁹) Other jurisdictions place risk management provisions in their regulations and codes of practice. While Queensland has reference to a risk management process in its legislation, it is not mandated.

Analysis & Evidence

Defining 'hazard' and 'risk'

There are a number of reasons why the terms 'hazard' and 'risk' should not be defined in the model OHS Act:

- In relation to OHS, the terms 'hazard' and 'risk' are generally understood and have not been the focus of extensive legal debate. The dictionary definitions of 'hazard' and 'risk' are clear and further definition is not required as there is no ambiguity.
- Definitions of 'hazard' and 'risk' may be required for specific circumstances, e.g. mining hazards. In this case it is more appropriate that definitions be confined to interpretive documents, codes, or general non-statutory guidance. More detailed definitions can provide clarity as to the nature of hazards and risks in relation to a specific set of circumstances.
- Any attempt to define the terms may inadvertently narrow the meaning. Subsequent definitions under subordinate legislation, codes or guidance material need to align with any definitions in the principal Act. Not defining the terms in the principal Act eliminates any prospect of a conflict of definitions in subordinate legislation or supporting documentation. (See also section 2.4 of this submission).

Figure 4 Existing definitions in OHS laws for 'hazard' and 'risk'

³⁸ *Work Safety Bill 2008* (ACT), ch 8

³⁹ *ibid.*, Division 3.1

	Hazard	Risk
WA	' hazard ', in relation to a person, means anything that may result in- (a) injury to the person; or (b) harm to the health of the person	' risk ', in relation to any injury or harm, means the probability of that injury or harm occurring
ACT	hazard- a thing (including an intrinsic property of a thing), or a situation is a hazard if it has the potential to kill or injure a person	risk means the likelihood of death or harm to a person from a hazard.
Queensland	Not defined	risk means risk of death injury or illness
Macquarie Dictionary	hazard 1. a risk; exposure to danger or harm. 2. the cause of such a risk; potential source of harm, injury, difficulty, etc	risk 1. exposure to the chance of injury or loss; a hazard or dangerous chance: <i>to run risks.</i>

Reasonably practicable

The risk management process involves the identification of hazards, the assessment of the risks associated with those hazards, the implementation of controls to eliminate or reduce the assessed risks and the monitoring/review of those controls. These steps are integral parts of the general duties contained in the Victorian OHS Act 2004. As illustrated below, s20 of the OHS Act requires a duty holder to have regard to the risk management principles without prescribing a mandatory process of risk management. This approach is consistent with a performance-based approach to legislation in that it is outcome-focussed and enables duty holders to focus efforts on *controlling* risks as opposed to merely *documenting* risk management processes:

- **Hazard Identification:** The elements of 'reasonably practicable' in s20(2) of the OHS Act require a duty holder to have regard to the likelihood that a hazard may cause harm and the potential harm that it may cause. In addition the duty holder has to have regard to what they know or ought to know about the hazard. There is already sufficient legislative compulsion through the general duties to know about hazards.
- **Risk Assessment:** The elements of 'reasonably practicable' require the duty holder to have regard to the likelihood and degree of harm that may be caused should a risk eventuate and to have regard to what the person knows or ought to know about the risk. These are the primary purposes of a risk assessment and it is, in part, on this basis that Victoria believes it inappropriate to mandate 'risk management' duties in the model Act.
- **Risk Control:** At the basic level, this is what the general duties seek to achieve. The elements of 'reasonably practicable' in the OHS Act require the duty holder to have regard to what the person knows or ought to know about the ways of eliminating or reducing the risk, the availability and suitability of control measures and cost. The duty to control risk is already sufficiently covered through the general duties. To the extent that a duty holder may require further information in order to understand how to assess and control risks, Victoria believes this information should be provided through the model regulations (and then only in industry-specific regulations where the industry has been identified as 'hazardous') and in national codes of practice/compliance codes.
- **Monitoring/Review:** The general duties are not time dependent; they are continuous. Monitoring and review need to be carried out by any prudent duty holder to ensure that compliance is maintained in the face of changing

circumstances or changes in the 'state of knowledge' about a risk or how it is controlled.

Under section 12 of the OHS Act, WorkSafe has developed statutory guidance on how WorkSafe applies the Act in relation to reasonably practicable (see Attachment 2) and the identification of hazards and risks (see Attachment 3). These documents provide detail in relation to interpreting the legislation. This assists duty-holders in meeting their obligations under Part 3 of the OHS Act.

Risk assessment

Adopting a risk management approach will ensure that duty holders apply a systematic process to addressing OHS issues. However mandatory risk management is problematic, particularly in relation to risk assessment. Victoria does not support mandating of risk assessment in the model OHS Act.

Mandating risk management principles places an unnecessary burden on duty-holders in the case of risks that are well known and where there are universally accepted risk controls. Not mandating risk management duties through the model Act would be consistent with COAG's focus on reducing the regulatory burden whilst, in Victoria's view, not producing a diminution in OHS standards, the ability of duty holders to comply with them and the capacity of regulators to enforce them.

Mandating risk assessments may act as a barrier to the implementation of risk controls. For example, where hazards and risks are well-known and there are universally-accepted control measures, a duty holder may identify the hazard and implement the appropriate control without doing a risk assessment. There is little point in performing a risk assessment in these cases because it will yield no new knowledge and is likely to delay the implementation of controls. While a risk may be controlled in compliance with the law, the failure to conduct a risk assessment means that a breach of the legislation has occurred.

Mandating of the risk assessment process may divert the attention of duty holders under the model OHS Act from what Victoria believes should be one of their primary obligations: to eliminate or control OHS risks. Duty holders may be more focussed on the process than their safety obligations. The proposition that the effort needs to be proportional when determining the most reasonably practicable way to control risks is diminished by overly prescribing process steps in achieving appropriate risk controls.

Not mandating risk management in principal OHS legislation is no bar to consideration of risk management in subordinate legislation and guidance. This allows for risk management to be mandated where specific circumstances require it. For example the Victorian OHS Regulations prescribe risk assessment in relation to major hazard facilities and mines. This is because the risks associated with these industries are complex and significant.

The shortcomings of a mandatory risk management approach were addressed by Maxwell who concluded that the Act should support a systematic approach to workplace health and safety, but it should not go so far as to impose an obligation to implement an OHS management system.⁴⁰

Evidence from Victorian workplaces suggests that, in practice, many employers are implementing adequate control measures without going through formal documented risk assessment processes in every case. For example, a 2006 study conducted by WorkSafe indicated that 89% of employers had adequate risk controls in place for plant hazards even though only 49% had documented risk assessments. Similarly, 89% of employers had

⁴⁰ Maxwell, op. cit., pp 157-8

adequate risk controls in place for manual handling hazards, even though only 46% had documented risk assessments in place.⁴¹

Not mandating prescriptive risk assessment requirements results in the reduction of record-keeping and hazard identification tasks as businesses streamline their compliance activities. It is estimated that the removal of prescriptive risk assessment from the Victorian OHS Regulations 2007 will result in \$52.3 million in savings over 10 years for businesses already complying with the Regulations.⁴² In Victoria, small businesses represent 96% of all businesses. It is estimated that by removing the prescription on risk assessment from the Victorian OHS Regulations, typical small businesses will save \$550 each over 10 years from not needing to undertake risk assessments.⁴³

Victoria's Position

The model OHS Act should not define 'hazard' and 'risk'. Victoria considers that the terms should only be defined in other elements of the model national OHS compliance framework and then only in relation to specific circumstances and where clarification is warranted.

The model OHS Act should not contain 'risk management' duties. The model Act should include the test for 'reasonably practicable' as it appears in the Victorian OHS Act, as this allows for the principles of risk management to be taken into account as part of a consideration of what is 'reasonably practicable' for a duty holder to do.

The model OHS Act should not mandate risk management principles and processes. It should, however, support a systematic approach to workplace health and safety.

See also WorkSafe Positions on 'reasonably practicable' and 'identifying and understanding hazards and risks' in Attachments 2 and 3.

⁴¹ Regulatory Impact Statement Occupational Health and Safety Regulations 2007, Equipment (Public Safety) Regulations 2007, p 41

⁴² op. cit., p 173

⁴³ ibid., p 188

CHAPTER 5: CONSULTATION, PARTICIPATION AND REPRESENTATION

5.1 & 5.2 Consultation, Participation and Representation

Consultation, Participation and Representation

- Q45. What provisions should be made in the model OHS Act for consultation?
- Q46. What are the work relationships to which a consultation provision should apply?
- Q47. Should there be different levels of consultation required for different relationships?
- Q48. How should consultation be provided for:
- a multi-employer worksite
 - an employer with operations across more than one worksite
 - small business
 - remote workplaces
 - precarious employment
 - workers from culturally and linguistically diverse backgrounds
- Q49. Should there be a requirement for establishing HSRs and HSCs?
- Q50. What provision should be made in the model OHS Act to enable the effective participation and representation of employees to improve health and safety outcomes?
- Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?
- Q52. Where an election is required, who should be entitled to vote?
- Q53. What should the powers and functions of HSRs be?
- Q54. What should the structure and functions of HSCs be?
- Q55. What training and qualifications should HSRs and members of HSCs have?
- Q56. Are there alternative mechanisms that should be considered?
- Q57. To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?
- Q58. Are there classes of employees for whom the current representation requirements are not effective? How could the model OHS Act address such problems?

Background

Lord Robens believed that consultation between employers and employees was central to the successful management of health and safety risks in the workplace without the need for outside intervention by the regulator. He recommended a statutory requirement for employers to consult with employees or their representatives on measures for promoting health and safety at work, and to provide arrangements for the participation of the employees in the development of such measures.

Jurisdictions across Australia have adopted the Robens recommendations by including provisions in their legislation for consultation with employees or their representatives and providing for arrangements to support participation, such as the formation of designated workgroups and the election of Health and Safety Representatives (HSRs), and the establishment of consultative health and safety committees. However, there are many inconsistencies.

Consultation

There are two main issues in regard to consultation provisions across Australian jurisdictions. Firstly, the provisions are inconsistent. Secondly, not all those who work for the employer may be involved in consultation in the workplace. In Victoria, the OHS Act requires employers to consult with employees, and 'employee' is defined by the nature of the contract of employment. However, employers must also consult with contractors and employees of contractors if they are affected by the OHS issue.

Participation and Representation

Work groups

In regard to participation and representation, there are many inconsistencies across the jurisdictions. For example, most jurisdictions provide for the establishment of workplace groups or units (usually called 'designated work groups') which may elect a representative (usually called an 'HSR'), as well as providing for health and safety committees. Importantly, these arrangements are not mandatory. If employees are satisfied with health and safety in their workplace and do not see the need for representative arrangements, they do not have to have them.

Being a member of a representative group varies across jurisdictions. For example in Victoria, where a designated work group is established, the employer and employees can negotiate on whether the HSR can represent independent contractors and their employees who work at the workplace along with the employer's employees.

Employee representatives

While employer obligations to employee representatives are largely but not fully consistent across jurisdictions, the extent of the employee representative's role, functions, entitlements and powers varies, with the most inconsistency being in the power to issue provisional improvement notices (in Victoria, Western Australia, South Australia and the Australian Capital Territory) and to direct cessation of dangerous work (in Victoria, South Australia, and the Australian Capital Territory). In some jurisdictions, unions may have a role in supporting representative processes, by consultation or by employee request.

Consultative committees

Across Australia, health and safety committees are established following a request by a number of prescribed parties (employees, employer, employee representative, director of the department or commissioner of the regulator, or majority of the employees) and where workplaces have above a minimum number of employees (20 or 50). The precise provisions vary greatly.

Analysis & Evidence

Consultation

Victoria embodies consultation in the objects of its OHS Act and has a stand-alone part for consultation in its OHS Act, however other jurisdictions include consultation in provisions for

representation. Not all jurisdictions define consultation or stipulate how it must be conducted, and with whom. Some jurisdictions include a role for health and safety committees in their local Act, while others focus on employees (or workers) and HSRs. Some jurisdictions provide detailed lists of what employers must consult on, and there are also differences in when consultation must take place, ranging from when a range of decisions are to be taken by the employer, to 'when reasonably requested' by an employee representative. Some jurisdictions provide for procedures for consultation to be agreed at the workplace level. The Victorian Regulations set out how employers are to involve HSRs in consultation in regulation 2.1.5.

Regardless of these inconsistencies, consultation provisions create a framework for enabling the objects and principles of OHS legislation to be achieved at the individual workplace level. There is general consensus amongst regulators and stakeholders that consultation makes an important contribution to effective management of health and safety in the workplace. Employers are able to make use of the collective knowledge and experience of their employees in identifying hazards and suggesting controls. Involving employees in consultation encourages a cooperative approach to issues as they arise with the result that employees are more likely to come forward with health and safety issues. Victorian workers express positive views about the effectiveness of workplace consultation, with 87% agreeing that information is shared with them, 90% stating that they are given the opportunity to respond, and 90% stating that their views are taken into consideration.⁴⁴

A more fundamental perspective is that all those who work for an employer should have the right to participate in consultation about all aspects of health and safety (such as hazards, risks, risk management, work practices, policies, procedures, training and consultative processes) in their workplaces, where these may have an impact on their health and safety.

However, the duty should be restricted to consultation only with those employees who are directly affected or likely to be directly affected by whatever it is that the employer is doing, and should be qualified by 'reasonably practicable', meaning that the employer must consult to the extent that it is reasonable in all the circumstances.

Several jurisdictions have provisions which explain the concept of consultation or set out how an employer must consult. Detailing consultation ensures that it is not understood by the workplace parties simply as the provision of information to employees. Consultation is a dialogue which requires information to be shared, employees to be given the opportunity to respond in a timely way, and their views to be taken into consideration by the employer.

Many workplaces, particularly micro and small businesses, may choose not to have representative arrangements in place, and in those, consultation should be undertaken directly with employees. However, where employees have elected a representative, the employer should consult with that representative in their role as a representative. The representative's role should be respected by the employer and protected under legislation. The legislation should allow the flexibility for the employer to consult directly with employees and with representatives where they have been elected. Employers and employees should be able to consult in order to design a process that suits them.

It is not necessary for the model national OHS laws to provide for different levels of consultation for different employment relationships. Australian health and safety law is 'performance based', and simply sets the standard that an employer must comply with. This allows employers and those who work for them to come to an agreement about how consultation should take place in their particular workplace, to suit employment relationships and the local workforce.

⁴⁴ Sweeney Research, WorkSafe KPI Survey, November 2007, p33

Participation and Representation

There is a persuasive and growing body of evidence on the positive benefits to health and safety of employee participation in OHS. The evidence is from many countries, including those where participatory mechanisms are not universally mandated by legislation. The evidence also suggests that participation which involves higher levels of employee involvement has superior outcomes to participation which is more limited.⁴⁵ A key issue for the model OHS Act is how best to encourage, support, and facilitate employee participation.

What is representation?

The Victorian OHS Act specifically includes in its principles of health and safety protection (s4(5)) that employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

By using the word 'representative', health and safety law clearly intends that a group of employees may choose someone to represent their health and safety interests. How the representative is to discharge his or her responsibility as a representative is a matter for discussion between the representatives and the members of the group. As in any other democratic electoral process, if employees are dissatisfied with how they are being represented, they can call another election.

As representative structures to facilitate employee participation are voluntary, if employees choose to act upon their entitlements, form a work group and elect a representative, then that is indicative of their will that they be represented. If they do not wish to be so represented, they can participate by direct consultation with their employer, or any other arrangement that is agreed through consultation.

The model OHS Act should contain provisions which capture these points.

Designated work groups

The very notion of participation, based on consultation and representation, requires model laws to be flexible in how they set out the arrangements to facilitate this. Workplaces vary considerably across Australia and consideration needs to be given as to how this can be done effectively. If employees are to be represented, they need to be entitled under law to request the formation of such a group, and the right to negotiate it with the employer. Employers also may request the formation of a group to assist them to effectively meet their duties. This is most likely to happen in large workplaces, where it would be impractical for an employer to attempt to consult directly with large numbers of employees often spread across many workplaces. Because workplaces are so varied, legislation should assist the workplace parties in this process by providing for a basic set of criteria for establishing a group, such as the matters to be taken into account during negotiations to ensure that the groups are established on a reasoned basis.

There are many locations and workplaces where there are multiple employers which may or may not interact and the legislation should contain provisions which enable designated work groups of multiple employers to be established.

Health and safety representatives (HSRs)

Participation through representation cannot be effective unless representation is supported by robust mechanisms. HSRs need to be provided by law with a range of functions that

⁴⁵ Johnstone R, Quinlan M and Walters D, 'Statutory OHS Workplace Arrangements for the Modern Labour Market', National Research Centre for Occupational Health and Safety Regulation Working Paper No. 22, Australian National University, Canberra, 2004, pp. 2-4

enable them to represent and safeguard the health and safety interests of their members. To carry out these functions, they need to be provided with robust powers; if they cannot act where necessary to improve health and safety outcomes, the Robens principle that issues are best resolved in the workplace is undermined. However, there should be appropriate limitations to their functions and powers. The model national laws should also provide strong protections for HSRs from discrimination against them by an employer because of their advocacy on behalf of their members.

The model Act should also provide that the Act and model regulations do not impose any function or duty on a HSR in their capacity as an HSR to make it clear that employers retain the prime responsibility for OHS decisions even after consultation and representation has taken place.

HSRs are most effective when they are properly trained, have facilities provided to them by the employer to support their role of representing their members, and other entitlements, and can access support from a third party such as an official of an employee organisation.

Health and safety committees

Health and safety committees can play an important role in workplaces to support employee participation through consultation and representation on an ongoing basis. Committees bring together employees' knowledge and experience of jobs and tasks and the employer's perspective of the workplace and business requirements.

In general, health and safety committees should give consideration to broad concerns, such as health and safety issues that are common to the workplace at large, and to planning, implementing and monitoring programs to address these issues. In this way, the activities of the committee will be complementary to the role of HSRs, whose powers are generally limited to issues affecting their particular work group.

While some jurisdictions provide for the involvement of health and safety committees in issue resolution, in general, committees have a formal and deliberative role, and are not an appropriate vehicle for responding immediately to local issues, particularly dispute resolution or immediate issues.

Victoria's Position

Consultation, Representation and Participation

Victoria believes that consultation, representation and participation are central to realising the objects and principles of health and safety legislation in the workplace. Victoria supports the model OHS Act addressing these matters, and in particular believes the model Act should:

- set a positive broad-based duty for employers to consult with employees
- include the purpose of consultation and how it must take place (i.e. describe a two-way process)
- include a set of principles establishing that employees have a right to be represented and that they should be encouraged to be represented
- provide broad enough functions and sufficient powers and entitlements for elected representatives to be able to act to contribute to achieving the degree of safety that employees require, and

- provide a level of protection that ensures HSRs are not discriminated against or victimised in the pursuit of their role.

Right of Entry

- Q59. Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?
- Q60. Should the model OHS Act specify training and qualifications for such persons?
- Q61. In what circumstances should the right of entry be exercisable?
- Q62. What powers should be exercisable upon entry, and subject to what conditions or limitations?

Background

Provision for the entry of authorised representatives of employee associations to workplaces was included in the OHS Act 2004 following the Maxwell Review.

There are many inconsistencies regarding provisions for entry to workplaces for authorised representatives of employee organisations across Australian OHS jurisdictions. Principal OHS legislation in Victoria, New South Wales, Queensland, and the Australian Capital Territory provides for entry, however, the rationale for the provisions and the powers vary. The new Northern Territory legislation, not yet operative, also provides for right of entry.

For example, the New South Wales and Australian Capital Territory laws confer the power of entry without notice and with substantial investigative powers conferred on the person granted right of entry. In New South Wales unions have the ability to mount prosecutions for health and safety offences and the investigative powers are to be understood in that context. In Victoria (and similarly in Queensland), the provisions are more limited and are based on the powers in the industrial relations laws; the Victorian provisions are intended to provide the workplace parties with another consultative avenue to raise health and safety issues. In Victoria, the representative seeking entry must 'reasonably suspect that a contravention of the Act or the regulations has occurred or is occurring at a workplace...' (s87). In Victoria and Queensland, written notice must be given on entry to the employer, and this notice must include a description of the suspected contravention.

Examples of other inconsistencies include methods for authorisation and training. In Victoria, authorisation is through the granting of a permit by the Magistrates' Court; in the Australian Capital Territory, in writing by the relevant union; and in New South Wales and Queensland by the industrial registrar under the relevant State industrial relations laws. In Victoria, Queensland and the Australian Capital Territory, authorised representatives must have completed training approved by, respectively, WorkSafe, the chief executive, or as required under the regulations.

Analysis & Evidence

Maxwell noted that even after 20 years of operation of the Victorian 1985 Act, there was widespread lack of representation of employee health and safety interests in workplaces. He proposed union right of entry as an alternative measure to achieve this.⁴⁶

⁴⁶ op. cit., para 885

Union right of entry for OHS purposes provides another way in which OHS issues can be addressed in workplaces, without the need for the regulator's involvement. Inspectors cannot access every workplace and deal with every OHS issue; however, authorised union representatives can provide additional 'eyes and ears' to deal with health and safety issues in many workplaces and can also play a representative role where there are no HSRs.

Since July 2005, the Victorian Magistrates' Court has approved the registration of 499⁴⁷ authorised representatives of registered unions and has not been called upon to de-register any of them. Over the same period WorkSafe inspectors were required to deal with only 8 entry disputes. Telephone inquiries about authorised representatives to WorkSafe Victoria's Advisory Service have also been declining, as set out in the table below.

Year	ARREO inquiry	All inquiries
2005-2006	182	54,178
2006-2007	78	48,319
2007-2008	56	50,942

Victoria believes that this evidence clearly shows that the provisions have operated as intended and have been implemented smoothly, and that generally, authorised officials gain entry into workplaces without significant problems. This is consistent with Maxwell's conclusions that employer concerns about the abuse of union right of entry were unjustified.

Union officials also have powers to enter workplaces under both State industrial relations legislation and the Commonwealth *Workplace Relations Act 1996*. However, this right of entry is granted to deal with industrial issues and not health and safety issues. Entry powers for health and safety issues should therefore continue to be granted under health and safety legislation only, even after taking into account the prospect of any amendments to the *Workplace Relations Act*.

Victoria's Position

Victoria considers that authorised employee representatives have an important role in the health and safety framework. This role should be supported in the model OHS Act by the right of entry to a place that is a workplace during working hours and the right to enquire into suspected contraventions of OHS law. The right of entry should be subject to limitations and conditions and authorised representatives should be provided with protection.

