Australian Government

NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

FIRST REPORT

OCTOBER 2008

The Honourable Julia Gillard MP
Minister for Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

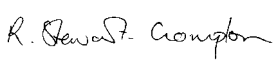
Dear Minister

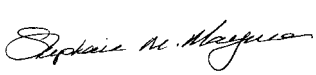
In accordance with clause 12 of the terms of reference for the National Review into Model Occupational Health and Safety (OHS) Laws, we submit to you, in your capacity as the Chair of the Workplace Relations Ministers' Council, our first report containing findings and recommendations on the optimal content of a model OHS Act in the following priority areas:

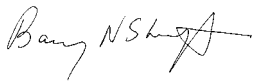
- duties of care, including the identification of duty holders and the scope and limits of duties; and
- the nature and structure of offences, including defences.

Our second report on all other matters relating to the optimal content of a model OHS Act will be submitted to the Workplace Relations Ministers' Council by 30 January 2009, as required under clause 13 of the terms of reference.

Yours sincerely







Robin Stewart-Crompton
(Chair)

Stephanie Mayman
(Panel member)

Barry Sherriff
(Panel member)

31 October 2008

Terms of Reference

Background

1 The health and safety of Australian workers is a key concern of Australian governments at all levels. All workers have the right to a safe and healthy workplace and employers have the right to expect that workers and visitors to their workplaces will cooperate with occupational health and safety (OHS) rules.

2 OHS regulation affects every workplace in Australia. All States, Territories and the Commonwealth have OHS laws that aim to prevent workplace death, injury and disease. Industry specific laws covering workplace safety and laws regulating particular hazards, for example the transport and storage of dangerous goods, also exist in certain jurisdictions.

3 All Australian governments have taken a broadly similar approach to regulating for safer workplaces. The approach involves a principal OHS Act codifying common law duties of care, supported by detailed regulations and codes of practice, and a system of education, inspection, advice, compliance activities and, where appropriate, prosecution.

4 Despite this commonality, there remain differences between jurisdictions as to the form, detail and substantive matters in OHS legislation, particularly in regard to duty holders and duties, defence mechanisms and compliance regimes, including penalties.

5 The importance of harmonised OHS laws has been recognised by the Council of Australian Governments, the Productivity Commission and the States and Territories in their work in this area to date.

6 The Australian Government has committed to work cooperatively with State and Territory governments to achieve the important reform of harmonised OHS legislation within five years. Following the recent meeting of the Workplace Relations Ministers' Council, all States and Territories have agreed to work together with the Commonwealth to develop and implement model OHS legislation as the most effective way to achieve harmonisation.

7 The model legislation will consist of a model principal OHS Act, supported by model regulations and model codes of practice that can be readily adopted in each jurisdiction.

8 Harmonising OHS laws in this way will cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties.

9 As the first step in this process the Australian Government has appointed an advisory panel to conduct a national review of current OHS legislation across all jurisdictions, and recommend to the Workplace Relations Ministers' Council the optimal structure and content of a model OHS Act.

Scope of the Review

10 The panel is asked to review OHS legislation in each State, Territory and Commonwealth jurisdiction for the purpose of making recommendations on the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions. The panel is asked to make its recommendations in two stages, to allow matters critical for harmonisation to be considered by the Workplace Relations Ministers' Council as a matter of priority (refer paragraphs 12 and 13).

11 In undertaking the review, the panel will:

a) examine the principal OHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency;

b) take into account relevant work already undertaken in this area by the Australian Safety and Compensation Council and others (including international developments), and consider recommendations from recent reviews commissioned by Australian governments relating to OHS laws;

c) take into account the changing nature of work and employment arrangements;

d) consult with business, governments, unions and other interested parties, and invite submissions from the public and other stakeholders on matters relating to the review; and

e) make recommendations on the optimal structure and content of a model OHS Act that promotes safe workplaces, increases certainty for duty holders, reduces compliance costs for business and provides greater clarity for regulators without compromising safety outcomes.

12 The panel should examine and make recommendations on the optimal content of a model OHS Act in the following areas as a matter of priority, and report to the Workplace Relations Ministers' Council by 31 October 2008:

a) duties of care, including the identification of duty holders and the scope and limits of duties;

b) the nature and structure of offences, including defences.

13 The review panel should also examine and make recommendations on the optimal content of a model OHS Act in the following areas, and report to the Workplace Relations Ministers' Council by 30 January 2009:

a) scope and coverage, including definitions;

b) workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;

c) enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;

d) regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional cooperation and dispute resolution;

e) permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;

f) the role of OHS regulatory agencies in providing education, advice and assistance to duty holders;

g) other matters the review panel identifies as being important to health and safety that should be addressed in a model OHS Act.

Principles for the Review

14 The review will be guided by the following principles:

a) an inclusive approach to the harmonisation process, where the concerns and suggestions of all jurisdictions and interested stakeholders are sought and properly considered;

b) that the development of model OHS legislation be accompanied by an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions;

c) consideration of the resource implications for all levels of government in administering harmonised laws;

d) the observance of the directive of the Council of Australian Governments that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns.

Methodology and timeframe

15 The review will be undertaken by:

a) Mr Robin Stewart-Crompton – Chair

b) Mr Barry Sherriff – Member

c) Ms Stephanie Mayman – Member.

16 The advisory panel will be supported by a secretariat resourced by the Commonwealth Department of Education, Employment and Workplace Relations. State and Territory governments may also provide practical support and assistance to the advisory panel.

17 The following timeframe will apply to the review:

Information gathering, research and consultation with key stakeholders	April – May 2008
Publish issues paper and invite submissions	May 2008
Provide a progress report to Workplace Relations Ministers' Council meeting	May 2008 (expected)
Provide report and recommendations to Workplace Relations Ministers' Council on priority areas outlined in paragraph 12 (duties of care and the nature and structure of offences)	31 October 2008
Provide report and recommendations to Workplace Relations Ministers' Council on remaining matters	30 January 2009

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Abbreviations

ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACT	Australian Capital Territory
ACT Act	*Work Safety Act 2008* (ACT)
ACT Review	ACT *Occupational Health and Safety Act 1989*: Scope and Structure Review (2005)
ACTU	Australian Council of Trade Unions
AICD	Australian Institute of Company Directors
AiG	Australian Industry Group
AMMA	Australian Mines and Metals Association
APESMA	Association of Professional Engineers, Scientists and Managers Australia
AQTF	Australian Qualifications Training Framework
ASCC	Australian Safety and Compensation Council
ATC	Australian Transport Council
BCA	Business Council of Australia
CAR	Confirmation of Advice Record
CCI WA	Chamber of Commerce and Industry Western Australia
CCF	Civil Contractors Federation
CEPU	Communications, Electrical and Plumbing Union
CFMEU	Construction Forestry Mining and Energy Union
CMEWA	Chamber of Minerals and Energy of WA
COAG	Council of Australian Governments
CPSU/SPSF Group	Community and Public Sector Union, State Public Services Federation Group
Cwth	Commonwealth
Commonwealth Act	*Occupational Health and Safety Act 1991* (Cwth)
Commonwealth WR Act	*Workplace Relations Act 1996* (Cwth)
DEEWR	Department of Education, Employment and Workplace Relations (Cwth)
DOCEP	Department of Consumer and Employment Protection (WA)
DPP	Director of Public Prosecutions
EEA(SA)	Engineering Employers Association South Australia
ENA	Energy Network Association

ETU	Electrical Trades Union
HIA	Housing Industry Association
HSC	Health and Safety Committee
HSE	Health and Safety Executive (UK)
HSR	Health and Safety Representative
IALI	International Association of Labour Inspection
IC	Industry Commission
IC Report	Industry Commission Inquiry Report: Work, Health and Safety (1995)
ILO	International Labour Organization
IR	Industrial Relations
Laing Review	Review of the *Occupational Health and Safety Act 1984* (WA) (2002), R Laing
Laing Review (Mine safety)	Final report: Review of the *Mines Safety and Inspection Act 1994*, (WA) R Laing
LPP	Legal professional privilege
Maxwell Review	Victorian *Occupational Health and Safety Act* Review (2004), C Maxwell
MBA	Master Builders Australia
MCA	Minerals Council of Australia
McCallum Review	Advice in relation to workplace death, occupational health and safety legislation & other matters - Report to WorkCover Authority of NSW (2004), R McCallum
MCE	Ministerial Council on Energy
MCMPR	Ministerial Council on Mineral and Petroleum Resources
MPMSAA	Master Plumbers' and Mechanical Services Association of Australia
National OHS Strategy	National Occupational Health and Safety Strategy 2002-2012
NMSF	National Mine Safety Framework
NOPSA	National Offshore Petroleum Safety Authority
NSW	New South Wales
NSW Act	*Occupational Health and Safety Act 2000* (NSW)
NSW Regulations	Occupational Helath and Safety Regulations 2001 (NSW)
NSW WorkCover Review	Report on the Review of the *Occupational Health and Safety Act 2000* (2006)
NSW IR Act	*Industrial Relations Act 1996* (NSW)
NT	Northern Territory
NT Act	*Workplace Health and Safety Act 2007* (NT)
NT Review	Review of the NT *Work Health Act and Mining Management Act* (2007)

NTC	National Transport Commission
NZ	New Zealand
NZ Act	*Health and Safety in Employment Act 1992* (NZ)
OECD	Organisation for Economic Cooperation and Development
OHS	Occupational Health and Safety
OPP	Office of Public Prosecutions
PC	Productivity Commission (previously the Industry Commission)
PIN	Provisional Improvement Notice
Qld	Queensland
Qld Act	*Workplace Health and Safety Act 1995* (Qld)
Qld Review	Review of the *Workplace Health and Safety Act 1995*, (2001), Crittall J.
Robens Report	Report of the Committee on Safety and Health at Work (1972), Lord Robens
SA	South Australia
SA Act	*Occupational Health, Safety and Welfare Act 1986* (SA)
SA Review	Review of Workers Compensation and Occupational Health Safety and Welfare Systems in South Australia (2002)
Stein Inquiry	Inquiry into the Review of the *Occupational Health and Safety Act 2000* (2007)
Tas	Tasmania
Tas Act	*Workplace Health and Safety Act 1995* (Tas)
Tas Review	Safe from Injuries and Risks to Health: Review of Workplace Health and Safety in Tasmania – 2006 Interim Report (2007)
UK	United Kingdom
UK Act	*Health and Safety at Work etc Act 1974* (UK)
VACC	Victorian Automobile Chamber of Commerce
VECCI	Victorian Employers Chamber of Commerce and Industry
Vic	Victoria
Vic Act	*Occupational Health and Safety Act 2004* (Vic)
Vic Administrative Review	A Report on the *Occupational Health and Safety Act 2004* – Administrative Review (2007)
WA	Western Australia
WA Act	*Occupational Safety and Health Act 1984* (WA)
WA Review	Final Report: Review of the *Occupational Health and Safety Act 1984* (2006), R Hooker
WA IR Act	*Industrial Relations Act 1979* (WA)
WHSO	Workplace Health and Safety Officer
WR	Workplace Relations
WRMC	Workplace Relations Ministers' Council

Preface

OHS regulation affects every workplace in Australia and aims to prevent workplace death, injury and disease. The OHS legislative framework must provide an effective foundation to achieve the ongoing improvements nationally agreed to in Australia's National OHS Strategy and must be capable of doing so in a rapidly changing world of work.

The legislative framework must also reflect Australia's commitment to the International Labour Organization's (ILO) *Occupational Safety and Health Convention 1981* (C155).[1] Our recommendations take account of Australia's obligations under C155 and are consistent with the ILO's 2003 *Global Strategy on Occupational Safety and Health*.[2]

Our terms of reference reflect the principles of harmonisation, including enhanced health and safety standards, greater regulatory efficiency and effectiveness, more certainty for duty holders and the elimination of unnecessary regulatory compliance burdens.

The review provides an opportunity to create legislation which clarifies the roles of various parties and accommodates changes in the nature of work, to ultimately improve OHS outcomes in workplaces across Australia.

In conducting this review, we have been guided by the scope and principles set out in the terms of reference. We are required to make our recommendations in two stages, to allow matters critical for harmonisation to be considered by the Workplace Relations Ministers' Council (WRMC) as a matter of priority.

Our first report focuses on the priority areas specified in clause 12 of our terms of reference:

a) duties of care, including the identification of duty holders and the scope and limits of duties; and

b) the nature and structure of offences, including defences.

Our second report is to be provided to the WRMC by 30 January 2009. It will cover other matters relevant for a model OHS Act. These are specified in clause 13 of our terms of reference.

In combination, the two reports will provide all our recommendations for the optimal content of a model Act.

It is therefore important to consider the reports together in order to gain a better understanding of the overall balance of our proposals. We aim to assist all interested persons to achieve the best OHS results when the proposed model Act is implemented.

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1 Ratified by Australia on 26 March 2004.

2 Conclusions adopted by the International Labour Conference at its 91st Session, 2003.

We consider that the model Act should build on the successful approach of supporting a continuum of methods for achieving the best OHS results. Overall, these will range from facilitating voluntary cooperative measures to ensure a safe and healthy working environment through to effective means of compelling compliance with the statutory obligations. Many provisions of the model Act will be complementary and inter-related, both as a result of this approach and for technical reasons. For example, the second report is to contain recommendations regarding the scope and coverage, including definitions, of a model Act, which are also essential for the duties of care and offences.

We have conducted extensive consultations in each jurisdiction, attending over 80 meetings. In the course of these meetings we spoke to more than 260 individuals representing over 100 organisations, including regulators, union and employer organisations, industry representatives, legal professionals, academics and health and safety professionals. We also received 243 written submissions providing a rich source of ideas and information.

Throughout the consultation process, we invited stakeholders to express their views in a forthright and constructive manner. The well-considered responses and enthusiastic support for our review are proving to be invaluable in shaping our recommendations.

Acknowledgments

We are grateful to the many representatives of various organisations and the individuals who took the time to meet with us and provide submissions during the Review. Due to time constraints, we regret that we have not been able to provide more detailed information about the content of the submissions in this report. However, we strongly recommend that all interested persons refer to the submissions which can be found on the review website at: www.nationalohsreview.gov.au.

The number of submissions received exceeded our expectations and highlights the importance for all concerned in achieving uniform OHS laws across Australia that lead to better OHS outcomes.

We also wish to record our appreciation for the valuable assistance and cooperation provided by the secretariat in the Department of Education, Employment and Workplace Relations (DEEWR).

Summary

The main aim of OHS legislation is to protect the health and safety of persons at work or affected by work. OHS legislation should be designed to facilitate, support and secure that protection.

Our first report focuses on the priority areas in clause 12 of our terms of reference, being:

a) duties of care, including the identification of duty holders and the scope and limits of duties;

b) the nature and structure of offences, including defences.

The protection of health and safety should be enabled by statutory duties of care and other obligations, which are imposed on those who cause work to be performed and contribute to the processes and means for work to be undertaken.

Our first report has five parts. Our recommendations relating to the optimal content of a model Act commence in Part 2. In each chapter, we examine the current arrangements in OHS laws, highlighting areas of inconsistency. We also refer to the submissions we received and the comments and advice provided to us during consultation. We then discuss the options and our reasons for making our recommendations, and note any related areas that will be the subject of our second report. A table of our first 75 recommendations, identified by Part and chapter, follows this summary and should be read with it.

Part 1: The Regulatory Context *(Chapters 1–3)*

Part 1 sets the scene for our review. We briefly describe how Australia's OHS laws have developed since the introduction of Robens-style legislation in Australia over 25 years ago. Since 1995, there have been two national reviews of OHS and all jurisdictions have undertaken reviews of their principal OHS Acts. These considered many of the matters that are in our terms of reference. The reports of the reviews have given us a useful source of information and analysis.

OHS legislation must have wide coverage, so that it applies to all hazards and risks arising from the conduct of work and imposes appropriate duties on those who are in a position to eliminate the hazards or control those risks. We therefore examine in some detail, the significant changes that have occurred to the labour market and the nature and organisation of work in Australia, such as the growth in casual, part-time and temporary work, outsourcing, the use of labour hire, migrant workers and home workers. There is a body of evidence showing that such atypical forms of employment can adversely affect health and safety outcomes and that the regulatory regime has not kept pace with these changes.

Changes, not only in work relationships, but also in the types of OHS hazards and risks, will continue to occur, and a model OHS Act should be able to accommodate such new and evolving circumstances without requiring frequent amendments to meet them.

We also note that there has been a gradual reduction in both the number and incidence rate of compensated work-related injuries and fatalities since the beginning of the decade, but the number of Australians killed and injured each year remains unacceptably high. Each year over 140,000 Australians are seriously injured at work, more than 250 are killed and it is estimated that over 2000 die as a result of work-related disease. The social and economic costs are immense.

Part 2: The Duties of Care *(Chapters 4–9; R.1–49)*

Part 2 of this report discusses the duties of care to be included in the model Act, including the identification of duty holders and the scope and limits of duties. In Shapter 6, we make detailed recommendations about the holders of the primary duty of care. Chapter 7 contains our examination of issues concerning specific classes of duty holders, other than officers (dealt with in Chapter 8) and workers and other persons (Chapter 9).

In making our recommendations, we are concerned that the model Act provides for:

- as broad a coverage as possible, to ensure that the duties of care deal with emerging and future hazards and risks and changes to work and work arrangements;
- clarity of expression, to ensure certainty in the identification of the duty holders and that they can understand the obligations placed upon them; and
- the interpretation and application of the duties of care consistent with the protection of health and safety.

We therefore propose that the model Act include a set of principles, which will, amongst other things, guide duty holders, regulators and the courts on interpreting and applying the duties of care. There would also be a provision dealing with the common features of the duties. Duties of care should be non-delegable, and more than one person may concurrently have the same duty.

We recommend that there be a primary (or general) duty of care imposed on any person who conducts a business or undertaking (whether as an employer, self-employed person, principal contractor or otherwise) for the health and safety of:

- 'workers' within an expanded definition; and
- others who may be put at risk by the conduct of the business or undertaking.

This expression of the primary duty of care would cover new and evolving work arrangements and extend the duty beyond the traditional employer and employee relationship. Therefore, a duty for 'employers' to 'employees' would no longer be needed.

There is a range of specific classes of persons who we consider should have duties of care under a model Act. These persons include:

- those with management or control of workplace areas;
- designers of plant, substances and structures;
- manufacturers of plant, substances and structures;
- builders, erectors and installers of structures;
- suppliers and importers of plant, substances and structures;
- OHS service providers;
- officers;
- workers; and
- other persons at the workplace.

Each duty of care of care should be qualified by what is 'reasonably practicable', apart from duties of care of workers and other persons at the workplace (which should be qualified by 'reasonable care') and officers of organisations (which should be qualified by 'due diligence').

We consider that 'reasonably practicable' is an effective qualifier of the duty of care, and that it is more transparent for it to be contained within the duty of care than provided as a defence. This is significant as the qualifier provides for the reasonableness of the duty and the ability of duty holders to comply with their duties of care. Placing the qualifier elsewhere than in the duty may lead to a perception that the duty is not qualified and is unachievable. That may discourage a duty holder from taking steps to achieve compliance.

The model Act should define 'reasonably practicable' (but not include 'control' in the definition) to assist the duty holder to understand what is required to comply with the duty of care. The term should be explained in a code of practice or other guidance material.

The model Act should also place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act. These persons may, in providing the services, influence decisions that are critical to health and safety in relation to a specific activity, or across an organisation (e.g. advising on governance structures, safety policies or systems).

We propose that officers of an organisation should have a positive duty to exercise due diligence to ensure their organisation complies with its duties of care, having regard to the officers' responsibilities and position. Currently, a breach of a duty of care by an organisation is usually attributed to officers without any positive duty placed on them. The duty would make clear that the officer must be proactive in taking steps to ensure compliance by the organisation.

Using a wide definition of 'worker', we recommend that workers should have a duty of care to themselves at work and to others who may be affected by the workers' acts and

omissions. They should also cooperate with reasonable action taken by a person conducting the business or undertaking to comply with the model Act. There should also be a limited duty of care on others at a workplace.

Part 3: Offences relating to breaches of duties of care *(Chapters 10–12; R.50–61)*

In Part 3, we discuss the nature and structure of offences relating to the duties of care. We conclude that the offences should be criminal, not civil, and should continue to be 'absolute liability' offences, subject to the qualifiers on the duties that we recommend earlier.

We propose making sanctions more related to culpability for breaches than to their outcomes, as well as more effective in terms of deterrence.

We propose three categories of offences. *Category 1* would relate to the most serious cases of non-compliance, involving recklessness or gross negligence and serious harm (fatality or serious injury) to a person or a risk of such harm. *Category 2* would deal with serious harm or the risk of it without recklessness or negligence. *Category 3* would apply to other breaches.

We recommend that the most serious breaches should be indictable offences (permitting trial by judge and jury) as in Victoria and South Australia.

We recommend significant increases in fines. These would be aligned with the three categories of offences. The highest fines would apply to *Category 1* breaches of the primary duty of care or of the duty held by a specified class of duty holder (other than officers, workers and other persons).

Reflecting the very high level of risk and culpability in a *Category 1* offence, the maximum fine for a corporation would be $3 million and the maximum fine for an individual would be $0.6 million. Imprisonment for up to five years could also be imposed on an individual for a *Category 1* offence.

A *Category 2* breach of the primary duty or of a duty held by a specified class of duty holder (other than officers, workers and other persons) would be subject to a maximum fine of $1.5 million for a corporation and $0.5 million for an individual.

A *Category 3* offence, for a breach of the above-mentioned duties that does not involve serious harm or the risk of serious harm, would be subject to a maximum fine of $0.5 million for a corporation and $0.1 million for an individual.

There would similarly be three categories of offence and penalties for breaches of the positive duty of care that we recommend for officers. The three categories would have the same criteria as for the offences described above. The fines would, however, be lower,

reflecting the lesser capacity of an officer to eliminate hazards and reduce risks. The maximum fine for a *Category 1* breach (gross negligence or recklessness and serious harm or risk of serious harm) of an officer's positive duty would be $0.6 million. There could also be a sentence of imprisonment for up to 5 years. The maximum fine for a *Category 2* breach (serious harm or the risk of serious harm) of an officer's positive duty would be $0.3 million and the maximum fine for a *Category 3* breach would be $0.1 million.

As mentioned above, we recommend a duty of care for workers and others who are at a workplace. Again, reflecting the lower level of influence of such persons, the penalties for the three categories of offence would be lower. For a *Category 1* breach (gross negligence or recklessness and serious harm or risk of serious harm) of the duty of care of a worker or other person, the maximum fine would be $0.3 million. A sentence of imprisonment for 5 years could be imposed. For a *Category 2* breach (serious harm or the risk of serious harm), the maximum fine would be $0.15 million and for a *Category 3* breach, the maximum fine would be $0.05 million.

In addition to monetary fines, there should be more sentencing options (remedial orders, adverse publicity orders, training orders, injunctions, compensation orders, community service orders, corporate probation). No jurisdiction presently provides all of them.

Part 4: Other matters relevant to duty of care offences *(Chapters 13–18; R.62–74)*

Part 4 of our report addresses the burden of proof, appeals, limits on prosecutions, guidance on sentencing, and proposals to avoid duplicity and double jeopardy.

We recommend that the prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care. In reaching this conclusion, we have carefully considered the differing views that were put to us, the reasoning in previous reviews and current practice. We also took into account the fact that we recommend substantial increases in the size and range of penalties, and that, in our second report, we will address how the regulators should have strong and wide-ranging investigatory powers.

To reinforce the continuing consistency of harmonised OHS laws, we recommend that an appeal should ultimately lie to the High Court of Australia from the courts in each jurisdiction (recognising that some adjustment may be required to the processes for appeal in NSW and Queensland).

We propose that there be common limitation periods for initiating prosecutions for breaches of duties of care, and that action be taken to develop consistent sentencing guidelines and processes for presenting victim impact statements to courts in appropriate circumstances.

We recommend that the model Act contain provisions to ensure that a complaint or indictment can contain all of the details that show how a pattern of conduct has breached a duty of care (to avoid legal complications from the application of the law relating to 'duplicity'). We also propose that the model Act clearly state that no one can be subject to 'double jeopardy'.

We also recommend that there should be no Crown immunity, so that the Crown in all jurisdictions would be subject to the same duties and sanctions as all other duty holders.

Part 5: Defences *(Chapter 19; R.75)*

Because of our recommendations about the duties of care, the place of reasonable practicability, etc, in qualifying the duties and the onus of proof in prosecutions, we have not recommended that the model Act expressly provide for defences.

Second Report

As we note in the preface, many provisions of the model Act are complementary or inter-connected, so that the overall balance of our recommendations will not be clear until our second report is submitted at the end of January 2009. At that time our recommendations should be considered as the basis for an integrated and complete model Act.