⁴⁷ As at June 2008, 652 people had completed approved training for authorised representatives of employee associations but not all necessarily apply to the Magistrates' Court to be registered.

Issue Resolution

- Q63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?
- Q64. When should issue resolution procedures be activated?
- Q65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?
- Q66. How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?

Background

The Robens approach to health and safety has workplace resolution of health and safety issues as its centrepiece. Robens believed that as health and safety issues arise in the workplace, they should for the most part be solved there by those whose undertaking creates the risk (the employer) and those who work with the risk (the employees). The intention is to resolve health and safety issues wherever possible without needing to call upon external intervention by the regulator.

A health and safety issue can be relatively minor, or it can be an immediate threat. Most Australian jurisdictions distinguish between an 'issue' and an 'immediate threat', and require different processes for how the two kinds of issues are dealt with.

Health and safety laws include issue resolution provisions to provide for those circumstances where the workplace parties have not been able to agree on resolving a health and safety matter.

There is little consistency in how issue resolution is addressed in legislation across Australia. The Victorian legislation places a duty on employers and employees to resolve issues. The Queensland legislation provides that workplace safety representatives are entitled to be involved in resolution and also that resolution is a function of health and safety committees. HSRs in South Australia are entitled to write a notice, if an issue is not resolved.

The Victorian OHS Act provides for procedures for issue resolution to be developed through consultation at the workplace level by the workplace parties, and agreed to by them. However, in practice, questions have arisen in regard to a number of factors, including what 'agreed' actually means.

Another concern is that the employer, or the person representing the employer, has enough competence in OHS matters to understand and resolve the issue, and enough seniority to make binding decisions on behalf of the employer.

Analysis & Evidence

It is clear from the various local OHS Acts that processes or procedures for resolving issues are envisaged but in most cases these are not spelt out, though several jurisdictions refer to local agreed procedures and procedures in regulations to be used where there are no local agreed procedures. All jurisdictions provide for the issue to be referred to an inspector if not resolved satisfactorily in the workplace.

In the Victorian OHS Act, the provisions are framed proactively, requiring employers and employees, or employers and HSRs, depending on workplace arrangements, to attempt to resolve issues concerning health and safety at the workplace, through locally agreed procedures or the procedures in the regulations. This reflects the importance given to joint consultation in the Victorian legislation.

The Victorian OHS Act does not define 'issue', to avoid limiting the scope of what could require resolution. The position put in guidance is that an 'issue' can be any matter to do with health and safety in the workplace, or processes in the Act and regulations, while not necessarily indicating the existence of a 'dispute'. There is a greater likelihood of effective resolution and commitment to decisions by all the workplace parties if the issue can be settled there, without conflict and without the need for external intervention by the regulator. This is particularly so where the employer has designated a management representative senior enough to make decisions and sufficiently competent in health and safety matters to resolve issues in consultation with employees or HSRs.

The advantage of having local agreed procedures is that they can be negotiated through the consultation process to suit the particular workplace, and provide consistency and transparency in how health and safety issues are to be resolved in a timely and efficient way. Agreed procedures help avoid conflict and disputes. However, the negotiating and agreement process needs to be transparent to ensure that 'agreement' is not imposed by one workplace party on the other.

Some jurisdictions require the involvement of health and safety committees in issue resolution. While health and safety committees play an important role in setting directions, monitoring performance and reviewing incidents, their role should be overseeing, rather than involvement in the details of issue resolution. Issues need to be resolved in a timely and effective manner, and referring them to a committee can result in long delays in arriving at a decision.

Victoria's Position

Victorian considers that the model national OHS laws should have a separate part on issue resolution to signify its importance as a key part of consultation and representation in workplaces. There should be a positive duty on the workplace parties to attempt to resolve any issue concerning health and safety, using either local agreed procedures or the procedure prescribed in the regulations. These agreed procedures should be one of the things included as a topic for consultation in the consultation part of the national model OHS laws.

Right to Cease Unsafe Work

- Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider to be unhealthy or unsafe?
- Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?
- Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?
- Q70. In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?

Background

Current OHS laws in the majority of Australian jurisdictions include provisions enabling cessation of work due to immediate threats to health and safety. These are couched either as a right for a worker to refuse unsafe work, or as a right for a HSR to direct that work should stop (after consultation with the employer, the employer's representative or a supervisor).

The majority of jurisdictions provide for employees to be directed to do alternative work under the same terms and conditions of employment when they have stopped unsafe work or refused unsafe work. The Victorian Act provides that if an inspector affirms that the work was unsafe, employees are to be paid for the period of the work cessation.

Jurisdictions are inconsistent when dealing with disagreements and disputes arising from work cessations under OHS legislation. In those jurisdictions which do provide for refusal of unsafe work or a work cessation to be directed, there are several concepts of what the dispute may relate to. One is the nature of the health and safety issue itself, which may be referred by any party to the regulator, its delegate, an inspector or an investigator for resolution. Another is a dispute over a pay entitlement, which may be referred by any party to an industrial tribunal or court. Yet another is dissatisfaction with the actions of an inspector, referred to an industrial court (or in Victoria, internal review in the first instance with a right of administrative review of the internal review decision before the Victorian Civil and Administrative Tribunal).

There are two main issues in regard to the right to cease unsafe work and associated matters (such as the role of HSRs, payment of wages, and disputes arising from work cessations). These are the right itself, how it is understood by employers and employees, and taken up by employees; and inconsistencies across jurisdictions in dealing with it and associated matters.

The common law provides employees with the general right to refuse unsafe work, or stop work where work is unsafe, but many employees (and employers) may not be aware of this. Consequently, many employees and employers would be unaware of the legal rights of employees in such circumstances. It follows that many employees may be unwilling to refuse unsafe work even if they recognise that it is unsafe. If they are aware of their rights, they may not act because they are afraid of retribution by the employer.

Anecdotally, there appears to be a broad and strongly held consensus of opinion in the Australian community that employees should be entitled to refuse unsafe work. The employee general duty to take care for their own health and safety contained in all

jurisdictions' OHS statutes can be interpreted as allowing the right to refuse unsafe work, or to stop work where work is unsafe. However many employees (or employers) may not view the duty in this light.

Overall, this lack of clarity in regard to employee rights, and the inconsistency of laws across jurisdictions, means many Australian workers may *in effect*, if not by intention, be disempowered in regard to taking action to protect their own health and safety.

Secondly, and as noted above, there are inconsistencies between jurisdictions regarding the right to work cessation, who can direct a work cessation, alternative duties and pay during work cessations, and resolution of disputes arising from work cessations.

Analysis & Evidence

The current patchwork of provisions across jurisdictions results in the following outcomes:

- in four jurisdictions⁴⁸, work cessations can only take place where there is an elected HSR (which is, at this time, a minority of Australian workplaces)
- in three jurisdictions employees can refuse unsafe work⁴⁹ but HSRs cannot direct a cessation
- in two jurisdictions⁵⁰ there is no provision in either the Act or the Regulations in regard to refusal of unsafe work or work cessations, and
- the concept of 'dispute' is not consistent and the remedies vary.

The current exposure draft of proposed legislation from the ACT is the only legislation which entitles employees to refuse work as individuals, *and* HSRs to exercise 'emergency powers' on behalf of employees.

Historically, employers and employer associations have opposed the insertion of a right to stop work in OHS legislation, especially the power of HSRs to direct work cessations. However, the evidence shows that in Victoria, since 1985 the power of HSRs to direct work cessations has been exercised extremely sparingly.

Visit type	2005/2006	2006/2007	2007/2008
Work cessation	65	20	24
Other visit	36674	37143	31315
All	36739	37163	31339

Victoria's Position

Victoria considers that the power to cease or to refuse unsafe work should be made explicit in the model OHS Act, to remove all doubt. The model Act should include provisions empowering employees to cease work, to capture those workplaces which do not have employee representative structures and processes in place, and provisions empowering HSRs to direct work cessations where there is an immediate threat to health and safety after consultation with the employer or employer's representative. There should also be provisions making it clear that employees must not be penalised either monetarily or through their work conditions as a result of their involvement in a work cessation where they had a reasonable belief that there was an immediate threat to their health and safety.

⁴⁸ Seafarers, the Commonwealth, South Australia and the Australian Capital Territory

⁴⁹ Tasmania, Western Australia and the Northern Territory

⁵⁰ Queensland and New South Wales.

5.3 Protection from Discrimination and Victimisation

- Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?
- Q72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?
- Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?
- Q74. Who should have the burden of proving relevant elements of offences (eg conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?
- Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?
- Q76. What remedies should be available to the victims?
- Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?
- Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

Background

Victoria supports protection from discrimination and victimisation of employees to enable them to raise OHS issues without fear of reprisals. Similarly, HSRs and members of health and safety committees should be free to perform their statutory functions secure in the knowledge they are protected from reprisals. On issues concerning discrimination in relation to consultation, participation and representation, see also sections 5.1 and 5.2 in this submission.

Currently, Victoria's OHS Act 2004 prohibits an employer or prospective employer from discriminating against employees or prospective employees by:

- dismissing them, injuring them or altering their position to their detriment
- threatening to dismiss, injure or alter the employee's position to their detriment, or
- not offering a prospective employee a job or treating them less favourably than another prospective employee.

It is an indictable offence if an employer engaged in that conduct because the employee or prospective employee:

- is an HSR, or is involved in a health and safety committee
- exercises a power as an HSR or as part of a health and safety committee
- assists or gives information to an inspector, HSR or health and safety committee, or
- raises an issue or concern about health and safety with the employer, a HSR or health and safety committee.

The OHS Act places the burden of proof in such matters on the defendant. The health and safety activity needs to be the 'dominant' reason for the discrimination. The Act makes provision for the court to make an order that either, or both, damages be paid to an

employee or prospective employee, or they are reinstated in their former position or offered the position they applied for, or an equivalent position, if an employer or prospective employer is convicted. This is in addition to imposing a penalty.

The issue of protection against discrimination is of great interest to the community and was addressed in the recent administrative review of OHS Act 2004. The Stensholt Review made a range of recommendations for improving administration of these provisions, including development of further supporting information and enhanced training for inspectors.

Although Victoria's legislation enshrines protection for employees and prospective employees from discrimination, there is scope for clarification of terms such as 'detriment' and 'injury' to an employee, to ensure it is well understood by both duty holders and inspectors as to what these terms actually mean. Similarly, the provisions state that the employee or prospective employee's health and safety activity must be the 'dominant reason' for the employer's discrimination for it to constitute a breach of the Act. This requires significant judgment from inspectors, and Stensholt recommended that the 'dominant reason' test be further clarified by WorkSafe and that WorkSafe raise awareness of the issue and provide more support to inspectors for their enforcement of the current provisions.

Analysis & Evidence

Although all jurisdictions provide some form of protection against discrimination arising from health and safety activity, there are differences in the way the provisions are formulated.

A key area of difference in the way jurisdictions address this issue in legislation is the test for what constitutes discrimination. Some jurisdictions require that the OHS activity is the sole, or only, reason that discrimination occurred, whereas others require that it be a dominant or substantial reason. Comparison can also be drawn with other legislation covering discrimination, such as equal opportunity legislation, which similarly sets a test for what constitutes a breach, prohibiting discrimination only "on the basis of", "on the ground of" or for "one of the reasons" of a particular attribute.⁵¹

Maxwell discussed the issue of protection from discrimination and found the main disadvantage of having a narrow test for what constitutes a breach is that it is difficult to prove that discrimination has occurred, because any other plausible reason for the employer's action makes it lawful. This arguably provides a lower level of protection. Similarly, it can be argued that it makes it very difficult to enforce protective provisions and prove a breach has occurred if the onus of proof is not placed on the defendant. Broader tests, however, have the disadvantage of requiring a high level of judgment from inspectors as to whether an employer's behaviour constitutes a substantial or dominant reason for their discrimination.⁵²

Not only is it important that provisions are enforceable and provide real protection, it is important that any provisions are supported by clear understanding by both duty holders and inspectors as to what constitutes a breach. Provisions often rely on undefined terms to describe discriminatory behaviour such as 'injury' and 'detriment' and although these terms may have been tested in case law, it is critical that regulators ensure officers who are required to enforce these provisions understand clearly what constitutes a breach. In particular, inspectors would need to be given clear information about what constitutes a breach. For example, in Victoria's current provisions, the victim's health and safety related

⁵¹ For example, Equal Opportunity Act 1995 (Vic) s7, *Sex Discrimination Act 1984* (Cth), s5, *Anti-Discrimination Act 1977* (NSW), s4A

⁵² *Workplace Health and Safety Act 1995* (Qld.) s174, *Occupational Health and Safety Act 1984* (WA) s56, *Workplace Health and Safety Act 2007* (NT) s93, *Occupational Health and Safety Act 2005* (Vic) s76(3)

activity must be the 'dominant reason' for the employer's discrimination and it needs to be well understood what this means.

Victoria's Position

Victoria's position is that the model OHS Act should include protection against discrimination or victimisation and that protection should be afforded to employees, including employees of independent contractors.

Who should be able to bring an action for unlawful discrimination depends on the nature of the provisions that are included. If a breach of the provisions is an indictable offence, then Victoria's position is that only a regulator should be able to bring an action for unlawful discrimination. If the provisions allow for matters to be dealt with by civil proceedings, Victoria would not object to other parties bringing an action, or making provisions for representative actions.

Victoria's position is that the model Act should allow for individual civil remedies for the resolution of discrimination cases through civil proceedings whether or not an OHS prosecution has been brought by the local regulator. Victoria's position is that the model Act should not prevent an individual issuing civil proceedings arising from an alleged discrimination offence under the model Act whether or not an OHS prosecution has been brought by the local regulator.

Victoria believes the defendant should have the burden of proving relevant elements of offences (e.g. conduct and intention). The standard of proof should be the criminal standard (beyond a reasonable doubt) for these elements, where the offence is a criminal matter. In civil proceedings the usual 'balance of probabilities' test should apply.

Specific powers for providing ongoing protection from victimisation and discrimination are not necessary, as powers available to inspectors to issue notices are sufficient.

Remedies that should be available to victims of discrimination are compensation in the form of damages and provision for reinstatement of an employee who has been dismissed, or to employ the prospective employee in the position for which they applied, or a similar position.

It is not necessary to make additional provision for conciliation or arbitration before a tribunal within the model OHS law. The option of conciliation or arbitration is already available under existing tribunals.

CHAPTER 6: REGULATOR FUNCTIONS, POWERS AND ACCOUNTABILITY

6.1 Role and Functions of Regulators

- Q79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?
- Q80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?
- Q81. Should the model Act include provisions that allow the making of interpretative documents?
- Q82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?
- Q83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?

Background

Victoria has a single regulator responsible for administering both its health and safety and accident compensation legislation. This enables the regulator access to timely data regarding injuries, incidents and claims in order to most effectively target prevention activity. Victoria's accident compensation legislation provides for the establishment of the regulator.

Victoria's health and safety legislation sets out a comprehensive list of the functions of the regulator in relation to health and safety, including:

- reporting to and making recommendations to the Minister
- monitoring and enforcing compliance
- administering/reviewing registration and licensing
- exchanging information with corresponding regulators and stakeholders
- disseminating information to assist compliance
- promoting education and training
- fostering cooperative, consultative relationships between employers and employees
- engaging in and promoting information sharing to achieve the objectives of the Act
- promoting public awareness and discussion of OHS and understanding and acceptance of the principles of health and safety
- developing and implementing incentive programs for employers
- monitoring the operation of measures put in place to ensure occupational health, safety and welfare
- initiating and encouraging research, and
- collecting and publishing statistics.

Victoria's health and safety legislation provides the regulator with specific powers to:

- enter into agreements with corresponding regulators
- obtain information, including when it can be disclosed
- make guidelines
- accept undertakings if a breach or alleged breach of the Act has occurred, and
- give advice on compliance (this power can also be exercised by an inspector).

Accountability

The legislation makes a number of provisions in relation to the accountability of the regulator. The accident compensation legislation specifies that the regulator shall perform its functions and exercise its powers subject to general direction and control of the Minister and subject to specific directions from the Minister. It also requires that the regulator develop internal management structures and procedures to enable it to perform its functions and exercise its powers effectively, efficiently and economically. The regulator must also submit an annual operating and financial report to the Minister.

Compliance and Enforcement Policies

Victoria currently has a 'constructive compliance' strategy. This involves a combination of initiatives that together support compliance through positive encouragement and advice, as well as through deterrents like prosecutions and penalties. This strategy is outlined in the publication *WorkSafe Compliance and Enforcement Policy* (July 2005), which also incorporates General Prosecution Guidelines (which the legislation requires be issued and published in the Government Gazette).

Victoria makes provision in its OHS Act for the making of interpretative documents. This is considered an important tool to support the less prescriptive duties in the legislation and to transparently state how the regulator will exercise its discretions under the Act and regulations. Performance and principle based formulations have the advantage of flexibility and remaining relevant over time, however they have the disadvantage of creating a lack of certainty about compliance. Interpretative documents can help to address this lack of certainty and their utility was acknowledged in the recent Administrative Review of the OHS Act 2004 and the Victorian Government's response to the Review. Consequently, in 2008/09, WorkSafe will work with stakeholders to develop a number of guidelines (called 'WorkSafe Positions') on a range of key issues, including:

- the meaning of terms that are not defined in the Act, such as 'suitably qualified' and 'sufficiently competent'
- employers' duty to consult with employees
- multiple duty holders and the concept of 'control'
- provisions protecting employees from discrimination, and
- the requirement to answer questions put by an inspector.

Victoria's health and safety legislation gives inspectors specific powers as authorised officers of the regulator, and clearly defines the nature and extent of those powers. The legislation also provides for the regulator to give advice on compliance and an inspector may provide this advice and assistance. Victoria's accident compensation legislation mandates as a function of the regulator that it must establish and fund a WorkCover Advisory Service, and Victoria provides a phone service for general inquiries and advice on both health and safety and accident compensation matters. This phone service is widely used - an average of more than 50,000 calls are received on OHS matters each year (based on data from 2003-2007).

The powers and functions of the regulator were considered in the Maxwell review of Victoria's health and safety legislation. As Victoria's accident compensation legislation provides for the establishment of the regulator, Maxwell noted that the functions in relation to OHS were 'buried' within the list of functions related to accident compensation. It was recommended that the powers and functions in relation to OHS be made clearer and that the legislation be self contained. As a result, the OHS Act 2004 clearly sets out the functions and powers of the regulator in relation to health and safety.

Maxwell also discussed the duty holders' need for advice on what constitutes compliance. He noted that most employers do not have the resources to engage full time assistance from

health and safety specialists.⁵³ Maxwell discussed the role of inspectors and whether or not they should provide advice on compliance. He described the tension between an inspector's role in enforcement and provision of advice. Maxwell recommended that the Act specifically provide the regulator with a power to give advice on compliance, but this should make clear that such advice should not limit a duty holder's legal liability.⁵⁴ Maxwell's recommendation was adopted in OHS Act 2004.

Analysis & Evidence

Most jurisdictions express similar general aims in their legislation and regulator functions usually include general statements such as promoting health and safety, raising awareness, fostering cooperation and stakeholder involvement, collecting data and statistics. Following the Maxwell review, Victoria undertook analysis of other jurisdictions' legislation to consider whether it should add any additional matters and as a result the Victorian OHS Act 2004 has a comprehensive list of functions and powers.

Evidence for the effectiveness of a regulator and whether it is performing its functions and exercising its powers appropriately can be drawn from a range of sources. Victoria measures its performance by asking for stakeholder feedback via a regular Omnibus Survey. The recent administrative review of the Act also received public comment from a range of stakeholders.

Stakeholder data has shown increases in general satisfaction levels with WorkSafe's performance as a regulator and a general view that the OHS Act is working well in most areas and achieving the policy aims intended. WorkSafe is seen as a more constructive, accountable, transparent and effective regulator since the Maxwell review and introduction of the OHS Act in 2004. WorkSafe is also generally seen as having achieved some success in rebalancing compliance and the provision of advice. WorkSafe's engagement with industry and the community on OHS issues has improved and stakeholders feel they are better informed about WorkSafe's activities. The increased ability of the inspectorate to provide workplaces with advice on compliance and the internal review process are seen positively by stakeholders. (See also Attachment 4 of this submission for statistical data).

Victoria's Position

Victoria's position is that health and safety legislation administered by a regulator should clearly set out the functions, powers and accountability of the regulator. However, provision for the establishment of a regulator may not need to be included in model OHS laws, as this may be provided by other legislation.

Model OHS law should be comprehensive in outlining the functions of a regulator and should include:

- reporting to and making recommendations to the Minister
- monitoring and enforcing compliance
- administering/reviewing registration and licensing
- exchanging information with corresponding regulators and stakeholders
- disseminating information to assist compliance
- promoting education and training
- fostering cooperative, consultative relationships between employers and employees
- engaging in and promoting information sharing to achieve the objectives of the Act
- promoting public awareness and discussion of OHS and understanding and acceptance of the principles of health and safety
- developing and implementing incentive programs for employers

⁵³ Maxwell, op. cit., p258, para 1205-1206

⁵⁴ *ibid.*, p264, para 1235

- monitoring the operation of measures put in place to ensure occupational health, safety and welfare
- initiating and encouraging research, and
- collecting and publishing statistics.

The powers of the regulator should be clear, and relate specifically to those matters which an OHS regulator must be able to undertake to discharge its responsibilities and functions, including:

- entering into agreements with corresponding regulators
- obtaining information and circumstances in which information may be disclosed
- power to make guidelines
- power to accept undertakings in relation to a contravention or alleged contravention of the Act or regulations, and
- power to give advice on compliance.

Victoria strongly believes that a regulator should be transparent and provide clear information to duty holders about the way it will enforce and monitor compliance with legislation. The publishing of enforcement and prosecution policies is current practice in Victoria. The model OHS Act should include a requirement to publish and gazette prosecution guidelines, but it would not be necessary for the model Act to specify the details of what should be in the guidelines. These guidelines should be supported by clear guidance on the regulator's compliance and enforcement policy.

Victoria supports the inclusion of a provision allowing for the making of interpretative documents in the model Act, to transparently state how the regulator will exercise its discretions under the Act and regulations. This provision may be based on section 12 of the Victorian OHS Act, for example.

Victoria considers that some high level powers and functions of the regulator are not appropriate to be delegated to inspectors; for example, the making of guidelines, entering into agreements with corresponding regulatory bodies, and making recommendations to the Minister.

Victoria also considers that the way a regulator organises its advisory and enforcement functions is an operational matter. Model OHS law should clearly allow for a regulator to provide advice and information to duty holders to assist them in meeting their duties. The model OHS laws should also allow a regulator to give authorised officers such as inspectors the power to provide compliance advice. However it is an operational matter as to how inspectors should approach their duties when visiting the workplace and how much of their time they split between enforcement and the provision of advice.

6.2 Inspectors

- | | |
|------|--|
| Q84. | How should the model OHS Act provide for the appointment, qualification, powers, functions and accountability of inspectors? |
| Q85. | Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how? |
| Q86. | Are there any circumstances in which an inspector should be independent from direction, instruction or review by the regulator? |
| Q87. | Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances? |

Background

In his review of the OHS Act 2004 Maxwell identified inspectors' functions as critical to the effectiveness of an OHS scheme and that it was 'impossible to overstate the importance' of the role of the inspector in OHS.⁵⁵ In this context he recommended that OHS legislation needed to expressly deal with inspectors' 'role, functions, qualifications, privileges and immunities' and their powers and the purposes for which they are exercised.⁵⁶

The majority of Australian jurisdictions provide for the predominant investigative, inquiry and enforcement functions to be performed by appointed inspectors. Victoria supports this position. The disparity with the Commonwealth legislation which appoints investigators who rely on administrative delegation for their powers sits at odds with the states and should be addressed. It is important that inspection and investigative powers are independently and impartially exercised by inspectors exercising their judgment within a framework provided by the legislation and administrative arrangements.

Analysis & Evidence

The following is a list of actions that an inspector, in general, can take as a result of an inspection. The steps are ordered from the most common to the least common:

- giving advice, either for a specific situation or work practice, or in the form of referring the employer to codes of practice/compliance codes or other guidance material
- issuing notices
- issuing on-the-spot fines, or
- initiating a prosecution for breach of the legislation where authorised.

In Victoria, inspectors under the OHS Act 2004 are appointed by the Minister (Part 9). The powers of the inspectors include:

- to enter workplaces, inspect and make enquiries
- to require that documents be produced, seized or copied
- to seize other things for further examination and take samples for analysis
- to take photographs or measurements or make sketches or recordings
- to issue notices, including non-disturbance notices, improvement notices and prohibition notices
- to require a person's name and address
- to give a direction to a person if it is necessary to do so because of an immediate health and safety risk, and
- to do anything that is reasonably necessary to exercise their powers.

Proceedings for offences may be brought by WorkSafe or an inspector authorised by the Victorian WorkCover Authority (the Authority) (s 130).

Consistent with the Victorian OHS Act 2004, Victoria supports certain common high level inspector powers as follows:

- to enter workplaces, (without notice or search warrant) (ss98, 102-103)
- to exercise powers on entry (ss99-101,124)
- to be provided with assistance (ss121-122)
- to take affidavits (s123)
- additional powers to require name and address and to give directions (ss119-120)
- to issue notices (ss110-113), and

⁵⁵ op. cit., p284, para 1331

⁵⁶ ibid., p293, paras 1387-1388

- capacity to apply for search warrants (ss104-106).⁵⁷

Appointment

In Victoria, Maxwell recommended that the OHS Act 2004 make it clear that inspectors are officers of the Authority and exercise their powers on behalf of the Authority. This is a view adopted by Victoria and it is considered that OHS legislation should reflect the fact that the powers which inspectors exercise are powers conferred on the regulator, not on inspectors as individual statutory officers.

Mindful of the importance of delivering uniform OHS compliance across Australia, Victoria supports the model OHS Act allowing for inspectors appointed by an OHS regulator in one jurisdiction to be deemed as inspectors capable of exercising the authority of OHS regulators in all other states and territories.

Qualifications

Maxwell suggested that the current *Diploma of Government (Workplace Inspection)* might be an appropriate pre-condition for appointment.⁵⁸ This recommendation assumed that it is appropriate for inspectors to conduct such a course prior to appointment. WorkSafe considers, however, that the tertiary course is more valuable for inspectors when they can bring some field experience to their studies. Under current arrangements in Victoria, inspectors go through extensive internal training and are then appointed, work in the field for some time (approximately two years) prior to undertaking the Diploma. As a general observation, Victoria asserts that regulators should ensure all inspectors are properly trained and have attained nationally accredited competency requirements (as they already do in Victoria).

Functions

In Victoria's view, it is impossible to separate the compliance, monitoring and investigative functions of inspectors. Inspectors have a dual prevention and compliance function. The power of inspectors must be exercisable for the purpose of all of the functions of inspectors. To place arbitrary distinctions would be unnecessarily cumbersome, liable to cause confusion amongst those subject to inspection and also an undue level of hesitation on the part of inspectors.

The OHS Act 2004 contains no reference to the functions of inspectors but contains a reference to the performance of those functions - that they are subject to the Authority's directions (s97). The Victorian government supports inclusion of a statement of the purposes of inspectors' powers in the model Act and agrees with Maxwell that it is not necessary for the purpose of each power-conferring provision to be explicitly stated.

Accountability

Victoria supports the principle that when somebody is subject to inspection powers they should be able to know that the person exercising those powers does so with authority. To that end, the model Act should require that inspectors identify themselves before exercising inspection powers. The precise nature of that identification may need to vary with circumstances to take account of practicalities and privacy issues.

In addition, the Victorian government supports provisions requiring inspectors to inform persons subject to questioning that they may refuse to answer any question if it would tend to incriminate him or her. A capacity for a witness or duty holder to maintain legal professional privilege should also be maintained.

⁵⁷ CCH Solution finder regarding different State provisions relating to inspectors (para 9-610)

⁵⁸ op. cit., p295, para 1401

Although discussed elsewhere in this submission (in section 6.3 of this submission), an appropriate internal framework for oversight and review of inspectors' decisions is also supported by Victoria. Such a function enables an objective assessment of the exercise of inspectorial discretion and aids the consistency of decision-making.

Protections

In addition to the matters raised by the Panel, Victoria is committed to protecting inspectors from being obstructed in exercising lawful powers. Victoria therefore supports such matters being included in the model OHS Act as well as an indemnity provision which ensures inspectors can act forthrightly to deal with health and safety issues and exercise their judgment.

All jurisdictions provide for offences in relation to inspectors/investigators including prohibitions on hindering or obstructing an inspector and refusing to comply with a requirement (without lawful or reasonable excuse).⁵⁹

The model OHS Act should specify that before the offence can be committed, the inspector must, where practicable, identify themselves as an inspector with authority to exercise certain powers and warn the person that obstruction is an offence.

Advice

Employer groups have generally supported the inclusion of provisions in OHS legislation which allow inspectors to provide advice. Unions argue that such a provision is not appropriate and inspectors should not act as 'consultants to industry'.

Maxwell stated that employers do not expect inspectors to be consultants but they expect to be informed by inspectors of measures which may be appropriate to rectify an OHS contravention.⁶⁰

Improving the capacity of the inspectorate to offer assistance - and its readiness to do so - does not require any specific legislative provisions.

One of the central functions of an inspector is to *promote and foster* compliance with the Act. This may, from time to time, and within appropriate administrative protocols, involve inspectors offering assistance to duty holders, in the form of advice, recommendations, information or opinions about a particular hazard or risk, or risk management generally. Face to face information and advice is provided by WorkSafe inspectors as part of their compliance and enforcement functions. However, this advice appropriately falls well short of providing individual duty holders with consultancy advice, and employers' duty to obtain such advice is contained at s22(2)(b) of the Victorian Act.

Victoria's Position

Victoria supports provision being made in the model OHS Act for the appointment, functions, powers and accountability of and protections for inspectors by local OHS regulators in a manner consistent with Part 9 of the Victorian OHS Act 2004.

Appointment

Victoria's position is that inspectors are officers of the regulator and exercise their powers on behalf of that regulator.

⁵⁹ Qld – s173, WA – s47, SA – s38 NT- s39 Tas – s37 Vic – s125, NSW – s66

⁶⁰ op. cit., p266, para 1247-1252

The model Act should allow for inspectors appointed by an OHS regulator in one jurisdiction to be deemed as inspectors capable of exercising the authority of OHS regulators in all other states and territories.

It should also confer an express power on OHS regulators to revoke an inspector's appointment.

Qualifications

Victoria considers that inspectors should be appropriately qualified or trained before exercising inspection powers. However, the details of the required qualifications and training do not need to be specified in the model OHS Act, provided there are processes and policies in place locally to ensure that appropriate standards are met.

Powers

Victoria supports the provision of powers in the model OHS Act as given to inspectors under Division 3-10, Part 9 of the Victorian OHS Act 2004.

To ensure good governance it is appropriate to also reserve inspector powers to the regulator itself for use in appropriate circumstances where it may not be appropriate or feasible for an inspector to individually exercise a statutory power.

Victoria supports the inclusion in the model Act of the offences of hindering and obstructing inspectors when they are exercising their powers.

Functions

Victoria does not consider it necessary to include a statement of the functions of an inspector in the model OHS Act other than in a very general way. Significant guidance at state level exists on the functions and operation of inspectorates. Following the development of the model law this guidance should be harmonised, in conjunction with the proposed national compliance and enforcement policy.

Accountability

In Victoria's view, accountability mechanisms should be included in the model OHS Act and it is considered that an internal review process providing for review of notices is appropriate to achieve this end.

In respect of the exercise of coercive powers, the model Act should include such measures as a duty to provide identification, and a duty to advise regarding the privilege against self-incrimination in specific circumstances.

Internal disciplinary matters should be dealt with locally and not in model OHS legislation.

Victoria believes there is no need to confer an express power on inspectors to give advice. WorkSafe offers advice through various channels including its advisory service, as do other regulators, which is independent from the role of inspectors.

Victoria believes an inspector should be an employee/officer of the regulator and subject to the direction of the relevant regulatory authority. The position should not be one of an independent statutory officer. The evidence in the Victorian context of support for the inspectorate and WorkSafe's regulatory function and the effectiveness of the advice and actions taken by the inspectorate mean that such a significant change in the structural

arrangement of the inspectorate should require a compelling evidence based case for change.

6.3 Internal Review of Inspectors' Decisions

- Q88. What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?
- Q89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

Background

Australian OHS statutes contain a variety of provisions allowing for the review of decisions, particularly of notices issued by inspectors.

The Victorian OHS Act 2004 provides for internal and external review of most inspectors' decisions. Part 10 of the Act itemises the provisions which are reviewable, provides strict timelines and prescribes who is eligible to apply for review.

Reviewable decisions include the issue of notices, unresolved particulars concerning designated work groups, the election of HSRs, as well as failure to make any of these decisions and decisions relating to granting licenses.

The internal review process involves a review of the merits of the inspector's decision, where the reviewing body has all the powers available to the inspector and the task is to make the correct decision on the basis of the information available (a merits review).

The review provisions in the OHS Act 2004 arose out of Maxwell's recommendation that OHS legislation should be supported by a proper system of internal review of decisions that is accountable, transparent, accessible and speedy. Maxwell also recommended that the review process should include a mechanism allowing for external review of internal review decisions by a body that has the jurisdiction to review administrative decisions. If an eligible person is dissatisfied with an internal review decision they may apply to the Victorian Civil and Administrative Tribunal ('VCAT') for a review of that internal decision (s129).

Analysis & Evidence

In 2005, WorkSafe established an internal review unit to manage the review process at 'arm's length' from the inspectorate.

The internal review model provides a transparent mechanism for review in which outcomes are required to be clearly documented and explained, and where both the person seeking review and the inspector concerned have an opportunity to provide information to the reviewer.

Over 1700 applications for internal review have been received in the 3 year period to June 2008 (out of about 120,000 inspections conducted over the same period).

Internal Review Application by Type	Cumulative Total From 1Jul 05	2005/06	2006/07	July 2007 to 27 June 2008
Improvement Notice - Compliance Date only	1401	339	540	522
Improvement Notice - Other	187	63	63	61
Prohibition Notice	69	23	37	9
Provisional Improvement Notice	60	17	25	18
Inspector refused to make a decision	46	9	21	16
All Other Reviewable Decisions	18	9	0	9
TOTAL	1781	460	686	635

Outcomes	Cumulative Total From 1Jul 05	2005/06	2006/07	July 2007 to 27 June 2008
Inspectors decision affirmed (no change)	170	56	69	45
Inspector's decision set aside	101	24	29	48
Inspector's decision varied	53	13	27	13
Compliance date only changed	1255	295	495	465
Application withdrawn	130	49	38	43
Application ineligible/no reviewable decision	31	6	12	13
Extension Refused	17	0	8	9
TOTAL	1757	443	678	636

Outcomes requiring formal finding	Cumulative Total From 1Jul 05	Whole of 2005/06	2006/07	1 Jul 07 to 27 June 08
Inspectors decision affirmed	170 (52.47)	56 (60.22%)	69 (55.20%)	45 (42.45%)
Inspector's decision varied to some extent	53 (16.36)	13 (13.98%)	27 (21.60%)	13 (12.26%)
Inspector's decision set aside entirely	101 (31.17)	24 (25.80%)	29 (23.20%)	48 (45.29%)
TOTAL	324 (100%)	93 (100%)	125 (100%)	106 (100%)

Since July 2005, 28 VCAT applications have occurred following IRU decisions:

Year	Applications
2005/06	14
2006/07	7
2007/08	7

This reflects a substantial reduction in the number of external appeals when compared with appeals lodged under the 1985 Act which permitted appeals to the Magistrates' Court (in excess of 50 appeals in 2004/05 alone).

In recent Omnibus surveys, employers and HSRs expressed high levels of satisfaction with the inspectorate (91%).⁶¹ WorkSafe has also conducted regular surveys of review

⁶¹ Sweeney Research, WorkSafe KPI Survey, November 2007

applicants since internal review commenced. These surveys provide positive feedback of the system with over 90% of respondents feeling that the internal review process adequately dealt with their issues.

In the 2007 Stensholt administrative review of the Victorian OHS Act 2004 viewed the introduction of internal review and its operation as positive and effective aspects of the new Act that have been generally well received by workplace parties, particularly employers who are the major users (95% of applications).⁶²

In other jurisdictions review processes vary. Some differences include:

- The review process may depend on the issue. For example, in one jurisdiction, provisional improvement notices issued by an HSR are reviewed by an inspector without a further right of appeal, while other notices (e.g. prohibition notices) are reviewed by a commissioner with a further right of appeal to a tribunal.
- External review is undertaken by industrial courts, local courts, and in one case by a review committee of the industrial court consisting of judicial, employer and employee representatives.
- Some applicants can opt to appeal directly to an industrial court without requesting an internal review.
- Issues may be resolved through conciliation rather than by a review of the merits of a decision.
- Certain notices (improvement or provisional improvement notices) are stayed pending completion of the review.

Although some statutes enable differing review processes depending on the type of issue, another approach, as occurs in Victoria is to establish one process for all reviewable decisions, allowing for both internal and external review (available only after internal review). This should ensure a streamlined approach that is accountable, timely and minimises the escalation of disputes through the court system. It would also ensure that duty holders have access to a consistent process for review of inspectors' decisions regardless of the jurisdiction.

Some jurisdictions allow for the suspension of notices pending review. The public interest in safety in workplaces requires that notices issued by an inspector should continue in force. However, while there seems little justification for an automatic statutory suspension of a notice pending either internal or external review, the model Act could give the recipient of the notice the right to apply for an interim stay. This right exists under the Victorian OHS Act 2004.

In some jurisdictions, review of some decisions is through conciliation. Since many decisions relate to the control of workplace hazards and risks, in the interests of health and safety, it is preferable that decisions are reviewed on the merits of the case and by applying administrative review principles. This is consistent with other State and Commonwealth models for reviewing administrative decisions.

Victoria's Position

Victoria believes that the internal and external review mechanisms in Part 10 of the Victorian OHS Act have enhanced the transparency, accountability and effectiveness of its regulator and a similarly streamlined model should be adopted in the model OHS Act.

The following principles should apply when developing the review provisions in the model OHS Act:

⁶² Stensholt, B, MP. 'A report on the Occupational Health and Safety Act 2004 Administrative Review', p 90

- internal and external review of inspectors' actions should be provided for in the legislation with consistent statutory timeframes
- most inspector decisions should be subject to review, including decisions about HSRs, HSCs, DWGs, and the issuing of notices (see for example, the list in s127 of the Victorian OHS Act 2004)
- one review process for all reviewable decisions
- any review should be based on the merits of the original decision applying administrative law principles rather than a process of conciliation
- in the interests of health and safety, notices should remain in force pending the outcome of the review. However, the recipient of a notice should be able to seek a stay of a notice, and the relevant decision maker apply conditions, and
- external review should only be available after internal review.

As set out in Part 10 of the Victorian OHS Act 2004, the model provisions should specify:

- what decisions are reviewable (s127)
- who is eligible to seek review (s127)
- the type of internal review decisions that can be made (for example, those that 'affirm' a decision, 'vary' a decision or 'set aside and substitute a new decision') (s128)
- timeframes for review (s128), and
- a process for external review of decisions (s128 and 129).

Guidelines can be drawn up by the regulators as to what steps are expected to be undertaken by the reviewing officer. The Victorian model utilises publicly available guidance principles to assist with transparency and consistency.

CHAPTER 7: COMPLIANCE AND ENFORCEMENT

7.1 Enforcement Measures

Q90: Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

Q91: Should there be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?

Background

There has been general acceptance in all Australian jurisdictions of the 'enforcement pyramid'.

The pyramid has a number of different levels of intervention which are notionally risk based, with the most intrusive and onerous regulatory tool – prosecution – being reserved for the worst cases. A range of regulatory tools are embodied in the various levels, recognising that different motivators will achieve different reactions from duty holders subject to regulation⁶³.

A duty holder is not required to progress through each step in the pyramid – having been given the opportunity to work through the various compliance tools with escalating severity higher up the pyramid⁶⁴. Depending on the nature of non-compliance or consequences of a breach, investigation and possible prosecution are likely outcomes for serious breaches which have resulted in serious injury or death. In Victoria, as in other jurisdictions, the regulatory scheme assists in this regard as serious injuries and workplace deaths must be reported.

Victoria believes the crux of good regulatory outcomes is the existence of a graduated enforcement pyramid and enforcement personnel who are principled in their use of discretion, knowing when to punish and when to persuade. Over time there has necessarily been different emphasis on the various tiers of the pyramid in order to respond to different and/or evolving workplace situations.

Analysis & Evidence

The enforcement pyramid is an important model for changing behaviours and influencing OHS compliance. Gunningham has found there is considerable evidence that 'the single most important driver of improved performance ... is regulation'⁶⁵.

In Victoria the predominant mechanism for securing compliance is persuasion⁶⁶, via a mix of education, information, advice and publicity. Raising the profile of the cost in human and economic terms of workplace death and injury is a key focus of WorkSafe's information strategy. This is reflected in advertising, guidance material and publications, and most

⁶³ Indeed it has been argued that the same firm may react differently to different tools at different times or that different parts of the same organisation will react differently. Black, J 'Managing Discretion' proceedings of the *Australian Law Reform Commission Conference Penalties: Policy, Principles and Practice in Government Regulation*, Dockside, Cockle Bay Darling Harbour, Sydney 2001 p 35

⁶⁴ Wells indicates that in reality 'few businesses are ever subjected to the whole scale' and cautions that use of the enforcement half of the regulatory pyramid only for injury related matters may have a counter productive effect, Wells, C 'The Role of the Criminal Law' *Corporations and Criminal Responsibility* (2nd Edition) 2001, Oxford, Clarendon Press p 29

⁶⁵ Gunningham, N CEO and Supervisor Drivers: Review of Literature and Current Practice, National Occupational Health and Safety Commission, October 1999 p 12

⁶⁶ This is typical of the regulatory pyramid; see Haines, F *Corporate Regulation: Beyond Punish or Persuade*, Oxford, Clarendon Press p 218

recently, the annual 'Roadshow' conducted by WorkSafe throughout metropolitan and regional Victoria. These initiatives and activities aim to raise awareness of the issues and act as a call to action to employers and other duty holders. WorkSafe endeavours to encourage and promote effective workplace safety through information and education, provision of financial incentives and, on the other hand, to provide 'strong deterrence for poor performance'.⁶⁷

There are about 270,000 to 300,000 workplaces in Victoria. WorkSafe's inspectorate numbers about 236 so in reality most workplaces will not be visited by an inspector in a given year. However, every 12 minutes approximately a workplace is visited by an inspector. It is true to say that behaviour of many duty holders will depend on whether they perceive the system will be monitored and that non-conformance will be addressed.⁶⁸

The next level of the pyramid is constituted by enforcement action in the form of inspectors' notices. The following table provides consolidated data on numbers of notices and voluntary compliances issued by WorkSafe inspectors from 1998/99 to 2006/07.

Financial Year	Improvement Notices	Prohibition Notices	Other Notices/Directions	Voluntary Compliances	Total Notices & voluntary compliances
1998/99	1735	1059	3122	1062	6978
1999/00	2763	2468	1155	2192	8578
2000/01	6862	2748	850	2983	13443
2001/02	11879	3095	967	3058	18999
2002/03	14963	2902	1430	4202	23497
2003/04	12486	2298	1262	5161	21207
2004/05	12097	2298	1154	5585	21134
2005/06	11274	1897	261	4626	18058
2006/07	12041	1538	241	4635	18455
2007/08*	10260	1039	180	4194	15673

* Preliminary figures

In considering this data, it should be borne in mind that the number of notices issued in any given financial year represents only a proportion of actual inspections. Effectively an improvement notice is based on an observed contravention of the law but provides an opportunity for the employer to remedy the contravention within a stated period⁶⁹.

A higher level of intervention is available in cases of immediate risk where a prohibition may be imposed on a given activity.⁷⁰

⁶⁷ *Health and Safety Compliance and Enforcement Policy*, Victorian WorkCover Authority p3. Black suggests that the ability to effectively use persuasion in the bottom tiers of the pyramid relies on the existence of the existence of enforcement capability, Black, J 'Managing Discretion' proceedings of the *Australian Law Reform Commission Conference Penalties: Policy, Principles and Practice in Government Regulation*, Dockside, Cockle Bay Darling Harbour, Sydney 2001 p7

⁶⁸ Government of Canada, *Regulatory Alternatives Identification Kit* Undated pp9-28 p 28

⁶⁹ *Occupational Health and Safety Act 2004*, s111

⁷⁰ *ibid.*, s112

The top of the pyramid, as in many other jurisdictions⁷¹, is occupied by prosecution. The following table provides consolidated data on the number of prosecutions undertaken by WorkSafe during the financial years 1998/99 to 2007/08 inclusive:

Year	Number of Prosecutions
1998/99	105
1999/00	85
2000/01	111
2001/02	198
2002/03	217
2003/04	206
2004/05	188
2005/06	136
2006/07	107
2007/08	119

Prosecutions may be seen as a last resort in the regulatory pyramid but they are not necessarily an indication that the defendant has not taken up the opportunity of earlier interventions. Some defendants will have 'self-selected' themselves as potential prosecution targets by ignoring earlier opportunities (e.g. by not complying with an improvement notice or breaching a prohibition notice). However other defendants will have been the subject of investigation and prosecution activity due to the nature of the breach or consequence. All workplace deaths from unnatural causes for instance, are the subject of comprehensive investigation by WorkSafe, greatly increasing the likelihood that non-compliance will be detected and subjected to prosecution action.