Table of Recommendations

Recommendations—First Report

Chapter 4: Principles, common features and structure		Reference
1	The model Act should contain a set of principles including, amongst other things, the following to guide duty holders, regulators and the courts on the interpretation and application of the duties of care: a) Duties of care are imposed on those who are involved in, materially affect, or are materially affected by, the performance of work. b) All duty holders (other than workers, officers and others at the workplace) must eliminate or reduce hazards or risks so far as is reasonably practicable. c) Workers and other individuals at the workplace must cooperate with persons conducting businesses or undertakings at the workplace, to assist in achievement of the objective of elimination or reduction of hazards or risks and must take reasonable care for themselves and others. d) Officers must proactively take steps to ensure the objective of elimination or reduction of hazards or risks is achieved within their organisation. ***Note:*** *Recommendations relating to principles other than those relating to the interpretation of the duties of care will be dealt with in our second report.*	Page 23
2	The model Act should include provisions explicitly providing for the following common features applicable to all duties of care: a) Duties of care are non-delegable. b) A person can have more than one duty by virtue of being in more than one class of duty holder and no duty restricts another. c) More than one person may concurrently have the same duty. d) Each duty holder must comply with an applicable duty to the required standard (reasonably practicable, due diligence or reasonable care) notwithstanding that another duty holder has the same duty.	Page 25

	e) Each duty holder must comply with an applicable duty to the extent to which the duty holder has control over relevant matters, or would have had control if not for an agreement or arrangement purporting to limit or remove that control. f) Each duty holder must consult, and cooperate and co-ordinate activities, with all persons having a duty in relation to the same matter.	
3	The model Act should adopt an approach whereby: a) the duty of care provisions together impose duties on all persons who by their conduct may cause, or contribute in a specified way, to risks to the health or safety of any person from the conduct of a business or undertaking; b) the duties of care are focused on the undertaking of work and activities that contribute to its being done, and are not limited to the workplace (except where a duty relates specifically to the workplace or things within it, or the limitation is needed to place reasonable limits on the duty – e.g. the duty of care of a worker or visitor); c) there is a primary (general) duty of care imposed on the person conducting a business or undertaking (whether as an employer, self-employed person, principal contractor or otherwise) for the health and safety of— i) 'workers' within an expanded definition, and ii) others who may be put at a risk to their health or safety by the conduct of the business or undertaking; and	Page 34

3	d) even though many of the following persons will be covered by the primary duty of care of a person conducting a business or undertaking, for certainty and to provide guidance through more detailed requirements, duties of care should be imposed on specified classes of duty holders who are involved in the undertaking of work or activities that contribute to it being done, or are present when work is being done. These are: i) those with management or control of workplace areas; ii) designers of plant, substances and structures; iii) manufacturers of plant, substances and structures; iv) builders, erectors and installers of structures; v) suppliers and importers of plant, substances and structures; vi) OHS service providers; vii) officers; viii) workers; and ix) other persons.	
Chapter 5: 'Reasonably practicable' and risk management		**Reference**
4	'Reasonably practicable' should be used to qualify the duties of care, by inclusion of that expression in each duty of care, except for the duties of officers, workers and other persons for whom different qualifiers are proposed.	Page 42
5	'Reasonably practicable' should be defined in the model Act.	Page 43
6	'Reasonably practicable' should be defined in the model Act in a way which allows a duty holder to understand what is required to meet the standard. ***Note:*** *Our example clause is provided at paragraph 5.55.*	Page 44
7	The meaning and application of the standard of reasonably practicable should be explained in a code of practice or guidance material.	Page 44
8	'Control' should not be included in the definition of 'reasonably practicable'.	Page 46

9	The principles of risk management should: a) be identified in a part of the model Act setting out the fundamental principles applicable to the model Act; b) while implied in the definition of 'reasonably practicable', not be expressly required to be applied as part of the qualifier of 'reasonably practicable'; and c) not be expressly required to be applied by the duties of care. ***Note:*** *The principles will be dealt with in our second report*.	Page 47
Chapter 6: The primary duty of care		**Reference**
10	The model Act should provide in a single section a primary duty of care owed by a person conducting a business or undertaking to a broad category of 'workers' and others.	Page 62
11	To ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships and arrangements, the duty should not be limited to employment relationships. The duty holder is any person conducting the business or undertaking.	Page 63
12	The primary duty of care should clearly provide, directly or through defined terms, that it applies to any person conducting a business or undertaking, whether as: a) an employer; or b) a self-employed person; or c) the Crown in any capacity; or d) a person in any other capacity; and whether or not the business or undertaking is conducted for gain or reward.	Page 64
13	The primary duty of care should exclude workers and officers to the extent that they are not conducting a business or undertaking in their own right. Alternatively, guidance material should make clear that the primary duty of care is not owed by such persons.	Page 66
14	The primary duty of care should not include express reference to 'control'.	Page 68
15	The primary duty of care should be sufficiently broad so as to apply to all persons conducting a business or undertaking, even where they are doing so as part of, or together with, another business or undertaking.	Page 70

16	The model Act should include a definition for 'worker' that allows broad coverage of the primary duty of care. The definition of 'worker' should extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.	Page 71
17	The primary duty of care should not be limited to the workplace, but apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking.	Page 72
18	To avoid the exclusion or limitation of the primary duty of care, the model Act should specifically provide that the duty should apply without limitation, notwithstanding anything provided elsewhere in the model Act (that is, more specific duties that may also apply in the circumstances should not exclude or limit the primary duty of care).	Page 74
19	The primary duty of care should include specific obligations, namely ensuring so far as is reasonably practicable that: a) the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health or safety of any person; b) the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances; c) each workplace under the control or management of the business operator is maintained in a condition that is safe and without risks to health; d) the provision of adequate welfare facilities; and e) the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their safety and health from the conduct of the business or undertaking.	Page 76
20	The model Act should extend the primary duty of care to circumstances where the primary duty holder provides accommodation to a worker, in circumstances where it is necessary to do so to enable the worker to undertake work in the business or undertaking (along the lines of that currently found in Part III, Division 4 of the WA Act). Detailed requirements and the specified scope should be contained in regulations.	Page 78
21	In giving effect to the recommendations relating to the primary duty of care, the proposed model clause at paragraph 6.125 should be taken into account.	Page 79

22	The primary duty of care should be supported by codes of practice or guidance material to explain the scope of its operation and what is needed to comply with the duty.	Page 80
Chapter 7: Specific classes of duty holders		**Reference**
23	The model Act should include a specific duty of care owed by a person with management or control of the workplace, fixtures, fittings or plant within it to ensure that the workplace, the means of entering and exiting the workplace, and any fixtures, fittings and plant within the workplace are safe and without risks to health and safety.	Page 85
24	The model Act should define 'management or control' of the workplace, fixtures, fittings and plant to make it clear who owes the duty of care. ***Note:*** *A definition of 'management or control' will be provided in our second report.*	Page 86
25	The duty should make it clear that more than one person can have management or control of the same matter at the same time or at different times. The duty should be placed on a person who has, to any extent, management or control of: a) a relevant workplace area (or part thereof); b) any area adjacent to a relevant workplace area; c) fixtures; d) fittings; or e) plant.	Page 87
26	The duty of care should be owed to any person at the workplace or any adjacent areas.	Page 87
27	The duty of care of a person with management or control of a workplace etc should be qualified by the standard of 'reasonably practicable'.	Page 87
28	Domestic premises should be excluded from the definition of a 'workplace' for the purposes of the duty of care of the person with management or control unless specifically included by regulation. ***Note:*** *'Workplace' will be defined in our second report.*	Page 89
29	The model Act should provide for separate duties of care owed by specific classes of persons undertaking activities, as noted in Recommendation 30, in relation to plant, substances or structures intended for use at work.	Page 94

30	The model Act should place specific duties of care on the following classes of persons: a) designers of plant, structures or substances; b) manufacturers of plant, structures or substances; c) builders, erectors or installers of structures; and d) importers or suppliers of plant, structures or substances.	Page 96
31	The duty of care would be to ensure that the health and safety of those contributing to the use of, using, otherwise dealing with or affected by the use of plant, structures or substances is not put at risk from the particular activity of: a) construction; b) erection; c) installation; d) building; e) commissioning; f) inspection; g) storage; h) transport; i) operating; j) assembling; k) cleaning; l) maintenance or repair; m) decommissioning; n) disposal; o) dismantling; or p) recycling.	Page 96
32	The duties of care should apply in relation to any reasonably foreseeable activity undertaken for the purpose for which the plant, structure or substance was intended to be used (e.g. construction, installation, use, maintenance or repair).	Page 98
33	The duties of care are owed to those persons using or otherwise dealing with (e.g. constructing, maintaining, transporting, storing, repairing), or whose health or safety may be affected by, the use of the plant, substance or structure.	Page 98

34	The specific duties of care should incorporate broad requirements for: a) hazard identification, risk assessment and risk control; b) appropriate testing and examination to identify any hazards and risks; c) the provision of information to the person to whom the plant, structure or substance is provided about the hazards, risks and risk control measures; and d) the ongoing provision of any additional information as it becomes available.	Page 99
35	The model Act should include a definition of 'supply'. ***Note:*** *The definition of 'supply' will be dealt with in our second report.*	Page 100
36	The model Act should exclude passive financiers from the application of the duty of care of a supplier. ***Note:*** *Passive financiers are persons who may own the plant, structure or substance concerned only for the purpose of financing its acquisition.*	Page 101
37	The model Act should place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act.	Page 103
38	The model Act should include a definition of a 'relevant service' and a 'service provider' to make it clear what activities fall within the duty and who owes the duty. The definition will be discussed in our second report.	Page 103
39	The duty of care should require the service provider to ensure so far as is reasonably practicable that no person at work is exposed to a risk to their health or safety from the provision of the services.	Page 103
Chapter 8: Duties of 'officers'		**Reference**
40	The model Act should place a positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care of that entity under the model Act.	Page 109
41	For the purposes of the model Act, 'officers' should be those persons who act for, influence or make decisions for the management of the relevant entity. ***Note:*** *The definition of 'officers' will be dealt with in our second report.*	Page 112

42	The provision should apply to officers of a corporation, unincorporated association, or partnership or equivalent persons representing the Crown. Note: These terms will be defined in our second report.	Page 112
43	If our preferred position in recommendation 40 for a positive duty for officers and associated recommendations is not accepted, we recommend that provisions based on s.144 and s.145 of the Victorian *OHS Act 2004* be adopted in the model Act.	Page 112
Chapter 9: Duties of care owed by workers and others		**Reference**
44	The model Act should place on all persons carrying out work activities ('workers') a duty of care to themselves and any other person whose health or safety may be affected by the conduct or omissions of the worker at work.	Page 116
45	The duty of care should be placed on 'workers', defined in a way as to cover all persons who are carrying out work activities in a business or undertaking. ***Note:*** *The definition of 'worker' is to be dealt with in our second report.*	Page 116
46	The duty of care should require workers to: a) take reasonable care for their own health and safety; b) take reasonable care that their acts and omissions do not adversely affect the health or safety of others; and c) cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act.	Page 117
47	The workers' duty of care should be qualified by the standard of 'reasonable care' being the standard applied for negligence under the criminal law.	Page 117
48	The model Act should place a limited duty of care on other persons present at a workplace (not being a worker or other duty holder under the model Act) involved in work activity: a) to take reasonable care for their own health and safety; and b) to take reasonable care that their acts and omissions do not adversely affect the health and safety of others; and c) to cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act.	Page 118
49	The duty of care of such other persons present at the workplace should be qualified by the standard of 'reasonable care', being the standard applied for negligence under the criminal law.	Page 118

Chapter 10: The nature of OHS offences – General features		Reference
50	To emphasise the seriousness of the obligations and to strengthen their deterrent value, breaches of duties of care should only be criminal offences, with the prosecution bearing the criminal standard of proof for all the elements of the offence. ***Note:*** *We discuss and make a recommendation about the onus of proof in Chapter 13 and in Recommendation 62.*	Page 123
51	Penalties should be clearly related to non-compliance with a duty, the culpability of the offender and the level of risk, not merely the actual consequences of the breach.	Page 124
52	Offences for a breach of a duty of care should continue to be absolute liability offences, and clearly expressed as such, subject to the qualifier of 'reasonable practicability', 'due diligence' or 'reasonable care', as recommended earlier.	Page 125
Chapter 11: Types of offences		**Reference**
53	Prosecutions for the most serious breaches (i.e. Category 1 offences, see Recommendation 55) should be brought on indictment, with other offences dealt with summarily.	Page 128
54	There should be provision for indictable offences to be dealt with summarily where the Court decides that it is appropriate and the defendant agrees.	Page 128
55	There should be three categories of offences for each type of duty of care: a) Category 1 for the most serious breaches, where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent; b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness or gross negligence; and c) Category 3 for a breach of the duty without the aggravating factors present in the first two categories; with maximum penalties that— a) relate to the seriousness of the breach in terms of risk and the offender's culpability, b) strengthen the deterrent effect of the offences, and c) allow the courts to impose more meaningful penalties, where that is appropriate.	Page 130

56	The model Act should provide that in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was serious harm (fatality or serious injury) to any person or a high risk of such harm, the highest of the penalties under the Act should apply, including imprisonment for up to five years. ***Note:*** *This would be a Category 1 case in our recommended 3 category system. Recommendation 57 proposes a range of penalties for each category and for the holders of the various recommended types of duty.*	Page 135
Chapter 12: Sentences for breaches of duties of care		**Reference**
57	The model Act should provide for the penalties for Category 1, 2 and 3 offences relating to duties of care, as set out in Tables 11, 12 and 13.	Page 143
58	The model Act should separately specify the penalties for natural persons and corporations, with the maximum fine for non-compliance by a corporation being five times the maximum fine for a natural person.	Page 143
59	The model Act should provide for custodial sentences for individuals for up to five years in circumstances (Category 1 offence) where: a) there was a breach of a duty of care where there was serious harm to a person (fatality or serious injury) or a high risk of serious harm; and b) the duty holder has been reckless or grossly negligent.	Page 144
60	In light of our other recommendations for higher maximum penalties and a greater range of sentencing options, the model Act should not provide for a further penalty for a repeat offender.	Page 146
61	The model Act should provide for the following sentencing options in addition to fines and custodial sentences: a) adverse publicity orders; b) remedial orders; c) corporate probation; d) community service orders; e) injunctions; f) training orders; and g) compensation orders. ***Note:*** *We support making provision for enforceable undertakings but they are dealt with in our second report to allow a full examination of the options, including providing for such an undertaking as an alternative to a prosecution and as a sentencing option.*	Page 149

Chapter 13: Burden of proof		Reference
62	The prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.	Page 155
Chapter 14: Appeals		**Reference**
63	The model Act should provide for a system of appeals against a finding of guilt in a prosecution, ultimately to the High Court of Australia, commencing with an application for leave to appeal to the Supreme Court.	Page 158
64	The model Act should not provide for appeals from acquittals.	Page 158
Chapter 15: Limits on prosecutions		**Reference**
65	Crown immunity should not be provided for in the model Act.	Page 160
66	Prosecutions for non-compliance with duties of care should be commenced within two years of whichever is the latest of the following: a) the occurrence of the offence; or b) the offence coming to the regulator's notice; or within 1 year of a finding in a coronial proceeding or another official inquiry that an offence has occurred.	Page 162
Chapter 16: Guidance on sentencing		**Reference**
67	The model Act should provide for or facilitate the presentation of a victim impact statement to any court that is hearing a Category 1 or Category 2 case of non-compliance with a duty of care, including by or on behalf of surviving family members or dependants.	Page 164
68	Subject to wider criminal justice policy considerations, the model Act should provide for the promulgation of sentencing guidelines or, where there are applicable sentencing guidelines, they should be reviewed for national consistency and compatibility with the OHS regulatory regime.	Page 164
Chapter 17: Avoiding duplicity & double jeopardy		**Reference**
69	The model Act should provide that two or more contraventions of duties of care may be charged as a single offence if they arise out of the same factual circumstances.	Page 166
70	The model Act should enshrine the rule against double jeopardy by providing that no person is liable to be punished twice for the same offence under the Act or for events arising out of and related to that offence.	Page 167

Chapter 18: Related issues		Reference
71	Penalties for non-compliance with duties of care should be specified in the same provisions as the duties to which they relate.	Page 169
72	If Recommendation 71 is not accepted, the provisions relating to penalties for non-compliance with duties of care should be collocated with the provisions specifying the duties.	Page 169
73	The model Act should expressly state the dollar amounts of the maximum fines for each category of breach of a duty of care.	Page 169
74	Further advice should be sought on the effects of other laws relating to the jurisdiction, powers and functions of the courts with jurisdiction over OHS matters to identify whether those laws have any unintended consequences inimical to the objective of harmonising OHS laws.	Page 170
Chapter 19: Defences relating to duty of care offences		**Reference**
75	In light of our recommendations about who should bear the onus of proof in relation to reasonable practicability, the model Act should not provide for defences to prosecutions for non-compliance with duties of care.	Page 173

Recommendations—Second Report

Chapter20: Scope		Reference
76	We recommend that Ministers agree that: a) in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws, (including where they form part of an Act that has other purposes) for particular hazards or high-risk industries that are within the responsibility of the Ministers, should only continue where they have been objectively justified; b) even where that justification is established, there should be an ongoing, legislative and administrative inter-relationship between the laws and, if there are different regulators, between those regulators; c) as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws; d) where the continuation of the separate legislation is not justified, it should be replaced by the model Act within an agreed timeframe; e) where specific provisions are necessary, they should normally be provided by regulations under the model Act, with specific provision in the model Act relating to the matters previously regulated by the separate legislation kept to a minimum; and f) this approach should be recommended to COAG so that, subject to COAG agreement, it is extended within a reasonable timeframe to other legislation that pertains to OHS but which is within the responsibilities of other Ministers.	Page 17
77	To establish a clearer application of the model Act to public safety: a) the underlying OHS objectives of the model Act should be clearly articulated, including the protection of all persons from work-related harm; and b) when the model Act is drafted and when it is amended after it is in operation, care must be taken to avoid giving it a reach that is inconsistent with those objectives.	Page 26

78	To avoid misunderstandings about the protection of public safety, the model Act should facilitate the publication by the regulator of up-to-date advice and information about how the model Act relates to the protection of the safety of the public.	Page 26
Chapter 21: Structure of the model Act		**Reference**
79	The general structure of the model Act should be: 1. Scope, objects and definition provisions. 2. Duties of care and other obligations. 3. Workplace consultation, participation and representation. 4. Functions and powers of the regulator and inspectors. 5. Legal proceedings. 6. Other matters.	Page 28
Chapter 22: Objects and principles		**Reference**
80	The model Act should contain: a) objects and principles along the lines of those set out in 22.31 that are based on those in existing Australian OHS Acts; and b) a new object that expresses the aim of ensuring that the Act facilitates and supports the ongoing harmonisation of Australia's OHS laws.	Page 40
Chapter 23: Definitions		**Reference**
81	The model Act should define a "business or undertaking".	Page 53
82	The model Act should define a "business or undertaking" in broad terms, but provide for the exemption of specific organisations or activities or specific types of organisations or activities in a Schedule to the model Act or in regulations.	Page 55

83	The model Act should define a "business or undertaking" to be activities carried out by, or under the control of, a person (including a corporation or other legal entity or the Crown in any capacity): a) whether alone or in concert; b) of an industrial or commercial nature or in government or local government; c) whether or not for profit or gain; and d) in which: i) workers are engaged, or caused to be engaged, to carry out work; or ii) the activities of workers at work are directed or influenced, or iii) things are provided for use in the conduct or work (e.g. a workplace, plant, substances, OHS services); by the person conducting the business or undertaking. For avoidance of doubt, a "business or undertaking" does not include the engagement of workers solely for private or domestic purposes.	Page 56
84	The model Act should not include a definition of "control".	Page 60
85	To provide certainty that the model Act operates in relation to all aspects of health, the model Act should: a) include objects that clearly relate to the elimination or minimisation so far as is reasonably practicable of risks to physical and psychological health; and b) contain a definition of 'health' that recognises that health relates to: i) both physical and psychological health, ii) immediate and long-term health, and iii) freedom from disease or illness or incapacity.	Page 64
86	The model Act should define an "officer" for the purposes of the duty of care of an officer of a body corporate, partnership or unincorporated association: a) to have the meaning given by s.9 of the *Corporations Act 2001* (Cwth); and b) to include directors and senior managers of the Crown, public sector agencies and statutory authorities	Page 72

87	The model Act should provide that an officer who is a volunteer is only liable to prosecution and a penalty for a breach of the duty of care of an officer where the breach is a Category 1 offence. ***Note:*** *See Recommendation 55 in our first report for the categories of offence.*	Page 72
88	The model Act should define "due diligence" for the purposes of the duty of care of officers, to provide direction as to the appropriate role of an officer in OHS and how compliance may be achieved. The definition should be stated to include the following elements: 1. The standard for the officer is to be assessed against what a reasonable person in the position of the officer would do 2. The officer is required to take reasonable steps proactively and regularly to ensure— a) up-to-date knowledge of OHS laws and compliance requirements, b) an understanding of the nature of the operations of the entity and generally the hazards and risks associated with those operations, c) that the entity has available and uses appropriate resources and processes to enable the identification and elimination or control of specific OHS hazards and risks associated with the operations of the entity, d) verification of the implementation by the entity of the matters referred to in (c), and e) a process for receiving, considering and ensuring a timely response to information regarding incidents, identified hazards and risks.	Page 78

89	The model Act should define an "OHS service provider" to include persons engaged by another duty holder to provide any or all of the following ("OHS service") in the course of conducting a business or undertaking, (other than in the capacity of a worker or officer): a) advice or information on any matter related to the health or safety of any person; b) systems, policies, procedures or documents relevant to the management of OHS, broadly or in relation to specific matters; c) training on matters relating to OHS; and d) testing, analysis, information or advice (including, but not limited to, mechanical, environmental or biological matters) but **not** to include: a) a person providing an OHS service as part of the performance or exercise of a function, role, right or power under the model Act; or b) a person providing an OHS service while undertaking activity specifically required or authorised by or under any Act or regulation; or c) a member or employee of an emergency service organisation, providing advice or information during the course of responding as a matter of urgency to circumstances giving rise to a serious risk to the health or safety of any person; or d) a legally qualified person practising as a barrister or solicitor when, and to the extent only to which, that person is providing advice to which LLP may apply.	Page 84
90	The model Act should define "plant", using the definition in s.5 of the Vic Act as a model.	Page 85

91	The model Act should define "supply" to be, and occur at the time of, passing of physical possession of a relevant item: a) directly or through an intermediary; b) whether by way or sale, re-supply, exchange, lease, hire or hire-purchase or otherwise; c) including by sale of business assets including the relevant item or all of the shares in a company that owns the relevant item; d) but not including an act by which the owner resumes possession at the conclusion or termination of a lease or other agreement.	Page 88
92	The model Act should define the term "union" so that it covers: *an association of employees (or whatever term is locally used) registered or taken to be registered under the relevant Commonwealth or State industrial relations Act.*	Page 91
93	The model Act should define a "worker" for all purposes of the model Act consistently with the definition of that term in the NT Act, with appropriate modification to replace references to 'employer' to 'person conducting a business or undertaking'.	Page 95
94	The model Act should define a "workplace" to be any place at or in or upon which work is being undertaken (including during recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work. For avoidance of doubt, workplace should specifically include a vehicle, ship, aircraft and other mobile structures when used for work. ***Note:*** *Recommendation 28 in our first report regarding the exclusion of domestic premises unless included by regulation.*	Page 98
95	The model Act should adopt s.15B of the Qld Act to define a person with management or control of a workplace.	Page 102

Chapter 24: Consultation rights and obligations		Reference
96	The model Act should include a broad obligation for the person conducting the business or undertaking most directly involved in the engagement or direction of the affected workers to consult with those workers (and their representatives), as far as is reasonably necessary, about matters affecting, or likely to affect, their health and safety. Consultation should occur when any of the following activities is undertaken: a) identifying hazards and assessing risks arising from the work performed or to be performed at the business or undertaking; b) making decisions about ways to eliminate or control those risks; c) the adequacy of facilities for the welfare of workers; d) proposing changes that may directly affect the health and safety of workers; e) making decisions regarding procedures for the resolution of health and safety issues, consultation mechanisms, monitoring the health of workers and conditions at the workplace; and f) the provision of information and training for workers.	Page 110
97	The model Act should make it clear that consultation that is 'reasonably necessary' is that which enables the person conducting the business or undertaking to make timely, informed decisions about matters affecting, or likely to affect, the health and safety of their workers.	Page 110
98	The model Act should include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary.	Page 110

99	The model Act should define "consultation" and the definition should provide for: a) sharing relevant information with workers and other persons directly affected by the health and safety matter; b) providing workers and other persons directly affected by the health and safety matter with a reasonable opportunity to express their views and to contribute to the resolution of OHS issues; and c) taking into account those views. ***Note:*** *Consultation does not imply agreement.*	Page 110
Chapter 25: Health and Safety Representatives		**Reference**
100	The model Act should contain a provision for workers to collectively elect health and safety representative(s) (HSRs) to represent them in health and safety matters.	Page 115
101	The model Act should provide for: a) workers to initiate the election of HSRs by advising the person conducting the business or undertaking most directly involved in the engagement or direction of the workers that they wish to elect HSR(s) for that workplace; and b) a person conducting the business or undertaking most directly involved in the engagement or direction of affected workers to commence the process for the election of HSRs.	Page 117
102	The number of HSRs to be elected at a workplace should not be limited by the model Act, but rather determined following discussions between the workers who wish to be represented and the person conducting the business or undertaking who is most directly involved in the engagement or direction of the workers.	Page 118

103	a)	The model Act should provide that workers be grouped in work groups for the purposes of representation by one or more HSRs and that work groups may include workers engaged at more than one workplace and the workers engaged by more than one person conducting a business or undertaking.	Page 123
	b)	Within a reasonable period of time following a request from worker(s) for work groups to be determined, the workers (and any person authorised to represent them) and the person conducting the business or undertaking (or each of them if more than one) most directly involved in the engagement or direction of the workers are to conduct discussions to agree the number of work groups.	
	c)	The purpose of the discussions is to determine: i) the number and composition of work groups to be represented by HSRs; ii) whether a deputy HSR may also be elected by a work group; and iii) the workplace or workplaces at which the work group(s) will apply; and iv) if more than one business or undertaking to which work groups will apply—the grouping, into one or more work groups at one or more workplaces.	
	d)	The diversity of workers and their work must be taken into account when determining the workgroups to be represented by HSRs ensuring any worker within a work group has ready and timely access to an HSR familiar with the work and the hazards and risks to which the workers may be exposed.	
	e)	The range of matters to be considered in determining work groups may be specified in regulations under the model Act.	

104	The model Act should provide that: a) an HSR for a work group is to be elected by the members of that work group; and b) the members of the work group are to determine how an election is to be conducted; c) the majority of members of a work group may request a union or other person or organisation to assist them in the conduct of the election; d) where the number of candidates for election as a HSR equals the number of vacancies, an election need not be conducted and each candidate is to be taken to have been elected as a HSR for the work group; and e) as soon as practicable after being informed of the election of a HSR the members of the affected work group are to be informed by the person conducting the business or undertaking most directly involved in engaging the affected workers of the election outcome.	Page 128
105	The term of an elected HSR is three years unless: a) the HSR resigns; or b) the HSR is disqualified. An HSR may be re-elected.	Page 128

106	The functions, rights and powers of HSRs should be specified in the model Act. For the purposes of representing the members of their work group, an HSR should have rights and powers to: a) inspect the workplace or any part of the work area where a member of the work group works— i) after giving reasonable notice to person conducting the business or undertaking or their representative, or ii) immediately, in the event of an incident or any situation involving an immediate risk to the health or safety of any person; b) accompany an inspector during an inspection of the work area they represent; c) to be present with a member or a work group (with the member(s) consent) at an interview concerning OHS between the member(s) and an inspector or the person conducting the business or undertaking (or their representative); d) request the establishment of an HSC for the business or undertaking; e) receive information affecting the OHS of workers; f) request the assistance of an inspector at the workplace; g) monitor measures taken by the person conducting the undertaking or their representative in compliance with the model Act, or regulations; h) represent the members of the work group in matters relating to OHS; i) investigate OHS complaints; j) enquire into anything that appears to be a risk to the health or safety of members of the work group, arising from the conduct of the undertaking; k) issue a provisional improvement notice; and l) where an issue involves an immediate threat to the health and safety of any person to direct that work cease.	Page 132

	An HSR's rights, powers and functions are limited to the work group whom they were elected to represent, unless: a) subject to the conditions set out in paragraph 25.82, a member of another work group requests the HSR 's assistance; or b) there is an immediate risk to health or safety that affects or may affect a member of another work group and the HSR (and any deputy HSR) for that other work group is determined after reasonable enquiry to not be available.	
107	The model Act should provide that a person conducting a business or undertaking most directly involved in the engagement of the HSRs is required to: a) consult with HSRs on OHS matters; b) allow HSRs access to information relating to OHS hazards at the workplace, and the health and safety of workers; c) allow HSRs to accompany a worker during an OHS interview between the worker and an inspector or the person conducting the business or undertaking (with the consent of the worker); d) allow HSRs to take paid time off normal work as is reasonably necessary to perform their functions and to attend approved training; e) provide resources, facilities and assistance as are necessary or prescribed by the regulations to enable HSRs to perform their functions; f) allow a person assisting HSRs to have access to the workplace where that is necessary to enable the assistance to be provided; g) permit an HSR to accompany an inspector during an inspection of any work area in which a member of the work group works; and h) provide any other assistance that may be required by regulations under the model Act.	Page 134

108	The model Act should provide that an HSR have the power to issue a PIN to a person where the HSR has reasonable grounds to believe the person: a) is contravening the model Act or regulations; or b) has contravened in circumstances that make it likely such contravention will continue or be repeated.	Page 140
109	The provisions relating to PINs may usefully be modelled on the provisions contained in ss.60-66 of the *Occupational Health and Safety Act 2004* (Vic) or the amendments recently made to the *Workplace Health and Safety Act 1995* (Qld) with the following modifications: a) the PIN should clearly state the person required to comply with it; and b) a PIN that has been affirmed by an inspector (with or without modifications) shall be deemed to be an improvement notice of the inspector.	Page 140
110	The model Act should provide that following election, an HSR, as soon as is reasonable in the circumstances of the business or undertaking in which they are engaged, must attend training which is subject to the following requirements: a) The training must consist of an initial five-day, competency based training course, approved by the regulator (an 'approved course'). b) The approved course may be either of the HSR's choice or as directed by an inspector. c) The HSR is entitled to paid leave to attend training. d) The training is to be at a time agreed with the person conducting the business or undertaking, having regard for the duties and functions of the HSR in meeting their obligations under the model Act, or otherwise as directed by an inspector.	Page 145

111	The model Act provide that an HSR may attend and receive paid leave for: a) one day's refresher training per year after the first year, being a course approved by the regulator; and b) such further attendance (as considered reasonable having regard for the circumstances of the business) at an approved training course as: i) may be agreed with the person conducting the business or undertaking in which the HSR is engaged, or ii) directed by an inspector. The HSR must first consult with, and attempt to reach agreement with, the person conducting the business or undertaking in which they are engaged, as to the timing and costs of the training. Any issue in relation to the details of the training, or payment, must be resolved in accordance with the issue resolution procedures required by the model Act, or referred to an inspector for decision.	Page 146
112	The model Act include a provision protecting HSRs from incurring civil liability when in good faith performing or omitting to perform, or properly exercising or omitting to exercise a right or power of an HSR.	Page 147

113	A relevant court or tribunal may, on application, disqualify or suspend an HSR or suspend the right of the HSR to exercise a power for a specified period, for: a) repeatedly neglecting their HSR functions; or b) exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or c) acting unreasonably in the performance of their functions and exercise of their powers as an HSR. Persons able to make such applications include: a) a person detrimentally affected by the performance or failure to perform the functions or the exercise of powers by the HSR (e.g. a person conducting the business or undertaking); or b) the regulator; or c) a member of the HSRs work group. The onus in such proceedings is on the applicant to prove, on the balance of probabilities that the grounds exist for disqualification or suspension.	Page 151
Chapter 26: Health and Safety Committees		**Reference**
114	The model Act should provide that a workplace HSC: a) must be established: i) where requested by an HSR, or ii) where requested by five or more workers, or iii) if initiated by one or more persons conducting businesses or undertakings, or iv) if specified by regulation, or v) in workplaces with 20 or more workers; or b) may be established in any business or undertaking; and c) must include equal membership of workers (excluding managers or supervisors) and managers.	Page 158
115	The details of the structure and functions, minimum frequency of meetings and other operational matters relating to an HSC be provided for in regulations to the model Act.	Page 158

Chapter 27: Issue resolution		Reference
116	The model Act should define an 'issue' for the purposes of issue resolution at a workplace, as being a dispute or concern about OHS that remains unresolved after consultation between the affected worker(s) and the representative of the person conducting the relevant business or undertaking most directly involved in the engagement or direction of the affected worker(s).	Page 169
117	The following persons should be entitled to be involved in the resolution of an OHS issue at a workplace: a) any HSR elected to represent the affected worker(s), in consultation with the affected worker(s); or b) where there is no relevant HSR, the affected worker(s); or c) a representative of the person conducting a business or undertaking at the workplace that is involved in the engagement or direction of the affected worker(s) and if more than one relevant business or undertaking, a representative or representatives appointed by them for the purpose. Any party should be entitled to obtain assistance from or be represented by a person nominated or authorised on their behalf, who should thereby be entitled to enter the workplace for that purpose.	Page 171
118	The model Act should require all parties to, or authorised to be involved in consideration of, an OHS issue (including inspectors, courts and tribunals) to make all reasonable endeavours to achieve a timely, final and effective resolution of the issue.	Page 172
119	The model Act should encourage workers and those conducting businesses or undertakings at a workplace to agree to procedures by which OHS issues are to be resolved, should they arise, where they are able to do so. The model Act should provide for default issue resolution procedures, as specified in regulations, to be adopted where the parties have not agreed to issue resolution procedures. The model Act, or regulations, should provide for the matters that must, as a minimum, be provided for in an agreed issue resolution procedure (referred to in paragraph 27.86).	Page 174

120	The following process should apply to the resolution of issues at a workplace: 1. The parties should meet to determine the nature and scope of the issue. 2. The parties should seek to resolve the issue as soon as possible in accordance with: a) an agreed procedure; or b) where there is more than one relevant business or undertaking at the workplace, a procedure agreed between all parties; or c) where a procedure has not been agreed or cannot be agreed, a default procedure prescribed by the regulations. 3. If the issue remains undetermined or unresolved after reasonable attempts have been made, any party can: a) seek the attendance at the workplace of an inspector, as soon as possible, to assist in resolution of the issue; or b) bring proceedings in a court or tribunal with powers to hear and determine such matters and exercising powers of conciliation and arbitration, such proceedings to be brought and determined in accordance with a process to be determined by Regulations. 4. The referral of an issue to an inspector or court or tribunal should not prevent the exercise of the right of a worker to cease unsafe work, or prevent the exercise of power by an HSR to direct a work cessation or issue a provisional improvement notice (PIN). 5. A court or tribunal may not hear a matter relating to an OHS issue with respect to which a provisional improvement notice has been issued: a) where processes have been commenced under the model Act for the review of the provisional improvement notice; or b) until the time has elapsed for taking steps under the model Act for the review of the provisional improvement notice other than to the extent that the issue is broader than the matters dealt with by the provisional improvement notice, or by the consent of the parties. Formal processes under the model Act for the review of a provisional improvement notice should not prevent a court or tribunal, or the parties, from taking steps to resolve the issue by conciliation.	Page 176

Chapter 28: Rights to cease unsafe work		Reference
121	The model Act should provide that: a) a worker(s) may cease work where they have reasonable grounds to believe that to continue to work would expose them or any other person to a serious risk to their health or safety or that of another person, emanating from immediate or imminent exposure to a hazard; b) a worker(s) who exercises their right to cease unsafe work in accordance with (a) is required as soon as possible to inform the person conducting a business or undertaking most directly involved in the engagement of the affected worker(s); c) the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s) may require suitable alternative work to be undertaken by the worker(s) until they resume their usual work; d) a worker who refuses to work as mentioned in section (a) is entitled to the same pay and other benefits, if any, to which they would have been entitled if they had continued to do their usual work; e) the procedures for the determination of any disputes relating to the provision of payment and/or entitlements may be referred to a relevant court or tribunal for consideration; and f) any issue arising under this section of the model Act may be referred to the issue resolution process for the business or undertaking, required by the model Act.	Page 186

122	The model Act should provide that: a) where an HSR has reasonable grounds to believe there exists a serious risk to the health or safety of a worker(s) represented by the HSR, emanating from immediate or imminent exposure to a hazard worker, the HSR may direct the worker(s) to cease work, subject to the following— i) the HSR must first consult with the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s), unless the risk is so serious and imminent that it is not reasonable to do so, in which case that consultation should occur as soon as possible after the direction of the HSR for the work to cease, ii) the HSR must attempt to resolve the issue of concern with the person conducting the business or undertaking, in accordance with the issue resolution procedures required by the model Act, iii) the person conducting the business or undertaking will be entitled to direct the worker(s) to undertake suitable alternative work, if available, and iv) the worker(s) would be entitled to the payments and/or benefits they would have received had they continued to carry out their normal work; and b) the HSR or the person conducting the business or undertaking most directly involved in the engagement of the worker(s) may request an inspector attend the workplace to resolve any issue arising in relation to the cessation of work.	Page 187
Chapter 29: Discrimination, victimisation and coercion		**Reference**
123	The model Act should protect the exercise or intended exercise of rights, functions or powers, and the taking of action, under the model Act by prohibiting discrimination, victimisation and coercion relating to those activities.	Page 194

124	Provisions relating to discrimination, victimisation and coercion should provide protection of and remedies for all persons who have been, are, or intend to be, involved in any of the following activities ('relevant activities'): a) exercising a right, role or power, or performing a function under the model Act; b) taking action to seek compliance with any duty or obligation under the model Act; c) being involved in raising or resolving, or both, an OHS concern or issue; and d) communicating with or assisting any person exercising a power or performing a function under the model Act and specifically including: a) workers and witnesses; b) health and safety representatives and members of health and safety committees; c) inspectors; and d) authorised persons.	Page 195

125	The following conduct by any person ('*proscribed conduct*') should be prohibited by the model Act. a) Discrimination and victimisation Directly or indirectly putting a person, or intentionally causing another person to put a person, to their detriment in employment, prospective employment or commercial arrangements, or threatening to do so, because the person has been, is, or proposes to be, involved in any of the relevant activities. ***Note:*** *We discuss later whether the reason should be the dominant or a substantial reason or whether another requirement should apply.* b) Coercion Without reasonable excuse, coercing, requiring, authorising, intentionally causing or inducing a person to: i) take action detrimental to the health or safety of any person; ii) refrain from exercising a right or power or performing a function under the model Act or not exercise or perform it in a particular way; iii) refrain from seeking , or continuing to, undertake a role under the model Act; iv) engage in any unlawful discriminatory conduct, as defined. c) Aiding and abetting discrimination, victimisation or coercion ***Note:*** *Drafting conventions relating to the use of ' reasonable excuse' will need to be observed, while meeting the intention of this recommendation.*	Page 198
126	The model Act should provide for criminal offences and liability to civil interventions and remedies, for engaging in, authorising, aiding or abetting proscribed conduct.	Page 199
127	The model Act should provide that an offence related to proscribed discriminatory conduct is committed where involvement or intended involvement in the relevant activity is the dominant reason for the proscribed discriminatory conduct.	Page 202

128	A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in a criminal prosecution of proving on the balance of probabilities that the reason alleged was not the dominant reason for which that person engaged in that conduct. A person alleged to have engaged in coercion should bear the onus of proving on the balance of probabilities that the person had a reasonable excuse for doing so. The prosecution should bear the onus of proof in relation to all other elements of an offence of engaging in proscribed conduct, beyond a reasonable doubt.	Page 202
129	An offence of engaging in proscribed conduct should be a Category 3 offence (see Recommendation 55 in our first report).	Page 202
130	The model Act should provide for civil action against a person who has engaged in, authorised, aided or abetted proscribed conduct.	Page 206
131	A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in civil proceedings of proving, on the balance of probabilities, that the reason alleged was not one of the operative reasons for the conduct. A person alleged to have engaged in coercion should bear the onus of proving the person had a reasonable excuse for doing so. The person bringing a civil claim should bear the onus of proof in relation to all other elements of the action, on the balance of probabilities.	Page 207
132	The model Act should permit a person authorised by a claimant to have standing before a court or tribunal to represent that person and to bring a civil claim on the person's behalf in relation to proscribed conduct.	Page 207

133	A relevant court or tribunal should be able to make the following orders in relation to a person who has suffered loss or damage as a result of proscribed conduct: a) an injunction to restrain the continuation of the proscribed conduct; and/or b) compensation; and/or c) reinstatement of employment or, in relation to a prospective employee, employment in a similar position; and/or d) other relief as considered necessary save that a person should not be able to recover compensation or other relief under the model Act and under any other applicable Commonwealth, State or Territory legislation.	Page 207
134	The model Act should provide that a person may not: a) commence or proceed with a civil claim under the model Act if they have commenced proceedings for the same subject matter under another law and those proceedings have not been determined or withdrawn; or b) recover any compensation under the model Act if they have received compensation for the same subject matter under another law; or c) commence or proceed with a civil claim under the model Act if they have previously commenced and failed in a claim relating to the same subject matter under another law.	Page 207
135	The model Act should provide that it would be a defence to a prosecution or civil action against a person (body corporate, partnership or individual) relating to proscribed conduct engaged in by another person, to prove, on the balance of probabilities, that they had taken reasonable precautions to prevent that other person from engaging in the proscribed conduct.	Page 209
Chapter 30: Risk management		**Reference**
136	The model Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.	Page 216

Chapter 31: Monitoring workplace etc		Reference
137	The model Act should include an obligation for persons conducting a business or undertaking to ensure, as far as is reasonably practicable, the health of workers engaged by them or under their direction, is monitored for the purpose of preventing fatalities, illnesses or injury arising from the conduct of the business or undertaking.	Page 221
138	The model Act should include an obligation for persons with management and control of a workplace to ensure, as far as is reasonably practicable, that conditions at that workplace are monitored for the purposes of preventing fatalities, illness or injury.	Page 221
Chapter 32: Obtaining advice		**Reference**
139	The model Act should provide that persons conducting a business or undertaking must, where reasonably practicable, employ or engage a suitably qualified person to provide advice on health and safety matters. The qualifications of persons providing such advice should be addressed in the regulations. Provision should be made along the lines of the Qld Act for the appointment by persons conducting a business or undertaking of Workplace Health and Safety Officers and further consideration should be given to how that requirement can be extended to non-traditional work arrangements that normally involve thirty or more workers.	Page 228
Chapter 33: Incident notification		**Reference**
140	The model Act should place an obligation on the person conducting the business or undertaking to ensure that the regulator is notified immediately and by the quickest means of a: a) fatality of any person; b) 'serious injury' to any person; c) 'serious illness' of any person; or d) a 'dangerous incident' arising out of the conduct of the business or undertaking.	Page 233
141	A written record of the incident must be provided to the regulator within 48 hours of the obligation holder reporting the incident.	Page 234

142	Definitions of 'serious illness', 'serious injury' and 'dangerous incident' for incident notification should reflect the principle that only the most serious events are to be captured as outlined in paragraph 33.21.	Page 234
143	The model Act should contain all provisions governing incident notification, including associated provisions such as site preservation. Related definitions should be placed in a schedule to the model Act.	Page 234
144	Persons with management and control of the workplace should have an obligation to ensure an incident site, including any plant, substance or other item associated with the incident, is not disturbed until an inspector attends the incident site, or the regulator directs otherwise, which ever occurs first.	Page 238
145	The obligation to preserve an incident site does not preclude any activity: a) to assist an injured person; b) to remove a deceased person; c) considered essential to make the site safe or to prevent a further incident; d) associated with a police investigation; or e) for which an inspector has given permission.	Page 238
146	The model Act should place an obligation on workers to report any illness, injury, accident, risk or hazard arising from the conduct of the work, of which they are aware, to the person conducting the business or undertaking or (where this is a different person) the person with management or control of the workplace. The obligation should also make clear that it in no way impinges on a worker's ability to report an OHS issue to the regulator at any time.	Page 239

Chapter 34: Permits and licensing		Reference
147	The model Act should include provisions that make it an offence: a) to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation; b) to contravene any conditions placed on an authorisation; or c) for a person conducting a business or undertaking to direct or allow a worker to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation.	Page 246
148	The regulation-making power in the model Act should allow for: a) the automatic recognition of equivalent licences, permits and registrations issued under a corresponding OHS law, and include safeguards to ensure jurisdictions can make case-by-case exceptions where there are concerns about fraud; and b) the sharing of information with other government agencies in relation to the issue, renewal, variation, revocation, suspension and cancellation of authorisations.	Page 246
149	The regulation-making powers in the model Act should allow for the processes of application, issue, renewal, variation, suspension, cancellation, review of decisions and placing conditions on such authorisations to be established via regulation.	Page 246
150	Decisions for the types of activities that may need authorisations should be justified at the national level based on the level of risk and a cost-benefit analysis.	Page 246

Chapter 35: Functions and powers of the regulator		Reference
151	The model Act should: a) subject to the final decisions about its objects and principles, make clear in the objects or principles that education, training and information for duty holders, workers and the community are important elements of facilitating good occupational health and safety; b) include in the enumerated powers and functions of the regulator sufficient authority for the regulator to promote and support education, training and information for duty holders, workers and the community; c) as recommended in our discussion of the role of inspectors, make clear that an inspector may provide advice about compliance with the model Act; and d) authorise the regulator to make guidelines on the way in which— i) a provision of the model Act or regulations would, in the regulator's opinion, apply to a class of persons or to a set of circumstances, or ii) a discretion of the regulator under the model Act or regulations would be exercised.	Page 252
Chapter 36: Enforceable undertakings		**Reference**
152	The model Act should authorise a regulator to be able to accept, at the regulator's discretion, a written enforceable undertaking as an alternative to prosecution, other than in relation to a Category 1 breach of a duty of care. The provisions relating to enforceable undertakings should provide for the safeguards relating to process, transparency of decision making, reviewability of decisions and enforcement that are outlined in paragraph 36.54. If the power to do so does not already exist, a court should be given the discretion under the model Act to release an offender, after conviction, who gives a health and safety undertaking to the court. This judicial discretion should not be available in respect of a Category 1 offence.	Page 263

Chapter 37: Cross-jurisdictional cooperation		Reference
153	We recommend that Ministers note the range of measures designed to reinforce and enhance cross-jurisdictional cooperation which we have identified in this report.	Page 265
Chapter 38: Appointment of inspectors		**Reference**
154	The model Act should make specific provision for the process of appointment of inspectors.	Page 271
155	Inspectors should ordinarily be public servants appointed on an ongoing basis.	Page 271
156	The model Act should provide for the temporary appointment of inspectors, subject to strict conditions.	Page 271
157	The model Act should, subject to written agreement between Ministers or regulators, specifically permit: a) inspectors to be appointed in more than one geographical or industry/activity-based jurisdiction; or b) inspectors appointed in one jurisdiction to be authorised to perform functions and exercise powers in, or for the purposes of, another jurisdiction.	Page 275
158	The model Act should clearly set out the scope and limits (if any) of the cross-jurisdictional appointment or authorisation.	Page 275
159	The model Act should provide for the valid use and admissibility of evidence gathered by an inspector exercising cross-jurisdictional authority.	Page 275
160	The model Act should make specific provision for ID cards for inspectors, containing at least the information specified at s.48 of the NSW Act.	Page 277
161	The model Act should provide that it is an offence to forge an inspector ID card, or to alter or deface it without authorisation.	Page 277

Chapter 39: Role and functions of inspectors		Reference
162	The model Act should: a) specify the roles and functions of an inspector, including— i) providing information and advice to duty holders, ii) undertaking specific industry, occupational or hazard and risk- based interventions (e.g. advice, risk management and enforcement in relation to the industry, occupation or hazard and risk concerned), iii) assisting in the resolution of issues at workplaces, iv) reviewing PINs and the appropriateness of work stoppage on safety grounds, v) securing compliance with the model Act and regulations through the exercise of various powers, including the issuing of notices and giving directions, and vi) investigating suspected breaches and assisting in the prosecution of offences, and b) allow the appointment of an inspector for all, or only specified roles and functions.	Page 282
163	The model Act should make clear that an inspector may provide advice about compliance with the model Act and that an inspector's power of entry and the powers that an inspector can exercise upon entry are available for the provision of advice.	Page 286
164	The model Act should provide powers necessary to enable an inspector to effectively carry out the roles and functions of issue resolution and review of PINs.	Page 289
165	A PIN should be taken to be a notice issued by an inspector, upon affirmation of the notice, with or without modification.	Page 289
Chapter 40: Qualifications and training		**Reference**
166	The model Act should provide for inspectors to have such nationally consistent qualifications and training (including ongoing training) as mandated by or under the legislation.	Page 293

Chapter 41: Powers required to perform inspectors' roles		Reference
167	The model Act should provide for the right of an inspector to enter a workplace during such times as the business conducted thereat is operating or the workplace is accessible to members of the public, and at other times if the inspector reasonably believes that an immediate risk to the health or safety of any person exists from activities or circumstances at the workplace.	Page 302
168	The model Act should provide inspectors with the authority to obtain and execute search warrants.	Page 302
169	The model Act provide requirements on an inspector to: a) at all times during entry to a workplace, display or have available for examination, such identification and authorisation card or documentation as required by the model Act; b) notify as soon as practicable after entry— i) the person with apparent management or control of the workplace, and ii) any person conducting a business or undertaking at the workplace in respect of whom the inspector proposes to exercise functions or powers, and iii) a health and safety representative (if any) representing workers undertaking work as part of the relevant business or undertaking at the workplace of the entry and the purpose of the entry; c) provide a written notice to each of those mentioned in (b), upon or as soon as practicable after leaving the workplace, specifying— i) the purpose of the entry, ii) relevant observations, iii) any action taken by the inspector, and iv) the procedure for seeking a review of any decision made by the inspector during the entry.	Page 302

170	The model Act should provide for (a consolidation of) all of the powers currently provided in OHS Acts in Australia, that may be exercised by an inspector upon entry to a workplace, in relation to the following: a) inspection, examination and recording, including— i) taking samples of substances and things (including biological samples), ii) taking measurements and conduct tests (e.g. noise, temperature, atmospheric pollution and radiation), iii) taking photographs and make audio and video recordings, and iv) requesting assistance from owners, employers and others at a workplace in exercising their powers and functions; b) access to documents (subject to each of the matters recommended by Maxwell, the request being in writing unless circumstances of urgency otherwise require, and allowing reasonable time for the person to consider and respond to the request); c) testing, analysis, seizure and forfeiture of plant (but not operation of it) and substances; d) the taking of affidavits; and e) the taking of persons who are providing assistance to an inspector in the proper exercise of a power or function, to a workplace for the purpose of providing such assistance (e.g. interpreters and technical experts). ***Note:*** *The exercise of some of these powers may be subject to the availability of LPP or the privilege against self-incrimination.* ***Note:*** *Powers to ask questions, and associated rights and privileges, are the subject of Recommendations 179 to 198.*	Page 313
171	The model Act should provide power to an inspector to issue the following notices and directions upon entry to a workplace: a) safety directions; b) infringement notices; c) improvement notices; d) prohibition notices; and e) direction to leave a site undisturbed.	Page 333

172	The model Act should clearly state: a) the circumstances in which notices or directions may be issued; b) on whom they may be issued; c) requirements for confirmation in writing of any direction given orally; d) procedures for service and display of written notices or directions; and e) the availability of processes for review of a decision by an inspector to issue any notice or direction.	Page 333
173	The model Act should provide that an inspector may, at their discretion, make recommendations and provide advice and assistance in improvement and prohibition notices, and that the actioning of such recommendations and advice is not compulsory.	Page 333
174	For improvement notices, the model Act should provide that: a) the minimum timeframe for compliance with an improvement notice should not be less than the timeframe provided to seek a review of the notice; and b) an application for review of an improvement notice should automatically stay the notice.	Page 334
175	For prohibition notices, the model Act should provide that: a) the issuing of prohibition notices should be dependent on the 'severity of the risk', not the immediacy; and b) an application for review of a prohibition notice does not stay the operation of the notice.	Page 334
176	Inspectors should be provided powers to make minor amendments or modifications to notices, including: a) to extend the timeframe for compliance with the notice; b) for improving clarity; c) for changes of address or other circumstances; and d) to correct errors (e.g. date) or references (e.g. to a section of an Act or regulation). Such decisions should not substantially change the effect of the notice and should be open to review.	Page 334

177	The model Act should make provision for the regulator to seek an injunction to: a) restrain ongoing breach of a prohibition notice; or b) compel compliance with an improvement notice after the time for compliance has expired.	Page 338
178	The model Act should allow a regulator to take remedial action where: a) there is an immediate and serious risk to the health or safety of any person; and b) the person conducting the relevant business or undertaking in which that risk arises is unavailable, or they or another person fails or refuses to comply with proper and reasonable directions of an inspector in respect of that risk and the action taken by the regulator; and c) the person is first informed of the intention of the regulator to take such action and recover the costs of the regulator from that person. The costs of the regulator should be recoverable from the person conducting the relevant business or undertaking, or such other person to whom an inspector has properly issued a notice or direction in respect of the risk, but: a) the person from whom recovery is sought shall be entitled to challenge in a court or tribunal the necessity for and reasonableness of the action and/or cost; and b) that person shall have the onus of proving the action and/or cost was not necessary or was not reasonable.	Page 338

Chapter 42: Questioning and related privileges and rights		Reference
179	The model Act should include a requirement that a person must answer questions and provide information requested by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.	Page 351
180	A person should not be entitled to rely on a privilege against self-incrimination in response to a request for information by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.	Page 351
181	The requirement that a person answer questions, and the unavailability of a privilege against self-incrimination, for the purpose of enforcing ongoing compliance and securing health and safety, should be subject to: a) a specific prohibition against the use of the information in any proceedings against the person providing the information for a breach of the model Act or regulations; b) the inspector being required to inform the person from whom the information is sought that— i) the information is required for the purpose of ensuring compliance and ongoing health and safety protection, ii) the person must answer the questions and provide the information, iii) the privilege against self-incrimination is not an excuse for failing to answer the questions or provide the information, iv) the information may not be used in any proceedings against the person for a breach of the model Act or regulations, and v) LPP may apply to the information that is being sought; c) in the absence of the inspector providing the information referred to in (b) above, it should be assumed that the information has been requested for the purposes of the investigation of a breach of the model Act or regulations; and d) if the inspector does not provide the information noted in (b) above, any information obtained or discovered by reason of the provision of the information by the person shall not be able to be used in proceedings against that person for a breach of the model Act or regulations.	Page 354

182	A request for documents, for whatever purpose it is made under the model Act, would not be subject to a privilege against self-incrimination.	Page 354
183	An inspector may ask questions about the circumstances in which a document came into existence and the means by which the document may be verified, and such questions would not be subject to a privilege against self-incrimination.	Page 354
184	Questions relating to matters referred to within a document would be subject to the provisions relating to the asking of questions, as are applicable to the purpose for which the questions are asked.	Page 354
185	The model Act should explicitly provide that nothing in the model Act shall in any way affect the availability of LPP.	Page 355
186	LPP should be confirmed to apply: a) to companies and to natural persons; and b) to documents as well as statements.	Page 355
187	If LPP is not explicitly confirmed in the model Act, then any provision that allows for a 'reasonable excuse' for not complying should explicitly include the availability of LPP as a reasonable excuse.	Page 356
188	The model Act should require that a person answer questions asked by an inspector investigating a breach of the model Act or regulations.	Page 358
189	The privilege against self-incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.	Page 358
190	The requirement that a person answer questions for this purpose should be subject to the requirement in Recommendation 196 that the inspector provide a warning to the person from whom the information is sought.	Page 358
191	The model Act should make clear that a corporation does not enjoy any right to silence or privilege against self-incrimination and must respond, through its authorised officers, to requests for documents or information by the regulator or requests for documents by an inspector, subject to the availability of LPP.	Page 361
192	The model Act should make clear that the members and officers of a partnership or unincorporated association do not enjoy any right to silence and must respond, directly or through their authorised officers, to requests for information from the regulator or an inspector. Such requests may be subject to the privilege against self-incrimination and LPP.	Page 361

193	An inspector should have the power to require, by written notice, the production of documents from a corporation, partnership or unincorporated association. Such a request may be subject to LPP.	Page 361
194	The regulator should have the power to ask questions as to facts (but not law), in writing, of a corporation, partnership or unincorporated association and answers in writing must be provided, subject to the availability of LPP or (in the case of members or officers of a partnership or unincorporated association) the privilege against self-incrimination.	Page 361
195	LPP should be available to a natural person or corporation in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.	Page 362
196	The requirement in the model Act that a person answer questions relating to the investigation of breaches should be subject to a requirement that the inspector warn the person from whom the information is sought: a) that the information is being sought or the questions are being asked for the purpose of an investigation of a breach of the model Act or regulations by that person, or may (depending upon the information or answers) give rise to an investigation of a breach by that person; b) the person must provide the information or answer the questions unless a relevant privilege is available to that person; c) the person shall not be required to provide the information or answer a question if, to do so, may tend to incriminate them; d) LPP may apply in respect of the information sought; and e) the person is entitled to seek and obtain legal advice with respect to the request for information.	Page 363
197	The model Act should provide that in the event of a failure by an inspector to give a required warning before requesting information from a person in the course of investigating a breach, a use immunity and derivative use immunity will apply to all information obtained by reason of the request.	Page 363

198	The model Act should make clear that a person shall not be taken to fail or refuse to comply with a requirement, request or direction, or to hinder or obstruct an inspector in the exercise of powers under the Act, merely by seeking and taking a reasonable time to obtain legal advice. ***Note:*** *This recommendation is supported by Recommendation 181 and Recommendation 196 in relation to the provision of information and warning to a person of whom a request is made, and Recommendation 197 providing for a use immunity and derivative use immunity for a failure to provide that information and warning.*	Page 365
Chapter 43: Protection and offences relating to inspectors		**Reference**
199	The model Act should provide for immunity of an inspector from personal liability in relation to the bona fide exercise by the inspector of his or her role, functions and powers.	Page 369
200	The model Act should provide a consolidation of the offences for assault and intimidation etc of an inspector in current OHS Acts. The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered: a) for a corporation – $250,000; and b) for an individual – $50,000 and/or two years imprisonment.	Page 371