While fines and imprisonment (in limited circumstances) are typical dispositions in prosecution, some courts have been willing to make restorative dispositions which are aimed at addressing the financial detriment to victims' families, remedying risk and rehabilitating defendants⁷². In Victoria the tip of the pyramid includes a number of potential sentencing sanctions which WorkSafe considers increase the 'effectiveness' of prosecution in achieving changed work practices.⁷³

There is a considerable degree of discretion built into the scheme which Victoria considers is important to retain in the model Act. This discretion operates at many levels in the process. The regulator needs to retain policy discretion as to how it deploys the inspectorate and the types of risks on which their activity will focus. Inspectors attending workplaces should also have considerable scope during an inspection to choose their area of focus, and a discretion on how workplace risks will be considered and acted upon.

WorkSafe seeks to ensure consistency in the exercise of this discretion by providing that inspectors will issue notices in relation to observed contraventions.⁷⁴ However, differences in the exercise of inspector discretion are inevitable not only because of the different inspectors involved, but because the persons subject to regulations differ, and therefore, the nature and context of any hazards or risks will also differ.

It has already been noted, the Victorian OHS legislative framework is performance-based and not prescriptive 'process' regulation. This allows flexibility for employers to consider a variety of ways to achieve compliance. On the other hand, some employers, particularly

⁷¹ Haines, F and Hall, A "The Law and Order Debate and Occupational Health and Safety [Paper in: Challenges for OHS Regulators, Gunningham, Neil and Johnstone, Richard (eds.)]" (2004) 20:3 *Journal of Occupational Health and Safety Australia and New Zealand* 263-273

⁷² See for instance DPP v Leighton Contractors Ltd, County Court Geelong, 27 May 2004

⁷³ op. cit., p350 para

⁷⁴ *Health and Safety Compliance and Enforcement Policy*, Victorian WorkCover Authority at p9

small and medium enterprises, may prefer the certainty of being told how to comply. The lack of prescription in the Victorian Act and regulations provides considerable discretion. There is a risk however of inconsistency between inspectors who apply their discretion to risk control measures. Consequently, it is also important for the regulator to vigilantly monitor the performance of inspectors and the outcomes achieved⁷⁵ to ensure consistency.

The notion of a regulatory pyramid is a logical and necessary framework for regulatory activity. The pyramid recognises that limited resources should be used in a variety of ways to influence behaviours and achieve compliance. Reserving prosecutions for the top of that pyramid (for the most serious breaches and matters which are likely to have a significant general deterrence) is likely to augment the regulatory tools used lower down. Having a range of available regulatory tools enables regulatory responses to remain responsive to the OHS environment.

Victoria's Position

Victoria believes that provision should be made in the model OHS Act for the features of the enforcement pyramid but in such a way as to allow the regulator discretion in its application at individual workplaces. However, the exercise of this discretion should be principled and transparent. In this context Victoria considers the development of a single national compliance and enforcement policy is imperative.

Further, Victoria considers the model OHS Act should provide for a variety of enforcement measures, each reflecting the various stages of the enforcement pyramid. It is not necessary for the model Act to specifically articulate how a matter is escalated as there needs to be retained an area of discretion for the regulator as articulated in its compliance and enforcement policy. That is, the regulator must have available to it the discretion to deliver an appropriate response to a particular workplace circumstance or situation. The enforcement measures in the model Act should provide for a variety of responses to be available at each level of the pyramid, consistent with those contained in the Victorian OHS Act 2004.

While it is acknowledged that enforcement powers and tools should be used appropriately, and enforcement and prosecution functions discharged effectively and fairly, Victoria considers there is no need for statutory articulation of their appropriate use.

This can be, and is usually, provided for in policy. In Victoria, this is by way of the compliance and enforcement policy which WorkSafe has ensured is clear and was well understood by internal and external stakeholders prior to its introduction.

It is proposed that such policy or guidelines should:

- provide certainty that when an inspector observes a breach of the legislation, unless the breach is remedied in the inspector's presence a notice will be issued requiring the remedy to be put in place
- provide for escalating issues beyond inspectors' notices
- set out the priorities for comprehensive investigation reflecting the regulator's strategic enforcement approach
- explain the process for making prosecution decisions
- incorporate the public interest criteria applied by the Australian Directors of Public Prosecutions
- refer to more detailed Supplementary Prosecution Policies which articulate specific decisions such as when employees will be prosecuted, or which officers are likely to be prosecuted

⁷⁵ Office of Regulation Reform, *Principles of Good Regulation*, State Government of Victoria (undated) p 19

- provide greater clarity in relation to the types of decisions made in enforcing OHS laws and the criteria for these decisions
- provide detailed information on the role of the regulator, its inspectors and the types of inspection and enforcement tools available, and
- commit the regulator to providing practical and constructive advice.

7.2 Measures Exercised at the Workplace

- Q92. What provisions should be made for PINs, improvement notices and prohibition notices in the model OHS Act?
- Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?
- Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?
- Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement and prohibition notices?
- Q96. Should the lodging of an application for internal review or an appeal application affect the continued operation of notices? If so, what should the effect be?
- Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?
- Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?
- Q99. What amounts should be specified as fines for infringements?

Background

As the Robens Committee recommended, regulators should have the power to issue improvement notices to duty holders requiring them to ‘... remedy particular faults or to institute a specified program of work within a stated time limit.’ The Committee also recommended stronger powers to deal with serious risks.⁷⁶ These recommendations have generally been adopted and the concepts of improvement and prohibition notices are similar in all Australian jurisdictions.

Analysis & Evidence

PINs, Improvement and Prohibition Notices

Victoria believes the model OHS Act should allow for the issuing of PINs by HSRs, improvement, non-disturbance and infringement notices and, in cases of immediate risks, oral directions and prohibition notices by OHS inspectors.

Where an inspector forms a reasonable belief that the OHS legislation is being contravened or has been contravened in circumstances which make it likely that the contravention will continue or be repeated, they should have the power to issue an improvement notice. Such notices are vital in moving duty holders to a position of compliance with the Act.

⁷⁶ op. cit., p85

As noted by Maxwell, the issuing of improvement notices with time for compliance, tacitly allows a continuation of the identified risk. In this context there is also a strong argument that the legislation providing the power to issue improvement notices should also provide for the discretionary inclusion of interim directions and a 'cease activity' direction if the notice has not been complied with by a certain time or date. These additional features will allow the inspector to ensure that all is done that is necessary to minimise risk while the duty holder is moving to compliance.

More serious or immediate risks can be dealt with in the model Act by providing power for an inspector to give oral directions and/or issue a prohibition notice requiring immediate cessation of any activity giving rise to an immediate risk. The concept of 'immediate risk' is well-understood across the jurisdictions. Such a notice need not be dependent on the identification of a contravention of the Act nor does the person to whom it is issued need to be a duty holder under the Act. Such directions and notices are an important tool enabling inspectors to intervene 'on-the-spot' to deal with an imminent risk and effectively stop continuation of the activity giving rise to it.

Provisional improvement notices (PINs) are an important tool to promote safety in the workplace and provision should be made in the model OHS Act for their issue by HSRs. There are operational and budgetary limits to the capacity of the regulator to attend each workplace and Maxwell noted that WorkSafe inspectors stressed that 'HSRs are their 'eyes and ears' at workplaces.'⁷⁷ In this context the power of an HSR to issue a PIN should be retained as an important part of the compliance function.

Infringement Notices

Maxwell noted that the Victorian *Environment Protection Act 1970* provides for infringement notices as an alternative enforcement tool, as do New South Wales, Northern Territory and Queensland. Infringement notices have the capacity of bringing home quickly to the duty holder the fact of a contravention and the need for compliance.⁷⁸

In addition the impact of infringement notices (or 'on-the-spot' fines) were generally found to be 'an effective preventive measure.'⁷⁹

Maxwell also noted the Industry Commission's 1995 report which recommended the adoption of an on-the-spot fine system for OHS breaches. Maxwell supported the argument for provision of the power and Victoria has included a provision to allow the making of infringement notices in the OHS Act 2004.⁸⁰

However, as the Australian Law Reform Commission (ALRC) contended, infringement notices should only be used for lower-level offending and not where a serious contravention (i.e. an indictable offence) is identified⁸¹ or where an offence raising the question as to what is reasonably practicable arises.⁸² They could be used, for example, where there is an identified failure to observe a regulation requiring the display of signs indicating the need for hearing protection. In this context Maxwell referred with approval to the NSW legislation which specifically identifies situations in which infringement notices may be issued.⁸³

⁷⁷ op. cit., p209, para 963

⁷⁸ op. cit., p347, para 1666

⁷⁹ Gunningham, N et al 'On-the-spot fines and the prevention of injury and disease: the experience of Australian workplaces' a report prepared for NOHSC, Sydney, May 1998

⁸⁰ Occupational Health and Safety Act 2004 (Vic) s139

⁸¹ Australian Law Reform Commission 'Principled regulation' Report no. XX 2002

⁸² op. cit., p348, para 1673

⁸³ ibid., p348, para 1674

Victoria's Position

Victoria considers the model OHS Act should provide for HSRs to issue PINs. The preconditions of the issue of a PIN should mirror the preconditions to the issuing of an improvement notice by an inspector. The requirements for issue should be simple and protected from attack on technical grounds.

In addition to the generally common provisions for improvement and prohibition notices, Victoria's view is that provisions for improvement notices should include discretion for the inspector to add interim or 'cease activity' directions, if appropriate, in the circumstances. Provision should also be made for an inspector, in cases of immediate risk, to issue oral directions.

The model OHS Act should enable inspectors to issue a notice or oral direction requiring that a workplace or any part of it be left undisturbed for a period.

The model OHS Act should provide, in relation to notices:

- the class of person to whom they may be issued
- form (in writing)
- service
- display
- protection from technical challenge by providing that they are not invalidated by formal defects or irregularities
- information to be given about rights, obligations and penalties
- offences for non-compliance, and
- revocation and variation.

Victoria believes it is appropriate for the model Act to allow inspectors, through notices, to provide advice regarding how to achieve compliance.

The OHS legislative framework is performance-based and not prescriptive 'process' regulation. This allows flexibility for employers to consider a variety of ways to achieve compliance. On the other hand, some employers, particularly small and medium enterprises, may prefer the certainty of being told how to comply.

Victoria also supports internal and external review of notices by certain affected persons. See section 6.3 of this submission.

Victoria supports the removal of minimum time periods for compliance with inspector-issued notices other than PINs as unduly rigid. It is considered more appropriate to provide for a 'reasonable time' enabling inspector flexibility to assess time required as appropriate in the particular circumstances. In the case of PINs, a minimum time needs to be stipulated due to the provisional nature of the notice which allows an employer a certain amount of time to comply before an inspector can be called in by either party. Subsequent to this period, an inspector attending will then decide on what is a 'reasonable time' to comply.

Victoria's position is that an application for review, either internally or externally, should not stay the notice, and that there should be a capacity for the duty holder to seek a stay and have the application assessed on its merits.

Victoria supports provision for the making of infringement notices in the model OHS Act. They should only be issued for lower-level offending. As in s139 of the Victorian OHS Act 2004, they should be provided for in regulations.

Maxwell noted the variety of applicable penalties across the jurisdictions. Victoria supports his recommendation that the ALRC recommendations in this regard be adopted.⁸⁴

7.3 Measures Exercised beyond the Workplace

- Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?
- Q101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?
- Q102. Should the giving of an enforceable undertaking result in an admission of fault or liability?
- Q103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?

Background

Where there has been a failure to comply with an improvement, prohibition or non-disturbance notice, the Victorian OHS Act 2004 provides a capacity for WorkSafe to seek an injunction from the Supreme Court (see s118). In Queensland and Tasmania an injunction is available if an imminent risk is identified. The Australian Capital Territory provides a much wider power relating only to where there is an identified contravention of the Act. Similarly the Commonwealth legislation allows for Comcare to apply to a Court for an injunction restraining a breach of the OHS Act.

Analysis & Evidence

Victoria believes that provision should be made in the model Act for the use of injunctions in certain specified circumstances and that enforceable undertakings be available as an alternative to prosecution for a contravention of the Act, again in certain limited circumstances.

Injunctions

As Maxwell noted, failure to comply with a notice may have serious implications for worker safety and that of members of the public.⁸⁵ In such circumstances, where a safety issue has clearly been identified, there may be a need to address or stop the risk that gave rise to the notice. Victoria believes that injunctions are a useful enforcement tool to enable the regulator to deal with duty holders who disregard notices and are also a support to local inspector powers to issue the notices.

Enforceable Undertakings

In other modern regulatory schemes, enforceable undertakings (EUs) have proved a useful regulatory tool, with a capacity to be forward-looking and resource efficient.

⁸⁴ op. cit., p 348-9, paras 1675-1677

⁸⁵ op. cit., p 346, para 1662

An EU is a promise enforceable in Court. Criminal proceedings are not able to be brought by WorkSafe or an inspector for a contravention to which a signed undertaking relates. The EU operates as an alternative outcome to prosecution.

There is no compulsion on duty holders to offer an undertaking or on WorkSafe to accept an offer.

The acceptance of an EU must be in the public interest and there should be information that would provide sufficient information to support a prosecution because it is an *alternative* to prosecution.

The Maxwell review recommended that WorkSafe be empowered to accept enforceable undertakings as an alternative to prosecution, to deal in detail with risk prevention by the duty holder into the future. A variety of law enforcement agencies have added EUs to their enforcement and compliance governance models including Workplace Standards Tasmania and the Department of Employment and Industrial Relations (QLD), the Civil Aviation Safety Authority, the Australian Securities and Investment Commission (ASIC), the Australian Competition and Consumer Commission (ACCC), Consumer Affairs Victoria, and the Department of Consumer and Employment Protection, Western Australia.⁸⁶

Maxwell considered that the power should be expressed broadly so as not to unduly fetter the discretion available to the regulator in the circumstances.

The advantages of such an undertaking, the content of which would necessarily need to be over and above the duty holder's rectification of the breach, are as follows:

- a capacity to deal in detail with risk prevention by the duty holder into the future
- an opportunity to avoid the costs and delays inherent in a prosecution, and
- achievement of more focussed and tangible outcomes.

Maxwell acknowledged the negatives:

- the inherent imbalance of power between small/medium business and regulator
- the potential adverse effect on injured workers and families (in particular, in Victoria at least, they would be precluded from making victim impact statements and therefore potential compensation claims (s85B of the *Sentencing Act 1991*), and
- it reduces the transparency of an enforcement process (ALRC).⁸⁷

There is also an undoubted tension between providing for broad powers which allow the regulator maximum flexibility and the need for clearly articulated legislative parameters to ensure undertakings are only available and negotiated in appropriate matters and that they are, in fact, enforceable.

Victoria's Position

The model OHS Act should provide for the capacity to seek an injunction where there has been a failure to comply with a notice issued under the Act by an inspector. As a minimum, evidence of the breach or failure to comply would be required. Victoria's position is that an injunction should not be available in wider circumstances than where an 'imminent risk' is identified (as provided for in the Queensland and Tasmanian legislation). The fact of the giving of the notice already demonstrates an OHS failure.

⁸⁶ op. cit., para 1679

⁸⁷ ibid., p351, para 1687

The model OHS Act should provide for enforceable undertakings. However, certain types of cases are considered inappropriate for disposition by an EU. For example, offences that cause death, serious injury or show high culpability or involve recidivists. In addition, applications must be considered in the context of the obligations on associated duty holders, (e.g. builders, sub-contractors, plant suppliers associated with the same risk situation).

In determining whether to accept an undertaking, the model Act should require:

- acknowledgement via admissions
- clear identification of facts of contravention
- a statement of regret
- commitment about future behaviour
- demonstration of consultation having occurred (e.g. with HSR or relevant employee group, victim and/or family members)
- agreement to publication
- self monitoring and reporting proposal and plan (not to be confused with the Authority's over-arching commitment to monitor compliance), and
- additional outcomes of a broader philanthropic (but OHS relevant) character (e.g. funding research).

Unacceptable terms of an Enforceable Undertaking would be where there were:

- denials of responsibility or relevant facts
- obligations placed on the Authority, or
- non-admission of contravention.

The model Act should also provide:

- that there is to be no compulsion on duty holders to offer an undertaking or on the regulator to accept an offer
- circumstances where there may be a need to vary or revoke the undertaking
- for the enforcement of the undertaking should the duty holder fail to comply, such proceedings should be civil, not criminal in character and so a failure would need to be proved on the balance of probabilities, not beyond reasonable doubt.

Other issues such as eligibility criteria, the need for a comprehensive investigation as a pre-condition and monitoring compliance could be dealt with in a national compliance and enforcement policy.

CHAPTER 8: PROSECUTION

8.1 Criminal or Civil Liability

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties or a mixture of both?

Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

Background

It is important to be clear what is understood by the terms 'civil' and 'criminal' penalties in order to respond to these issues. In this context the ALRC usage of the terms 'criminal penalties', 'civil penalties' and 'administrative penalties' in its report 95 'Principled Regulation'⁸⁸, have been adopted for this submission.

Analysis & Evidence

As Maxwell noted in his report, 'The avoidance of death or injury in the workplace is treated by the Act, as by the community, as a self-evident good. An employer who fails to discharge the duty to (take reasonable steps to) ensure a risk-free workplace is, so the legislation assumes, deserving of censure; hence the imposition of a criminal liability.'⁸⁹

Richard Johnstone's research has indicated that, while a judicious mix of compliance and deterrence is likely to be the optimal regulatory strategy, a credible enforcement strategy must include a significant deterrent component. It must invoke strategies which successfully deter egregious offenders. He acknowledges that some duty holders are only likely to change their behaviour where the severity and likelihood of punishment make it rational for them to do so.⁹⁰

Gunningham and Johnstone have considered the basic principles which are necessary in order for prosecution to be an effective compliance tool. These principles require that there must be tough penalties for successful prosecutions and that mainstream criminal law must be integrated into prosecution policies.⁹¹

Glasbeek also argues for recognition of health and safety breaches as criminal in nature and states that risks arising from conduct which in any other context would be treated as criminal and anti-social behaviour should be treated as such in this arena also.⁹²

Victoria's legislation provides for a broad enforcement capacity with a range of penalties available to the regulator, both administrative and criminal. These are underscored by a published compliance and enforcement policy which provides for criminal prosecution where there is sufficient evidence and the public interest is served. These prosecutions may be conducted in either the indictable or summary stream depending on the nature of the offence.

⁸⁸ Australian Law reform Commission 'Principled regulation: Federal Civil and Administrative Penalties in Australia'. Report no. 95, 2002, paras 2.40, 2.41, 2.45, 2.64 and 2.66.

⁸⁹ op. cit.' para 1708.

⁹⁰ Gunningham, N and Johnstone, R; *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, Oxford, 1999), p 201

⁹¹ *ibid.*,

⁹² Glasbeek, H, *Occupational Health and Safety Law: Criminal Law as a Political Tool* (1998) 11 Australian Journal of Labour Law 95

Victoria does not support provisions which allow for the civil prosecution of offending. Such penalties diminish the deterrent effect of the prosecution and have not been demonstrated to be effective. It was the ALRC's view that Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.⁹³ It is Victoria's contention that OHS offences clearly do warrant this moral and social censure and stigma.

In certain prescribed circumstances the laws should also allow for the pursuit of civil action by individuals, including for such matters as unlawful discrimination and recovery of wages where a cease work has been justified due to an immediate risk to health and safety. Other sections in this submission comment on the availability of improvement, prohibition, infringement notices and similar administrative tools.

Victoria's Position

The model OHS Act should provide that breaches of duties or obligations attract criminal liability.

In addition, Victoria supports the provision of civil action for individuals to seek redress where there is a failure to comply with a provision of the Act conferring a specific right, such as where:

- a person suffers discrimination by reason of their engagement in OHS-related activities
- a person has wages deducted following a cease work related to an immediate OHS risk, and
- a person assisting a HSR is refused entry to a workplace.

Victoria does not support provisions in the model OHS Act which allow for the civil prosecution of offending.

8.2 Where Prosecutions should be Heard

- Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?
- Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?
- Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?
- Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

Background

The Magistrates' Court is the forum for the overwhelming majority of criminal prosecutions in Victoria.⁹⁴ Many of the OHS offences in Victoria are indictable and are thus triable before a judge and jury.

There are jurisdictional limits in the Magistrates' Court in relation to the penalties and sentences it may impose. Not unusually, these limits have grown over time as the

⁹³ Australian Law Reform Commission op. cit. Ch 3

⁹⁴ For instance, in 2001/2 year 101,043 criminal proceedings were initiated in the Magistrates Court but only 2,299 cases were committed to a higher court. *Magistrates Court of Victoria Annual Report 2001-2002*; The Council of Magistrates pp 25-29.

acceptance of summary hearings as the dominant form of dispensing criminal justice has grown. Also in relation to OHS matters, Schedule 4 (clause 53(b)(i)) of the *Magistrates Court Act 1989* provides that indictable offences under the Act are summarily triable subject to a reduced jurisdictional limit on penalties.⁹⁵

The *Magistrates Court Act*⁹⁶ permits the informant or the defendant to apply to the court for the summary hearing of an indictable offence rather than have the matter dealt with in a higher court. The court then determines whether the charge is an appropriate one to be dealt with summarily. The election therefore may be made by either party whether to proceed in a superior court. However, the prosecution must convince a Magistrate that a matter ought only proceed indictably while the defendant may not be compelled to consent to jurisdiction in the Magistrates' Court and in reality, therefore, may *choose* to have a prosecution against it proceed indictably.

WorkSafe generally initiates prosecutions for offences alleged to involve serious workplace breaches or fatalities (or if it is felt that the jurisdictional limit in the Magistrates' Court does not give adequate scope for the imposition of an appropriate substantial penalty⁹⁷) in the 'committal stream' of the Magistrates' Court, thus allowing a defendant to be committed to stand trial before a judge and jury in a superior trial court.