201	The model Act should provide for the following additional offences: a) hindering or obstructing an inspector in the exercise of functions and powers; b) impersonating an inspector; c) concealing from an inspector the existence or whereabouts of a person, document or thing; and d) making false or misleading statements or providing false or misleading documents. The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered: a) for a corporation – $50,000; and b) for an individual – $10,000.	Page 371
Chapter 44: Accountability of inspectors		**Reference**
202	The model Act should specifically provide for circumstances in which the authorisation of an inspector may be suspended or cancelled.	Page 375
203	The model Act should include a consolidation of provisions presently included in OHS Acts relating to accountability of inspectors, confidentiality of information, and their liability for improper conduct.	Page 375
Chapter 45: Authorised right of entry		**Reference**
204	The model Act should provide right of entry for OHS purposes to union officials and/or union employees formally authorised for that purpose under the model Act.	Page 388
205	Authorised persons for right of entry purposes are those persons who are elected officers and/or employees of unions registered under relevant state or federal labour law and: a) hold current authorisation under the OHS Act; and b) hold current authorisation required under any other relevant law. ***Note:*** *Union is defined in the chapter containing the definitions.*	Page 392

206	The authorising authority must be satisfied that the union official and/or union employee who is the subject of an application to be an authorised person (applicant) is competent in: a) the right of entry requirements of the model Act, regulations and guidance notes; b) issue resolution under the model Act; c) an understanding of the duties and framework of the model Act; d) how to apply risk management principles at a business or undertaking; and e) the relationship between the model Act and any relevant labour laws.	Page 393
207	At the first periodic review of the model Act, the issue of whether mutual right-of-entry authorisations (able to be exercised across jurisdictions but subject to the same limitations) should be considered.	Page 393
208	A union (as defined) may apply for authorisation on behalf of persons who are elected officers and/or employees of the union to the specified court or tribunal within the jurisdiction. The application must include a statutory declaration confirming that the applicant: a) has satisfactorily achieved the training required under the model Act; b) meets the fit and proper person test specified in the model Act; c) holds or will hold a current permit under any other relevant law; and d) has not within the previous three years, had their OHS authorisation revoked or suspended; or e) has not within the previous three years, had a permit to enter workplaces under state or federal labour law revoked. Objections should be permitted as outlined in paragraphs 45.63 to 45.65.	Page 395
209	The process of authorisation (including term, approved forms, training, refresher training, procedure for application and any issue relevant to the process) should be contained in regulations under the model Act.	Page 396

210	The model Act should provide that: a) authorisation for right of entry for OHS may be issued for up to three years; b) application for a further authorisation may be made prior to the conclusion of the three-year period; c) in circumstances where the elected official or employee leaves the union the authorisation automatically lapses; d) the union in such circumstances is to advise the regulator of officials/employees' changed circumstances as envisaged by (c); and e) the regulator is to keep an up-to-date, publically available, register of authorised persons.	Page 396
211	The model Act should provide authorised persons with the capacity to: a) investigate a suspected contravention of the model Act or regulations; b) consult workers on OHS issues; and c) provide advice to workers, and consult with the person in management or control of a business or undertaking or relevant workplace area, on OHS issues. ***Note:*** *See also recommendations 213 to 223*	Page 398

212	The model Act should limit right of entry by authorised persons to: a) areas of the workplace where work is being carried out as part of a business or undertaking by workers who are members or eligible to be members of the relevant union; b) consultation with, and/or provide advice to, any worker within the eligible group referred to in (a) (subject to that person's consent); and c) where necessary, advice and/or consultation with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on the resolution of OHS issues and/or the suspected breach of the model Act and, be subject to: a) the right being exercised during working hours; and b) ensuring there is no undue disruption to any business or undertaking at the workplace; and c) reasonable OHS requirements that may apply to the workplace being followed by the authorised persons.	Page 400
213	The authorised person is prohibited from the exercise of powers under the model Act at domestic premises unless: a) such entry is provided for under a regulation under the model Act, or the premises are otherwise declared by regulation to be a business or undertaking; or b) such entry is permitted by the owner or other person with the management or control of the premises.	Page 400

214	The exercise of a right of entry for OHS purposes under the model Act by an authorised person will be subject to: a) current authorisation of the authorised person under the relevant OHS Act; and b) any other permit required under relevant federal or State labour law for the authorised person to enter the workplace; and c) written notice of at least 24 hours by the authorised person to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to consult or advise workers; or d) notice as soon as reasonably practicable after entry to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is investigating a suspected breach, unless to do so would defeat the purpose for which the premises were entered, or, unreasonably delay the authorised person in a case of urgency; or e) written notice of at least 24 hours to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to inspect documents relevant to the suspected breach of the model Act or regulations.	Page 403

215	An authorised person exercising a right of entry under the model Act may do any of the following: a) consult with or advise those workers who are members of or eligible to be members of the union, subject to written notice of 24 hours; b) consult with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on an OHS issue; c) inspect work systems, plant or processes contained within the area where relevant workers work; d) investigate a suspected breach of the model Act or associated subordinate instrument(s), subject to the provision of proof of authorisation to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union unless to provide such proof of authorisation would defeat the purpose of the investigation or, it is considered by the authorised person to be an urgent case; e) inspection of documents of the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union relevant to a suspected breach of the model Act or regulations, subject to— i) provision of 24 hours written notice with a reasonable time given for the person from whom the documents are requested to produce them, and ii) written notification to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union of details of the particular contravention suspected, and iii) a list of the documents sought being provided with the request;	Page 408

	f) warn any person that the authorised person reasonably believes to be exposed to a significant and immediate risk of injury; g) request an inspector visit the workplace to determine whether a notice should be issued; and h) have the right to seek a review of the action taken by the inspector (including a decision of the inspector to not take any action). Any right exercised by an authorised person is limited to matters affecting the health or safety of those workers who are members of or eligible to be members of the authorised representative's union.	
216	A relevant court or tribunal may deal with a dispute relating to the exercise or purported exercise by an authorised person of a right of entry under the model Act. The process may involve conciliation, mediation and, where necessary, arbitration.	Page 410
217	Authorisation of an authorised person under the model Act may be suspended or revoked, in whole or in part, or limitations imposed where, after providing the authorised person a reasonable opportunity to be heard, it is determined by a court or tribunal (civil process) that such action should be taken.	Page 413

218	Grounds for suspension, revocation or the taking of alternative action (including imposing limitations) should include where: a) the authorised person has ceased to satisfy the requirement under relevant federal labour law, in which case the action to be taken is subject to the operation of the decision of the relevant federal labour tribunal; or b) a relevant court or tribunal determines it is satisfied the authorised person has— i) acted or purported to act in an improper manner in the exercise of the rights conferred under the model Act, or ii) unduly and/or intentionally hindered a person conducting a business or undertaking or the workers during working hours, or iii) no longer meets the fit and proper person test required for authorisation under the model Act. Where action has been taken under (a) by the federal labour tribunal, the OHS court or tribunal is to convene to enable the authorised person to show cause why complementary action ought not be taken under the model Act. In proceedings brought under (b) the onus is on the applicant.	Page 413
219	In determining whether to revoke or suspend or impose limitations on the authorisation of an authorised person, the court or tribunal shall have regard for: a) the seriousness of any findings of the court or tribunal having regard to the objects of the model Act; and b) the requirement for an authorised person to continue to meet the fit and proper person test; and c) any other matter considered relevant. In proceedings initiated under this provision the onus is on the authorised person to show cause why complementary action should not be taken.	Page 413

220	A provision be inserted in the model Act prohibiting a person from: a) refusing an authorised person gaining entry to the workplace in accordance with the provisions of the model Act; or b) delaying, obstructing, intimidating or threatening an authorised person acting in accordance with the provisions of the model Act, or inducing or attempting to induce another person to do so.	Page 415
221	An authorised person must not contravene any limitation imposed by the issuing authority on their right-of-entry authorisation. and It is an offence for any person to impersonate an authorised person under the model Act.	Page 417
222	Any specific requirements on union right of entry, additional to those contained in the model Act, are to be specified in regulations. Guidance material on right of entry is to be: a) drawn up by the regulator in consultation with the relevant tripartite body; and b) issued and distributed in that jurisdiction.	Page 417

Chapter 46: Who may prosecute		Reference
223	We recommend that the model Act provide that: a) only an official who is acting in the course of a public office or duty may bring a prosecution for a breach of the Act; b) in accordance with the process and time frame described in our discussion of Option 4, in the case of an alleged Category 1 or 2 breach of a duty of care, a person may request in writing that the regulator bring a prosecution for the breach and, if no prosecution is to be brought, have the decision of the regulator reviewed by the DPP; c) where a person requests prosecution of an alleged Category 3 breach the regulator should be required to explain in writing what action the regulator proposes to undertake; and d) the model Act should provide that the DPP is able to bring proceedings for an indictable offence under the model Act notwithstanding any other provisions in the model Act.	Page 435
Chapter 47: Regulation-making powers		**Reference**
224	The model Act should contain broad regulation-making powers, which allow for the development of regulations necessary or convenient to carry out or give effect to the provisions of the model Act.	Page 442
225	There should also be more specific regulation-making powers (that expressly do not limit the broad general regulation-making power) prescribing those matters that are not expressly identified within the scope or objects of the model Act for which regulations may be required.	Page 442
226	To assist in identifying the specific matters mentioned in Recommendation 225, the range of existing regulation-making powers in each jurisdiction's OHS Acts should be consolidated into a workable list of more broadly worded, specific regulation-making powers. This should be used to settle the specific matters to be included in the model Act's regulation-making power. ***Note:*** *The range of such matters will only be able to be finalised once the extent of matters that will be dealt with by the model Act are finalised.*	Page 442
227	The model Act should allow the regulations to provide for summary offences with lower penalties.	Page 442

Chapter 48: Codes of practice		Reference
228	The model Act should provide for codes to be developed through a tripartite process, with expert involvement, and approved by the relevant Minister.	Page 450
229	The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.	Page 450
230	The model Act should make it clear that a duty holder may achieve and demonstrate compliance with relevant provisions of the Act and regulations by ways other than the ways set out by an approved code of practice.	Page 450
Chapter 49: Other matters		**Reference**
231	The model Act should provide for: a) the imputation to a corporation of the conduct and the state of mind of officers, employees and agents of the corporation acting within the scope of their actual or apparent authority; and b) a defence for a corporation if it is proved that the corporation took all reasonable and practicable measures to prevent the offence occurring.	Page 455
232	The model Act should provide for the review of its content and operation and that of the subordinate regulation at least once in each period of five years after the model Act's commencement. The review must be part of or take account of any national review of the content and operation of the principal OHS Acts. Any persons who are affected by the operation of the model Act and regulations must be given a reasonable opportunity to provide their views for the purposes of the review. The report of the review must be presented to the responsible Minister and presented to the Parliament within a reasonable time after the Minister has had an opportunity to consider it.	Page 456

PART 1
THE REGULATORY CONTEXT

- Background to the Review
- The constantly changing work environment
- OHS in Australia

Chapter 1: Background to the Review

The Australian OHS legislative framework

1.1 Australia has nine OHS jurisdictions, with a multitude of laws relating to health and safety in the workplace. This includes ten specific OHS statutes (six State Acts, two Territory Acts and two Commonwealth Acts) and over 50 other legislative instruments applying to offshore petroleum, mining, construction, public health (i.e. radiation, agriculture and veterinary chemicals), public safety (i.e. amusement equipment, electrical safety, plumbing and gas safety, machinery, scaffolding and lifts) and statutes relating to explosives, transport of dangerous goods, radioactive materials and many more.

1.2 The general Australian OHS laws in each jurisdiction are based on the 'Robens model'. The recommendations made by Robens' Committee[1] in the United Kingdom (UK) resulted in widespread legislative reform in OHS across the UK and other countries whereby OHS laws shifted from detailed, prescriptive standards to a more self-regulatory and performance-based approach.

1.3 The Robens model includes two principal elements: a single umbrella statute containing broad 'general duties' based on the common law duty of care; and the incorporation of 'self-regulation' by empowering duty holders, in consultation with employees, to determine how they will comply with the general duties. Prescriptive requirements were replaced with a three tiered approach involving regulations and codes of practice designed to support the general duties in the Act. Robens also recommended the use of improvement and prohibition notices in compliance activities as new administrative sanctions to enable regulators to contribute to the self-regulatory culture.

1.4 In the past decade, all jurisdictions have undertaken major reviews of their OHS laws, with the most recent, publicly available reviews being completed in New South Wales (NSW), the Northern Territory (NT) and the Australian Capital Territory (ACT).[2] The reviews in the Territories resulted in the introduction of new OHS Acts.[3]

1.5 Although they have had various objectives, the reviews have all examined the relevant OHS laws and addressed many of the matters that are also contained in the terms of reference for our review:

- Ensuring the general duties include the types of work arrangements that fall outside the traditional employer and employee relationship;
- Providing greater clarity for duty holders and regulators in defining key concepts;
- Increasing penalties and introducing additional enforcement measures such as enforceable undertakings; and

[1] Lord Robens, Report of the Committee on Safety and Health at Work, HMSO, London, 1972.
[2] NSW WorkCover Review, Stein Inquiry, NT Review, ACT Review.
[3] The *Workplace Health and Safety Act 2007* (NT) took effect on 1 July 2008 and the *Work Safety Act 2008* (ACT) is to take effect on 1 July 2009. The new ACT Act has been referenced in regard to this Review.

- Strengthening provisions relating to consultation, participation and representation.

1.6 In some jurisdictions, reviews have also examined consolidating industry specific legislation under the OHS Act.[4] Following the recent review of the NT legislation, the new *Workplace Health and Safety Act 2007* was expanded to include mine safety responsibilities and dangerous goods regulation.

Harmonising OHS legislation

1.7 The National OHS Strategy includes 'a nationally consistent regulatory framework' as one of nine areas requiring national action.[5] While there has been some progress towards achieving consistency in various areas of OHS regulation, there are material differences between the principal OHS Acts, as we identify in this report.

1.8 The importance of harmonised OHS laws has also been recognised by the Council of Australian Governments (COAG), the Productivity Commission (PC) and the States and Territories in their work in this area to date.

1.9 Our review is part of the broader COAG National Reform Agenda aiming to reduce regulatory burdens and create a seamless national economy. Since February 2006, when COAG agreed to improve the development and uptake of national OHS standards,[6] the Australian Safety and Compensation Council (ASCC) has been reviewing the national OHS framework to achieve greater national consistency and prioritising areas for harmonisation.

1.10 At its meeting on 1 February 2008,[7] the WRMC agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws. Ministers supported the Australian Government's intention to initiate a review to develop model legislation and agreed to settle the terms of reference for the review, including priority areas for attention.

1.11 The commitment of all jurisdictions to adopt model OHS laws by 2011 was formalised when COAG signed an Intergovernmental Agreement[8] which sets out the principles and processes for cooperation between the Commonwealth, States and Territories to implement uniform OHS legislation complemented by consistent approaches to compliance and enforcement.

1.12 The new body which is to replace the ASCC, Safe Work Australia, will develop the model Act based on the WRMC's decisions on our recommendations. Safe Work Australia will also develop model regulations to support the model OHS Act.

4 Maxwell Review; NT Review.
5 National OHS Strategy 2002-2012, Commonwealth of Australia, p 10.
6 COAG Communiqué, 10 February 2006 – see: http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm.
7 WRMC Communiqué, 1 February 2008 – see: http://www.workplace.gov.au/NR/rdonlyres/31BED76B-2655-4CDF-952F-E84FE0CD3469/0/WRMC75AgreedCommunique.pdf.
8 Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety – see: http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/OHS_IGA.pdf.

1.13 In conducting our review, we became aware of other work in related areas of COAG's reform agenda which may affect the OHS legislative framework over the next few years. This includes the regulation of chemicals and plastics, mine safety laws, energy safety, rail, road and maritime safety regulation.[9] We have contacted the relevant persons responsible for these areas to advise them of our work.

The scope of the Review

1.14 The Terms of Reference require us to examine the principal OHS legislation in each State, Territory and Commonwealth jurisdiction for the purpose of making recommendations on the optimal content of a model OHS Act that is capable of being adopted in all jurisdictions.[10] Our recommendations are to be made in two stages, to allow matters critical for harmonisation to be considered by the WRMC as a matter of priority.[11]

1.15 Although the scope of our review is limited to the content of a model OHS Act, we have kept in mind the interdependence of the principal OHS Acts with their subordinate instruments, as well as the overlap with other health and safety laws. We examined the breadth of regulation required to support a model OHS Act, but have not covered the specific detail found in OHS regulations, codes of practice and guidelines. We also have not covered the content of other health and safety laws, but have examined the extent to which such laws could be accommodated under a model OHS Act. These matters are to be discussed in the second report, in accordance with the terms of reference.

1.16 As mentioned in the preface, it will be important to consider the two reports together. The following table outlines the full scope of the review and which areas will be addressed in each report:

TABLE 1: Scope of the Review

Report One
General duties of care, including the identification of duty holders and the scope and limits of these duties
Nature and structure of offences related to breaches of the general duty of care, including defences

[9] COAG Business Regulation and Competition Working Group Agenda – see: http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm#fragment-3.

[10] Terms of Reference, clause 10.

[11] Ibid, clause 12 and 13.

Report Two
Scope and coverage
Definitions
Workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees
Enforcement and compliance, including the role and powers of OHS inspectors and the application of enforcement tools
Role of regulators in providing education, advice and assistance to duty holders
Permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances
Application of codes of practice
Regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional cooperation and dispute resolution
Other matters that should be addressed in a model OHS Act

The Review process

1.17 At the outset of the review, we agreed on a comprehensive process of information gathering, research and consultation. To provide information and facilitate communication with interested parties, a review website was established.[12] Following our first panel meeting in April 2008, we issued a media release outlining the broad process. Further media releases were issued at key milestones.

1.18 We examined all principal OHS legislation in each jurisdiction. We also drew on previous inquiries relating to OHS (see Appendix A), a range of Australian and international research, and work undertaken by the ASCC to develop a National OHS Framework.

1.19 The first stage of the review process involved initial consultation with stakeholders to inform the development of an issues paper. We met a range of stakeholders in each jurisdiction, including employer and employee organisations, governments, industry representatives and other interested parties. We also held discussions with organisations involved in other recent or current review processes with a potential OHS impact, in particular in the energy, mining and transport industries.

1.20 We have also addressed a number of conferences and meetings including:

- a meeting of the ASCC in April 2008;
- the Australian Council of Trade Unions' (ACTU) OHS and Workers' Compensation Under Labor Conference in May 2008;
- the Australian Industry Group (AiG) National OHS Conferences 2008 in Melbourne, Sydney and Brisbane during June 2008;

[12] See http://www.nationalohsreview.gov.au/. As at 24 October 2008 the website has had 4102 visits and 233,606 page views since June 2008.

- a meeting of the Heads of Workplace Safety Authorities (HWSA) in August 2008; and
- the Australian Chamber of Commerce and Industry (ACCI) National Employers OHS Consultative Forum meetings.

1.21 The second stage of the review process commenced on 31 May 2008 with the release of the issues paper[13] to help interested parties prepare written submissions. The public comment period was advertised in the Government Notices Gazette, all major metropolitan newspapers and two regional newspapers on 31 May 2008.

1.22 The issues paper posed a series of questions on specific issues that we identified during our preliminary consultations and research. All persons making submissions were encouraged to include evidence and examples to justify their position on each issue. The public comment period was open for six weeks and concluded on 11 July 2008.

1.23 We received a total of 243 written submissions (one submission was withdrawn), including:

- 8 from governments – States, Territories and the Commonwealth;
- 12 from employer organisations;
- 60 from industry associations;
- 24 from unions;
- 6 from union organisations; and
- 43 from companies.

1.24 Submissions were also received from academics, community organisations, professional associations, government organisations, individuals and other groups. A full list of submissions is at Appendix B.

1.25 The third stage of the review process involved analysing the written submissions and drafting our first report. Further targeted consultation with key stakeholders was undertaken. This included meetings with groups of legal practitioners and academics who specialise in OHS. We also met with representatives of families who had lost a family member due to a work-related death, which underscored the importance of achieving better OHS outcomes.

1.26 The final stage of the review will involve preparing the second report covering all other matters specified in the terms of reference. The review will be completed by 30 January 2009 when our second report will be submitted to WRMC.

1.27 In formulating the optimal content of a model OHS Act, we have given close attention to the views of all interested stakeholders. We identified areas of best practice, common practice and inconsistency in legislation, and considered how model legislation could be adopted without compromising safety standards, and with the most effective use of resources.

[13] *National Review into Model OHS Laws: Issues Paper*, Australian Government, Canberra, 2008.

Resource Implications

1.28 Clause 14(c) of our terms of reference require us to consider the resource implications for all levels of government in administering harmonised laws.

1.29 It is widely accepted that harmonised OHS laws will reduce red tape and compliance costs for multi-state employers. In its 1995 report, the Industry Commission (IC) concluded that:[14]

> *National employers have to work within multiple OHS jurisdictions. Multiple regimes means additional costs whenever systems of work are changed or staff are moved between regimes. They also raise the costs of compliance by their operations.*

1.30 That inquiry discussed options for achieving greater consistency between jurisdictions, but it did not provide any estimates of the benefits of doing so, or indicate how these estimates could be reached.

1.31 Similarly, the 2004 PC Report[15] noted that there are significant benefits to be gained from a national OHS system, particularly for multi-state employers and for the increasingly mobile workforce. Apart from reproducing data provided by a number of large companies in their submissions, the PC did not quantify the economic benefits of harmonisation.

1.32 In 2006 the PC estimated the potential benefits of COAG's National Reform Agenda; of which OHS is one of 10 cross-jurisdictional 'hot-spot' areas where overlapping and inconsistent regulatory regimes are impeding economic activity. While the PC did not consider OHS in isolation, it did find that the regulatory reforms proposed under the National Reform Agenda have the potential to reduce compliance costs by up to 20 per cent (0.8 per cent of GDP per annum or as much as $8 billion in 2005-06 values). The PC did not quantify implementation costs of the reforms, but noted that international evidence showed the levels government expenditure required to achieve reductions were small relative to the benefits.[16]

1.33 We have not been able to quantify the resource implications. Among other things, this will depend on the final decisions by the WRMC on our recommendations. We note that, while there may be short term costs involved for governments in implementing the model laws, in the longer term the resource implications should be no greater as uniform model laws will reduce duplication and obviate the need for the periodic, individual jurisdictional reviews that have become common in recent years.

1.34 We also consider that the implementation of model OHS laws would improve OHS outcomes, as business would be able to spend the time and resources focusing on developing better prevention strategies which they may otherwise have spent on researching and complying with different OHS laws.

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[14] IC, *Work Health and Safety: Inquiry into Occupational Health and Safety*, Report No 47, AGPS, Canberra, 1995.

[15] PC, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Productivity Commission Inquiry Report No 27, AGPS, Canberra, 2004.

[16] PC, *Research Paper: Potential Benefits of the National Reform Agenda – A report to the Council of Australian Governments*, AGPS, Canberra, 2006, p. 156.

Chapter 2: The constantly changing work environment

2.1 Clause 11(c) of the Terms of Reference requires us to take into account the changing nature of work and employment arrangements. The processes of change that we describe in this chapter have reinforced our view that the model Act should be designed so that it is capable of accommodating such new and evolving circumstances, without requiring amendments as these changes occur.

2.2 Over the past few decades, significant changes have occurred to the economy, the labour market and the nature and organisation of work in Australia. These changes have led to growth in casual, part-time and temporary work, outsourcing, job-sharing and the use of labour hire and home workers. In many ways, the work environment, arrangements and activities of 2008 are fundamentally different from those of 25 years ago, when the early Robens-style OHS legislation was first introduced in Australia.

2.3 At the same time, the numbers of small businesses (those with less than 20 employees) and micro-businesses (those with less than five employees) have increased. Globalisation and changes in technology have led to organisations becoming more flexible and responsive. Australia is also experiencing a labour shortage and an ageing workforce.

2.4 Such changes are challenging many of the principles underpinning the Robens model, which had assumed relatively stable, permanent work arrangements between employers and employees.

The Australian labour market

2.5 The traditional model of OHS regulation and administration is founded on dealing with physical hazards in high risk industries such as manufacturing and construction and with workers in medium to large workplaces. OHS laws have struggled to keep pace with the considerable changes that have affected the composition of the labour market over time.

2.6 The decline in employment in the manufacturing industry has occurred in tandem with a growth in the services sector. Over the past decade, employment in the manufacturing sector has fallen from 14 per cent of all employed people in 1996–97 to 10 per cent in 2006–07. The manufacturing industry now ranks equal with the health and community services sector, at 10 per cent of all employed persons, after the:[1]

- retail trade sector (14 per cent of all employed persons); and
- property and business services sector (12 per cent of all employed persons).

2.7 During the same period, the greatest increases in the proportion of employed people were in the:[2]

- property and business services industry, from 10 to 12 per cent; and
- construction industry, from 7 to 9 per cent.

2.8 Despite the decline in employment in manufacturing, this sector recorded the highest incidence rate of accepted workers' compensation claims in 2005-06 (28.8 claims per 1000 employees) followed by the transport and storage industry (27.6), the agriculture, forestry and fishing industry (25.9) and the construction industry (25.0).[3]

2.9 The expansion of the service sector and the changing nature of work have shifted the pattern of occupational injury and disease towards psychosocial problems and musculoskeletal disorders.[4]

2.10 New and emerging technologies are also impacting on OHS. For example, there is expanding use of engineered nanoscale particles, or nanotechnology, of which the health and safety effects remain mostly unknown.[5]

1 ABS, *Year Book 2008* (Cat. No. 1301.0), Australian Government, Canberra, 2008, p. 228.
2 ibid.
3 WRMC, *Comparative Performance Monitoring Report 10th Edition*, p. 32, Indicator 24. All these sectors, together with the health and community services industry, are priority industries receiving attention under the National OHS Strategy.
4 E Bluff, N Gunningham & R Johnstone, *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004, p. 3.
5 Flinders Consulting Pty Ltd, *A Review of the Potential Occupational Health and Safety Implications of Nanotechnology: Final Report July 2006*, DEEWR, Canberra, Australia, 2006.

Business size

2.11 As of June 2007, there were approximately 2.01 million businesses operating in the Australian private sector and 309 public sector organisations.[6]

2.12 The majority of private sector businesses (95.8 per cent) were small businesses with less than 20 employees. Of those remaining businesses approximately 3.9 per cent were classified as medium (employing 20-199 employees) and 0.3 per cent were classified as large businesses (200+ employees).

2.13 Research in Australia and internationally has demonstrated that preventing occupational injury and disease in small business is likely to require a different regulatory strategy from that for large organisations.[7] The characteristics of small business mean that they may be vulnerable to higher rates of occupational injury and disease due to a lack of resources and OHS management expertise, as well as inadequate worker representation. They also have shorter life cycles, find compliance difficult and are inspected by regulators infrequently.[8]

2.14 Table 2 shows that the number of small businesses in Australia has increased from 846,300 in 1997 to approximately 1.93 million in 2007. At the same time, the proportion of small businesses as a percentage of all businesses has increased from 81 per cent to 96 per cent.[9]

TABLE 2 – Numbers of Small Businesses 1997–2007

Year	1997	2001	2007
All Businesses	1,051,900	1,281,700	2,011,770
Small Business	846,300	1,122,000	1,927,590
Non-employing businesses	*392,700 (46.4%)*	*582,100 (51.9%)*	*1,171,832 (58.2%)*
Businesses that employed 1–4 people	*323,100 (38.2%)*	*370,100 (33%)*	*527,445 (26.2%)*
Businesses with 5-19 employees	*130,500 (15.4%)*	*169,800 (15.1%)*	*228,313 (11.4%)*
Small business as a percentage of all businesses	80.5%	87.5%	95.8%

6 ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007* (Cat. No. 8165.0), Australian Government, Canberra, 2007.

7 F Lamm & D Walters, 'Regulating Occupational Health and Safety in Small Businesses', in E Bluff et al (Eds), *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004.