In the event that a defendant is committed to stand trial, the Office of Public Prosecutions has the statutory responsibility for the conduct of trials in superior courts and the conduct of the matter post-committal in these cases is transferred to that Office.⁹⁸

Analysis & Evidence

A review of other Australian jurisdictions reveals that with the exception of South Australia, which provides for an indictable offence in relation to an aggravated charge under its OHS legislation, no other Australian state creates indictable offences under its equivalent legislation (although provision is made in some for 'serious summary' offences).

In a past review of the Queensland OHS Act, it was noted that industrial magistrates do not see many OHS prosecutions and treat them relatively leniently, and that some tend to view health and safety breaches as 'quasi-criminal' in nature.⁹⁹

Magistrates and judges face difficult challenges in hearing cases relating to OHS law. The majority of them hear few OHS cases in the course of a year, and are faced with a body of law that can be very technical and involve unfamiliar concepts. The general duties that are at the core of OHS legislation are tempered by practicability i.e. the issues are rarely black and white. This, however, is insufficient reason to relocate the hearing of these offences from the criminal stream of the courts to a tribunal or 'specialised' court. To do so, in Victoria's submission, would be to diminish the seriousness with which these offences should be regarded.

As noted earlier in this submission, within a regulatory context the use of mainstream criminal courts for the most serious offending is seen as the very tip of the enforcement pyramid. Prosecution as a regulatory tool is used as a strong deterrent in the 'punish or persuade' strategy.¹⁰⁰ In order for the tool to be effective, prosecutions for these offences

⁹⁵ \$136,104 in 2008/9 for corporations (Item 53 – Schedule 4 *Magistrates Court Act 1989*).

⁹⁶ s54

⁹⁷ *Braybrook v Hall* op. cit., per Sholl J

⁹⁸ See *Public Prosecutions Act 1994* and s353 *Crimes Act 1958* which provides that a Presentment must be signed by the Director of Public Prosecutions or a Crown Prosecutor.

⁹⁹ *Review of the Workplace Health and Safety Act, Issues Paper*; Department of Industrial Relations, Queensland, 2001 p 20

¹⁰⁰ Haines, F and Hall, A, 'The Law and Order Debate in Occupational Health and Safety', *Journal Occupational Health and Safety Australia and New Zealand*, 2004, 20:3, forthcoming, p3

require swift, known and serious consequences.¹⁰¹ The deterrent and stigmatising effect of prosecution is maximised by having OHS prosecutions heard in mainstream criminal courts.

It is clear that even offences of a summary nature when matched with appropriate levels of fines and the body of criminal court procedure, are considered 'criminal' in nature rather than civil.¹⁰² Indeed, the NSW Review Panel commented, 'Nothing less than the criminal law should be used given the community's disapprobation of behaviour which endangers life and limb at the workplace'.¹⁰³

The two tiered court responses proposed by Gunningham and Johnstone acknowledge a perception that prosecutions in the Magistrates' Court are seen as less serious, quicker matters in which there is little analysis of OHS systemic problems or culpability.¹⁰⁴ However the considerable breadth of this court's jurisdiction and the relative speed in which matters may be brought there make it an effective tool in delivering quicker outcomes and deterrence.

Gunningham and Johnstone argue that prosecutions in the higher courts are necessary to reinforce the message that OHS offences are serious.¹⁰⁵ Additional benefits of access to higher courts include the greater likelihood that such proceedings will be reported and afforded publicity.¹⁰⁶ Written reasons are also provided by higher courts resulting in the development of a body of law which may be referred to by workplace parties. This, in turn, may possibly have some preventative effect while at the same time being of benefit to prosecuting agencies in assisting their decisions to initiate proceedings and assessing the likelihood of success of such prosecutions.

Victoria believes that the status of the court is an important factor in maximising deterrent effect and the seriousness with which OHS offences are considered by the courts and in the community. This is particularly so in relation to incidents which result in death, which (as Maxwell pointed out) should be dealt with in higher courts to demonstrate the significance of the matter. Since 2004 WorkSafe has operated in accordance with its public policy to seek to have matters involving death heard in the County Court before a judge and jury. The OHS Act 2004 differentiates between the maximum penalties that can be dealt in summary matters as opposed to those that proceed by indictment to a higher court.

The Other Australian jurisdictions have created 'serious summary' offences under OHS legislation and they have not provided the safeguard of jury trial to either individual or corporate defendants. It is submitted that the Victorian experience has not proved less effective simply by virtue of the provision of jury trials and by designating offences as being indictable. In fact, so designating an offence is a clear and public indication of its more serious nature contributing to the effect of general deterrence.

Victoria does not support that the hearing of OHS matters be removed from the mainstream criminal justice system to 'specialised' courts or tribunals. In taking this position, Victoria notes that such an approach has been criticised as reinforcing the perception that these offences are something less than criminal.¹⁰⁷ Moreover, with maximum penalties in the largest states exceeding \$1million and significant legal costs and reputational damage which may result from prosecution, it is critical that the utmost integrity be ensured in the courts that hear these matters with all the rights and privileges associated with criminal

¹⁰¹ *ibid* p4

¹⁰² *Review of the Occupational Health and Safety Act 1983 (NSW) – Final Report of the Panel of Review*, (A report to the NSW Standing Committee on Law and Justice); February 1997 at 100

¹⁰³ *ibid.*, at 101

¹⁰⁴ Gunningham, N and Johnstone, R; *op. cit.*, at 200

¹⁰⁵ *id* at 201

¹⁰⁶ In September 2003, WorkSafe Victoria commissioned research from Sweeney which found that 86% of a random sample of 100 Victorian employers and managers could recall a WorkSafe prosecution. 85% of respondents either 'strongly' or 'slightly' agreed that hearing about other employers that have been prosecuted causes them to review their own work practices.

¹⁰⁷ Gunningham, N and Johnstone, R, *ibid.*, at 197

proceedings. To do less than this, in Victoria's view, risks undermining community confidence in the administration of justice. This risk is particularly grave in the case of individual defendants who should be entitled to these rights and privileges preserved in criminal procedure with the same appeal rights as apply to all criminal proceedings, and the same public interest considerations and oversight that apply to appeals by the prosecution in the general criminal law.

To the extent other jurisdictions might consider it desirable, even within the parameters of uniform OHS laws, Victoria believes it would be possible for them to establish a specialist division in their existing local criminal jurisdictions that would have and develop expertise in the hearing of OHS matters. The obvious advantage of establishing a panel of specialised occupational health and safety Magistrates or judges would be the frequent exposure to OHS cases that panel members would receive and in the example of the NSW Industrial Relations Commission, contributing to the development of the common law by the handing down of written judgments in that jurisdiction. This is however considered to be an administrative issue and capable of being dealt with at the local level, whilst still ensuring that OHS offences are heard in mainstream criminal courts, with the preservation of all the rights and privileges associated with the criminal law.

Alternatively and on the basis this submission is accepted, other jurisdictions may choose to develop a process of recognition that magistrates or judges have sufficient experience in the jurisdiction to be designated as 'specialists'.¹⁰⁸

Victoria's Position

Victoria's view is that provision should be made in the model OHS Act for the initiation and conduct of OHS prosecutions in mainstream criminal courts.

Victoria considers that prosecutions for OHS offences should be able to be brought in the equivalent of the Local or Magistrates' and higher courts, depending on the seriousness of the offending and allowing for the exercise of prosecutorial discretion.

Victoria considers that, as with other criminal matters, appeals should lie to the superior courts in a manner consistent with the existing State laws. Any conditions on appeal should also be consistent with existing rights in local criminal law and procedural requirements.

Victoria supports the inclusion in the model OHS Act of an entitlement of defendants to be tried by jury in line with existing laws in the particular State.

Victoria's view is that specialist OHS courts or tribunals can be dealt with as an administrative issue, as jurisdictions can establish specialist divisions, or specialist magistrates or judges even within the parameters of national OHS harmonisation.

8.3 Who may Commence Prosecutions and Relevant Procedures

- | | |
|-------|---|
| Q110. | Who should be entitled to commence criminal proceedings? |
| Q111. | If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings? |
| Q112. | What should appropriate time limits be for the commencement of a prosecution and why? |
| Q113. | Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal? |

¹⁰⁸ specialisation would also include training for the judiciary; Gunningham, N and Johnstone, R; *ibid.*, at 198

Background

All jurisdictions, with the exception of NSW and South Australia, reserve the exclusive right to bring proceedings under their local OHS Acts to the State.

The ACTU Charter of Workplace Rights supports the 'fundamental right' of unions to 'initiate investigations and prosecutions for OHS breaches'. The NSW OHS Act 2000 contains provisions which allow 'proceedings to be instituted 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' (s106(1)(2)).

Further, the Work Safety Bill (ACT) also allows for the 'private prosecution' of general duties offences and 'any other offence prescribed by regulation'.¹⁰⁹

Unions argue that provisions such as these are essential to address concerns where a union believes a local OHS regulator is not prosecuting appropriate matters under the Act.

Analysis & Evidence

The prosecution of persons by the State for criminal offences is a matter of the utmost seriousness. Regardless of the legislation, only in the rarest of circumstances is it devolved to third parties. In the case of indictable offences, most States have moved to abrogate the historical concept of a grand jury or other mechanisms for private citizens to initiate indictable criminal proceedings. Customarily it is the exclusive function of the State, and performed by a State agency whether that is by a Crown Prosecutor (subject to the DPP) or a prosecuting statutory authority. In Victoria for instance the Director of Public Prosecutions retains the right to assume the conduct of any prosecution undertaken by another person to ensure governance and public confidence in the administration of justice.

The most important reason for this is the need for consistency, proportionality and fairness in bringing prosecutions. OHS prosecutions involve criminal charges, with criminal standards of proof, evidence and procedure with substantial penalties. The legal, financial and reputational consequences for all participants are significant. This is particularly so for offences against individuals and given the potential for terms of imprisonment for some offences.

Because of these risks, actual evidence of bias is less significant than the perception that the impartiality of the justice system can be compromised by third parties for some ulterior purpose. This is more often the fact when provisions exist which would provide a moiety entitling the private prosecutor to a proportion of any penalty imposed in a successful prosecution. Duty holders must be confident that they will not be exposed to unwarranted prosecution instigated by a third party and the public expectation is that those making prosecutorial decisions will be held accountable through the courts and Parliament for the proper exercise of the powers vested in them. The integrity of prosecutorial discretion is critical to the credibility of enforcement decisions and therefore the deterrent value, and this discretion is diluted if it is spread beyond the purview of the State.

The evidence in Victoria is that WorkSafe meets these community expectations. Independent research by Sweeney in 2006 and 2007 of a survey of 1000 employers and employees shows strong support for WorkSafe's enforcement approach. For instance, in 2007, 89% of employer respondents agreed that 'WorkSafe is an effective regulator of health and safety in workplaces'. Similarly, 93% of respondent employers, and 86% of employees agreed that 'WorkSafe is taken seriously as the upholder of laws on workplace safety'.¹¹⁰

¹⁰⁹ Work Safety Bill 2008 (ACT), clause 217

¹¹⁰ Sweeney Research, WorkSafe KPI Survey, 2006 and 2007.

Arbitrary, capricious or inconsistent third party prosecutions also risk bringing the government prosecutors' conduct into disrepute by association. Each state jurisdiction has its own compliance and enforcement policy (relying on the prosecutorial guidelines of the Australian Directors of Public Prosecutions) and model litigant guidelines, which preserve the highest standard of legal and prosecutorial conduct. These standards do not apply to third party litigants such as unions, potentially derogating from the consistent application of these standards in OHS prosecutions. Victoria believes that permitting third parties to initiate prosecution would be to invite the bypassing of a national compliance and enforcement policy, potentially escalating breaches that would ordinarily be dealt with by an administrative or civil remedy such as an improvement notice, to prosecution. This would undermine the consistency and certainty provided to duty holders and the community in a consistent or uniform national compliance and enforcement policy.

In addition, in Victoria, the Victims Rights Charter and the Victorian Human Rights Charter impose obligations on prosecuting agencies. These protections and safeguards would not apply to private prosecutions and would undermine these important justice requirements. The right of victims of crime to make a victim impact statement and have these properly put by a prosecutor with the knowledge and understanding and professional obligations associated with the prosecutor's role, again do not apply to private prosecutors.

Prosecutions in the OHS area are undertaken predominantly for the purposes of general deterrence. An important aspect of the prosecutorial discretion is exercising the discretion in favour of prosecutions which are the most serious and which are associated with moral culpability. Another important aspect of prosecutions is the educative impact of these cases. WorkSafe publishes the outcomes of all its prosecutions, both successful and unsuccessful. These are again important accountability measures on the regulator's use of prosecution powers. WorkSafe's success in prosecution rates averages over 90% and is consistently published in its annual report.¹¹¹

However without an absolute duty of care and a reverse onus of proof (both of which operate in New South Wales in conjunction with a union right to prosecute) the likelihood of unions being successful in prosecution action is greatly diminished, given they are not conferred with the same wide-ranging information gathering powers of OHS regulators. This includes powers to take samples, issue search warrants, require production of documents and, upon entering a workplace, the power to require a person to answer questions.

It has been argued that unions should have a right to prosecute OHS offences on the basis that the 'regulator doesn't prosecute'. In Victoria, the evidence does not support this contention.

Since 1 July 2005 there have been 9 requests made pursuant to s131(3) of the Victorian OHS Act for WorkSafe to refer matters it has already investigated and decided not to prosecute to the DPP for its consideration. Under the Act, the DPP must then advise WorkSafe as to whether a prosecution should be brought. None of these requests have been made by a union representative.

There have also been 6 requests by unions made under s131(2) for WorkSafe to undertake an investigation in circumstances where no prosecution had previously been brought in regards to the alleged offence within 6 months of it occurring. The decision not to prosecute has been communicated in 5 of these matters - there has not been a subsequent request for a review of this decision made under s31(3) (for review of that decision by the DPP) in any of

¹¹¹ Research from Sweeney in September 2003, indicated that there were high levels of agreement among employers and managers that specific violations deserve to be prosecuted. For instance 79% of respondents felt that breaches of OHS Act and regulations breaches *deserved* to be prosecuted.

these matters. There is one other outstanding matter in which WorkSafe is still to consider a request from a trade union for a review of a decision not to prosecute.

Third party prosecutions are not published unless otherwise reported by the court and not subject to the same transparency or scrutiny, which Victoria considers essential to maintaining credibility and community confidence in prosecutions. Indeed Victoria has not been able to obtain any statistics to indicate the number and type of prosecutions undertaken privately in New South Wales.

There is also considerable potential for conflict and duplication in allowing third parties to initiate prosecutions. Prosecution is not the only enforcement tool available to a regulator. For example, Victoria supports the inclusion of provisions in the model Act which allow for notices to be issued to duty holders and for enforceable undertakings to be entered into in lieu of prosecution. The capacity of third parties to undermine these measures (which are contained in all jurisdictions' principal OHS legislation) is significant should they prosecute where the regulator has already used or intends to use other enforcement tools.

Interested parties such as unions have significant and appropriate means available to influence a regulator's enforcement activity. If a union (or any other community organisation or member of the community) is aware of an OHS contravention which it believes should be investigated, it should notify the regulator without delay. In Victoria a right of appeal to the DPP in decisions not to prosecute,¹¹² coupled with a residual right of the Victorian DPP to take over any criminal prosecution,¹¹³ provides a critical means of accountability for prosecution decisions and the administration of justice. Any person may also request the Authority to review a matter where a prosecution has not been brought within six months of an incident which may breach the Act.¹¹⁴ These are important accountability measures on the regulator's exercise of discretion.

Victoria considers that including provisions such as these in the model OHS Act would address the concerns of unions and others regarding a union 'right' of prosecution, without undermining the impartiality, integrity, consistency and accountability of the prosecution function.

The principles of natural justice, accountability and transparency also necessitate prosecutions being conducted in a timely manner. Potential defendants need a level of certainty as to whether they will have to face charges, and affected workers and their families need resolution. The passage of time has been well recognised as a factor that can prejudice a defendant's ability to defend charges, as evidence becomes stale and issues of abuse of process can arise. For general deterrence to be effective, prosecution activities should be seen to be responsive to breaches of the Act.

For these reasons the model OHS Act should impose a time limit on the commencement of prosecutions, which balances the need for timely prosecution with the need of investigations to properly run their course.

Victoria's Position

Victoria believes the model OHS Act should limit the right to commence criminal prosecutions to the regulator, an authorised officer and the local Office of Public Prosecutions. Consistent with the principles of natural justice, accountability and transparency, a person should have a right under the model Act to seek review of prosecutorial discretion.

¹¹² OHS Act 2004 (Vic), s131

¹¹³ *ibid.*,s130(5)

¹¹⁴ *ibid.*,s131(1)

The model Act should enable parties who are injured as a result of criminal breaches to bring civil proceedings for restitution, noting that this right is already provided for in sentencing legislation in a number of States.

Victoria also considers that the model Act should contain provisions that limit the commencement of prosecutions to a period of two years after the act or omission alleged to constitute the offence, or after the regulator first becomes aware of the act or omission alleged to constitute the offence, whichever provides the longer period to institute proceedings, without limiting the ability of the local DPP to authorise in writing the commencement of proceedings at any time.

8.4 Evidence

Q114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?

Q115. Should the proof of any elements of an offence be affected by specific Provisions in the model OHS Act? If so, which elements and how?

Q116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

Background

The assumption of a single employer has traditionally been the underpinning of OHS regulation; however, this assumption has caused difficulties as to the application of OHS law when the employer or self-employed person is not a sole proprietor or a single corporate entity.

A fundamental element of proof in OHS prosecutions is the correct identification of the employer. In this context, given the complex corporate structures that now exist, the inclusion of deeming provisions in relation to employment are considered vital in any model OHS Act.

The Victorian OHS Act 2004 outlines the following relevant evidentiary provisions:

- s134 provides deeming provisions in relation to whether a place is a workplace
- s143 is a provision that states the common law position that 'any conduct' engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of their employment or actual or apparent authority, is conduct also engaged in by the body corporate
- s146 makes it clear that in order to facilitate process against the Crown (which Victoria advocates should be bound by employer duties in the model OHS laws) the responsible agency may be named in the process; the Crown in these circumstances is entitled to all the rights and privileges of other persons who are the subject of an accused in any proceedings
- ss146 and 148 provide for the successors of public bodies
- s153 creates an offence to give information or produce a document in complying or purportedly complying with the Act that the person knows to be false or misleading.
- s154 protects individuals (but not corporations) against self-incrimination, and
- s155 protects legal professional privilege.

Beyond these specific elements, Victoria is of the view that substantive evidentiary provisions in the commonwealth and state evidence statutes adequately deal with evidentiary matters relating to proceedings and process under OHS legislation.

Analysis & Evidence

Johnstone further identifies that the regulatory response to the avoidance of liability by the use of corporate groups has been described as ‘piecemeal’ and it has been noted that courts have not displayed any greater willingness to lift the corporate veil merely because they are dealing with a corporate group.¹¹⁵

In this context, the Australian OHS statutes contain deeming provisions which extend the reach of the employer’s duty beyond the strict limits of the employer’s employees. These should be retained. For example, in Victoria, s21(3) of the OHS Act 2004 deems contractors and their employees to be employees of the principal contractor. This duty is non-delegable. This means that the OHS statutes cover the possibility that, in any one situation, a worker might be owed duties by a number of employers and/or self-employed persons. Such deeming provisions have been broadly interpreted by the courts, (e.g. in *R v ACR Roofing Pty Ltd* [2004] VSCA 215.) The term ‘engaged’ was held to include any independent contractor in relation to matters over which the employer had control, notwithstanding the lack of a direct contractual relationship with the employer.

In addition, most of the Australian OHS statutes enable individual directors, managers or officers of a corporation to be prosecuted in certain circumstances for offences committed by the corporation.¹¹⁶ While the officer liability provisions have been discussed elsewhere, in terms of what must be established in a prosecution, the Victorian provisions extend the liability to ‘officers’ of partnerships and unincorporated associations, because the Act is not concerned with the particular legal form through which the undertaking is conducted. This duty extends to officers of government entities (including for example the heads of statutory authorities and government departments). Notably however, the Commonwealth OHS Act imposes duties on employers and employees but not officers of either corporations or government bodies.

As Johnstone identifies:

‘Perhaps most significantly, the Victorian corporate officer provisions have the potential to extend liability to individuals and other entities within organisational structures, where those individuals and entities make or participate in making decisions that affect the whole or a substantial part of the organisation’s business, and are responsible for an OHS offence having been committed, due to their failure to take reasonable care. We suggest that similar provisions should be included in all OHS statutes, to overcome at least some of the barriers limiting group responsibility for OHS statutory duties.’

‘...Consistently with the Standard Chartered Bank case which found that a holding company could be ‘shadow director’, the definition of ‘officer’ under the OHSA(Vic) could conceivably include a holding company or a franchisor. This would ensure that the holding company or franchisor would face liability under s 144 of that Act, whenever a contravention of the Act is attributable to that holding company, as an ‘officer’, failing to take reasonable care. In the absence of such a definition under other state OHS legislation, the problem of corporate group structures being used to avoid liability for occupational health and safety contraventions continues as a potential obstacle to effective regulation.’¹¹⁷

In order to ensure effective OHS regulation, and in view of the complex corporate and ‘employment’ structures that exist to enable a company to avoid these responsibilities,

¹¹⁵ *ibid*

¹¹⁶ See s26 of the OHS Act (New South Wales). Western Australia adopts another approach in s 55(1) of the OHS Act (Western Australia) as does Victoria in ss144-5 of the OHS Act 2004.

¹¹⁷ *ibid*

deeming provisions in the model OHS Act are necessary to overcome the evidentiary difficulties faced by prosecutors in seeking to identify the appropriate employer duty holder.

Victoria's Position

The model OHS Act should provide for the following specific evidentiary procedures:

- deeming provisions in relation to whether a place is a workplace
- a provision that states the common law position that 'any conduct' engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of their employment or actual or apparent authority, is conduct also engaged in by the body corporate
- in relation to process against the Crown (which Victoria advocates should be bound by employer duties in the model OHS laws) the responsible agency may be named in the process; the Crown in these circumstances is entitled to all the rights and privileges of other persons who are the subject of an accused in any proceedings
- provision should be made for the successors of public bodies (see s146 OHS Act (Vic) and s148), and
- an offence to give information or produce a document in complying or purportedly complying with the Act that the person knows to be false or misleading.