8 ibid.

9 ABS, *Characteristics of Small Business Australia*, 1997 (Cat. No. 8127.0), Australian Government, Canberra, 1998.

2.15 This period has also seen an increase in the numbers of businesses without employees, where non-employing businesses have increased as a proportion of small businesses from 46.4 per cent to 58.2 per cent.

2.16 Small businesses provided employment for around 3.82 million people in 2005–06. This accounted for around 46 per cent of private sector employment.[10]

Franchising

2.17 Research commissioned by the Franchise Council of Australia[11] has estimated that there were approximately 1,100 franchisors (i.e. controlled a franchise system) in Australia in 2008, compared with 693 in 1998.

2.18 Further, the research found that in 2008 there were an estimated 71,400 franchisees (i.e. persons who operate a franchise) employing an estimated 413,500 persons, comprising:

- 154,900 (37.5 per cent) permanent full-time employees (a decrease from 208,100 in 2006);
- 96,210 (23.3 per cent) permanent part-time employees (an increase from 72,800 in 2006); and
- 162,390 (39.3 per cent) casual employees (an increase from 145,600 in 2006).

2.19 Franchisees were found to be typically male and aged between 30 and 50 years (46 per cent of franchisees) and working full-time (57 per cent).

2.20 The research also indicated that most franchising takes place in the retail trade sector, which accounts for 28 per cent of franchisors. Other major franchisor industry sectors included:

- accommodation and food services (including food retail, fast food and coffee shops), which represents 16 per cent of franchisors;
- administration and support services (including travel agencies, office services, domestic and industrial cleaning, gardening services and lawn mowing), which represents 15 per cent of franchisors; and
- other services (including personal services, pet services, auto repairs and servicing and information technology services), which represents 10 per cent of franchisors.

[10] ABS, *Australian Industry 2005-06* (Cat. No. 8155.0), Australian Government, Canberra, 2006. (These figures exclude small business employees in the Finance and Insurance Industry and Government Administration and Defence sectors due to technical issues with data collection and processing.)

[11] L Frazer, S Weaven & O Wright, *Franchising Australia 2008: Survey*, Griffith University, Brisbane, 2008 http://www.franchise.org.au/content/?id=364.

Changes in the organisation of work

2.21 Over the past 25 years, changes in the organisation of work in Australia have led to a marked growth of part-time, fixed term and temporary employment arrangements. These changes have in large part been caused by:[12]

- organisational practices such as outsourcing, downsizing, restructuring and privatisation;
- management techniques such as labour leasing and franchising; and
- structural changes that have been occurring in many developed economies, including higher female labour force participation and the expansion of the service industries.

2.22 However, there is a concern that such working arrangements may adversely affect OHS, for example, where work targets or payment structures are in conflict with the ability to adhere to safety requirements. Additionally it is suggested these arrangements have diluted or, in some cases, bypassed existing occupational health and safety regulations.[13]

Full-time and part-time employment[14]

2.23 In 2006–07, there were 10.3 million employed people in the Australian labour force, with almost three-quarters (72 per cent) working full time. Approximately 85 per cent of men work full time compared with 55 per cent of women.[15]

2.24 Part-time work was most prevalent among the younger (15–19 years) and older (65 years and over) age groups, with 67 per cent of younger workers and 52 per cent of older workers working under part-time arrangements.[16]

2.25 The proportion of employed people who worked part time rose from 19 per cent in 1986–87 to 28 per cent in 2006–07, with approximately 71 per cent of all part-time workers being women.[17]

[12] M Quinlan, 'Flexible Work and Organisational Arrangements' in E Bluff et al (Eds), *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004.
[13] ibid.
[14] For statistical purposes, the ABS classifies full-time workers as those who work 35 hours or more per week. Part-time workers are those who usually work less than 35 hours a week.
[15] ABS, *Year Book 2008* (Cat. No. 1301.0), Australian Government, Canberra, 2008.
[16] ibid.
[17] ibid.

Casual employment[18]

2.26 Employees without paid leave entitlements rose as a proportion of total employment from 17 per cent in 1992 to 20 per cent in 1998. Since then, the proportion has remained relatively stable at 20 per cent.[19] Casual employees are more likely to be female, young and employed part-time.[20]

2.27 According to the Australian Bureau of Statistics (ABS) (2006), the industries with the highest percentages of casual workers were:

- accommodation, cafes and restaurants industry (59 per cent);
- agriculture, forestry and fishing sector (49 per cent);
- retail trade sector (45 per cent); and
- cultural and recreational services sector (45 per cent).

Independent contractors

2.28 The PC estimated that there were approximately 843,900 independent contractors in 1998, dropping to 787,600 in 2004 – a reduction from 10.1 per cent in 1998 to 8.2 per cent of total employed persons in 2004.[21]

2.29 The PC found that since 2004 the proportion of independent contractors has remained at 8.2 per cent of total employment indicating that the numbers of independent contractors have grown at a similar rate to other forms of employment in this period.

2.30 However, this data is subject to qualifications. It is based on the ABS *Forms of Employment Survey*, which included independent contractors in all five categories of workers that it covers.

2.31 The PC has applied a number of tests, and inferred the estimate for 2004 using the ABS surveys in 1998 and 2001, which are not strictly comparable. In addition, the PC does not include 'owner managers who employ others' as independent contractors. Despite the variation in figures, the PC concludes that independent contractors represent the second largest group of non-traditional workers after casuals.

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[18] ABS data collected on the number of employees without entitlements to paid leave (not entitled to paid holiday leave or paid sick leave), who received a casual loading as part of their pay or who considered their job to be casual is commonly used to measure the incidence of casual employment in Australia. Of these measures, the number of employees without entitlements to paid leave appears to be the most consistently used data for establishing trends in casual employment.

[19] ibid.

[20] ibid.

[21] PC, *The Role of Non-Traditional Work in the Australian Labour Market*, Australian Government, Canberra, 2006.

Labour hire

2.32 Labour hire is a form of indirect employment relationship in which an agency supplies workers to a workplace controlled by a third party (the host), usually in return for a fee from the host.

2.33 Labour hire figures have been difficult to obtain over recent years. The most recent ABS data on numbers employed through labour hire arrangements suggests that 3.9 per cent of employees (290,100) were on-hired through agencies in 2002.[22] This represents a tripling of the proportion of labour hire employees from 1.3 per cent in 1998[23] and a quadrupling from 0.8 per cent in 1990.[24]

2.34 The 2005 report of the Victorian Parliamentary Inquiry into Labour Hire Employment in Victoria identified a range of factors affecting the workplace health and safety of labour hire workers.[25] These included:

- economic pressures;
- fragmented lines of responsibility;
- uncertainty with the delineation of OHS responsibilities between labour hire agencies and host employers; and
- limited provision of training by labour hire agencies or host employers.

2.35 The Inquiry reported that the greatest use of labour hire was in traditional blue collar industries, and that in Victoria, labour hire was most frequently used in the industries of mining/construction, manufacturing, education and health and community services.[26]

Working from home

2.36 A recent review of 25 international studies of the OHS effects of subcontracting and home-based work found poorer health and safety outcomes in 92 per cent of the studies analysed.[27]

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22 House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into independent contracting and labour hire arrangements*, Australian Government, Canberra, 2005.

23 ABS, *Australian Social Trends 2000* (Cat. No. 4102.0), Australian Government, Canberra, 2000.

24 House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into independent contracting and labour hire arrangements*, Australian Government, Canberra, 2005.

25 Parliament of Victoria Economic Development Committee, *Final Report: Labour Hire Employment in Victoria*, State of Victoria, 2005. www.parliament.vic.gov.au/edic/inquiries/Labour_Hire/EDC-FinalReport_LabourHireEmployment_2005–07.pdf.

26 These are priority industries identified in the National OHS Strategy.

27 M Quinlan and P Bohle, *Under Pressure, Out of Control or Home Alone? Reviewing Research and Policy Debates on the Occupational Health and Safety Effects of Oursourcing and Home-Based Work,* International Journal of Health Services, Vol 38, No. 3, 2008, p. 489–523.

2.37 In 1995, there were approximately 343,300 persons who were employed only or mainly at home, representing approximately 4 per cent of all employees.[28]

2.38 By 2005, the number of persons employed only or mainly at home had increased to 724,500 or 8 per cent of people at work.[29]

Women in the workforce

2.39 Employment patterns of men and women have changed over recent decades. Significantly, the proportion of women who were employed has increased over the period. Changing social attitudes and smaller families have contributed to these changes in women's employment.[30]

2.40 The proportion of women aged 15 years and over who are employed has steadily increased over the last 30 years from 40 per cent in 1979[31] to 58 per cent in September 2008.[32] Over the same period, the proportion of men who were employed decreased from 74 per cent[33] in 1979 to 72 per cent in September 2008.[34]

2.41 As a result of the changes to the proportion of men and women who were employed, women now represent a higher proportion of employed people (45 per cent in September 2008[35] compared with 36 per cent in 1979[36]). In 2008, 4.8 million women and 5.9 million men were employed.[37]

2.42 Much of the increase in women's labour force participation has been associated with part-time work. In 2008, 45 per cent of employed women were working part-time[38], compared with 14 per cent of women in 1979.[39]

28 ABS, *Persons Employed at Home* (Cat. No. 6275.0), Australian Government, Canberra, 1995.
29 ABS, *Locations of Work* (Cat. No. 6275.0), Australian Government, Canberra, 2000.
30 ABS, *Australian Social Trends 2006* (Cat. No. 4102.0), Australian Government, Canberra, 2006, p. 121.
31 ibid.
32 ABS, *Labour Force Sept 2008* (Cat. No. 6202.0), Australian Government, Canberra, 2008.
33 ABS, *Australian Social Trends 2006* (Cat. No. 4102.0), Australian Government, Canberra, 2006, p. 121.
34 ABS, *Labour Force Sept 2008* (Cat. No. 6202.0), Australian Government, Canberra, 2008.
35 ibid.
36 ABS, *Australian Social Trends 2006* (Cat. No. 4102.0), Australian Government, Canberra, 2006, p. 121.
37 ABS, *Labour Force Sept 2008* (Cat. No. 6202.0), Australian Government, Canberra, 2008.
38 ibid.
39 ABS, *Australian Social Trends 2006* (Cat. No. 4102.0), Australian Government, Canberra, 2006, p. 121.

Other changes affecting the regulatory task

Ageing workforce

2.43 Population ageing is occurring across Australia due to a sustained decline in fertility rates and a decline in mortality owing to better healthcare and technology. Ageing workers face specific OHS concerns, including decreased physical capacity, fatigue, increased rates of musculoskeletal disorders and greater incidence of disease.[40]

2.44 In 2006-07, people aged 45-64 years made up over a third (37 per cent) of the labour force, compared with 24 per cent in 1983-84.[41]

2.45 In the 20 years to March 2008, the workforce participation rate of people aged 45 years and over increased from 40 per cent to 50 per cent, while the participation rate for those aged 15–44 years increased marginally from 78 per cent to 80 per cent.[42]

2.46 Between 2011 and 2030, the generation of people born between 1946 and 1965 will turn 65 years old. The large number of people set to retire from Australia's workforce over the next few decades raises the possibility of a shortage of labour to meet future demands, and hence new work pressures and arrangements.

Migrant workers

2.47 Migrant workers, particularly those used to undertake low skilled work, face a number of OHS challenges. There is concern that language barriers and interdependence of the employment/visa status may reduce the willingness of migrant workers to raise OHS concerns and to understand and respond to OHS risks and practices in the workplace.

2.48 The 457 Subclass visa program, also known as the temporary (long stay) business visa, was introduced in Australia in 1996 so that employers could quickly recruit skilled workers where employment vacancies could not be filled locally.

2.49 Due to recent labour shortages, the number of 457 visas issued has increased by 24 per cent between 2006-07 and 2007-08.[43]

2.50 Approximately 70 per cent of 457 visa holders are from non-English speaking countries.[44] In 2007-08, the visas were most commonly issued to people working in the health and community services, property and business services and construction industries.

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[40] Australian Safety and Compensation Council (ASCC), *Surveillance Alert: OHS and the Ageing Workforce*, May 2005.

[41] ABS, *Year Book Australia* 2005 (Cat. No. 1301.0), Australian Government, Canberra, 2005.

[42] ABS, *Health of Mature Age Workers in Australia: A Snapshot 2004*-05 (Cat. No. 4837.0.55.001), Australian Government, Canberra, 2008.

[43] Department of Immigration and Citizenship, *Subclass 457 Business Visa (Long Stay): State/Territory Summary Report 2008–09 Financial Year to 31 August 2008*, Australian Government, Canberra, 2008.

[44] ibid.

2.51 In April 2008, the Australian Government commenced a review of the temporary skilled migration program to address concerns about the exploitation of migrant workers.[45] This review includes examining health and safety protections and training requirements that apply in relation to temporary skilled workers.

Trade union membership in Australia

2.52 Article 21 of the ILO *Occupational Safety and Health Convention 1981 (C155)* recognises that cooperation between management and workers and/or their representatives is essential in ensuring health and safety at the workplace. Trade unions have an important role, mandated by Australian OHS laws, in representing workers on OHS issues. A number of studies have found that better OHS standards may be achieved in unionised workplaces than in non-unionised ones.[46] There is evidence that the effective participation of workers in OHS issues is essential to improving OHS performance and that this is enhanced where worker representatives are supported by trade unions.[47] However, Australian trade union membership has declined steadily since the early 1980s. In 1986, 46 per cent of Australian employees (or 2.6 million) were trade union members; by 2007 the unionisation rate had declined to 19 per cent (or 1.7 million employees).[48]

2.53 In 2007, a higher proportion of full-time employees were trade union members than part-time employees (21 per cent compared with 14 per cent), as were public sector employees compared to those in the private sector (41 per cent compared with 14 per cent).[49]

2.54 A number of comparable industrialised countries have also had similar experiences to Australia in having a pattern of decline in the levels of trade union membership. When compared with Australia's 15 per cent decline in trade union membership over the period 1993-2003, Ireland (12 per cent decline) and New Zealand (12 per cent decline) have experienced declines of a similar scale.[50] On the other hand, in 2003, rates of trade union membership were significantly higher in Sweden (78 per cent), Finland (74 per cent), Denmark (70 per cent) and Norway (53 percent).[51]

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45 See Subclass 457 Visa Integrity Review – http://www.immi.gov.au/skilled/457-integrity-review.htm

46 D Walters, 'Workplace Arrangements for Worker Participation in OHS', in E Bluff, N Gunningham & R Johnstone, *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004.

47 ibid.

48 ABS, *Australian Social Trends 2008* (Cat. No. 4102.0), Australian Government, Canberra, 2008.

49 ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia Aug 2007* (Cat. No. 6310.0), Australian Government, Canberra, 2008.

50 J Visser, 'Union membership statistics in 24 countries', *Monthly Labour Review*, January, 2006, pp. 38–49.

51 ibid.

Chapter 3: OHS in Australia

Australia's OHS performance

3.1 Although the economic costs of workplace injury and illness to the Australian economy are difficult to quantify, they are undoubtedly very high. A 2004 report estimated the cost for 2000-01 to be $34.3 billion.[1] This was equivalent to five per cent of Australia's Gross Domestic Product (GDP) for the 2000-01 financial year.[2]

3.2 In 2005-06, 270 Australians died as a result of a work-related injury.[3] It is estimated that more than 2000 Australians die each year as a result of a work-related disease.[4] Each year over 140,000 people are compensated for injuries resulting in one or more weeks off work and in 2005-06, nearly 400,000 people reported that they had suffered a work-related injury or illness that resulted in some time off work.[5]

3.3 The National OHS Strategy provides the framework that Australia's OHS regulators use to co-ordinate efforts to improve OHS outcomes for Australian workplaces. It sets the following targets:

- a reduction in the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent being achieved by 30 June 2007); and
- a sustained significant, continual reduction in the incidence of work-related fatalities with a reduction of at least 20 per cent by 30 June 2012 (and with a reduction of 10 per cent being achieved by 30 June 2007).

3.4 Since the National OHS Strategy was implemented, some progress has been made towards achieving these targets.

3.5 By 30 June 2007, there had been a 16 per cent reduction in the incidence of workplace injury since the Strategy was developed. This is below the 20 per cent reduction required to meet the interim target and a greater rate of improvement will be needed if Australia is to achieve a 40 per cent reduction by 2012.

3.6 The incidence of workplace injury fatalities also decreased by 16 per cent between 2002 and June 2007.[6] This surpasses the interim target of 10 per cent and promises to meet the 20 per cent reduction required by 2012. There is however, a considerable amount of volatility in this measure and continuing improvement is required.

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1 NOHSC, *The Costs of Work-related Injury and Illness for Australian Employers, Workers and the Community*, NOHSC, 2004.

2 It should be noted that this estimate represented forgone economic activity, and not the proportion of GDP that is lost as a result of work-related injury and illness.

3 ASCC, *Work-related traumatic injury fatalities, 2005–06,* Australian Government, 2008.

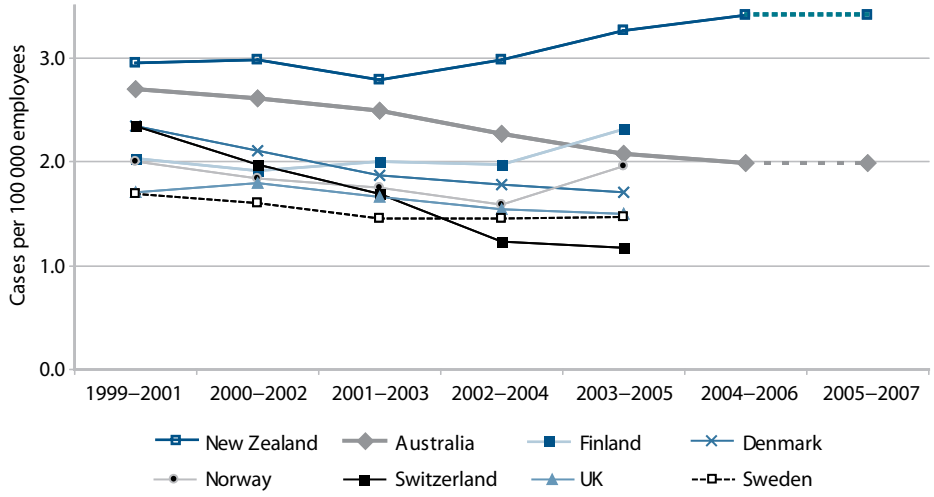
4 NOHSC, 2003, Estimates ranged from 2,040 to 7,627; Access Economics, *Review of methodology and estimates of workplace fatalities, 2003*.

5 ABS, *Work-related injuries, Australia, 2005–06,* Dec 2006.

6 WRMC, *Comparative Performance Monitoring Report 10th Edition*, Australian Government, Canberra, 2008, p. 3, Indicator 3.

3.7 The National OHS Strategy also includes an aspirational target for Australia to have the lowest work-related traumatic injury fatality rate in the world by 2009. Analysis of international data indicates that, in 2006–07, Australia recorded the sixth lowest work-related traumatic injury fatality rate. While the gap between Australia and the better performing countries has reduced, it is unlikely that Australia will meet the aspirational goal unless substantial improvements are recorded in the next two years. It should be noted that due to differences in scope and methodology, comparisons of occupational injury fatalities data between countries have many limitations.[7]

GRAPH 1: Comparison of Australia's work related injury fatality rate with the best performing countries[8]



3.8 Using workers' compensation data, the ASCC has found that the five most common causes of work-related injuries are body stressing from manual handling or repetitive movements (42 per cent of all claims), falls on the same level, falls from height, and hitting or being hit by moving objects.[9] The most common causes of work-related fatalities are vehicle accidents, being hit by moving objects, falls from a height, past exposure to asbestos and contact with electricity.[10]

3.9 ASCC data also indicate that the most common causes of compensated occupational disease are mental stress and exposure to noise and to chemicals or other substances.

3.10 As noted in Chapter 2 the industries with the highest rates of compensated claims are manufacturing, transport and storage, agriculture, forestry and fishing, and construction.

7 ibid p. 4, Indicator 4.
8 ibid p. 4.
9 ASCC, *Compendium of workers' compensation statistics, Australia 2005–06.* Australian Government, 2008. p. 14.
10 ibid, pp. 21–22.

How regulation affects OHS performance

3.11 In 1995, the IC Report stated that employers and their employees have insufficient incentive to prevent injury and disease at work by themselves. For this reason, governments regulate health and safety and implement programs to inform, educate and train people as a way to steer employers and employees to better performance. The inquiry concluded that there is considerable scope in Australia to reduce the human and economic loss associated with injury and disease at work via better regulation.[11]

3.12 The views of the IC are supported by a significant body of research in Australia and overseas which recognise that regulation, supported by a balanced mixture of advice, enforcement and incentives, is the most important government driven factor in achieving better OHS performance.

3.13 This assumption was supported by Professor Neil Gunningham in his review of the literature and practice to identify categories of factors motivating chief executive officers (CEOs) and supervisors in achieving better OHS performance.[12] The results of Professor Gunningham's review indicated regulation as the most important motivator of behavioural change and identified personal liability, reinforced by credible enforcement, as the single most important motivator of CEOs. The review also identified the importance, not only of regulation, but also of the perceived legitimacy of that regulation and its effect as a moral guideline.

3.14 The importance of a balanced mix of regulation, advice, enforcement and business incentives was also identified in research commissioned by the UK Health and Safety Executive (HSE).[13] The purpose of the research was to build an evidence base on what interventions can improve health and safety and compliance and what factors determine the success. The results indicated that enforcement is an effective means of securing compliance, creating an incentive for self-compliance and a fear of adverse business impacts such as reputational damage in all sectors and sizes of organisations. The research shows that advice and information is less effective in the absence of the possibility of enforcement.

3.15 It also revealed that enforcement supported by advice and guidance is considered to be of equal benefit to health hazards, such as noise, passive smoking, manual handling and stress, as it is to safety risks.

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11 IC, *Work, Health and Safety: Inquiry into Occupational Health and Safety*, Report No. 47, Canberra, Australia, 1995.

12 N Gunningham, *CEO and Supervisor Drivers: Review of Current Literature and Practice*, NOHSC, Canberra, Australia, 1999.

13 Greenstreet Berman Ltd., *Building an evidence base for the Health and Safety Commission Strategy to 2010 and beyond: A literature review of interventions to improve health and safety compliance*, Contract Research Report 196/1998, Health and Safety Executive, London, UK, 2004.

PART 2
DUTIES OF CARE

- Principles, common features and structure
- 'Reasonably practicable' and risk management
- The primary duty of care
- Specific classes of duty holders
- Duties of officers
- Duties of care owed by workers and others

Chapter 4: Principles, common features and structure

4.1 This part of the report provides discussion and recommendations on specific duties of care to be included in the model Act.

Interpretive principles applicable to all duties of care

4.2 In making our recommendations, we are concerned that the model Act provides for:

- as broad a coverage as possible, to ensure that the duties of care deal with emerging and future hazards and risks and changes to work and work arrangements;
- clarity of expression, to ensure certainty in the identification of the duty holders and that they can understand the obligations placed upon them; and
- the interpretation and application of the duties of care consistent with the protection of health and safety.

4.3 We accordingly propose that the model Act include a set of principles, which will, amongst other things, guide duty holders, regulators and the courts on the interpretation and application of the duties of care.

4.4 This is a matter that falls outside the scope of clause 12 of our Terms of Reference and will be dealt with in greater detail in our second report. Given the significance of these interpretive principles to the understanding of the duties of care, we note briefly the proposed principles:

- Duties of care are imposed on those who are involved in, materially affect, or are materially affected by, the performance of work.
- All duty holders (other than workers, officers and others at the workplace) must eliminate or reduce hazards or risks so far as is reasonably practicable.
- Workers and other individuals at the workplace must cooperate with persons conducting businesses or undertakings at the workplace, to assist in achievement of the objective of elimination or reduction of hazards or risks and must take reasonable care for themselves and others.
- Officers must pro-actively take steps to ensure the objective of elimination or reduction of hazards or risks is achieved within their organisation.

4.5 We consider that s.4 of the Vic Act provides a useful example of a statement of principles of this nature. The principles stated above are, however, more extensive as they relate to the roles of all duty holders.

RECOMMENDATION 1

The model Act should contain a set of principles including, amongst other things, the following to guide duty holders, regulators and the courts on the interpretation and application of the duties of care:

a) Duties of care are imposed on those who are involved in, materially affect, or are materially affected by, the performance of work.

b) All duty holders (other than workers, officers and others at the workplace) must eliminate or reduce hazards or risks so far as is reasonably practicable.

c) Workers and other individuals at the workplace must cooperate with persons conducting businesses or undertakings at the workplace, to assist in achievement of the objective of elimination or reduction of hazards or risks and must take reasonable care for themselves and others.

d) Officers must proactively take steps to ensure the objective of elimination or reduction of hazards or risks is achieved within their organisation.

***Note**: Recommendations relating to principles other than those relating to the interpretation of the duties of care will be dealt with in our second report.*

Common features of all duties of care

4.6 Duties of care are imposed on duty holders because they influence one or more of the elements that go to the performance of work, and in doing so may affect the health or safety of themselves or others. Duties of care require duty holders to ensure that, in their role and by their conduct, they do not adversely affect health or safety.

4.7 The model Act must make clear that all duty holders must at all times accept their responsibility for health or safety and ensure that the duties of care are met. The provisions of the model Act should not permit or encourage, directly or indirectly, any duty holders to avoid their health and safety responsibilities.

4.8 We share the view that has been expressed in a number of submissions and during consultation that the model Act should not allow any duty holders to relinquish or pass on their duties to anyone else. To allow this to occur may result in:

- a focus on passing on or relinquishing duties rather than focusing on achieving the protection of health and safety; and/or
- confusion as to who has the responsibility to provide for the protection of health and safety, which may result in no-one doing so.

4.9 The model Act should, therefore, include a number of matters to apply to all of the duties of care. These are that:

a) Duties of care are non-delegable.

b) A person can have more than one duty by virtue of being in more than one class of duty holder and no duty restricts another.

c) More than one person may concurrently have the same duty.

d) Each duty holder must comply with an applicable duty to the required standard (reasonably practicable, due diligence or reasonable care) notwithstanding that another duty holder has the same duty.

e) Each duty holder must comply with an applicable duty to the extent to which the duty holder has control over relevant matters, or would have had control if not for an agreement or arrangement purporting to limit or remove that control.

f) Each duty holder must consult, and cooperate and coordinate activities, with all persons having a duty in relation to the same matter.

4.10 These principles are not novel. Each of these matters is clearly recognised in decided OHS cases across the jurisdictions. Our experience is, however, that they are not universally understood. We consider that they are so important that they should be stated clearly in the model Act.

4.11 The provisions of s.24(3) and s.25 of the Queensland (Qld) Act and s.16 and s.17 of the recently passed ACT Act are examples of how these matters may be dealt with in the model Act. We believe that the common features set out above are wider in scope and clearer.

4.12 Each of these matters will be the subject of further discussion and specific recommendations in our second report.

RECOMMENDATION 2

The model Act should include provisions explicitly providing for the following common features applicable to all duties of care:

a) Duties of care are non-delegable.

b) A person can have more than one duty by virtue of being in more than one class of duty holder and no duty restricts another.

c) More than one person may concurrently have the same duty.

d) Each duty holder must comply with an applicable duty to the required standard (reasonably practicable, due diligence or reasonable care) notwithstanding that another duty holder has the same duty.

e) Each duty holder must comply with an applicable duty to the extent to which the duty holder has control over relevant matters, or would have had control if not for an agreement or arrangement purporting to limit or remove that control.

f) Each duty holder must consult, and cooperate and coordinate activities, with all persons having a duty in relation to the same matter.

The structure and coverage of the duties of care

4.13 In line with the principles that we recommend above, the model Act should ensure that duties of care 'cover the field'. They should be clearly owed by all persons carrying out activities in, and specific classes of persons associated with, the undertaking of work, including those who provide things necessary for work to occur. They should be owed to all whose health and safety may be put at risk by the activities.

4.14 The model Act should clearly state the basis for imposing duties of care. These are that the duty holder provides, makes a specified contribution to or involvement in, or manages, at least one of the elements that go to work being undertaken, being:

- the activity;
- the place of work;
- the systems or arrangements under which the work is undertaken;
- the things used in undertaking work (plant, substances, structures or components); or
- the capability (training and information), instruction and supervision and welfare of those undertaking the work.

4.15 Duties must apply to the design, manufacture or supply of any of these elements.

4.16 As we noted earlier in this report, in recent years, there has been considerable change in the nature of hazards and risks (such as nanotechnology, psychosocial hazards), work organisation and work relationships. That change is continuing and concern has been expressed by many of those who made submissions, or otherwise made public comment, that the current OHS legislation in Australia cannot accommodate these changes satisfactorily.

4.17 Accordingly, we believe that the model Act should include duties of care that not only apply to current circumstances, but also are broad enough to address changed circumstances in the future.

4.18 These considerations underpin our approach to the structure and content of the duties of care.

Options for the structure of duties of care

4.19 We have considered the duties of care in current Australian and overseas OHS legislation, as well as the views expressed in submissions, during consultations and in the literature. We have thereby identified four options for the structure of the duties of care in a model Act.

4.20 ***Option one*** – Allocate responsibilities to specific duty holders as currently identified in legislation in most jurisdictions in Australia. The provision would operate so that:

1) the primary duty holder would be the employer (as traditionally defined), with—
   a) detailed requirements specified as part of a duty of care owed by the employer to the employees of that employer,
   b) a more generally expressed duty owed to persons other than employees,
   c) the beneficiaries of the employer's duties to be as traditionally defined, and
   d) with no deeming of employment in contracting arrangements; and
2) other specific duty holders are as currently identified (e.g. designers, manufacturers, suppliers, self-employed persons); and
3) a duty is owed by employees to take reasonable care for the health or safety of themselves and others affected by the acts or omissions of the employee at work; and
4) officers of a corporation may be liable for offences committed by the corporation that are attributable to specified conduct or omissions of the officer; and
5) the geographic limits of the workplace limit many duties.[1]

4.21 ***Option two*** – As for the first option, but with various deeming provisions, e.g. contractors and their employees deemed to be employees of the employer for

[1] For example, this approach is taken in the NSW Act.

the purposes of the duties of care owed by the employer, as currently provided in some states.[2]

4.22 ***Option three*** – As with the first two options, but with further specific duty holders and duties added to take into account changes in work and its organisation.[3]

4.23 ***Option four*** – Adopt an approach whereby:

1) the primary duty holder is identified as the person conducting a business or undertaking, whether as an employer, self-employed person, principal contractor or otherwise; and
2) the beneficiaries of the duty of care owed by the primary duty holder are—
   a) 'workers' within an expanded definition that is not limited to a contract of employment or deeming through direct engagement by contracting, and
   b) others who may be put at a risk to their health and safety by the conduct of the business or undertaking; and
3) other duty holders are workers, officers, those specified in point 2 of option one, with duties of care also imposed on volunteers and visitors; and
4) the primary focus of the duties of care is the undertaking of the work and what contributes to its being done, rather than the geographic limits of a workplace, with the exception of duties necessarily relating to the workplace, such as the safe condition of the workplace, fixtures, fittings or plant within it.[4]

Discussion of the options and associated issues

4.24 Before turning to each option, we note that current OHS legislation throughout Australia provides for duties of care to be owed by:

- employers to employees;
- employers to persons other than their employees in relation to the conduct by the employer of its undertaking;
- self-employed persons to other persons in relation to the conduct by the self-employed person of their undertaking;
- various parties who in some specified way provide or contribute to various things used in or necessary for the undertaking of work (e.g. the workplace, plant, substances);
- employees; and
- officers, either by their direct duties or by attributed liability for offences by their corporation, partnership or unincorporated association.

[2] For example, this approach is taken in the Vic Act.
[3] This would follow the current approach and duties in the most jurisdictions, with additional duties of care.
[4] This is similar to, but extending on, the approach taken in the Qld Act, NT Act and in the new ACT Act.

TABLE 3: Duties of care under most OHS legislation

Owed by:	Owed to:
Employers Self-employed persons Contractors	Own employees Contractors Sub-contractors Self Customers Visitors Public generally
Occupiers of a workplace	All who are at the workplace
Designers, Manufacturers, suppliers etc	Those who use the plant or substances or affected by their use
Officers	(Effectively) Those to whom the other duty holders owe duties
Employees	Themselves and others affected by their acts or omissions at work

4.25 At first sight, these duties may collectively appear to require any person who is carrying out work, or activities related to the carrying out of work, to take care for the health or safety of any person who may be put to a risk from those activities. In practice, this is not the case.

4.26 Several issues were raised with us that point to shortcomings in the effectiveness of these duties of care. We accept that each is valid. These issues are:

4.27 *Incomplete coverage*

- placing the primary duties on the employer to employees does not impose detailed obligations on a person for whom work is being done towards those engaged by or through that person who are not employees within the 'traditional' or common law definition;
- while the broader and less specific duty owed to others in relation to the conduct of the undertaking is also owed by a self-employed person, there are circumstances in which arguments have been raised as to whether the person is 'self-employed' (e.g. whether they are engaged in a business for profit or reward);
- provisions deeming contractors and their employees to be employees of the employer who engaged the contractor only apply if the principal is an employer;

4.28 *Unintended consequences*

- attempts to deem contractors and their employees to be employees of the employer who engaged the contractor have produced some confusion and uncertainty as to the scope of their operation. Restricting the deeming provision to matters over which that employer has control has been of some concern, as it has resulted in:
  - gaps in the provision of health and safety protection, where duty holders believe that others are providing for it;
  - the inefficient use of limited health and safety resources through duplication of efforts by multiple duty-holders; and
  - in some cases, a duty holder may attempt to avoid the duty by relinquishing or passing on control, rather than focusing on the protection of safety and health;

4.29 *Artificiality*

- some specific provisions have also been required to extend the operation of duties beyond employees as defined at common law, such as taking serving members of police forces to be employees,[5] or providing that the duties of care are specifically owed to volunteers. This can make the legislation large and unwieldy and the legislative processes make timely amendments difficult;
- deeming provisions may be seen as being artificial and 'singling out' specific classes of persons arbitrarily and with a risk of gaps in coverage;

4.30 *Confusion*

- concerns that the general nature of the 'conduct of the undertaking' duty of care makes it unclear what is required of the duty holder in various circumstances, such as:
  - contractual chains in transport and clothing manufacture;
  - share fishing or farming;
  - outworker arrangements;
  - bartering; and
  - other circumstances where the person with effective control over significant aspects of the work is distant from those doing the work;
- defining the primary duty holder by reference to employment or other specific relationships results in a focus on the nature of the relationship, 'pigeon-holing' or compartmentalising of duties, and a lack of recognition that duties of care may be owed to persons engaged in doing the work, even if they do not fit into a 'pigeon-hole'; and

[5] Serving members of police forces are not considered at law to be employees.

- uncertainty whether the specific duties owed by an employer to employees in relation to systems of work, plant etc are also owed to non-employees who are in a relationship that is akin to employment.

4.31 We consider that this illustrates that although the current duties of care have been largely effective, problems have emerged. The current approaches may not satisfactorily accommodate ongoing changes in work and the way it is organised. We consider that a more comprehensive expression of the duties would reduce the risk of further gaps and uncertainty as more changes occur.

The first and second options

4.32 Against this background, the first and second options (providing for the continuation of the current legislative approach in most jurisdictions) are not likely to satisfy the principles set out in paragraph 14 of the Terms of Reference, particularly those relating to:

- increased consistency of enforcement; and
- ensuring that there be "no reduction or compromise in standards for legitimate safety concerns."

4.33 The first and second options may over time lead to a reduction in the protection of health and safety, by failing to respond to change and leaving significant groups of persons unprotected by the law.

4.34 Accordingly, we do not support the first and second options.

The third option

4.35 The third option (as the first two options but with further specific duties) would provide an opportunity to 'plug the gaps' and recognise specific issues arising from the changing nature of work and work arrangements. Experience has, however, shown this approach to be problematic as it:

- adds to the complexity of the duties;
- may lead to arrangements created to attempt to avoid the duty (e.g. by changing the nature of relationships from those that would attract a duty);
- provides further opportunity for inconsistent interpretation as to what comes within the duty and what does not; and
- is likely to respond only to current and immediately foreseeable future hazards, risks and work arrangements, rather than longer term, emerging changes.

4.36 We do not consider the third option to be appropriate.

The fourth option

4.37 The fourth option (where the primary duty holder is a person conducting a business or undertaking) has the potential to meet all of the concerns noted above; subject to the specific content of the duties, which we discuss below.

4.38 The fourth option is not entirely novel, given the existence of 'conduct of the undertaking' type provisions in all Australian laws.[6] We also note that the recently enacted NT Act and new ACT Act use broad definitions of 'employer' and 'worker' that remove the necessity for an employment relationship.[7]

4.39 We consider that how the duty is expressed is critical for achieving the objective of wide application.

4.40 While such a provision could simply state that the duty is owed to 'any person' affected by the conduct of the business or undertaking, it may not make clear that it applies to those persons carrying out the work. Referring to 'workers' and 'others' in the duty would make clear that it does apply to work relationships.

4.41 The Qld Act takes a similar approach, although there are possible difficulties arising from its definitions of employer and worker.[8] These definitions operate so that the reference to 'workers' excludes those persons who are engaged in work under a contractual chain (by the exclusion of engagement under a 'contract for services'). Although such persons would be covered in the Qld provision as 'others', that coverage may not be apparent to some duty holders. A restricted definition of 'workers' may therefore diminish the advantage of using that term in a primary duty provision.

4.42 An approach of this nature was proposed or supported broadly, although not universally, in the submissions and during consultation. A useful discussion of this type of approach is set out by Johnstone et al in their submission, and we agree with the following comment:[9]

> *…We submit a far more modern and sensible approach is taken in the Queensland Act, where the duty (in section 28) is simply imposed on 'a person who conducts a business or undertaking'. The disadvantage of this is that there may be early complications in interpreting 'business' and 'undertaking' in this context – although this has not been a problem in Queensland. In any event, the case law on whether a person is an 'employer' or 'employee' is notoriously complex. The benefits of imposing the duty on a 'person who conducts a business or undertaking' are that it signals that the duty is comprehensive and flexible in its approach; and that it removes an artificial step in the application of the duty. In short, it is both more transparent and accessible and applicable than the approach taken in other OHS statutes…*

6 See s.4 of the NT Act, ss.9 & 10 of the ACT Act.
7 ibid.
8 See ss.28 & 29 regarding duties, and ss.10 and 11 for definitions.
9 R Johnstone, L Bluff & M Quinlan, *Submission No. 55*, p. 12.

4.43 The submissions and comments during consultation, and our experience, has shown that reliance on the 'conduct of the undertaking' duty of care, may not produce the desired health and safety protection because of ambiguity and inconsistency in interpretation. We consider this may be overcome by a code of practice or guidance material clearly explaining the scope and application of this duty of care.[10]

4.44 It may be argued that a broad 'conduct of the undertaking' duty as proposed would remove the need for specific duties (e.g. person in control of workplace, designer of plant). We consider, however, that certain specific duties should also be provided in the model Act to:

- remove any doubt that particular classes of persons owe duties of care; and
- enable more detailed obligations to be provided than would be appropriate for a broad duty of more general application.

4.45 The introduction in Victoria (Vic) of duties of care for designers of buildings or structures resulted in mistaken concern being expressed that architects, engineers, draftspersons and others had a new duty of care that they did not previously have. The duties of care for designers of buildings or structures, however, may go no further than the 'conduct of the undertaking' duties in the Vic Act.[11] A benefit from the inclusion of a specific duty on a particular class of persons is to make clear that such a duty exists, while also providing clarity on its application.

4.46 This approach should best ensure that there will be maintenance or improvement in safety standards and lead to an increase in consistency in the interpretation and enforcement across jurisdictions (particularly if supported by codes of practice and guidance material that are consistent across all jurisdictions).

4.47 We see the particular benefits of the fourth option as:

1) it provides for a wide application of duties of care and the involvement of all persons undertaking or associated with work;
2) the breadth may lessen any perception of 'pigeon holes' or 'loopholes', removing any focus on avoidance of obligations and moving the focus to compliance (through prevention);
3) it may also make enforcement easier, as there should be less doubt as to whether a person is a duty holder or if a person is owed a duty;
4) by extending in the duty the identification of those who owe and are owed a duty, greater consultation or engagement by all persons involved in undertaking work would be encouraged, including those controlling or influencing how work is done or aspects of it, with those doing the work, regardless of the formal nature of the relationship. This should provide benefits to safety through better communication and more effective risk management;

[10] Codes of Practice and other guidance material will be discussed in our second report.
[11] See ss. 23 & 24.

5) the approach is consistent with and will support the principles and strategies in the National OHS Strategy[12] since—

   a) all persons involved in work will understand that they have (and cannot by various means pass to another) duties of care that are concurrent with others, and this should encourage cooperation and commitment of all to identifying OHS issues and initiating prevention action, and

   b) through clarification and simplification of the duties, it will assist in raising OHS awareness and allowing practical guidance to be provided;

6) these changes should not have any material 'start up' delays or costs in the various jurisdictions, given the significant similarity to existing provisions allowing this to occur without supporting regulations or substantial training or public education; and

7) there should not be any significant skill or competence requirements on duty holders, as they are already subject to similar obligations.

4.48 In recommending this option, we are accordingly proposing the development of an established approach that is not unknown to regulators and duty holders, but which we consider can be improved.

4.49 While it may take a short period of time for regulators and duty holders to understand the operation of the duties of care, with a need for training of inspectors and investigators, we do not anticipate any significant ongoing resource implications for regulators, or other levels of government.

4.50 Given that the changes we recommend are effectively a progression from existing provisions, rather than completely new concepts, this should assist in minimising the resource implications and time taken to understand the new provisions. This will hopefully also be assisted by the discussion in this report and in explanatory memoranda accompanying the Bills.

4.51 We accordingly recommend that the fourth option be adopted in the model Act.

[12] National OHS Strategy 2002–2012, Commonwealth of Australia.

RECOMMENDATION 3

The model Act should adopt an approach whereby:

a) the duty of care provisions together impose duties on all persons who by their conduct may cause, or contribute in a specified way, to risks to the health or safety of any person from the conduct of a business or undertaking;

b) the duties of care are focused on the undertaking of work and activities that contribute to its being done, and are not limited to the workplace (except where a duty relates specifically to the workplace or things within it, or the limitation is needed to place reasonable limits on the duty – e.g. the duty of care of a worker or visitor);

c) there is a primary (general) duty of care imposed on the person conducting a business or undertaking (whether as an employer, self-employed person, principal contractor or otherwise) for the health and safety of—

   i) 'workers' within an expanded definition, and

   ii) others who may be put at a risk to their health or safety by the conduct of the business or undertaking; and

d) even though many of the following persons will be covered by the primary duty of care of a person conducting a business or undertaking, for certainty and to provide guidance through more detailed requirements, duties of care should be imposed on specified classes of duty holders who are involved in the undertaking of work or activities that contribute to it being done, or are present when work is being done. These are:

   i) those with management or control of workplace areas;

   ii) designers of plant, substances and structures;

   iii) manufacturers of plant, substances and structures;

   iv) builders, erectors and installers of structures;

   v) suppliers and importers of plant, substances and structures;

   vi) OHS service providers;

   vii) officers;

   viii) workers; and

   ix) other persons.

Chapter 5: 'Reasonably practicable' and risk management

5.1 This chapter deals with concept of 'reasonably practicable' and its application to the primary duty and to a number of specific duties (except those of officers, workers and others). We discuss how reasonably practicable is used as a qualifier of the duties of care and how it is defined, including its relationship to risk management principles and the issue of control.

Current arrangements

5.2 'Reasonably practicable' is enshrined in the ILO's *Occupational Safety and Health Convention No.155*. Article 4, Clause 2 of this convention provides that the aim of national policy on occupational safety, occupational health and the working environment "shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment."[1]

5.3 OHS legislation in all Australian jurisdictions other than Qld (where an effectively similar standard is expressed as 'reasonable precautions') and in the UK, Singapore and other common law countries, provide for duties of care to be subject to, or subject to a defence relating to, the duty holder meeting the duty so far as is 'reasonably practicable'.[2] The inclusion of the test of reasonably practicable is often expressed as the standard of conduct or a limitation on the otherwise unlimited nature of the duty to ensure health and safety. In this report, we refer to it as the standard.

5.4 The OHS Acts of Vic, Western Australia (WA) and both Territories contain a definition of reasonably practicable. While the content of the definitions is largely consistent, two approaches have been taken.

5.5 The Vic and WA Acts require that, in determining what is reasonably practicable to address a duty of care, regard must be had to a number of matters, including:[3]

- the likelihood of a hazard or risk eventuating;
- the degree of harm that would result;
- the state of knowledge about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- the availability and suitability of ways to eliminate or reduce the hazard or risk; and
- the cost of eliminating or reducing the hazard or risk.

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1 http://www.ilo.org/ilolex/cgi-lex/convde.pl?C155 19 Sep 08.

2 This is sometimes expressed only as 'practicable' but defined by the legislation or interpreted by courts as incorporating the consideration of reasonableness.

3 See s.20(2) of the Vic Act and s.3 of the WA Act.

5.6 The tests used in the NT and ACT Acts to determine what reasonably practicable means are similar, but reasonably practicable is defined in terms of applying risk management processes, since both these Acts have incorporated risk management as an element of the primary duty.[4]

5.7 The IC advocated the application of 'reasonably practicable' "to all mandated requirements in OHS legislation".[5] Recent OHS reviews have also supported the continued use of reasonably practicable as a suitable qualification for the primary duties of care, and have recommended the inclusion of guidance on interpretation.[6]

5.8 An additional factor that has been considered in determining the extent of a duty owed is that of 'control'. The Victorian *Occupational Health and Safety Act* Review, conducted by Chris Maxwell QC (Maxwell Review), proposed that 'control' should be added as a factor to be considered in determining what is practicable.[7] The NSW *Inquiry into the Review of the Occupational Health and Safety Act 2000*, conducted by the Hon Paul Stein AM, QC (Stein Inquiry),supported Maxwell's recommendation, stating that:[8]

> *The consideration of the degree of control a duty holder has in particular circumstances enables the courts to assign responsibility appropriately where there are multiple duty holders. Arguably, the concept of 'reasonably practicable' includes considerations of control.*

5.9 The Victorian Report on the *Occupational Health and Safety Act 2004* Administrative Review (Vic Administrative Review) did not support the proposal to include 'control' as a factor in the 'reasonably practicable' test, arguing that the 'reasonably practicable' test and the issue of 'control' deal with different concepts.[9] Reasonably practicable focuses on managing OHS risks; 'control' on the other hand deals with the status of the duty holder. Including 'control' in the definition of 'reasonably practicable' may have the undesirable consequence of shifting the focus of the test from risk control to a deliberation about whether a duty exists at all.[10]

5.10 'Control' has not been included in the test for 'reasonably practicable' in any Australian OHS Acts.

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4 See s.5 of the NT Act and s.15 of the ACT Act.
5 IC, *Work Health and Safety, Inquiry into Occupational Health and Safety*, (Report No 47), AGPS, Canberra, 1995, p. 56.
6 NSW WorkCover Review (Recommendation 6), Stein Inquiry (Recommendation 4), Maxwell Review (Paragraph 422), ACT Review (Recommendation 9).
7 Maxwell Review, paragraph 496.
8 Stein Inquiry, paragraph 9.42.
9 Vic Administrative Review, p. 46.
10 ibid.

Stakeholder views

5.11 The majority of submissions support a test for 'reasonably practicable' to clarify the obligations of duty holders and aid consistency in application and interpretation of the standard of care required under the primary duties. This was also the view of ACCI, the Business Council of Australia (BCA) and the AiG in their submissions.[11] The preferred basis for a test for 'reasonably practicable' is the approach in the Vic Act. However, some submissions, such as that tendered by Unions NSW,[12] oppose any test or definition of 'reasonably practicable', preferring instead to rely on case law.

5.12 There are different views as to how 'reasonably practicable' should be incorporated into the model Act. Some support the qualification of the primary duties in terms of 'reasonably practicable', arguing that without the qualifier, a primary duty is unlimited and unachievable. Other submissions support providing for consideration of 'reasonably practicable' only as a component of a defence.[13]

5.13 Submissions are divided on whether or not risk management principles should be incorporated into the definition of 'reasonably practicable'. Arguments for the integration of 'reasonably practicable' with risk management processes include that such an approach would facilitate compliance with the general duties,[14] where the test of 'reasonably practicable' relies on foreseeability of potential risks, best addressed by a risk management approach.[15]

5.14 Those against the incorporation of risk management into 'reasonably practicable' distinguish between the nature and uses of each concept. For example, the Law Council of Australia observe that:[16]

> *The concept of 'reasonably practicable' relates to the appropriateness of particular safety measures, whereas 'risk management' relates to the particular steps that should be taken to identify, assess and eliminate risks. A 'risk management' process may identify a particular risk and/or possible solution, however, that solution may not be 'reasonably practicable' for any number or reasons (availability, suitability, cost, etc).*

5.15 On this basis, the Law Council of Australia does not support principles of risk management being incorporated into the test of 'reasonably practicable'.

5.16 There is a clear desire for examples based on case law (where possible), to aid interpretation and assess compliance. This is seen to be best placed in guidance materials or codes of practice. ACCI and AiG supported inclusion of examples in interpretive documents.[17] Submissions recommend specific advice on balancing risk and cost, (i.e. where costs are exceedingly disproportionate to the likelihood).

[11] ACCI, *Submission No. 136*, p. 32; BCA, *Submission No. 56*, p. 2; AiG, *Submission No. 182*, p. 35.
[12] For instance Unions NSW, *Submission No. 108*, p. 32 and ACTU, *Submission No. 214*.
[13] Unions NSW, *Submission No. 108*, p. 32; ACTU, *Submission No. 215*, p. 29.
[14] R Johnston, L Bluff & M Quinlan, *Submission No. 55*, p. 20.
[15] Mirvac, *Submission No.168*, p. 22.
[16] Law Council of Australia, *Submission No. 163*, p. 20, paragraph 4.7.
[17] ACCI, *Submission No. 136*, p. 33; AiG, *Submission No. 182*, p. 36.

5.17 There are various views regarding the inclusion of 'control' as an element of 'reasonably practicable'. Submissions supporting the explicit inclusion of 'control' argue that it is an essential consideration in determining who is a duty holder, the nature of the duty, the extent of the duty and the defences, especially in situations where multiple duty holders are involved.

5.18 Those against the inclusion of a 'control' test argue:

- 'Control' is used in different contexts in legislation (e.g. 'control' of people, work, places etc). Defining 'control' may add confusion to what is meant in these different contexts and could also narrow its interpretation, which may weaken the general duties;
- Defining 'control' could focus people on trying to eliminate their control to avoid liability; and
- 'Control' is best determined by the courts with regard to the unique aspects of each case.

5.19 There are varying views on the delegation of 'control'. Some stakeholders clearly oppose the delegation of 'control'. Others argue that 'control' should be able to be delegated in limited circumstances, including where, for example:

- a particular expertise or skill is relied on;
- the duty holder does not hold a required licence or accreditation for the particular task; and
- contractors who are not under the direct supervision of a principal.

Should the duties of care be qualified and, if so, how?

5.20 None of the submissions and recent reviews rejects the ongoing validity of the Robens model. Some observe that it should be brought up to date to meet changed and changing circumstances, whilst others suggest that elements of the Robens model no longer apply.

5.21 A key element of the Robens model is that duties of care must be broad and outcome focused, to apply to the variety of circumstances in which work is done. This recognises that detailed prescriptive requirements may not achieve widespread health and safety protection, as they may not be relevant or possible in many circumstances.

5.22 If duties of care are not subject to a qualifier, the duty holder would be guilty of an offence if the outcome (elimination of risk to health or safety) is not achieved, regardless of the efforts that the duty holder took to achieve that outcome. While the protection of health and safety is pre-eminent, we agree, on the grounds of fairness and practicability, with the approach that is taken in all Robens-based OHS laws of qualifying the duties of care.[18]

5.23 The defence provisions in the NSW Act[19] and in the Qld Act[20] place a qualifier on the duties of care. Submissions from a number of stakeholders, including peak organisations, suggested that the approach to the duties of care in the NSW Act should be adopted, but accept that there would continue to be a qualifier contained in the defence provisions, rather than in the duties of care. Other submissions expressly proposed or accepted that the duties of care should be subject to a qualifier.

5.24 The standard of 'reasonably practicable' has been generally accepted for many decades as an appropriate qualifier of the duties of care in all Australian jurisdictions other than Queensland (which has a similar qualifier of 'taking reasonable precautions'). This qualifier is well known and has been consistently defined and interpreted by the courts.[21]

5.25 The submissions and comments made during consultation and in learned articles, support this qualifier as appropriate for inclusion in the model Act.[22]

5.26 We recommend that the duties of care continue to be subject to a qualifier and we consider that the standard of 'reasonably practicable' is an appropriate qualifier.

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[18] For example, the qualifier of 'reasonably practicable is used in the UK *Health and Safety at Work etc Act 1974* and in the Singapore *Workplace Safety and Health Act 2006*, while the qualifier of 'all practicable steps' is used in the NZ *Health and Safety in Employment Act 1992*.

[19] See s.28 of the NSW Act.

[20] See ss.26(3)(b) and 27(2) of the Qld Act.

[21] See, for example, *Edwards v National Coal Board* [1949] 1 KB 704; *R v Associated Octel Limited* [1994] 4 All ER 1051; *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Holmes v RE Spence & Co Pty Ltd* [1992] 5 VIR 119; *WorkCover Authority of NSW v Cleary Bros (Bombo) Pty Ltd* [2001] 110 IR 182.

[22] The inclusion of this qualifier in the duties of care in the UK has been the subject of consideration in the European Court of Justice in January 2007. It was alleged that the inclusion of the standard was incompatible with the "duty to ensure the health and safety of workers in every aspect related to the work" (European Directive 89/391/EEC). The European Court of Justice found that the standard was appropriate and was not incompatible with the directive.

How should reasonably practicable be used to qualify the duties of care?

Options for the use of reasonably practicable to qualify the duties of care

5.27 There are two options for the use of 'reasonably practicable' as a qualifier of the duties of care.

5.28 ***Option one*** – Incorporate reasonably practicable as an element of the duty of care (currently, the approach in all Australian jurisdictions, other than NSW and Qld).

5.29 ***Option two*** – The duty of care is not limited by reference to 'reasonably practicable', which, as currently in NSW and Queensland, only appears as an element of a defence to a breach of the duty (in this way it still limits the otherwise unqualified nature of the duty, as the duty holder is not guilty of a contravention if meeting the standard, or another element of the defence).

Discussion of the options and associated issues

5.30 The placement of the qualifier of 'reasonably practicable', within the duty or within a defence, is relevant to the issue of who bears the onus of proving or disproving that the standard has been met. The question of onus is an important one that is considered later in our report.

5.31 In the submissions and during consultation, a number of points were made which we find persuasive for including reasonably practicable as a qualifier in the duty of care.

5.32 First, whether the qualifier is in the duty or in a defence, it is an effective limiter of the duty of care. However, it is more transparent for the qualifier to be contained within the duty of care than elsewhere. This is significant as the qualifier provides for the reasonableness of the duty and the ability of the duty holder to comply with it. Placing the qualifier elsewhere than in the duty may lead to a perception that the duty is not limited and is unfair and unachievable. That may deter a duty holder from taking steps for compliance.