In this context, although not specifically raised in the issues paper, it is considered that legal professional privilege and the privilege against self-incrimination (safe in relation to corporations) should not be disturbed. Beyond this, Victoria considers that existing evidentiary provisions, rights and protections in the general body of evidence law are adequate.

The avoidance of various types of legal liabilities by the use of corporate group structures has been well recognised and therefore it is Victoria's position that the deeming provisions and the principle of non-delegability relating to ostensible employers, as contained in the Victorian OHS Act, should be duplicated in the model OHS Act. This will ensure evidentiary difficulties presented by complex corporate structures are not a barrier to the successful identification and prosecution of OHS offences.

8.5 The Burden of Proof and Defences

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| Q117. | Is 'reasonably practicable' an appropriate standard for the model OHS Act? |
| Q118. | Should the prosecutor of the duty holder be required to prove whether the standard was met? Why? |
| Q119. | Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why? |
| Q 120 | What, if any, defences should the model OHS Act provide? |
| Q 121 | Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why? |

Background

In jurisdictions where the general duty is limited by 'practicability' or 'reasonable practicability', the prosecution bears the onus of proving the duty holder failed to do what was practicable and that a certain standard has not been met. As OHS offences are generally objective rather than subjective in nature it is appropriate that the prosecutor bears the onus of proof. This is consistent with the criminal law principle that the prosecution should bear the onus of proving every element of the offence. It is also consistent with human rights principles. The Victorian Charter of Human Rights and Responsibilities, for example, makes it clear that a person who is charged with a crime has the right to be presumed innocent until proven guilty according to the law.

In New South Wales, the reverse onus of proof applies and the defendant has the burden of proving that on the balance of probability it did everything that was reasonably practicable in the circumstances. The Queensland statute has the same practical effect.

Analysis and Evidence

It has been argued that a reverse onus of proof in OHS law is preferable because it will always be difficult for the prosecution to prove the elements of reasonable practicability which depend on the particular circumstances in each case.¹¹⁸

However, this position fails to appreciate that community and duty holder expectations are that there should be clarity as to the standard expected of duty holders in particular situations and that regulators have a significant responsibility to maximise awareness of what is required to comply with the law. The notion of an absolute liability provision, coupled with a reverse onus implies that it is for the duty holder to identify what is required to comply. Such a lack of clarity and transparency calls into question the credibility of the law itself.

It is apposite that in the debates surrounding the making of the United Kingdom's first post-Robens legislation, the following was said:

'If we delete the words 'so far as reasonably practicable' in effect we are saying in our criminal law that in many cases work simply cannot be carried on ...

It is not an acceptable legislative practice to impose absolute obligations of this very broad and wide-ranging nature ... Law which is unrealistic law is bad because it is unacceptable. There is no point in imposing legal duties which are not accepted, not complied with and not enforced, because everyone, including enforcing agencies and the courts know they are unreasonable duties.'¹¹⁹

Deviating from the general criminal law principle that the prosecution bears the onus of proof might be justified if there was strong evidence that the objects of the Act and the principles of health and safety are being defeated in the courts. However, in Victoria, where the prosecution has the onus of proof, the majority of prosecutions are successful. WorkSafe aims to ensure that 90% of prosecutions are successful which is commensurate with outcomes in general criminal matters in the Magistrates' Court. The success rate of prosecutions in the financial year to date is 95%.¹²⁰ Unfortunately, there is a paucity of published data from other jurisdictions on the success rate of prosecutions and it has therefore not been possible to compare these statistics with other jurisdictions. In any event, there is no evidence to indicate that the current success rate achieved in Victoria in prosecutions is not comparable to other prosecuting agencies in the State and there is

¹¹⁸ Submission to the Inquiry into New South Wales Occupational Health and Safety Legislation, 14 December 2006, Professor Ron McCallum AO.

¹¹⁹ House of Commons Debates, 18 June 1974, cols 340-341.

¹²⁰ As at 25 June, 2008, WorkSafe Victoria has completed 112 prosecutions with a 95% success rate. 21% of cases were contested, with an 84.6% success rate. Of committals, which make up 31% of completed prosecutions, 94.3% were successful.

certainly no evidence base that warrants a move to reversing the onus of proof to a defendant in the model OHS Act.¹²¹

As Creighton outlines in his attached discussion paper, the reverse onus is used as a collective term for a range of grievances that some stakeholders have with the current NSW legislation. Often these criticisms are directed at the exercise of prosecutorial discretion in a number of high profile cases¹²² which are considered to be evidence of arbitrary results on account of the combination of an absolute liability offence and the reversal of the onus of proof. Notwithstanding, given the negative connotations associated with recent public debates on the provisions in New South Wales, there appears to be no justification to transfer such provisions to other jurisdictions. Indeed, there is a genuine case to suggest that due to these negative connotations, the reverse onus should be abandoned in favour of a clear statutory provision which establishes a general duty based on an objective standard with the onus resting at all times with the prosecution to prove all elements of the offence. If, as Creighton argues, there is little practical difference in the way prosecution cases are run in courts between NSW and Victoria in particular, there appears little merit in a prolonged debate regarding the reverse onus which may divert efforts at harmonisation.

Victoria's Position

Victoria considers that the appropriate test for compliance with general duty provisions in the model OHS Act should be an objective one as characterised by the test of 'reasonable practicability'.

Victoria believes that there is no justification for requiring that the model OHS law adopt a reversal of the onus of proof which generally rests with the prosecutor. OHS general duties and the offences which are created by them should be considered criminal offences, subject to criminal procedures and appeal provisions and should accordingly attract the general protections of the criminal law. The offences in the majority of states attract significant maximum penalties. In this context, Victoria does not support a reverse onus of proof for the general duties.

In Victoria's view it follows that the onus of proof on the prosecution should be to prove all elements of a general duty offence beyond reasonable doubt. That being the case, there is no need for the model OHS laws to outline defences beyond those available under the general criminal law. Moreover, it is unnecessary to distinguish between alleged offences charged against individuals as opposed to corporations.

WorkSafe Victoria has recently commissioned Breen Creighton to independently evaluate the 'reasonably practicable' test as it applies in Victoria in comparison to the absolute provisions which exist in NSW and Queensland. Dr Creighton critically evaluated the 'reverse onus'. A copy of the Creighton paper *Reasonable Practicability and the Reverse Onus* is attached for the assistance of the Review Panel and in support of this submission.

¹²¹ Numbers of prosecutions have been falling in New South Wales and Victoria in recent years. (Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report*, 9th edition, p 17.) The NSW WorkCover Annual Report 2006/2007 reports 360 successful prosecutions involving 300 defendants in 175 matters.

¹²² See for instance *Kumar v Richie* [2006] NSWIRComm 323 ; *James v Sunny Ngai* NSWIRCComm203[2007]

8.6 Liability of Officers

- | | |
|-------|---|
| Q122. | Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence? |
| Q123. | How should officer be defined? |
| Q124. | Should liability of an officer, if any, be subject to the prosecution proving that an act or admission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why? |
| Q125. | Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain? |
| Q126. | Should the model OHS Act provide for specific defences to be available to an officer? If so, what? |
| Q127. | What should the approach to officers of unincorporated associations or volunteer officers be? |

Background

All jurisdictions provide for officers to be those who are involved in decision making, but they differ as to how far down the management chain the definition of officer may go. Some do not apply the same duties to officers in an unincorporated association or partnership.

Queensland and NSW reverse the onus of proof by providing that an officer has committed the same offence as the corporation, unless the officer proves a relevant defence such as the exercise of due diligence. In some jurisdictions where the prosecution bears the burden of proof, it must prove the higher standard of 'wilful neglect'.

Victoria's OHS Act 2004 applies to the most senior officers in a corporation or an unincorporated body. It adopts the definition at s9 of the *Corporations Act 2001* which is well understood and the subject of significant jurisprudence. The duty provides for officers to be personally liable where a breach of the organisation's duty is attributable to an officer failing to take 'reasonable care', though there is no requirement that the corporation be charged or found guilty before this provision is triggered. The burden of proof rests with the prosecution. Volunteer organisations are exempted.

Analysis & Evidence

The people within a corporation who participate in or make the decisions that have a real or direct influence on that corporation's policy and planning or financial standing are in a position to affect health and safety in the workplaces they manage. In Victoria the duties pertaining to these officers fall under ss144 and 145 of the OHS Act 2004.

The Act commenced in 2005, and more officers have been charged than ever before, consistent with the Victorian Government's intention to 'level the field'. In December 2007, a review of the operation of the Act reported 13 ongoing prosecutions against officers, another three investigations underway, and no concern about the operation of the provisions.¹²³

WorkSafe has developed a range of guidance material to assist in understanding and compliance, including *Information for Senior Officers of Organisations* (May 2005) and *Occupational Health and Safety in Boards* (2006). In addition WorkSafe has published supplementary enforcement and prosecution policies: *Liability of organisations, officers, employees, and other duty holders* and *Prosecution of Victorian Government Departments*.

¹²³ Stensholt, B, op. cit., pp 81-82

As the issues paper points out, it is axiomatic that a corporation can only make decisions and act through the people who run it. Officers make the decisions that may have a significant impact on a corporation's compliance with the Act and it is appropriate that they should have commensurate duties. In all jurisdictions these officers can be personally liable, an acknowledgment that compliance by a corporation depends on the conduct or omissions of its decision makers.

Officer liability should be on a similar basis to corporation liability and employee liability. Victoria's view is that a corporation should not be guilty of an offence unless it is proved that it failed to take those steps which were reasonably practicable in the circumstances i.e. it failed to do that which it could reasonably have been expected to do.

A similar objective test should apply to officers. Where a company commits an offence, an officer should be liable if it is proved they failed to do what they could reasonably have been expected to do in the circumstances to procure compliance by the company or entity. Assessing objectively whether they applied reasonable care should address such things as what they knew about the relevant matter, their ability to make or influence the corporation's decisions about the matter, and the degree of involvement by others.

Many persons who are officers will also be workers or employees, with the OHS duties attaching to that role. However the rationale for imposing duties on officers is not the same as the rationale for the imposition of duties on workers. To begin with there may not be a complete overlap between the worker duties and the officer duty. Most officers, as defined in the *Corporations Act 2001*, would not be categorised as workers.

A distinct positive duty on officers, including those representing the Crown, gives statutory reinforcement to the importance of officers taking responsibility for workplace health and safety and dispels any perception that officers are immune from liability in all but the most egregious cases. Most importantly, the officer duty signals that officers must fulfil their managerial and critical decision-making role in ensuring a corporation's compliance with its duties. Those duties oblige officers to pay attention not only to their personal responsibilities, but to their organisational responsibilities as decision makers, with control to a greater or lesser extent, depending on their position of how the entity itself goes about complying with its responsibilities.

Victoria considers that the same argument applies to an unincorporated business, as the significant consideration is the undertaking, and the activities associated with it. It is the activities which give rise to workplace risks; the legal form through which the undertaking is conducted is irrelevant. There is no reason, for example, why the duties of officers should not equally apply to the officers of the partnerships which run accounting and legal firms.

The officer provision should, however, not apply to volunteer officers (someone who acts without any fee, gain or reward or the expectation of any fee, gain or reward). Victoria considers that the prospect of criminal liability would be a disincentive to persons from undertaking voluntary officer positions and likely to be detrimental overall to voluntary work, which is of great public benefit.

A person charged only with implementing corporate decisions, policies or plans, by definition is not in a managerial and critical decision making role. Victoria considers that the officer provisions should not apply to such persons, and that the definition at section 9 of the *Corporations Act 2001* achieves this. It defines an officer as a person who makes, or participates in making, decisions that affect a substantial part of the business or who has the capacity to significantly affect the corporation's financial standing. The definition extends to include those in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business

relationship with the directors or the corporation). This definition would include all directors and secretaries of corporations, chief executive officers, members of boards of management of public authorities, all partners in a partnership and all office holders of unincorporated associations.

It is a fundamental principle of criminal law that the prosecution should bear the onus of proving all of the elements of an offence. Victoria sees no reason to depart from this principle in the model OHS Act. This question is dealt with in more detail in section 8.5 of this submission.

Victoria's Position

A corporation or an unincorporated body can only make decisions and act through the people who are in charge. The model OHS Act should provide that where a corporation or unincorporated body contravenes a provision, liability also attaches to the officers who participate in or make the decisions that direct and influence its policy, planning or financial standing and who therefore can affect health and safety in the workplaces they manage.

Victoria considers that this can best be achieved by employing the definition of 'officer' at section 9 of the *Corporations Act 2001* in the model OHS Act.

The likely detriment to publicly beneficial voluntary work justifies, in Victoria's view, the exemption of volunteer officers from officer liability.

Victoria also considers that there is no justification for the model OHS Act to depart from the fundamental principle of criminal law that the prosecution should bear the onus of proving all of the elements of an offence.

8.7 Sentencing Options

- Q128. For which offences should monetary penalties (fines) be imposed?
- Q129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?
- Q130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?
- Q131. Should there be a statutory minimum fine for some offences? If so, what?
- Q132. Should the level of penalties depend on culpability (recklessness) or outcome (death) of repeat offences?
- Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?
- Q134. What penalty options should be available in addition to or instead of fines?
- Q135. Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?

Background

Across Australia there is disparity in relation to sentencing options and levels of monetary penalties available to courts when dealing with breaches of occupational health and safety legislation.

The Industry Commission recommended in its inquiry into occupational health and safety in 1995 that all jurisdictions increase their maximum penalties in OHS legislation to \$500,000 for corporations and \$100,000 for individuals, noting that the 'appropriate level is likely to be much higher' in the longer run.¹²⁴

The Australian States have gradually increased their monetary penalties for OHS breaches; however a degree of inconsistency prevails.

Analysis & Evidence

Commentators have suggested that the utility of prosecuting corporations with resulting fines is limited by the reluctance of courts and legislatures to 'set fines and penalties which are high enough to provide a real deterrent'.¹²⁵ It is argued that fines generally have 'limited punitive impact' and that a broader range of alternative sanctions may serve a more useful rehabilitative and deterrent purpose.¹²⁶ These sentencing options include, for example, enforceable undertakings and community service or adverse publicity orders.¹²⁷ In the case of corporations these may extend to corporate probation, injunctions, stock dilution or equity fines and at the extreme, dissolution.¹²⁸

On the other hand, it is argued that prosecution of corporate employers allows those truly responsible i.e. the individual actors, to avoid responsibility. It is suggested that the punishment of a corporation (predominantly by fine) does not compel the organisation to change its behaviour, or punish the individuals responsible. Indeed it has been suggested that in relation to corporate commercial crime, prosecuting agencies have preferred to prosecute corporate entities rather than individuals largely because corporations are considered a somewhat 'easier target' and more likely to be the subject of a successful prosecution than an individual.¹²⁹

Gunningham has found there is considerable evidence that 'the single most important driver of improved performance ... is regulation'.¹³⁰ Moreover, the potential of personal liability for offences is also a powerful driver of improved safety standards.¹³¹ However, there appears to be much less evidence to date, particularly in the Australian context, that the quantum of fines arising from prosecution is effective in deterring employers or changing behaviours.¹³²

The reliance on the impact of the *level* of monetary penalty as a general deterrent focuses on the presumption that the employer corporation is a 'rational actor' which will seek to avoid monetary penalties and other economic impacts of prosecution where it is uneconomical to do so. The complexity of positive and negative motivators for compliance by employers means that it is difficult to associate single factors with levels of compliance. The risks of

¹²⁴ Industry Commission 'Work, Health and Safety- Inquiry into occupational health and safety', Report 47, Volume 1, p117

¹²⁵ Fisse, B 'Sentencing Options against Corporations [1989-1990] 1 Criminal Law Forum 211 at 214-215

¹²⁶ *ibid.*, 211 at 229-230

¹²⁷ *ibid.*, 211 at 229

¹²⁸ *ibid.*

¹²⁹ Fisse, B, *Corporations, Crime and Accountability*, Cambridge University Press 1993 p1

¹³⁰ Gunningham, N CEO and Supervisor Drivers: Review of Literature and Current Practice, National Occupational Health and Safety Commission, October 1999 at 12

¹³¹ *ibid.* at 13

¹³² Rozen, P, 'A New Approach to an Old Problem: A Report to the Victorian WorkCover Authority on Compliance and Enforcement Models and Strategies for Occupational Health and Safety offences', unpublished October 2000 at 5.

detection and inspection for instance, are also important deterrents.¹³³ Indeed studies in the United States suggest that while there is some impact on compliance arising following a regulatory inspection or administrative penalty, there is not necessarily a nexus between the quantum of that fine and the extent of the measures taken by an employer.¹³⁴

In his review of the Victorian OHS Act 2004, Maxwell acknowledged this 'lack of statistical correlation'¹³⁵ but was not deterred from a course which had been tried in reviews of similar legislation in other jurisdictions, by recommending 'substantial increases in the monetary penalties'.¹³⁶ Maxwell stated that his consultations during the review left him in no doubt that the threat of prosecution and size of the potential penalties were significant motivating factors in relation to compliance.¹³⁷ Maxwell also considered 'increasing public opprobrium' and adverse publicity relevant to the deterrence posed by prosecution.¹³⁸ Noting various research he drew a link between increased penalties and improved general deterrence.¹³⁹

In acknowledging the trend in other Australian states toward imposing custodial sentences in addition to the ability to impose fines, Maxwell recommended that such an option should be available for offences including repeated offending and offences of highest culpability.¹⁴⁰

In addition, he considered that the maxima for offences against the OHS legislation should reflect the seriousness of the offence in question and be adequate to deter would-be offenders. The scale should allow for penalties to be graduated to reflect the relative gravity of the offence and to guide courts in the exercise of sentencing discretion. In this context, however, he considered that the court's discretion should not be fettered. Mandatory sentencing was inappropriate in that it could result in the same punishment being imposed for offences with quite different levels of culpability.¹⁴¹

Other Sentencing Options

While the various OHS Acts refer mainly to fines and imprisonment (in limited circumstances), with appropriate submissions by prosecutors, some courts have been willing to make restorative dispositions which are aimed at addressing the financial detriment to victims' families, remedying risk and rehabilitating defendants.¹⁴² It is considered appropriate that the tip of the enforcement pyramid be constituted by a number of potential sentencing sanctions which will increase the 'effectiveness' of prosecution in achieving changed work practices.¹⁴³

Maxwell acknowledged the ALRC's findings in 1994 concerning the limited effectiveness of monetary penalties in securing compliance with the *Trade Practices Act 1974* (Cth).¹⁴⁴ Further he noted that the sentencing options available under the sentencing legislation had little applicability to OHS issues, particularly where the proceedings were conducted against a corporation.

In this context, Maxwell considered that, in addition to high penalties, undertakings had the potential to significantly improve standards by requiring duty holders to adopt a systematic approach to health and safety, the main advantage being that an undertaking can be tailored

¹³³ *Principled Regulation Federal Civil and Administrative Penalties in Australia*, Report of the Australian Law Reform Commission, Commonwealth of Australia, December 2002 at 791

¹³⁴ *ibid.* at 6. See also *Principled Regulation Federal Civil and Administrative Penalties in Australia*, Report of the Australian Law Reform Commission, Commonwealth of Australia, December 2002 at 790

¹³⁵ Maxwell, C, *op. cit.*, at 369

¹³⁶ *ibid.*, at 376

¹³⁷ *ibid.*, at 369

¹³⁸ *ibid.*, at 374

¹³⁹ *ibid.*, at 370

¹⁴⁰ *ibid.*, at 375-6

¹⁴¹ *ibid.*, at 367

¹⁴² See for instance *DPP v Leighton Contractors Ltd*, County Court Geelong, 27 May 2004

¹⁴³ Maxwell, C, *op. cit.*, at 350, Wells; C 'The Role of the Criminal Law' *Corporations and Criminal Responsibility* (2nd Edition) 2001, Oxford, Clarendon Press p 37

¹⁴⁴ *op. cit.*, 376

to suit the particular circumstances and 'can bring about inherent change in an offender's business to secure or at least encourage future compliance with the Act'.¹⁴⁵

In addition, observing that employers were placing increasing importance on establishing a reputation as a 'safe employer', Maxwell noted research findings that, for larger organisations, corporate image and credibility ranked second as a motivator behind regulation-related motivators.¹⁴⁶ Thus, in the context of the deterrent effect of court-imposed penalties, it was essential they be widely publicised. In his view, this provided a strong case for giving courts power to order the offender to publicise the offence as part of the penalty – similar to powers available to ASIC and ACCC. Such a power could be available on the court's own motion or that of the prosecutor, with legislated consequences for a failure to comply.

Other options such as community service orders may be appropriate, especially considering the restorative justice aspect of the sentencing process.

In any event, whatever other sentencing options additional to fines are available, it is necessary to ensure that any model legislation provides for time limits for compliance, supervision and reporting, and provisions for variation and breach of the order.

Custodial Penalties

Maxwell recommended that custodial penalties should be available to deal with cases involving high-level culpability. The ALRC has suggested that imprisonment is appropriate in circumstances where a 'last resort' sanction is needed after repeated or wilful violations, where the offence is serious and monetary sanction is not a sufficient indicator of the degree of social condemnation,¹⁴⁷ and where the level of penalty is not high enough to deter the unwanted behaviour. A coherent scheme should take into account both the harm and culpability, and outline appropriate penalties to deter corporate as well as individual offenders.

Most States currently provide for imprisonment for breaches of particular general duties. In Victoria where the health or safety of a person at a workplace is wilfully or recklessly placed at risk by a person, a custodial sentence is available, as it is in cases of prohibited discrimination and assault or intimidation of inspectors.

Victoria's Position

Victoria believes that provision should be made in the model OHS Act for monetary penalties and additional sentencing options for breaches of the legislation.

Monetary penalties are appropriate for all offences under the model OHS Act and courts should have available to them alternative or supplementary orders as constructive alternatives which can be aimed at improving the state of health and safety generally or at a particular workplace, namely:

- health and safety undertakings
- adverse publicity orders, and
- improvement projects.

Victoria considers that maximum penalties are important in promoting consistency because they provide a guide for the courts as to the seriousness of the offence and are an indicator of community opprobrium. The amount should be sufficient as a general deterrent, warning

¹⁴⁵ *ibid* p377

¹⁴⁶ *ibid* p379

¹⁴⁷ *Sentencing Act 1991*, s5(1)(d), ALRC 2002:105

potential offenders of the cost of the commission of the offence. It is also important to give sentencers sufficient discretion to deal with the most egregious conduct.

The level of fine should reflect the seriousness of the offending. Fines should only provide for a maximum in relation to the particular offence. It is Victoria's view that this provides guidance to the courts and duty holders on the relative severity of the offending and does not unduly fetter the court's discretion. It also guards against the potential for the same amount of fine to be applied regardless of the culpability of the offending. Victoria does not support a minimum fine.

OHS legislation is based on risk and prevention, not consequences. The fact that someone dies or is injured is evidence of the health and safety risk which the duty holder has failed to prevent and is also an indicator of the severity of the hazard or risk. The existing criminal law allows for 'causation' of a serious injury or death to be treated as an aggravating factor for sentencing purposes. Victoria considers that this is an appropriate way for higher penalties to be imposed where there are severe consequences. Severity is also dealt with by the inclusion of offences relying on *mens rea* such as reckless endangerment. In such cases, Victoria considers there should also be available a custodial sentence.

Victoria also considers that consistent outcomes would be facilitated by a national register (see discussion at section 8.9 of this submission) insofar as it may provide some assistance in sentencing disposition. However such a benefit would be predicated on the level of harmonisation of legislation and prosecution processes. Consistency would also be facilitated by:

- judicial education
- a national database of prior convictions
- the exchange of information/intelligence between regulators, and
- a register of companies in liquidation and their directors.

In Victoria's view, in addition to fines, penalty options should include adverse publicity orders, OHS enforceable undertakings or orders to undertake improvement projects.

Victoria considers that the model OHS Act should provide for custodial sentences in circumstances of more serious offending by persons such as reckless endangerment (maximum 5 years imprisonment), and prohibited discrimination and assault or intimidation of inspectors (maximum 2 years imprisonment).

8.8 Workplace Death and Serious Injury

- Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?
- Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or the crimes Act?
- Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the Model Act?

Background

The ASCC has estimated that in 2004-05 there were 405 work-related deaths Australia-wide. There is no national database or consistency in reporting so the exact number of people who die as a result of work-related activities in Australia cannot be reliably established.¹⁴⁸

Reviews of the various State and territory OHS laws have revealed different approaches to the question of whether criminal or OHS laws are the appropriate regulatory vehicle for the offence of 'industrial manslaughter'. Under the Crimes Acts in each state, individuals can already be charged with manslaughter when they contribute to the death of another person. The crime of manslaughter in most jurisdictions does not expressly state a maximum monetary penalty, only a prison sentence.

The only conviction of a corporation for manslaughter in Victoria related to Denbo Pty Ltd. In that matter, the corporation pleaded guilty but, by the time of sentencing, had divested itself of all assets. Fined \$120,000, the director of the corporation was fined \$10,000 for lesser offences under health and safety legislation. The decision has been criticised on the basis that the corporation effectively had no assets and had ceased to trade, and due to the prosecution's acceptance of a plea of guilty to the lesser statutory offences. It has been suggested that, 'A better result would have led to the conviction of the director under the *Crimes Act*.'¹⁴⁹

Analysis & Evidence

It is Victoria's position that prosecutions for manslaughter should remain within the province of the *Crimes Act*. The consequences of an OHS Act breach that results in death or serious injury is appropriately considered and dealt with in the sentencing process in a prosecution for a breach of OHS Act.

Foster notes that 'the legal possibility of corporate convictions for manslaughter in common law jurisdictions seems well-established.'¹⁵⁰

Gunningham and Johnstone consider that prosecutions for manslaughter are necessary if prosecutions are to be a credible and effective deterrent.¹⁵¹ They suggest that unlike the offence of manslaughter which carries with it clear notions of culpability and a sense of moral indignation warranting retribution in the name of the community, offences under OHS

¹⁴⁸ ASCC 'Work-related Traumatic Injury fatalities, Australia 2004-2005' Canberra, April 2008, piii, p1,

¹⁴⁹ *Review of the Occupational Health and Safety Act 1983 (NSW) – Final Report of the Panel of Review*, (A report to the NSW Standing Committee on Law and Justice); February 1997 at 98

¹⁵⁰ Foster, Neil 'Manslaughter by managers: the personal liability of company officers for death flowing from company workplace safety breach: 9 *Flinders Journal of Law Reform* 79, at 94

¹⁵¹ Gunningham, N and Johnstone, R; op. cit., at 213

statutes are considered lesser due to their nature as strict or absolute liability statutory offences not requiring proof of fault or *mens rea*.¹⁵²

The notion of corporate shame or stigma is significant in this context. The adverse publicity and reputational damage associated with a trial for an offence of manslaughter would be considerable. Arguably, this impact arises from the gravity of the offence rather than the rarity of such charges being brought against a corporation. The fact that such offences in Victoria are triable in the Supreme Court (i.e. the highest Victorian court) is also important as it elevates the importance of the proceedings and the nature of the offences charged.

Nevertheless, on one view the requirement to identify the corporate 'mind' makes any prosecution of a company for these crimes extremely difficult if not impossible. Thus, for example, the ACT legislation removes the need to identify an individual who could be deemed to be the 'directing mind and will of a corporation'.¹⁵³ While this was included to make it easier to hold the company, as an entity, responsible if found guilty, there have been no prosecutions under the ACT legislation.

Moreover, the rationale of lowering the proofs required to successfully prosecute organisations for manslaughter does not have a clear empirical basis. The effectiveness of such legislation should be measured on whether or not it has been able to improve the state of compliance through deterrence.¹⁵⁴ In this context there is little quantitative or qualitative evidence available to support the proposition that introducing an 'industrial manslaughter' offence into national model OHS laws will improve OHS outcomes.

Similarly, there is no evidence to indicate that there has been such improved compliance in those States which do have industrial manslaughter laws.

Victoria's Position

Victoria does not consider the model OHS Act is the appropriate statute in which to pick up offences such as manslaughter, which are properly located in principal criminal statutes.

In Victoria's view the model OHS Act should make appropriate provision for the capacity of courts to order a custodial sentence for OHS offences of high culpability. Such high culpability is demonstrated by instances of conduct in workplaces amounting to the offence of reckless endangerment, such as placing persons in danger of serious injury, not necessarily where workplace death or serious injury has resulted. There should be a specific offence of 'reckless endangerment' equivalent to that in s32 of the Victorian OHS Act 2004, as it relates to the workplace.

Victoria considers that breaches of OHS duties should be dealt with under the model OHS Act, however, these should not exclude the capacity of the prosecuting authority to bring charges under the relevant provisions of local criminal statutes where the circumstances so warrant. Where an OHS Act breach has resulted in death or serious injury, this consequence will be a relevant consideration in the sentencing of the offender.

Victoria believes that OHS offences should continue to be determined on the basis that the duty holder has failed to comply with the positive duty to maintain a safe workplace and not whether or not there were any actual consequences of the breach. Regard would be had to any consequences of the breach in the sentencing process.

¹⁵² Gunningham, N and Johnstone, R, *ibid.*, at 194

¹⁵³ Part 2A of the *Crimes Act 1900* (ACT)

¹⁵⁴ Gunningham, N *CEO and Supervisor Drivers: Review of Literature and Current Practice*, National Occupational Health and Safety Commission, October 1999 see discussion at 10

8.9 Enforcement of Penalties

Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations or defences or requirements?

Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?

Background

As the issue paper correctly asserts, the objects of deterrence are not met where a convicted corporate defendant avoids the payment of a penalty by winding up its operations or using some other strategy to avoid payment. These 'phoenix companies' are then often resurrected in another guise, against which the enforcement of the penalty is not possible.

Analysis & Evidence

This is not a phenomenon exclusive to the enforcement of OHS penalties. It is one which has been the subject of much discussion in the context of corporations and insolvency law and it is in those areas that a solution is likely to be found.

To some extent these difficulties are able to be dealt with by providing for a range of sentencing options. These are analysed in section 8.7 on sentencing options in this submission.

As the ALRC noted, 'Monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset-stripping. Safeguarding payment of a monetary penalty by means of a charge upon property that passes into the hands of subsequent parties is an imperfect solution because the impact may be borne not by the offender but by others who were not implicated in the offence.'¹⁵⁵

A recent paper by Martin¹⁵⁶ indicated quite clearly that such actions are likely to breach a number of directors' duties both under the common and statute law (e.g. s181 of the *Corporations Act 2001*). These duties are also imposed in some instances on other officers of the company. A number of remedies are available against such persons, both civil and criminal, under the general law and the *Corporations Act*. In addition Martin cites a number of cases in which the courts have been prepared to pierce the corporate veil to achieve a just outcome. Martin further notes the ASIC power to seek injunctive relief in such circumstances to ensure the preservation of the company's assets. Reportedly the federal government has provided substantial funding to ASIC to establish the Assetless Administration Fund, the focus of which is to curb the fraudulent activity of phoenix

¹⁵⁵ ALRC 'Compliance with the Trade Practices Act 1974' Report 68, 1994 at para 10.3

¹⁵⁶ Martin, A, Directors' duties and phoenix companies, April 20 presented in Sydney on 4 April 2007 at the Corporate Insolvency & Restructuring Forum. See also 'Phoenix crackdown reaps results' at asic.gov.au, 8 January 2007

companies. ASIC recently also announced it was stepping up its surveillance of such companies.¹⁵⁷

The Victorian Law Reform Commission has also made recommendations in this regard, such as a national register of rogue directors and the development of a statutory form of Mareva injunction to restrain a person from removing assets from the jurisdiction.¹⁵⁸

Actions are currently available to OHS authorities (and others) who are able to register a company name to whom charges have been served to ensure notification of any applications by such companies to deregister.

In addition, in Victoria, section 50(6) of the *Sentencing Act 1991* provides that if the court is satisfied that a corporate defendant will not be able to pay an appropriate fine it may declare, in certain circumstances, that the director is liable for any fine that is imposed as a result of the offence.

However, it is clear that some companies have gone into liquidation in some states to avoid the prospect of prosecution or avoid financial penalties being imposed.

WorkSafe has adopted a threefold approach to deal with issues of prosecuted corporations being placed into liquidation:

- in any matter where there is a suspicion of this type of activity, WorkSafe prosecutors use the alert service provided by ASIC. The prosecutor will take appropriate action including dealing with the liquidator or administrator, or, requesting that ASIC prevent de-registration of the company
- where there is sufficient evidence that an officer has committed an offence under the OHS Act 2004, that officer is likely to be prosecuted. Section 144 of the Act provides for a maximum penalty of approximately \$193,000. A prosecution under s144 is not affected by the status of the corporation, and
- in cases where the defendant corporation is in administration or liquidation, WorkSafe makes submissions that the prosecution should continue to sentence because of the importance of general deterrence in offences under the Act. This is particularly the case where the defendant's offending conduct is serious, or death has occurred in the workplace.

The model laws will require consideration to strengthening provisions to ensure accountability for offences in such circumstances.

Victoria's Position

Victoria does not support inclusion of provisions on the enforcement of penalties in the model OHS Act and believes instead that such matters are best left for enforcement under the existing State debt collection regimes and/or the general and Corporations laws. To provide these provisions separately under the OHS law may lead to confusion and inconsistency.

The model OHS Act should contain provisions similar to s144 of Victoria's OHS Act that allows for the prosecution of an offending officer regardless of the status of the corporation.

From a compliance and enforcement perspective, Victoria would advocate a role for the OHS regulator to work in closer cooperation with ASIC and support provisions that would

¹⁵⁷ Thomson, James '*ASIC steps up surveillance of phoenix companies*'. ASIC has launched civil proceedings against North Sydney solicitor Timothy Donald Somerville and eight company directors over their involvement in alleged phoenix-style transactions.

¹⁵⁸ VLRC '*Curbing the phoenix company*' 1994 para 4.1.44

enable such cooperation (including requesting that ASIC prevent company deregistration), and to continue to support sentencing a prosecution despite company administration/liquidation because of the importance of general deterrence in offences under the OHS law.

Victoria sees some value in the maintenance of a national register of corporate defendants who avoid payment of OHS fines. This might best be achieved, however, in cooperation with ASIC. A separate single register of prior OHS convictions would also be of some value but again this is something best explored outside the framework of the model OHS Act.

In terms of additional matters relevant to prosecutions that do not appear to have been dealt with elsewhere, it is Victoria's position that the model OHS Act should make it clear that:

- the Crown is bound by the legislation, and
- there should be an offence for any person to provide false information to a regulator.

CHAPTER 9: OTHER ISSUES

9.1 Regulation-Making Powers

Q142. Should the power to make regulations be limited and, if so, in what way?

Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?

Background

Australia's primary legislation dealing with health and safety is drafted predominantly in general terms, adopting principles-based standards while leaving matters of specific detail or prescription to the regulations or codes made under those Acts. Regulations can only be made if authorised in primary legislation, and courts are particularly vigilant in examining whether a regulation has been authorised when asked to adjudicate on it they consider only this issue, not the merits of the delegated legislation. Accordingly, sufficient regulation-making powers must be included in the model OHS Act to authorise the making of all the agreed regulations, otherwise they risk being declared *ultra vires*. Each state's Parliamentary Counsel and Scrutiny Committees are required to examine proposed regulations for validity and, as part of that obligation, carefully scrutinise the parent Act to satisfy themselves there is sufficient power to make the proposed regulations.¹⁵⁹

Analysis & Evidence

The first question arguably comprises two considerations. First is the level of detail required in the regulation-making powers inserted into the model OHS Act. Some jurisdictions go into specific detail in defining exactly what can and, by omission, cannot be the subject of regulation. Others craft their regulation making powers in broader, more generic, brushstrokes, seeking the least possible fettering of the ability to make regulations. In recent years, Victoria's drafting convention has moved away from the insertion of long lists of detailed regulation making powers set out in a schedule. This was due primarily to the need to address concerns that important matters might be inadvertently omitted from the list, limiting the regulatory options and possibly requiring ongoing amendment to the authorising Act.

Victoria's OHS Act has consolidated its regulation-making powers into a more compact list that is more broadly worded. As far as the courts are concerned, provided the matters were authorised, whether generally or specifically, then they can be covered in regulations. However, the regulation must not 'extend the scope or general operation of the enactment but [be] strictly ancillary' nor must it attempt 'to widen the purposes of the Act'.¹⁶⁰ Regulations should complement not supplement the Act.¹⁶¹

Secondly, the question requires a consideration of what types of matters are appropriate for inclusion in regulations. Many states have guidelines in this regard. For example, in Victoria there are the *Premier's Guidelines*, published under s26 of the *Subordinate Legislation Act 1994* (Vic) (SLA), Part 1 of which sets out guidelines as to the types of matters appropriate for inclusion in regulations versus Acts. The relevant sections are as follows and would form,

¹⁵⁹ See, for example, ss13(a) and 21(1)(a) of the *Subordinate Legislation Act 1994* (Vic) which requires the Chief Parliamentary Counsel and the Scrutiny Committee (SARC), respectively, to assess whether the proposed regulation 'appears to be within the powers conferred by the authorising Act'

¹⁶⁰ *Shanahan v Scott* (1957) 96 CLR 245 at 250

¹⁶¹ *Utah Construction and Engineering P/L v Pataky* [1966] AC 629

Victoria believes, a useful minimum set of principles in guiding the creation of model OHS laws:

- 1.08. The following are all matters which should be in primary rather than subordinate legislation:
- matters of substance or important procedural matters (particularly where they also affect individual rights and liberties, eg provisions that reverse the onus of proof, or certify evidentiary matters);
 - matters relating to a significant question of policy in that they introduce new policy or fundamentally change existing policy;
 - matters which have a significant impact on individual rights and liberties (eg powers of entry and search, arrest warrants, seizure and forfeiture), or which deal with property rights or traditional liberties and freedoms;
 - matters imposing significant criminal penalties (such as fines exceeding 20 penalty units or imprisonment); and
 - provisions imposing taxes.
- 1.09. By contrast, the following are more appropriately dealt with by subordinate legislation:
- matters relating to detailed implementation of policy, general principles and standards (rather than the policy, principle or standard itself);
 - prescribing fees to be paid for various services;
 - prescribing forms (if it is necessary that they be prescribed) for use in connection with legislation;
 - prescribing processes for the enforcement of legal rights and obligations; and
 - times within which certain steps should be taken.

Premier's Guidelines, published under s26 of the *Subordinate Legislation Act 1994* (Vic) (SLA)

The guidelines also emphasise that regulations must not duplicate, overlap or conflict with other existing or proposed regulations or legislation and should always reflect the intention and promote the purpose of the authorising statute. Sections 13 and 21 of the SLA also state that these matters, among others, must be examined by Parliamentary Counsel or Scrutiny of Acts and Regulations Committee.

Regulations should provide for summary offences with lower penalties. As a general rule, it is inappropriate for indictable offences to be in regulations. However, for some obligations under the regulations it is appropriate that a breach should be taken to be a breach of the Act. It all depends on the characterisation of the offence. For example, the current Victorian OHS Regulations contain regulations which can be classified into one of several categories:

- control of risk requirements (the most serious requirements including those that specify *how* specific risks are to be controlled or *how* the elements of a general duty are to be met)
- safety management requirements (the next most culpable class which sets out processes directed to management of safety issues and includes obligations relating to consultation)
- licensing and permissioning requirements (including notifications, authorisations, certificates of competency and exemptions)
- administrative requirements (the least culpable class not directly related to controlling risk, such as record keeping and incident notification), and
- others (such as the offence of providing false or misleading information).

In Victoria's OHS Act, regulations made pursuant to section 158(1)(a) and that relate in subject matter to control of risk or safety management (the first two points above) generally do not carry a separate penalty. Rather these regulations have a note that refers back to the OHS Act, alerting the duty holder to the fact that a breach of the regulation in question

amounts to a breach of a duty or obligation imposed by the Act (such as s21(1)) and may be prosecuted as such, exposing the duty holder to the larger Act penalty.

While many states often prosecute breaches of the general duties in their Acts (even though they could, if they so chose, merely prosecute a breach of the regulations with its lesser attendant penalty), Victoria is completely transparent in warning duty holders that breach of certain key regulations (which tend to have very serious consequences) may result in a much higher penalty than a mere breach of the regulations. This level of transparency for duty holders is supported for the national scheme. It has the added benefits of avoiding duplicity and uncertainty in penalties between the Act and the regulations and emphasising a holistic scheme with an internal logic and interconnectedness.

Victoria's Position

Victoria supports the inclusion of regulation-making powers in the model OHS Act that are sufficiently broad to enable the making of all agreed regulations while not being so precise and detailed as to require regular amendment.

The model Act should contain provisions to allow the regulations to provide for summary offences with lower penalties. The regulations should also ensure the most serious obligations under the regulations, such as those regulations setting out the way in which general duties or obligations imposed by the Act are carried out, do not have their own penalties but rather refer back to the relevant Act provisions and associated penalties.

9.2 Codes of Practice

Q116	What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?
Q144.	What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?

Background

Victoria's OHS Act 2004 introduced compliance codes, which replaced codes of practice under the 1985 Act. The new provisions enshrined deemed to comply arrangements, whereby a duty holder complying with a part of a compliance code is taken to have complied with the relevant provision under legislation. The same arrangement applies to compliance with regulations.

The relevance of codes of practice or compliance codes in proceedings for a breach of OHS legislation varies between jurisdictions. The legislation variously provides that:

- a failure to comply with a relevant code is deemed to represent a breach of the Act, unless the duty holder demonstrates how they complied with the Act by other means; or
- compliance with the code is deemed to be compliance with the Act to the extent that the code is relevant, or
- compliance with a code is a defence to a prosecution for breach of a relevant duty; or
- the code may be used as evidence of what could be done to meet the duty or obligation.

Analysis & Evidence

Regulators are significant repositories of expert knowledge on compliance solutions and guidance. In fact, the regulator's role of education, advice and assistance is a direct extension of its enforcement and compliance functions. Regulators and duty holders have a

reciprocal interest in the question of what, exactly, constitutes compliance with a legislated duty. There is also a legitimate and concurrent role for legislation in encouraging compliance.

Duty holders are entitled to have confidence that a regulator's roles in providing advice and developing statutory instruments are integrated with its compliance and enforcement roles. Certain instruments developed under OHS legislation, if followed, should provide duty holders with certainty in selecting their compliance solutions.

Accordingly, when a regulator develops a statutory instrument which answers the duty holder's question 'How do I comply?' it is reasonable for the duty holder to expect that that advice will represent the current state of knowledge. It follows that in implementing this state of knowledge advice the duty holder is entitled to be confident they will meet their legislated obligations. It is axiomatic that a solution proposed by a regulator should not be in breach of legislated duties.

Victoria therefore considers that in providing for regulations and codes of practice, the model OHS Act should ensure that these instruments will both provide compliance solutions and give duty holders compliance certainty. The need for an increased focus on interpretive 'how to comply' guidance material and advisory/educative enforcement approach is also a recognition of changing working arrangements, including the growth of labour hire arrangements and small business.

Such provisions would not prevent a regulator developing and publishing other non-statutory guidance material. In Victoria, WorkSafe continues to provide and develop guidance material which is intended to meet the information needs of various affected and interested parties and a range of knowledge levels. The deemed to comply relationship with the Act applies only to regulations and compliance codes, although some of the non-statutory guidance may be utilised in court proceedings.

In line with their status under the model OHS Act, Victoria considers that regulations and codes of practice should be made or approved at an appropriate level of responsibility such as by the Governor-in-Council or Minister. Powers to vary or revoke should be at the same level. Making or approving should be subject to commonly accepted accountability safeguards such as use of a disallowable instrument, requirement for publication or notification, and public accessibility.

Victoria's Position

Victoria considers that compliance with a regulation or code of practice should be deemed to be compliance with the particular requirement of the model OHS Act in order to:

- satisfy the regulatory principles of transparency, consistency and impartiality
- provide assurance to duty holders that regulatory advice is state of knowledge and meets legislated compliance standards, and
- encourage compliance with regulatory guidance.

Appropriate to their status under the model OHS Act, Victoria considers that regulations and codes of practice should be made or approved by the Governor-in-Council or Minister, and subject to the usual accountability safeguards attaching to those functions.

9.3 Notification of Incidents and Reporting

Q145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?

Background

Each State and the Commonwealth provides under either its OHS Act or the associated regulations, for notification to the relevant regulator of certain workplace incidents or 'occurrences'. This information is an important feature of the OHS regulatory framework; however, there are significant differences between the States as to what is required to be reported and how and when this is to be done.

Against this background, the Productivity Commission has expressed the view that:

*'it would be highly desirable that all jurisdictions mandate the same set of reporting requirements and that all work-related injuries, fatalities, disease and 'dangerous occurrences' should be reported to the relevant authorities and that this information should not be restricted to 'employees'.*¹⁶²

Analysis & Evidence

Incident reporting systems are provided for in various forms and specifications in all jurisdictions.