5.33 Second, the duty must be realistic and capable of being complied with. The standard of 'reasonably practicable' is a high one, requiring the duty holder to consider all of the circumstances and take measures that are commensurate to the likelihood and seriousness of the harm which may result from the relevant activities, and relieved only by consideration of what is not possible or what is clearly unreasonable in the circumstances. A duty holder must clearly understand that this standard must be met. Having the qualifier in the duty makes this clear, while not having the qualifier in the duty may not.

5.34 Third, decisions to pursue a prosecution and impose a penalty will be more readily justified where there is a failure to meet a standard that is set out in the duty.

5.35 The maintenance of the qualifier of reasonably practicable in duties of care has also been supported in a number of recent reviews of legislation.[23]

5.36 A concern was expressed in some submissions and during consultation, that including the qualifier in the duty of care 'waters down' the duty from a requirement to ensure health and safety, which should be unqualified. Its place in a defence was accepted.

5.37 We consider, however, that this view, while consistent with the objectives of OHS regulation, does not give sufficient weight to the actual operation of the law. The defence of 'reasonably practicable', however expressed, is a qualifier of the duty. There is, as we note, a separate question of who should bear the burden of proving that it was met (this is discussed later in our first report).

5.38 Our view is consistent with the findings of the European Court of Justice that the inclusion of the qualifier is not inconsistent with the requirement to ensure health and safety. We also note that this position is consistent with Article 4, Clause 2 of the ILO Convention 155.

5.39 We are required by the Terms of Reference to observe the direction of COAG that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns. While there has been significant statistical performance improvement in NSW and Queensland, where the qualifier is not included in the duties of care, we are not persuaded that this demonstrates that such reduction in death and serious injury is attributable to the absence of the qualifier in the duty of care. It could conversely be argued that the jurisdictions other than NSW and Queensland have enjoyed greater improvement in death and injury rates and therefore that the inclusion of the qualifier in the duty is advantageous for the protection of health and safety. The standardised statistics are, in our view, not reliable for reaching conclusions about the effect of particular legislative provisions.

5.40 We do not consider that the inclusion of the qualifier in the duties of care will result in a reduction or compromise of safety standards.

5.41 Having the qualifier of 'reasonably practicable' in the duties of care also has the advantage of providing information and education, assisting the duty holder to understand what is required to comply with the duty of care.

5.42 For these reasons, we recommend that the expression 'reasonably practicable' be a qualifier referred to in each duty of care, other than the duties for officers, workers and others, for which we propose (in the following chapters) other standards tailored to those classes of duty holders.

[23] For example the Stein Inquiry, NSW WorkCover Review, Maxwell Review and NT Review.

5.43 In making this recommendation we note that this does not necessarily determine the issue of whether the prosecution must prove a failure of the duty holder to meet the standard, or whether the duty holder must prove the standard has been met. This recommendation is therefore linked to, but not dependent upon, acceptance of our recommendation on the issue of onus of proof. That is dealt with in Chapter 13 relating to offences.

RECOMMENDATION 4

'Reasonably practicable' should be used to qualify the duties of care, by inclusion of that expression in each duty of care, except for the duties of officers, workers and other persons for whom different qualifiers are proposed.

Should reasonably practicable be defined?

5.44 The majority of submissions support the inclusion of definition of 'reasonably practicable' in the model Act, however the main focus of many of the stakeholders was on whether or not the duties of care should be qualified, whether 'reasonably practicable' should be the qualifier and whether it should appear in the duties of care or in a defence.

5.45 The submissions commenting on this issue discussed:

- whether it is necessary to define 'reasonably practicable', given the courts have made clear what it means and how it is to be applied; and
- whether information regarding 'reasonably practicable' would be required in the model Act or could be instead provided in guidance material.

5.46 Overall, the weight of opinion expressed in the submissions favoured 'reasonably practicable' being defined in the model Act. This position is also supported by some jurisdictions that do not currently define the term[24] and in reviews of legislation under which the term is not currently defined.[25]

5.47 We are persuaded by the view expressed that defining 'reasonably practicable' in the model Act would provide guidance to duty holders on how to fulfil their duties of care. Inclusion of a definition was generally supported by those who represent or are duty holders. While the case law is consistent and helpful, it is not easily accessible to duty holders. The model Act should be primarily designed for the advancement of health and safety in the workplace and this would be assisted by including guidance to duty holders in a definition of 'reasonably practicable'.

5.48 Providing guidance on how to apply 'reasonably practicable' by defining the term in the model Act may assist in achieving compliance. It may also reduce the force of any excuse by a duty holder that uncertainty as to the standard caused a breach of the duty.

[24] SA Government, *Submission No. 138*, p. 28.
[25] For example the NSW WorkCover Review and Stein Inquiry.

5.49 We recommend that 'reasonably practicable' be defined in the model Act.

RECOMMENDATION 5

'Reasonably practicable' should be defined in the model Act.

How should reasonably practicable be defined?

5.50 We will deal with definitions in our second report. We consider, however, that understanding what is meant by 'reasonably practicable' and how it will be applied is important to any discussion on the content and operation of the duties of care. We accordingly deal with this definition in this report.

5.51 Reasonably practicable is currently defined or explained in a number of jurisdictions.[26] The definitions are generally consistent, with some containing more matters to be considered than others. The definitions 'are consistent with the long settled interpretation by courts, 'in Australia and elsewhere.[27]

5.52 The provision of the Vic Act relating to reasonably practicable[28] was often referred to in submissions (including those of governments) and consultations as either a preferred approach or a basis for a definition of reasonably practicable.

5.53 We recommend that a definition or section explaining the application of reasonably practicable be modelled on the Victorian provision. We consider that, with some modification, it most closely conforms to what would be suitable for the model Act.

5.54 We consider that the current definitions could be enhanced for easier understanding of the required process. Case law makes it clear that determining what is reasonably practicable requires a process of weighing up or balancing the various elements.[29] This is not clear from current definitions, which state that "regard should be had" to those elements.

[26] See s.20(2) of the Vic Act; s.3 of the WA Act; s.5 of the NT Act; s.15 of the ACT Act; note also that a definition was contained in the draft NSW Bill considered by Stein.

[27] See *Edwards v National Coal Board* [1949] 1 KB 704; *R v Associated Octel Limited* [1994] 4 All ER 1051; *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *Holmes v RE Spence & Co Pty Ltd* [1992] 5 VIR 119; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *R v ACR Roofing Pty Ltd* [2004] 11 VR 187; *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84); *WorkCover Authority of NSW v Cleary Bros (Bombo) Pty Ltd* [2001] 110 IR 182).

[28] See s.20(2) of the Vic Act.

[29] See *R v Associated Octel Limited* [1994] 4 All ER 1051; *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *R v ACR Roofing Pty Ltd* [2004] 11 VR 187; *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84).

5.55 We provide the following wording as an example definition of reasonably practicable:

Identifying what is 'reasonably practicable'

Reasonably practicable *means (except in relation to obligations for consultation) that which is, or was, at a particular time reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including:*

a) *the likelihood of the hazard or risk eventuating;*

b) *the degree of harm that may result if the hazard or risk eventuated;*

c) *what the duty holder knows, or a person in their position ought reasonably to know, about—*

   i) the hazard, the potential harm and the risk, and

   ii) ways of eliminating or reducing the hazard, the harm or the risk;

d) *the availability and suitability of ways to eliminate or reduce the hazard, the harm or the risk; and*

e) *the costs associated with the available ways of eliminating or reducing the hazard, the harm or the risk, including whether the cost is grossly disproportionate to the degree of harm and the risk.*

5.56 We also recommend that the definition of 'reasonably practicable' be supported by guidance material, explaining the process, to assist an understanding by duty holders and others of the requirements.[30]

RECOMMENDATION 6

'Reasonably practicable' should be defined in the model Act in a way which allows a duty holder to understand what is required to meet the standard.

Note: *Our example clause is provided at paragraph 5.55.*

RECOMMENDATION 7

The meaning and application of the standard of 'reasonably practicable' should be explained in a code of practice or guidance material.

[30] An example of how this may be done is the WorkSafe Victoria document '*How WorkSafe applies the law in relation to reasonably practicable*'.

The issue of 'control'

5.57 An issue of some controversy in submissions and during consultation has been whether or not the level or extent of 'control' able to be exercised by a duty holder over relevant matters should be:

- a consideration in determining what is 'reasonably practicable';
- included in the definition of 'reasonably practicable'; and
- defined.

5.58 The issue of 'control' as an element in duties of care, to determine the duty holder or the scope of the duty, was also the subject of quite divergent views. We consider this issue in Chapter 6 when we discuss the primary duty of care.

5.59 Some submissions were concerned that including 'control' as an element of 'reasonably practicable' might limit the scope of the duties of care. We note, however, that the case law provides that 'control' is relevant in determining what is 'reasonably practicable' in the circumstances.[31]

5.60 As noted above, 'reasonably practicable' represents what can reasonably be done in the circumstances. An inability to 'control' relevant matters must necessarily imply that it is either not possible for duty holders to do anything, or it is not reasonable to expect them to do so. It is in this way that 'control' is at least implied as an element in determining what is 'reasonably practicable'.

5.61 A view was expressed in submissions that 'control' should not be an element of the duty of care. A concern was that including it might focus the attention of those who might be duty holders on whether the duty of care is placed on them and whether it may be avoided by artificial arrangements. Some of those submissions, however, suggested that 'control' would be appropriately placed as an element of determining what is 'reasonably practicable', as that would provide a focus on compliance and managing risk.

5.62 There has been inconsistency in the interpretation and application by the courts of 'control' as an element of a duty of care. However, there does not appear to have been inconsistency in the approach of the courts to considering the issue of 'control' in determining what was 'reasonably practicable'.

[31] For example in *R v Associated Octel Limited* [1994] 4 All ER 1051 at 1063 it was found that "…The question of control may be very relevant to what is reasonably practicable. In most cases the employer/principal has no control over how a competent or expert contractor does the work…" While in *R v ACR Roofing Pty Ltd* [2004] 11 VR 187 at 214] it was stated that "…it could hardly be said that ACR had no control over the siting of the crane or the method of lifting or that it was practicable for ACR to do much if anything about either of those matters…"

5.63 We consider, on balance, that it is not necessary for 'control' to be expressly included in the definition of 'reasonably practicable' and recommend that it not be included. 'Control' is an inherent element in determining what can reasonably be done in the circumstances. Making express reference to 'control' in the definition of 'reasonably practicable' may have lead to a focus on that issue, ahead of other factors noted in the definition.

5.64 We recommend previously that the meaning and application of the standard of 'reasonably practicable' be explained in a code of practice or guidance material. The relevance of 'control' to determining what is 'reasonably practicable' should be explained in that material.

RECOMMENDATION 8

'Control' should not be included in the definition of 'reasonably practicable'.

Should reasonably practicable explicitly refer to risk management principles and processes?

5.65 The 'risk management' process is fundamental to the protection of health and safety. This entails:

- identifying hazards;
- identifying and assessing the risks associated with the hazards (the degree and likelihood of harm); and
- taking steps to eliminate or reduce the risk (the likelihood or degree of harm).

5.66 We consider this process should be recognised and reinforced by addressing risk management in a set of principles in the model Act. This will be discussed further in our second report.

5.67 Whether or not the model Act should contain requirements for specific risk management processes to be undertaken is also a matter which will be discussed in our second report.

5.68 When dealing with the definition of 'reasonably practicable', consideration must be given to whether or not risk management principles or processes should be specifically included.

5.69 Current definitions and case law interpreting 'reasonably practicable' require consideration to be given to the degree and likelihood of harm and the availability and suitability of risk controls. This provides in effect for the application of risk management principles.

5.70 Some submissions and comments during consultation proposed that the application of risk management principles should be expressly provided for in the definition of 'reasonably practicable', rather than merely being implied. Some went further to suggest that specific process requirements should also be included.

5.71 We consider that the definition of 'reasonably practicable' should be simple and easy to understand, setting out principles rather than processes. 'Reasonably practicable' should be a standard to be met, rather than a process. If it is appropriate for risk management process requirements to be included in the model Act, they can be provided in separate provisions as specific obligations. This is consistent with the principles in our terms of reference.

RECOMMENDATION 9

The principles of risk management should:

a) be identified in a part of the model Act setting out the fundamental principles applicable to the model Act;

b) while implied in the definition of 'reasonably practicable', not be expressly required to be applied as part of the qualifier of 'reasonably practicable'; and

c) not be expressly required to be applied by the duties of care.

***Note**: The principles will be dealt with in our second report.*

Chapter 6: The Primary Duty of Care

6.1 The primary duties of care establish the overarching OHS responsibilities of key parties involved in the conduct of a business or undertaking. In this chapter we discuss the primary duties of care in relation to who should owe duties of care and to whom; and what the duties should be.

Who owes the primary duty of care and to whom?

Current arrangements

6.2 All OHS Acts assign the primary duty of care to employers. Duties are also assigned to self-employed (except in the Commonwealth). However, in Queensland the primary duty of care is more broadly assigned to 'persons who conduct a business or undertaking, whether as employers, self-employed persons or otherwise.'[1]

6.3 The new ACT Act also follows the Queensland model of applying the primary duty to 'persons who conduct a business or undertaking'.

6.4 Although the NT Act uses the term employer in assigning the primary duty of care, the term is broadly defined as 'a person who carries on a business' (whether or not workers engaged in the business are or include employees).

6.5 The primary duty of care is typically owed to employees (i.e. persons engaged under a contract of service). Some OHS Acts also deem certain other workers to be employees.[2]

6.6 However, the primary duty of care is owed to an extended group of persons under the NT Act through the use of the term 'worker',[3] and under the Qld Act[4] through application of the primary duty of care to 'workers and others'. The ACT Act applies the primary duty of care to persons in relation to work.[5]

6.7 To provide protection to a broader class of workers as well as to members of the public, the Vic, NSW, South Australia (SA), WA and Tasmania (Tas) Acts include a separate duty for both employers and self-employed persons to 'others'.

6.8 Table 4 provides an overview of the primary duties of care in OHS Acts across Australia.

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1 See s.23(1) of the Qld Act.

2 Vic, WA, SA and Cwth Acts.

3 Under the NT Act the term 'worker' is broadly defined to include contractors, casual workers, outworkers, labour hire workers and volunteers.

4 Like the NT Act, the Qld Act utilises the term 'worker' but it is more narrowly defined and specifically excludes persons engaged under a contract for services (for example contractors, outworkers and labour hire).

5 The ACT Act includes a broad definition of 'worker' but this is not used in the primary duty of care. Rather, under s.21 of the ACT Act the primary duty holder has a duty to ensure work safety: "work safety, of people, means the health, safety and wellbeing of people in relation to work." (see s.7) The specific duties of care arising under the primary duty of care are then owed to 'person's' or 'people' at the 'business or undertaking'.

6.9 Recent OHS reviews have recognised the need to address changes in the modern labour market by extending protection to persons other than traditional employees. Both the Maxwell Review and the ACT Review recommended the use of the term 'worker' accompanied by a broad definition. The expansion of the primary duty of care provisions to include clothing outworkers was advocated by the Stein Inquiry.[6]

TABLE 4: Current jurisdictional arrangements for the primary duty of care

Duty Holder…	Duty owed to…	The duty includes…
New South Wales		
• Employer (ss.8(1) & 13)	• Employees	• Ensure premises controlled by the employer are safe and without risks to health; • Ensure safe plant, substances and systems; • Provide information, instruction, training and supervision to ensure health and safety; • Provide adequate facilities for welfare at work; and • Consult on decisions affecting health, safety and welfare at work.
• Employer (s.8(2))	• People, other than employees	• Ensure people are not exposed to risks arising from the conduct of the employer's undertaking while at the place of work.
• Self-employed (s.9)	• People, other then employees	• Ensure people are not exposed to risks arising from the conduct of the self employed person's undertaking while at the workplace.

[6] Stein Inquiry, pp. 53–59.

Duty Holder…	Duty owed to…	The duty includes…
Victoria		
• Employer (ss. 21, 22 & 35)	• Employees • Contractors (deemed)	• Safely maintain each workplace under the employer's management and control; • Provide adequate facilities for welfare at any workplace under the management and control of the employer; • Ensure safe plant, substances and systems; • Provide information (in appropriate languages), instruction, training and supervision to ensure work is performed safely; • Monitor health of employees and conditions at any workplace under the employer's management and control, and keep records; • Employ or engage suitably qualified persons to provide OHS advice; and • Consult with employees who are likely to be affected by specified activities and decisions undertaken by the employer for health and safety.
• Employer (s.23)	• Persons, other than employees	• Ensure persons are not exposed to risk arising from the conduct of the employer's undertaking.
• Self-employed (s.24)	• Persons, other than employees	• Ensure persons are not exposed to risk arising from the conduct of the self-employed person's undertaking.
Queensland		
• Persons conducting a business or undertaking whether or not it is conducted for reward or gain. (ss.28 & 29)	• Workers • Volunteers • Self • All others (incl contractors)	• Ensure safe work environment, plant, substances and systems; and • Provide information, instruction, training and supervision to ensure health and safety.

Duty Holder…	Duty owed to…	The duty includes…
Western Australia		
• Employer (ss.19, 23D & 23E)	• Employees • Contractors (deemed) • Labour hire (deemed)	• Provide work environment, workplace, plant, substances and systems that do not expose employees to hazards; • Provide information (in appropriate languages), instruction, training and supervision to ensure work is performed without exposure to hazards; and • Where it is not practicable to avoid exposure to hazards, provide adequate personal protective clothing and equipment at no cost to employees.
• Self-employed (s.21(1))	• Self	• Protect the person's own health and safety at work.
• Employer • Self-employed (s.21(2))	• Persons, other than employees	• Ensure persons are safe from injury or risks to health, either while at the workplace or where the person could be adversely affected, wholly or in part, by: ◦ the work of the employer and their employees or the self-employed person; or ◦ hazards arising from that work, or from systems of work used by the employer or self-employed person.

Duty Holder…	Duty owed to…	The duty includes…
South Australia		
• Employer (ss.19 & 20)	• Employees • Volunteers (deemed) • Contractors (deemed)	• Provide and maintain safe work environment, workplace, plant, substances and systems; • Provide adequate facilities for welfare at any workplace under the employer's control and management; • Monitor health and welfare insofar as that monitoring is relevant to the prevention of work-related injuries; • Provide information (in appropriate languages), instruction, training and supervision to ensure work is performed safely (including hazardous work, new or changed work & for inexperienced employees); • Keep records of safety training undertaken by employees; • Provide information (in appropriate languages), instruction, and training for managers and supervisors to ensure work is performed safely; • Provide adequate facilities for welfare; • Monitor working conditions at any workplace that is under the management and control of the employer; • Ensure accommodation and eating, recreational or other facilities provided for work and under the management and control of the employer, are maintained in a safe and healthy condition; and • Prepare and maintain a health and safety policy in consultation with employees and their representatives.

Duty Holder…	Duty owed to…	The duty includes…
• Employer • Self-employed (s.22)	• Self • Persons, other than employees	• Protect the person's own health and safety at work; and • Ensure persons are safe from injury or risks to health, either while at the workplace or while the person could be adversely affected through an act or omission in connection with the work of the employer.
Tasmania		
• Employer (ss.9(1) & (2))	• Employees	• Ensure safe work environment, plant, substances and systems; • Provide adequate facilities for welfare at any workplace under the employer's management or control; • Provide information (in appropriate languages), instruction, training and supervision to ensure health and safety (also for hazardous work & new or changed work/activity/process); • Provide supervision to employees who are inexperienced in the performance of any work to ensure health and safety; • Provide information (in appropriate languages), instruction, and training for responsible officers, managers and supervisors to ensure health and safety; • Monitor health of workers (where hazards have been identified) and conditions at any workplace under the employer's management or control, and keep records; and • Ensure accommodation and eating, recreational or other facilities provided at work, and under the employer's control or management, are maintained in a safe and healthy condition.

Duty Holder…	Duty owed to…	The duty includes…
• Employer (s.9(3))	• Persons, other than an employee, a contractor, or a contractor's employee	• Ensure persons are not adversely affected as a result of work carried on at a workplace.
• Employer • Principal (i.e. a person with no employees) (s.9(4) & (6))	• Any person	• Ensure any person at a workplace under the employer's or principal's management or control, is safe from injury and risks to health.
• Employer • Principal (ss.9(5) & (6))	• Contractor • Contractor's employee	• Not allow a contractor (or contractor's employee) engaged by the employer, to carry out work, at the employer's workplace, in a manner which the employer believes would place health or safety at risk.
• Employer • Principal (s.9(8))	• Visitors	• Ensure visitors to a workplace under the employer's or principal's management or control, are aware of, and comply with, health and safety requirements; and • Remove visitors who fail to comply with health and safety requirements.
• Self-employed (s.13)	• All other persons	• Ensure all other persons are not exposed to risks to their health and safety arising from work carried on at a workplace.

Duty Holder…	Duty owed to…	The duty includes…
Northern Territory		
• Employer (persons who carry on a business, with or without employees) (ss.30, 55-57 & 60)	• Workers (incl volunteers, contractors, apprentices & any others) • Others • Self	• Ensure persons are not exposed to risks to health or safety by carrying out a systematic risk management process; • Ensure safe workplace and safe workplace infrastructure, equipment and materials; and • Monitor health of workers and conditions at a workplace under the employer's control, and keep records • Consult with workers to enable them to contribute to decisions affecting health and safety.
Australian Capital Territory		
• Persons conducting a business or undertaking, whether or not it is conducted for reward or gain. (s.21)	• People in relation to work • (e.g. Workers, volunteers, contractors, self and any others)	• Ensure work safety by managing risk (via mandated risk management process); • Ensure safe workplace, plant, substances and systems; • Provide information, instruction, training and supervision to ensure work is carried out safely; • Provide adequate facilities for welfare; • Monitor health of workers and conditions at a workplace and keep records; and • Consult on matters directly affecting work safety.

Duty Holder…	Duty owed to…	The duty includes…
Commonwealth		
• Employer (s.16)	• Employees • Contractors (deemed)	• Ensure safe work environment, workplace, plant, substances and systems; • Provide adequate facilities for welfare at work; • Provide and maintain access and egress to any workplace under the employer's control that is safe and without risk to health; • Develop written health and safety management arrangements in consultation with employees and their representatives; • Provide information (in appropriate languages), instruction, training and supervision to ensure work is performed safely; • Monitor health of employees and conditions at workplaces under the employer's control, and keep records; and • Provide appropriate medical and first aid services.
• Employer (s.17)	• Third parties, other than employees or contractors	• Ensure that persons at or near a workplace under the employer's control, are not exposed to risk to health or safety arising from the conduct of the employer's undertaking

Stakeholder views

6.10 Some submissions[7] express concern that the employer/employee relationship does not provide enough coverage due to the changing nature of working arrangements, and propose that the primary duty of care be more broadly assigned to 'persons conducting a business or undertaking' rather than employers.

[7] For example TWU, *Submission No. 227*; CGU Insurance, *Submission No. 80*; R. Johnstone, L. Bluff & M. Quinlan, *Submission No. 55*; QLD Government, *Submission No. 32*; SA Government, *Submission No. 138.*

6.11 Other submissions by industry representative bodies do not support such a broad application of the primary duty of care, in that:

- the line between OHS and public safety becomes blurred; and
- onerous duties upon organisers of volunteers could become a deterrent for people taking on such roles.

6.12 Government submissions regarding the primary duties are divided between those in favour of casting the primary duty of care based on the employer-employee relationship[8] and those who support the broader concepts of a person conducting a business or undertaking and worker. For example, the Victorian Government states:[9]

> *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.*

6.13 On the other hand, the Queensland Government states that:[10]

> *The employer/employee relationship currently used for assigning duties in OHS legislation is inadequate to capture the complex array of modern working arrangements. To overcome the limitations of the employer/employee approach, the scope and application of the model OHS Act should be based on the concepts of 'business or undertaking' and 'worker' rather than 'employer' and 'employee'. To do otherwise creates a complex and potentially unjust hierarchy of working relationships, and regulatory incentives for organisations to structure their labour requirements in a way that does not ensure the OHS of all workers.*

6.14 A number of submissions suggest that the primary duty of care should continue to be assigned to 'employers' as this is a readily understood concept. This view was expressed by ACCI, the ACTU, Unions NSW, and the AiG in their submissions.[11] Some of these submissions also add that the duty should be owed to others beyond the employment relationship.[12]

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8 Victorian Government, *Submission No.139*, and Western Australian Government, *Submission No.112*.
9 Victorian Government, *Submission No.139*, p. 27.
10 Queensland Government, *Submission No.32*, p. 2.
11 ACCI, *Submission No. 136*, p.24; *ACTU, Submission No. 214*, p.25; Unions NSW *Submission No. 182* p. 29; AiG, *Submission No. 182*, p. 25.
12 ACCI, *Submission No. 136*, p.25; *ACTU, Submission No. 214*, p.23; Unions NSW *Submission No. 182* p. 29; AiG, *Submission No. 182*, p. 29.

6.15 There is general support from submissions[13] for the primary duty to be owed to all persons engaged in work, whether paid or unpaid, or otherwise legitimately at the workplace, in particular: employees, labour hire, contractors, volunteers, outworkers, apprentices and visitors.

6.16 Migrant workers and students on placement are also specifically identified as persons who should be owed a duty of care.

What are the primary duties of care?

Current Arrangements

6.17 To meet the overarching primary duty, all OHS Acts cover the following specific obligations to:[14]

- provide and maintain a safe workplace;
- provide and maintain safe plant, systems of work and substances; and
- provide information, instruction, training and supervision.

6.18 The new ACT Act incorporates a requirement for duty holders to 'manage risk' as part of the primary duty.[15]

6.19 Most OHS Acts also have additional specific OHS obligations, which vary between jurisdictions as outlined in Table 4.

Stakeholder views

6.20 Submissions varied in relation to what the primary duties of care should include.

6.21 The majority of employer organisations and industry representatives reference current employer duties in the Vic, SA and WA Acts as the most appropriate models on which to base employers' duties, with the Vic Act being the most preferred model.[16] There was some support for duties in the NSW Act.[17]

6.22 Other groups, including governments, unions and union organisations, present a variety of aspects for consideration as primary duties.

6.23 The ACTU, Australian Manufacturing Workers Union (AMWU), and AiG[18] in particular provide extensive lists of preferred duties. The most common aspects of 'employers' duties proposed include duties to:

- provide a safe work environment;
- provide information, instruction and training;

[13] ACCI, *Submission No. 136*, p. 25; *ACTU, Submission No. 214*, p. 25; Business Council of Australia *Submissions No. 56* p. 2; Unions NSW *Submission No. 182* p. 29; AiG *Submission No. 182*, p. 29.

[14] Recent amendments to the NT Act removed the specific provisions from consideration when applying the general duty of an employer and made them separate provisions.

[15] See s.14 of the ACT Act.

[16] AiG *Submission No. 182*, p. 28.

[17] Unions NSW *Submission 108*, p. 25.

[18] ACTU, *Submission No. 214* p. 25–6; AMWU, *Submission No. 217*; AiG, *Submission No. 182*, p. 29.

- consult with workers and others;
- provide supervision;
- report injuries/illnesses and notify dangerous incidents
- monitor working conditions; and
- provide facilities for the welfare of employees.

6.24 Some submissions also include suggestions that the:

- employer's duty of care should be expressed in risk management terms;
- employer's duty of care should extend to providing safe and secure accommodation where it is provided in connection with employment where employees have no reasonable alternative accommodation and the accommodation is essential to the performance of the work;
- outcomes of investigations by employers into hazards and injuries that have been reported by employees, should be reported back to employees; and
- employers' should be required to train management in OHS consistent with their responsibilities.

A primary duty on those who conduct a business or undertaking

6.25 In Chapter 4, we considered the optimal structure and content, at a high level, of the duties of care. We recommend that the model Act place the primary duty of care on those who conduct a business or undertaking to all persons who may be put at risk from the conduct of the business or undertaking. The objective of doing so is to move away from the emphasis on the employment relationship as the determiner of the primary duty, to provide greater health and safety protection for all persons involved in, or affected by, work activity.