In Victoria where incidents (as defined) occur at a workplace under the management and control of the employer or self-employed person, that person must notify WorkSafe immediately after becoming aware of the occurrence. Within 48 hours written notification (on the approved form) must also be provided and records must be kept for at least five years. The site is to remain undisturbed until an inspector arrives or otherwise directs.¹⁶³

Despite the disparities, across jurisdictions, some common elements across jurisdictions are generally identifiable as follows:

- reporting requirements typically cover events involving both employees and other persons
- all jurisdictions require reports of incidents causing death or serious injury (however serious injury is variably defined)
- all jurisdictions require dangerous occurrences (or 'events' or 'incidents') to be reported
- in all jurisdictions there is a connection between the incident and work or a workplace (perhaps not surprisingly)

Alan Clayton notes the 'significant differences in wording' of the various reporting requirements and suggests that this 'undermines comparisons of reported incidents from jurisdiction to jurisdiction.' Further he contends that, 'It should also be noted that there is, no doubt, a significant under-reporting of reportable incidents under the OHS statutes, with some reports suggesting that only 20% of reportable incidents are notified to the OHS authorities.'¹⁶⁴

Victoria's Position

¹⁶² Productivity Commission *National Workers' Compensation and Occupational Health and Safety Frameworks Report* 2004, Ch 3, p66

¹⁶³ *Occupational Health and Safety Act 2004 (Vic) Part 5*

¹⁶⁴ Clayton, A., Johnstone, R. and Sceate, S. 2002, *The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems*, National Research Centre for OHS Regulation Working Paper 3, ANU, April, p34.

Victoria supports the inclusion in the model OHS Act of a comprehensive incident reporting system along the lines of that contained in part 5 of the Victorian OHS Act 2004. A consistent reporting system is a useful compliance tool and will also enable the collation and use of meaningful Australia wide data concerning overall performance.

9.4 External Appeals and Issue Resolution

Q146. What provisions should be made in the model OHS Act for external review of regulatory decisions?

Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

Background

In Western Australia the Occupational Safety and Health Tribunal is empowered to deal not only with certain decisions of the regulator made in internal reviews, but also, in the first instance, with specified OHS issues. The latter include matters such as:

- circumstances where workers assert they have not received pay or entitlements while attending OHS training or stopping unsafe work
- assertions that workers have been discriminated against for raising OHS matters, and
- where licences or permits have been suspended or revoked.

Victoria's position on the circumstances outlined above is dealt with in section 8 of this submission. In short, in Victoria individuals have the capacity to pursue a civil remedy in the courts where:

- they have not received pay or entitlements while stopping unsafe work
- a worker has been discriminated against for raising health and safety matters, and
- an employer has refused entry to a workplace for a person to assist an HSR.

Where a licence or permit has been suspended or revoked, Victorian law currently provides a right of appeal to the VCAT for a 'merits review' of the decision. These are the same rights of appeal as those accorded to a person who is dissatisfied with an internal review decision, made pursuant to s128 of the OHS Act 2004.

Analysis & Evidence

The variety of mechanisms for review of the regulator's administrative decisions is addressed in section 6.3 of this submission.

The Commonwealth OHS legislation makes provision for certain decisions to be appealed and heard by the 'reviewing authority', that is, the Australian Industrial Relations Commission (AIRC), which is empowered to conciliate and/or arbitrate. Similar provisions exist in the empowering statutes of other external OHS appeal bodies in the other jurisdictions. Given this, making specific provision in the model OHS Act for the resolution of OHS issues by conciliation and arbitration would be redundant.

Consistent with the position enunciated in section 8.2, Victoria believes it appropriate for local criminal and civil courts to adjudicate on all matters which may be the subject of appeal under the model Act, rather than to create special 'OHS tribunals' or courts. In Victoria's view, it is important that OHS law be regarded as part of the mainstream by the community and not a 'special case'.

Victoria's Position

Victoria believes that provision should be made in the model OHS Act for the external review of regulatory decisions in a manner consistent with part 10 of Victoria's OHS Act 2004. Further detail of Victoria's position is contained in section 6.3 of this submission.

Victoria believes there is no need to make provision for the resolution of OHS issues by conciliation or arbitration in a model OHS Act, as these methods of resolution are currently available in the external tribunals to which applications may be made by affected parties. To include such provisions in the model Act would, in Victoria's view, involve the imposition of an additional administrative burden which is unnecessary where this function is already adequately articulated and fulfilled by existing external appeals or tribunal structures.

9.5 Tripartite Mechanisms

Q148. Should the model OHS Act facilitate tripartite mechanisms in the administration of OHS regulation, and if so, how?

Q149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

Background

The great majority of jurisdictions in Australia provide for tripartite mechanisms in their principal OHS legislation (e.g. mechanisms such as advisory committees or boards of management, including government, union and employer representatives). These mechanisms are enunciated in the objectives of the legislation (e.g. 'encouraging the constructive involvement of registered associations of employers and employees in health and safety', or 'encouraging co-operation on health and safety matters between employers and employees'), and by local regulators establishing frameworks such as tripartite or multipartite advisory groups. The intention is to encourage cooperation and consultation on health and safety between the workplace parties and those who provide expert advice and support to them.

However, the jurisdictions vary widely in how their health and safety agencies are established, ranging from separate health and safety agencies to agencies which combine health and safety, workers' compensation and rehabilitation, and industrial relations. This in turn contributes to the variations in composition and powers of their governing and advisory bodies.

Australia ratified the ILO Convention C155 Occupational Health and Safety Convention 1981 on 26 March 2004. Article 4 states:

'Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers formulate, implement and periodically review a coherent national policy on occupational health, occupational safety and the working environment.'

Victoria believes a key issue for the national model health and safety laws is to include tripartite provisions which are flexible enough to permit state regulators to adopt them according to local requirements while ensuring compliance with ILO C155.

Victoria notes that ILO Convention 155 does not provide a decision-making role for community partners in the making of OHS instruments and/or policy. There is a right of consultation, not decision-making.

Analysis & Evidence

Victoria has a tripartite statutory advisory committee (the OHS Advisory Committee) with expertise in health and safety and with functions under the Act which allow it to enquire and report into matters referred to it by the Authority's non-tripartite Board of Management, according to its terms of reference (also set out by the Board). The OHS Advisory Committee has two members representing WorkSafe, two representing the Crown, six representing employers including small business, six representing employees, and two independent persons with health and safety expertise. The Committee is supported by sub-groups for specific issues and industries. These are tripartite but reserve the right to invite others with expertise that can contribute to achieving better OHS outcomes.

By contrast, New South Wales' Board of Management includes members representing union and employer stakeholders, while the Advisory Council which advises the Minister, is in effect 'multi-partite' as it has a broader membership including union and employer representatives and legal, medical, rehabilitation, insurance, legal and health and safety experts.

Other jurisdictions have separate health and safety administrative and regulatory units, which are branches of government departments (e.g. Queensland and Tasmania). WorkCover ACT is part of a large department but is unusual in that it administers labour legislation as well as health and safety and compensation.

Many regulators, including Victoria, New South Wales and Queensland have consultative structures at a number of different levels, such as stakeholder reference groups and industry forums (Victoria), and statutorily-enshrined industry groups (New South Wales, Queensland).

There are roles and functions which Victoria believes should properly be the responsibility of the elected government, consulting with stakeholders and, more generally, the community. These roles and functions include the making of legislation, standards, regulations and compliance codes.

Victoria's Position

Victoria considers that tripartism, as the relationship between the regulator, employers and unions should be central to consultative arrangements. However, the model OHS Act should be framed to ensure that these arrangements are also sensitive to the inclusion of independent health and safety expertise if required.

Victoria considers that the model OHS Act should:

- provide for the establishment of tripartite bodies, with the capacity to include independent members with specific OHS expertise
- broadly prescribe the role and functions of such a body
- ensure that regulators retain their decision-making powers in respect of standards setting, regulation-making and all operational matters, and
- ensure that the provisions are flexible enough to ensure compliance with ILO C155 while permitting regulators to comply with local requirements.

9.6 Mutual Recognition

Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?

Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:

- better OHS outcomes
- greater efficiency and effectiveness
- lower regulatory compliance and enforcement burdens, and
- improved harmonisation of the requirements for such permits and licensing for industry across Australia?

Background

Victoria supports mutual recognition as an important aspect of achieving harmonised OHS laws. Victoria considers its current arrangements for mutual recognition of interstate goods and services in its OHS regulations to be complementary to mutual recognition legislation (the *Mutual Recognition (Victoria) Act 1998*, which adopts the *Mutual Recognition Act 1992* (Cwlth)).

Currently, Victoria makes specific provision for mutual recognition in its OHS regulations in relation to plant, certification of plant users and operators, licensing of high risk work, hazardous substances, lead, and construction induction training.

Victoria considers the following to be significant factors in relation to ensuring permissioning/licensing is effective:

- permissioning should be used to ensure duty holders control the most significant hazards and health effects determined by society
- the level of permissioning such as notification, approval or license, should be proportionate to the risk, with a defined and achievable safety benefit resulting from the duty placed on the regulator
- the making of regulations should include the criteria for all aspects of the permissioning regulation to enable simple administration
- the total cost of any permissioning regime should be borne by all parties (including the OHS regulator) to justify the intended benefit, and
- OHS regulators should maintain the integrity of any permissioning schemes implemented under model OHS laws.

Analysis & Evidence

When Victoria went through the process of consolidating its separate health and safety regulations to align with updated OHS Act, it gave extensive consideration to the issue of mutual recognition and whether Victoria should either extend existing provisions, or remove them altogether and leave it to the operation of the mutual recognition legislation.

Victoria decided to provide that persons holding interstate permissions automatically be able to work in Victoria without the need to notify and be licensed or registered in Victoria. The regulations also built in safeguards, to fall back on the mutual recognition law where necessary, and require notification and the need for licensing. This will enable action to occur quickly if integrity issues arose with another jurisdiction's scheme.

Victoria has worked with other jurisdictions to further mutual recognition and enhance harmonisation where possible. For example, Victoria consulted extensively with other

jurisdictions to ensure its new construction induction training would meet the requirements of other states so that Victorian-trained construction workers would not have to retrain if they wanted to work elsewhere.

Arguably, the mutual recognition legislation is now dated, and hence the COAG review into these arrangements. The processes set up in regard to many occupations so far still appear to require an intervention by the regulator in the jurisdiction being moved, which is not the intended outcome of mutual recognition.

It is important to note that the Commonwealth Government has undertaken an evaluation of COAG's initiative for full and effective mutual recognition of occupational licences. Decisions made by the Panel need to be mindful of this COAG initiative in ensuring consistency with the recommended outcome of its own review.

Victoria's Position

Victoria's position is that nationally agreed licensing and registration schemes are appropriate areas for formal mutual recognition provisions to be applied; however, these are more appropriately covered in model subordinate law, rather than in model primary law. The provisions should be specific to the regulated activity that falls within the scope of OHS regulations.

In Victoria, additional provisions to general mutual recognition law currently exist in regulations that allow automatic recognition of interstate licensing/permissioning. Such provisions complement mutual recognition because they allow persons holding interstate permissions to be able to work in Victoria without the need to notify the local authority or obtain a new license. If provision is made in the model OHS Act for this kind of arrangement, it would also be necessary to include safeguards to ensure jurisdictions can make case by case exceptions where there are concerns about fraud.

Victoria also considers that model OHS law should allow for permissioning schemes to be established via regulation.

9.7 Cross-jurisdictional Co-operation

9.8 Interaction of Federal and State laws

Q152: How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and state or territory OHS laws, or minimise the difficulties of such overlap?

Background

Victoria believes all Australian employers and workers need access to modern occupational health and safety laws administered in a uniform way, regardless of where they are located. This approach to less and simpler regulation was recommended by the Banks Report, *Reducing the Regulatory Burden on Business*, and is central to the COAG National Reform Agenda.

Analysis & Evidence

The changes to the Commonwealth *Occupational Health and Safety Act 1991* in March 2007, in particular the specific exclusion of the operation of State laws, accompanied by the increasing numbers of employers who have transferred to the Commonwealth scheme, have

brought the difficulties of overlap between the Commonwealth and State jurisdictions, into greater focus.

Far from reducing the regulatory burden on business, those corporations which have swapped schemes are now subject to two sets of safety regulation at their worksites where there was previously only one; as contractors and others on those sites remain subject to State safety laws.

There has been confusion regarding this overlap amongst stakeholders and duty holders as to jurisdictional boundaries, particularly in the context of different compliance and enforcement approaches. In Victoria's view, this is not an efficient use of Comcare's resources and is contrary to the cooperative relationship it seeks with Comcare (as evidenced by Victoria's efforts to strike an memorandum of understanding with Comcare).

In addition, a 'safety gap' has been created by virtue of the change in the nature of the workforce with which Comcare must now contend, and Comcare's limited resources and enforcement capacity.

By mid-2007, Comcare estimated that an additional 50,000 employees had joined the scheme's jurisdiction, including workers from national transport and construction companies; two blue collar industry sectors that traditionally show an above average incidence rate of workplace injury and fatality. The risk profile of these employees has also rapidly changed, with much riskier work now being carried out under Commonwealth OHS laws, compared to the type of work being undertaken by the predominantly white-collar public service employees Comcare was originally established to serve.

For example, the Comparative Performance Monitoring Report (9th Edition, February 2008) shows that during the year to June 2006, Victoria undertook 41,163 workplace interventions (27,834 of which were proactive), compared to Comcare's 189 (113 of which were proactive).

Another vital area where there is overlap or inconsistency concerns the approach to compliance. Victoria considers it vital that employers are provided with certainty and workers with the protection afforded by an adequately equipped inspectorate acting in a consistent and transparent way, whichever scheme applies at their workplace.

The Comcare compliance and enforcement model differs from state regimes in its traditional reliance on a cumbersome formal investigation model that delays enforcement action until after the compilation of statements and a report and approval by senior management. Investigators need to be equipped to respond to prevent injury, to make timely enquiries into hazardous situations and act quickly to enforce the law, as they currently do under the State-based schemes.

In the context of cross-border trade and transport, and projects that occur on or at a State border, again there can be confusion as to overlap and jurisdictional boundaries. There are also significant efficiencies and streamlining which can occur in such locations if legislative provisions permitted seamless prevention activities and enforcement by agreement between jurisdictions. Such provisions would be buttressed by a uniform or at the least, consistent enforcement approach by the respective jurisdictions and their regulators.

Victoria's Position

Victoria believes the model Act should provide for state-based enforcement of Commonwealth OHS laws.

The application of a single national compliance and enforcement policy, applying to all employers would provide both certainty and consistency in compliance and the enforcement of non-compliance with relevant safety laws.

This policy would be uniformly administered by state-based inspectors applying both the Commonwealth and state OHS laws. Such a cooperative arrangement between the Commonwealth and the States would enable consistent application of uniform general OHS duties at workplaces in the same industry and provide for efficiencies in the significant resources applied by state bodies to educate and assist employers to comply with OHS laws and standards.

The in-depth knowledge of the needs of industry and the predominant hazards and risks possessed by State regulators positions them as the most effective means of targeting known causes of injuries and disease.

The administration of the Commonwealth laws at the state level is not only feasible but desirable in Victoria's view and would address the Commonwealth's current perceived lack of capacity to effectively regulate safety across the increasing number of industries and hazards within its jurisdiction, along with its reliance on trust and voluntary compliance.

This framework will inevitably reduce complexity for employers, employees and regulators, by having a single inspectorate, and compliance and enforcement approach transparently applied in any given workplace. By doing so, it would effectively remove the 'safety gap' created by the Commonwealth's reforms to national OHS laws in March 2007.

Such cooperative arrangements would ensure:

- state-based inspectors are authorised to administer the Commonwealth OHS Act within their territorial boundaries and exercise the enforcement policy currently in place within the relevant state
- state-based inspectors can investigate safety breaches by *all* Comcare covered employers and refer matters to Comcare for prosecution. Any decision by Comcare to reject a recommendation to prosecute must be referred to the Commonwealth Director of Public Prosecutions for review
- the Commonwealth provides payments (based on an agreed schedule) to State authorities to account for the costs of both proactive and reactive compliance activity related to Comcare covered workplaces, and
- the Commonwealth provides State-based regulators with claims and injury data related to Comcare covered employers for strategic planning purposes.

In section 6.2 of this submission Victoria advocates that the model OHS Act make provision for state inspectors to be granted authority to exercise the authority and powers of other state regulators, with a view to maximising the ability of Australian OHS regulators to consistently apply OHS laws in Australian workplaces. In this context, the model Act should include provisions establishing the mechanisms that would allow agencies to not only share inspectors but to also provide strategic data, compliance information, and general intelligence and expertise that assists in enforcement.

Even if the Panel does not accept that part of Victoria's submission, the above cross-jurisdictional arrangements should be readily capable of implementation and would represent a significant operational improvement in the regulation of OHS in Australia.

Model OHS Laws Need Model OHS Regulators

As part of its submission to the panel, the Victorian Government has supported the inclusion of 'principles of health and safety protection' in the model OHS Act. These principles will be important in providing guidance to the Australian community as to how OHS regulators will administer the laws and the expectations of the legislature as to how duty holders should conduct themselves to ensure compliance with the model OHS Act.

Consistent with the position taken by the Victorian Government regarding the making of a single national OHS compliance & enforcement policy, Victoria believes that, as important as *what* is in the model Act is *how* it will be implemented and regulated locally. There is a danger that, by focussing on the detail of the model Act, governments, OHS regulators and their community partners will overlook the importance of ensuring that the necessary OHS support to employers, workers and other workplace parties is secured in a consistent, positive and professional way, wherever they are in Australia.

The Victorian Government strongly believes that concepts of prevention, equity, participation, co-operation and acceptance of responsibility should be reflected in these principles.

As part of his review of the Victorian OHS Act 1985, Chris Maxwell QC focussed on the importance of the OHS regulator transforming itself to become a better, modern OHS regulator. Specifically, and as a result of the Victorian Government's response to the Maxwell Review, WorkSafe went through a process of transformation, which included improving the capability of its inspectorate, focussing resources on providing support to workplace parties, and the implementation of a transparent internal review process for OHS decisions.

During this time, as the transformation of Victoria's OHS regulator has been taking place, the State's performance in OHS and the reduction in injured workers has been improving, to reach standards which are the safest in Australia.

The rate of workplace injuries has been reducing to the point where Victoria is the only state which has realistic prospects of meeting National OHS Strategy targets.¹⁶⁵ Victoria has achieved a significant reduction in the number of work-related fatalities at a time when hazardous industries such as construction and Major Hazard Facilities have been a key part of Victoria's economy. Victoria also has some of the lowest hospitalisation rates in the country, which is a key indicator of long-term/significant injuries.

At the same time, WorkSafe has been able to deliver five premium reductions since 2003/04.

In Victorian workplaces, employers and HSRs have been telling WorkSafe, in increasing numbers, they are highly satisfied with the WorkSafe inspectorate, with the advice they are receiving from inspectors on the road and with the OHS guidance WorkSafe produces. The Victorian community is also telling the Victorian Government that WorkSafe inspectors are fairer, more transparent and regarded more positively by workplace parties than they have been in the past.¹⁶⁶

Despite these excellent outcomes, the Victorian Government and WorkSafe acknowledge there is a long way for all states to go to reach the National Strategy targets. These targets will not be met by relying on the harmonisation of OHS legislation alone; it will be, in large

¹⁶⁵ Claims per 1,000 workers has reduced from 13.89 in 2001/02 to 11.32 in 2006/07.

¹⁶⁶ Sweeney Research, WorkSafe KPI Survey, November 2007.

part, about how governments and OHS regulators engage with the community to drive home the importance of working safely.

In Victoria's view, this means regulators being prepared to adopt multi-faceted strategic approaches, which are cognisant of the importance of understanding the needs, behaviours and attitudes of the people they are seeking to influence; and of achieving the right balance of support, encouragement and deterrence, and tailoring this to recognise that the balance may differ by industry and employer size. This strategic approach is about continuing to make OHS a community issue, and getting people to value OHS and the role that regulators can play in supporting and delivering better OHS outcomes. It's about regulators (and the new national body, once established) being prepared to develop better risk identification and prioritisation models, to stop new OHS hazards and risks arising before they occur.

Perhaps as importantly as any other initiative, it's about building a shared vision with the community partners, not only through the new national tripartite OHS body, but at a local level as well.

Victoria believes it is vital that OHS regulators in all jurisdictions commit to using their regulatory powers in a constructive, accountable, transparent and effective manner. This is in part the reasoning behind Victoria's support for a robust "internal review" process, and for the creation of a "duty to consult" within the model Act. In order to ensure compliance with the law, Victoria also believes it important that OHS regulators are able to employ experienced and well trained people, empowered, professional and capable of dealing with an OHS situation on its merits, wherever that situation may arise in Australia.

It is also important that local OHS regulators are able to be proactive and positive – and therefore able to identify and focus their resources on the areas of greatest risk and impact. Consistent with the approach taken by WorkSafe, the Victorian Government believes that the role of an OHS regulator should be to help people remain on the right side of the law by showing them how to comply, but that regulators must also ensure there are fair and swift consequences for those who do not comply with OHS laws. Ensuring there are consequences for non-compliance with OHS laws will, amongst other things, deliver a message to employers in particular about the importance of making proactive changes to OHS in their workplaces.

In summary, the key attributes of an effective OHS regulator are:

- It seeks to secure broad community support for the importance of OHS and the regulator's activities (through advertising, branding and sponsorships for example);
- It ensures the community values the regulator itself as a constructive, accountable, transparent, effective and caring organisation, and is able to track its performance in this respect by measuring client service and satisfaction and publishing these results;
- It is effective and measures its effectiveness by the reduction of injuries, fatalities, and, ultimately, OHS risk;
- It commits to educating and supporting duty holders so they know what to do to comply with the law (through the services of a professional inspectorate, and useable and technically correct guidance, codes, and solutions to identified OHS risks and hazards);
- It ensures there are swift consequences for non-compliance which the community believes are fair (through the development of transparent processes such as internal review of decisions, the publication of its prosecution policy, OHS research and by measuring community perceptions).

How OHS regulators conduct themselves and engage with their community and stakeholders has been proven to deliver tangible and improved OHS outcomes for businesses, workers and the community. Without this, the harmonising of OHS laws may prove to be nothing more than a paper exercise.

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