Options for the duty of a person conducting a business or undertaking

6.26 ***Option one*** – Provide for:

1) a specific, separate duty of care by employers to ensure, so far as is reasonably practicable, that the health and safety of:
   a) employees; and
   b) persons other than employees

   is not put at risk from the conduct of the undertaking of the employer;[19]

[19] This would in effect be combining ss.21 & 23 of the Vic Act; ss.19 & 21(2) of the WA Act; s.9(1)(2) and (3) of the Tas Act; ss.19 & 22(2) of the SA Act; s.8 of the NSW Act; ss.16 & 17 of the Cwth Act.

2) together with a separate duty of care by self-employed persons to ensure, so far as is reasonably practicable, that the health or safety of others is not put at risk from the conduct of the undertaking of the self-employed person.[20]

6.27 ***Option two*** – Similar to the first option, except that it combines the two duties of care into a single section.

6.28 This option would place a duty of care on employers and self-employed persons to ensure, so far as is reasonably practicable, that the health or safety of:

- employees of the employer; and
- other persons

is not put at risk from the conduct of the undertaking of the employer or self-employed person.[21]

6.29 ***Option three*** – Similar to the second option, but would:

- replace references to the employer and self-employed person with a reference to a person conducting a business or undertaking; and
- provide that the duty of care would be owed to a broad category of 'workers' and others.[22]

6.30 This option would thereby provide simply that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health or safety of workers engaged in work as part of the conduct of the undertaking, and others, is not put at risk from the conduct of the undertaking.

6.31 ***Option four*** – Similar to the third option, except that it would provide for the duty of care to be owed by the person conducting the business or undertaking to 'all persons', with no specific reference to 'workers'.[23]

Discussion of options and associated issues

The first option

6.32 We consider that the first option is too limited, as it maintains the link to the employment relationship as a determinant of the duty of care. As discussed in Chapter 4, the changing nature of work arrangements and relationships makes this link no longer sufficient to protect all persons engaged in work activities.

[20] Examples of this approach are s.24 of the Vic Act; s.21(2) of the WA Act; s.13 of the Tas Act; s.22 of the SA Act; s.9 of the NSW Act.

[21] This would in effect be combining but modifying ss.21, 23 & 24 of the Vic Act; ss.8 & 9 of the NSW Act; ss.19 & 22(2) of the SA Act; ss.19 & 21(2) of the WA Act; ss.9 & 13 of the Tas Act.

[22] This is similar to ss.28 & 29 of the Qld Act and s.55 of the NT Act. The definitions of 'employer' and 'worker' in s.4 of the NT Act provide the broad coverage of s.55 of that Act.

[23] The approach taken in s.21 of the new ACT Act is similar to this, although it does not refer to the beneficiaries of the duty of care in this way.

6.33 Because the duty would refer to the employment relationship as the determinant of the duty of care, another duty of care would have to be placed on self-employed persons, who are not employers. There may also be circumstances, however, where a person with active control or influence over how work is conducted, may not be an employer or a self-employed person (e.g. a trustee of a family trust undertaking unpaid activities on behalf of and for the benefit of the trust). This leaves a gap that may need to be filled by some extension of the duty.

6.34 Current OHS legislation in most jurisdictions places specific duties and obligations (e.g. for safe systems of work, safe plant, supervision) on employers. This is due to the degree of control of the employer over the activities – and therefore the ability of the employer to manage health and safety associated with those matters – and to ensure that the specific, important elements of health and safety protection are clear and enforced.

6.35 The first option would not provide the benefits of specifying those detailed requirements, unless it also provided for the continuation of the particular duties of care owed by the employer to employees (and some others in a direct contracting line, e.g. identified by extending the definition of 'employees' to include contractors and their employees). This approach does not, however, provide explicitly for the application of the specific elements of the duty of care to those undertaking work who are not employees.

6.36 Where the relationship between the person directing the work ('the principal') and a person undertaking the work is one that is akin to employment, with the principal having significant influence or direction over the activities, many or all of the specific obligations of the employer may be required to be met by the principal as part of the principal's duty of care to 'persons other than their employees'. We consider it is unsatisfactory for the law to require a person to infer these specific requirements, which should explicitly apply in such circumstances.

6.37 Accordingly, we do not recommend the first option.

The second option

6.38 As noted, the second option is similar to the first option, but contains the duty of care for both employers and self-employed persons in one section. The same problems exist as those identified for the first option and we do not recommend the second option.

The third option

6.39 The third option makes it clear that all persons who are carrying out work activities as part of the conduct of the business or undertaking are owed a duty of care by the person who is conducting that business or undertaking.

6.40 This broadens who owes a duty and to whom it is owed. It places the duty on anyone who is conducting a business or undertaking, regardless of the capacity in which it is being done. The duty of care is owed to anyone who is performing work in the business or undertaking and to all who may be affected by the conduct of the business or undertaking (e.g. visitors and passers-by, other parties carrying out work activities at the same place).

6.41 Option three requires everyone carrying out work activities to be defined in a definition of 'worker' to that effect (as, for example, found in s.4 of the NT Act).

6.42 While persons coming within the definition of 'worker' would be covered by the duty of care referred to in the fourth option without such an explicit reference, the particular reference to 'workers' in the third option would make clear that those persons are intended to be covered and that the duty of care was not just the equivalent of the current duties owed to 'persons other than employees'.[24]

6.43 We consider that option three provides the best basis for achieving health and safety protection into the future, allowing for broad coverage and flexibility and accordingly recommend the third option be adopted. We discuss further in this chapter various considerations concerning, and elements of, the third option. The discussion is relevant to each of the options, but in it we demonstrate the benefits of adopting option three, while explaining the scope and operation of the proposed duty of care.

The fourth option

6.44 The fourth option is similar to the third option, but is shorter and is even broader in its terms. Because this option would not make any direct reference to workers, the duty could be mistaken for the current duty owed only to 'non-employees' and not to those in employment like arrangements.

6.45 We do not recommend that the fourth option be adopted.

RECOMMENDATION 10

The model Act should provide in a single section a primary duty of care owed by a person conducting a business or undertaking to a broad category of 'workers' and others.

Replacing the employer as the primary duty holder

6.46 As the discussion earlier in this chapter demonstrates, using the employment relationship as the determinant of the application of the primary duties under OHS legislation is no longer valid.

[24] For examples of the current duties of care owed to 'persons other than employees' see s.9 of the NSW Act; ss.23 & 24 of the Vic Act; s.21(2) of the WA Act; s.9(3) of the Tas Act; s.22(2) of the SA Act; s.17 of the Cwth Act.

6.47 The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under a contract of service. The person carrying out the work:

- may not be in a direct employment relationship with any person (e.g. share farming or share fishing; or as a contractor working under a contract for services, who may be carrying out work for only one principal);
- may be employed by someone who is simply organising the provision of labour (e.g. a labour hire or placement organisation) with the effective control and direction of the work being by another (commonly known as the 'host employer' or principal); and
- their employer may have limited ability to exercise discretion as to work systems and methods, because of the direction and requirements of another party (as may be found in some transport arrangements with the requirements of the consignor).

6.48 We consider that the model Act must provide a broader scope for the primary duty of care, to require those in effective control or influencing the way work is done to protect the health and safety of those carrying out the work.

RECOMMENDATION 11

To ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships and arrangements, the duty should not be limited to employment relationships. The duty holder is any person conducting the business or undertaking.

Defining the 'person who conducts a business or undertaking' and 'business'

6.49 We note that definitions are to be dealt with in our second report. The definition of the duty holder is, however, critical to an understanding of the scope of the duty. We accordingly consider this at this point.

6.50 The commonly used expression 'person who conducts a business or undertaking' might not be readily understood by all who are intended to be subject to the duty of care.

6.51 Whether or not an alternative expression is used and defined, we consider that it is important that the section containing the duty of care clearly demonstrates that the duty holder's obligation is not limited to any particular relationships. We also consider that the duty of care should apply to all forms of businesses or undertakings, whether or not they are carried on for gain or reward. This is expressly provided in some current legislation.[25]

[25] See s.28(3) of the Qld Act, the definition of 'business' in s.4 of the NT Act, and s.11 of the new ACT Act (which is supported by examples provided in s.21(1)).

6.52 An advantage of the approach taken in the Qld Act is that it makes clear in s.28 those by whom the duty is owed and the breadth of circumstances in which it is owed, without the need to go to the definition section.

6.53 We consider the use of the term 'employer' in the duty, even where it is defined as broadly as it is in the NT Act, to be less than ideal. Although the definition clearly goes beyond the ordinary meaning of employer, the use of the term 'employer' in the section may, without reference to the definition, give an impression of a more restricted scope of the duty than is intended. It is preferable that the key terms that are used are those whose ordinary meaning is the closest to the intended meaning. If a different meaning is to be applied than the ordinary meaning of a term, it should preferably be provided in the section in which the term is used.

6.54 The duty provision should make clear (in the section and/or through definitions) that it covers all activities that are undertaken other than those that are clearly undertaken only for private or social reasons. They cover 'businesses' in the usually understood sense of commercial, for profit, enterprises and also undertakings which may be not for profit or are more socially oriented in their focus. Government and local government activities are included.

6.55 We prefer the content of the NT Act definitions (although not the use of the term 'employer'), operating together, to the Qld Act provision. We prefer that definitions that are critical to the scope of the duty of care be included within the section in which the duty is provided. The primary duty of care provision should therefore include a sub-section along the lines of s.28(3) of the Qld Act, but including the elements of the NT Act definitions of 'business'.

RECOMMENDATION 12

The primary duty of care should clearly provide, directly or through defined terms, that it applies to any person conducting a business or undertaking, whether as:

a) an employer; or

b) a self-employed person; or

c) the Crown in any capacity; or

d) a person in any other capacity;

and whether or not the business or undertaking is conducted for gain or reward.

Duty owed by a 'person'

6.56 Statutory interpretation Acts in all jurisdictions provide that, unless the contrary is expressly provided, the term 'person' includes natural persons, corporations and unincorporated associations.[26]

6.57 This means that the primary duty we recommend would be owed by the operator of the business or undertaking, whether the operator were an individual, company, partnership or other body.

6.58 Some concern has been expressed to us about the application of duties of a 'person' to individuals within an organisation. Examples have included the potential liability of a middle manager or supervisor with practical day to day control of a workplace, for and on behalf of the employer, for a breach of the duty of care of a person with management or control of a workplace. The application of such duties to individual 'functionaries' within an organisation is problematic. It imposes obligations on the individual to be proactive so far as is reasonably practicable, rather than merely exercising reasonable care as is required of other employees. While limitations on the effective control able to be exercised by an individual will be relevant to what is reasonably practicable for them, this may present opportunities for the individual to be put to considerable expense and distress in trying to prove this.

6.59 We consider that imposing the duty of care on the 'person' who is conducting the business or undertaking, should overcome this concern and ensure that it is the person who is actually operating the business (e.g. the business owner or the appointed managing agent) who is the subject of the duty. As defining what is meant by 'conduct of a business or undertaking' might be difficult and could cause unintended consequences, we consider excluding certain individuals from the class of persons owing the duty of care to be a preferred approach.

6.60 The express exclusion of 'workers' and 'officers' in those capacities from the class of persons who owe the primary duty of care would achieve the desired outcome. We note that such persons will be subject to other duties of care.

6.61 Natural persons employed or engaged to undertake activities in the business or undertaking of another will be workers (within the proposed extended definition) or officers and will owe duties of care as such. They will accordingly be accountable for their conduct in those roles.

[26] For example, s.5 of the *Interpretation Act 1984* (WA), which provides that 'person' includes a public body, company or association or body of persons, corporate or unincorporate; s.4 of the *Acts Interpretation Act 1915* (SA) which provides that 'person' or 'party' includes a body corporate; s.38 of the *Interpretation of Legislation Act 1984* (Vic); s.41 of the *Acts Interpretation Act 1931* (Tas) provides that 'person' and 'party' respectively shall include any body of persons, corporate or unincorporate, other than the Crown.

6.62 We note that a person may be a worker, by being a self employed person engaged in the business or undertaking of another (e.g. a principal in a construction project), but may also be a person who is conducting his or her own business or undertaking. While that person would be excluded from owing the duty of care in the capacity of a worker 'conducting the undertaking' of the principal, that person is not excluded and owes the duty of care in the capacity of a person conducting a business or undertaking. Such persons would also have the concurrent, but lesser, duty of a worker to take reasonable care (discussed later in this report).

RECOMMENDATION 13

The primary duty of care should exclude workers and officers to the extent that they are not conducting a business or undertaking in their own right.

Alternatively, guidance material should make clear that the primary duty of care is not owed by such persons.

Meeting the challenges of changing work relationships

6.63 In considering the nature and content of duties of care, we have been particularly careful to take into account and accommodate the changing nature of work and employment arrangements.[27]

6.64 This issue is discussed at length earlier in this report. We consider that the duty of care of persons conducting a business or undertaking, as we recommend, would address this issue by overcoming the limitations of the current duties of care that have been identified by stakeholders and expert commentators.

6.65 Each of the persons conducting a business or undertaking involved at the various levels of contracting 'chains' (such as those commonly found in construction, transport and clothing) would owe duties of care in relation to their activities in the conduct of their business or undertaking, to those who are affected by what they do.

6.66 Both the labour on-hirer (direct employer of labour hire personnel) and the host employer would owe the duty of care to the labour hire personnel. The proposed reference to ensuring the provision of the various specific elements of the duty, would allow an appropriate allocation of health and safety protection activities between them, while each would retain the duty of ensuring the relevant matters were attended to.

6.67 Arrangements for the provision of labour that are not 'employment like' such as bartering, share fishing and share farming, would also be subject to the duty of care, either because the person carrying out work will fall within the broad definition of 'worker' or would fall into the residual class of 'others'.

[27] Clause 11(c) of the Terms of Reference expressly require us to take this into account.

6.68 Some arrangements may not be directly for the provision of labour, but may be related to the conduct of a business or undertaking in which persons work. An example is franchising arrangements. The franchisor will often impose a high level of detailed requirements on the franchisee, that will affect many of the elements of work (e.g. the layout of premises and equipment to be used in fast food franchises). The franchisor may therefore affect the health and safety of the employees of the franchisee and the public – each of whom would owe the duty of care to 'others'.

6.69 The only limiter in the duty should be that labour is provided for the purposes of, or in the course of, the conduct of a business or undertaking. All arrangements of whatever nature that meet that description would be the subject of the duty of care.

6.70 Differences in the role and ability of duty holders to direct or influence matters will be accommodated by applying the standard of 'reasonably practicable'.

The issue of 'control'

6.71 Whether or not 'control' should be a part of a duty of care, to identify the duty holder or the extent of the duty, is a matter of some controversy, with a large number of comments made in submissions and consultation.

6.72 The proponents of including 'control' in the duty of care assert that it is necessary to ensure that persons do not have duties and incur liability where they do not have control. Some have stated that it is important to include 'control' to determine the allocation of responsibility between duty holders.[28]

6.73 Those who argue against including 'control' as a determinant of the duty holder or the extent of the duty, assert that existing duties of care that include reference to 'control' encourage a focus on avoidance of control (to avoid the duty) rather than on practical compliance measures. Reference is made to various arrangements put in place by parties to relinquish 'control', when they are in a better position to exercise 'control' than those to whom they purport to pass it.[29]

6.74 We recommend that the primary duty of care on a person conducting a business or undertaking does not refer to 'control' (other than for the limited purpose of the explicit element relating to the safety of the workplace) and does not rely on 'control' as a determinant of the duty holder or the extent of the duty. Every person who is conducting a business or undertaking should owe a duty of care to any other person, worker or other, whose health or safety may be put at risk from the conduct of that business or undertaking.

[28] For example, ACCI, *Submission No. 136*; Master Builders Association (MBA), *Submission No.9*; Minerals Council of Australia (MCA), *Submission No. 201*.

[29] For example, SA Government, *Submission No. 138*; ACTU, *Submission No. 214*.

6.75 We consider that it is not necessary to use the issue of 'control' to determine who should have a duty or the extent of the duty. The incorporation of the standard of 'reasonably practicable' in the duty will provide for a consideration of 'control', in relation to compliance.[30]

6.76 If a duty holder does not have 'control' over an activity or a matter relevant to health and safety, then it cannot be 'reasonably practicable' for the duty holder to do anything in relation to it.

6.77 If the 'control' able to be exercised by the duty holder is limited, then that limitation will be relevant to determining what is 'reasonably practicable' for that duty holder in the circumstances.

6.78 In this way, the duty of care is limited by the issue of 'control' and it need not be stated in the duty.

6.79 An advantage to this approach is that any focus on 'control' occurs when considering compliance, at which time the focus is on effective management of risk, rather than on whether a duty of care exists and the parameters of it.

RECOMMENDATION 14

The primary duty of care should not include express reference to 'control'.

Meeting concerns about multiple, concurrent duties of care

6.80 The duty of care will apply to each of those involved in the undertaking of work or providing things for work to be undertaken. This will include multi-layered contracting arrangements and labour hire arrangements. It is appropriate that each person involved in such arrangements have a duty of care associated with their involvement.

6.81 Concern was expressed in submissions and discussions about possible problems that may arise from the concurrency of duties of care in these circumstances. The issues raised were that:

- those who have a lesser or minor part to play in relation to work should not have an obligation when those with more direct influence or control are better placed to manage the risks;
- the various parties may each believe that another should take action, and is likely to be the one seen to have the relevant obligations, with the result that no-one takes any action or that insufficient action is taken;

[30] See *R v Associated Octel Limited* [1994] 4 All ER 1051; *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *R v ACR Roofing Pty Ltd* [2004] 11 VR 187; *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84).

- duty holders should only be responsible for the risk control measures that they are best able to carry out; that is, responsibility should be allocated between them. For example, an employer who supplies labour hire personnel would only be responsible for ensuring competent and trained persons were provided to undertake the work and that they were provided with necessary information about it. The 'host' would be responsible for the safety of the systems of work, plant, workplace, workplace induction, provision of workplace and task specific information and supervision;
- where there are multiple duty holders with obligations over the same subject-matter, there may be a duplication of effort and accordingly a waste of resources that could be better applied to other OHS risk management measures; and
- a duty-holder should be able to reasonably rely on the expertise of another person engaged to undertake specialist tasks.

6.82 In practice, each party to a work activity or project has a particular role and ability to influence or direct particular matters relevant to health and safety that others may not. We consider that it is therefore appropriate that each owe a duty of care to those who may be affected by their involvement.

6.83 The incorporation of the standard of 'reasonably practicable' in the duty of care provides an answer to a number of the concerns listed above. In some circumstances it may be reasonably practicable to rely on:

- the expertise of others, particularly where that expertise is not held by the duty holder (recognising that there may be circumstances where it is not reasonable to do so);[31] or
- another party to undertake particular activities to ensure health and safety (e.g. providing supervision or welfare facilities) in relation to the work activities with which the duty holder is associated (noting, however, that the duty holder must ensure those activities are undertaken).

6.84 Where a duty holder has a very limited involvement or very limited ability to take relevant steps in relation to managing risks, those factors will assist in determining what is 'reasonably practicable' for them in complying with their duty of care.

6.85 Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made.

6.86 We recommend in this report that the model Act include a provision requiring cooperation and coordination of activities between concurrent duty holders.

[31] See, for example, *R v ACR Roofing Pty Ltd* (unreported, Supreme Court of Victoria, 1 December 2004); *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84).

6.87 The general part of the primary duty of care that we recommend refers to the duty holder being required to ensure the health and safety of workers and others. The explicit elements of the primary duty of care similarly require the duty holder to ensure certain outcomes or matters, such as the provision and maintenance of safe systems of work and plant. The primary duty does not require the duty holder to directly undertake the activities necessary for compliance with the duty – these can be done by others, whether at the instigation or direction of the duty holder or otherwise – with the duty holder only being required to ensure that the activities are undertaken and the outcomes achieved. This allows for the coordination of activities between duty holders and the reasonable reliance on others to facilitate compliance.

6.88 We agree with the view expressed by many who made submissions and commented during consultation, that duties of care should be non-delegable and that duty holders not be entitled to rely on others to fulfil their OHS obligations. Our recommended approach to the duty of care would not permit a delegation of the duty of care. Each duty holder would retain the non-delegable duty of care at all times. Arranging for another person to undertake activities necessary for compliance with the duty of care owed by the duty holder would not be sufficient to meet the duty so far as is reasonably practicable, unless the duty holder took steps necessary to confirm the relevant matters were appropriately attended to, and the required health and safety standards were maintained.

RECOMMENDATION 15

The primary duty of care should be sufficiently broad so as to apply to all persons conducting a business or undertaking, even where they are doing so as part of, or together with, another business or undertaking.

Defining the persons to whom the duty of care is owed

6.89 The definition of 'worker', the different contexts in which it may be used, and whether it may be different when used in different contexts, will be dealt with in the second report. The definition of the person to whom the primary duty is owed is, however, critical to understanding the scope of the duty. Accordingly we must now consider this point.

6.90 We consider that the definition of 'worker' must be clear and sufficiently broad in application to meet the intended scope of the primary duty. A good example is provided by s.4 of the NT Act:

worker *means:*

a) any person who works in the employer's business:

i) as an employee; or

ii) as an apprentice or person undergoing on-the-job training; or

iii) as a contractor or sub-contractor; or

iv) as an employee of a contractor or sub-contractor; or

v) as an employee of a labour hire company who has been assigned to work for the employer; or

vi) as a volunteer; or

vii) in any other capacity;

b) if the employer is a natural person who works in the employer's business – the employer him/herself.

6.91 The use of the term 'employer' in this definition is subject to the extended definition in s.4 of the NT Act. This would not be necessary in the model Act because the primary duty we propose would not use the expression 'employer'. The definition of 'worker' would instead refer to a person who works in a business or undertaking; and the other references to 'employer' instead be to 'the person conducting the business or undertaking'.

6.92 A definition of 'worker' should also include other specific classes, such as those persons who provide their labour as part of bartering, share fishing, share farming or other arrangements in the course of conduct of a business or undertaking by another person. Doubts exist about whether existing OHS Acts adequately cater for such arrangements.

6.93 The beneficiaries of the duty of care, in addition to 'workers', are 'others'. This clearly includes all other persons and no definition is required.

RECOMMENDATION 16

The model Act should include a definition for 'worker' that allows broad coverage of the primary duty of care. The definition of 'worker' should extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.

The duty should not be limited to 'a workplace'

6.94 The current duty of care of a person conducting a business or undertaking is in some jurisdictions limited to the conduct of the undertaking at a workplace of the duty holder (employer).[32] In other jurisdictions that limitation is neither explicit or implicit.[33]

6.95 Limiting the duty of care to the workplace has led to a focus on what is 'a workplace of the employer' and resulted in interpretations that may not be consistent with the meaning that a person reading the duty of care may give to the expression.[34] That is, the expression has been interpreted in a way that goes beyond its ostensible scope.

6.96 We do not consider the limitation to be appropriate or necessary. There may be circumstances in which activities are undertaken as part of the business or undertaking, at the direction of the duty holder, at a place that could not properly be considered to be a workplace of the duty holder.

6.97 The consequences of activities or conduct undertaken for the duty holder may occur beyond the workplace of the duty holder (e.g. goods that were inadequately restrained may fall from a truck on an open highway, or debris from an explosion may land some distance from the workplace). We do not consider such a limitation should be included in the duty. Any concern that the duty may apply inappropriately would be addressed by the application of the standard of reasonably practicable.

RECOMMENDATION 17

The primary duty of care should not be limited to the workplace, but apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking.

[32] See, for example, s.8(2) & 9 of the NSW Act.

[33] See, for example, *Whittaker v Delmina Pty Ltd* (unreported, Supreme Court of Victoria, 18 December 1998).

[34] See for example the case of *Workcover Authority of NSW (Inspector Wilson) v Chubb Security Australia Pty Limited* [2005] (NSWIRComm 263) in which the car-park of an RSL Club in which a contractor was shot was found to be a workplace of the defendant who engaged the contractor.

The importance of the standard of 'reasonably practicable'

6.98 It is common for a number of enterprises to be conducted within a confined area. While there is often a connection between the work that each is undertaking at that place, and ongoing communication, that is not always the case. The enterprises may be situated within a 'business park', using common areas or facilities, but operating separate businesses.

6.99 Many business activities are undertaken in areas where the public has free access and members of the public are not necessarily under the direction or control of the person conducting the business or undertaking. Often, however, the public can be directed or, at a minimum, informed by the business operator of hazards, risks and controls.

6.100 In each of these circumstances, those who have little or no connection with the activities of a person conducting a business or undertaking may be exposed to risks from those activities, by reason of their proximity.

6.101 This means that there may be circumstances where the fulfilment of specific safety requirements – such as safe plant, workplace and systems, or the provision of safety information – may be critical to the protection of health and safety of visitors and others who are not 'workers' within the business or undertaking (e.g. visitors to an industrial operation for a purpose connected with the business, public attendance at 'open days').

6.102 For this reason, among others, we have proposed a primary duty of care that is sufficiently wide so that, in appropriate circumstances, specific safety measures for both 'workers' and 'others' may be required by the person conducting the business or undertaking.

6.103 There may be concern that the primary duty of care may impose specific obligations in relation to 'others' over whom the duty holder may not have any practical control or ability to direct. This concern should be met by the application of the standard of reasonably practicable (such obligations are only to be met where it is both possible and reasonable for the duty holder to do so).

6.104 The primary duty itself, by referring to a risk from the conduct of the business or undertaking by the duty holder, provides the causal link necessary for the duty holder to be liable for risk to 'others'.

6.105 This is a key element of 'reasonably practicable' in current legislation and case law. A further safeguard would exist because the proposed duty would still require knowledge of the risk emanating from the activities of the duty holder.[35] Foreseeability of the risk to persons from the activity is an element of this question of knowledge.[36] This is particularly relevant to the extension of the duty of care for the benefit of 'others'.

Duty to apply notwithstanding any other duty

6.106 We observe earlier that it would be appropriate for specific duties of care to be included in the model Act for various classes of persons (e.g. designers, manufacturers, suppliers, persons with management or control of a workplace), even though such persons owe the primary duty of care as business operators.

6.107 The duties should be concurrent. The primary duty should not be limited by the existence and content of the more specific duty. To address this concern, we recommend that the model Act contain a provision expressly applying the primary duty of care of a person conducting a business or undertaking, without limitation, notwithstanding the existence and application of other, more specific duties.[37]

6.108 We illustrate this type of provision in the example primary duty. A more specific provision, for this duty, is suggested below in the example of the proposed primary duty set out later in this chapter.

RECOMMENDATION 18

To avoid the exclusion or limitation of the primary duty of care, the model Act should specifically provide that the duty should apply without limitation, notwithstanding anything provided elsewhere in the model Act (that is, more specific duties that may also apply in the circumstances should not exclude or limit the primary duty of care).

[35] See, for example, the definition of 'practicable' in s.3 of the WA Act which refers to the 'state of knowledge about' various matters; and s.20(2) of the Vic Act which refers to 'what the person concerned knows, or ought reasonably to know'. See slso, for example, the discussion in the cases of *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *Chugg v Pacific Dunlop Ltd* (unreported, Supreme Court of Victoria, 5 May 1989) and *Tenix Defence Pty Ltd v Maccarron* [2003] WASCA 165.

[36] See, for example, *Chugg v Pacific Dunlop Ltd* (unreported, Supreme Court of Victoria, 5 May 1989); *Tenix Defence Pty Ltd v Maccarron* [2003] WASCA 165; *Inspector Malone v Delta Electricity* [2003] NSWIRComm 212; *Workcover Authority of NSW v Cleary Bros (Bombo) Pty Ltd* [2001] 110 IR 182.

[37] Section 25 of the Qld Act and s.16 of the new ACT Act provide examples of a provision of this kind.

The duty to provide a safe and healthy working environment

6.109 Some OHS legislation in Australia commonly provides for a general duty of an employer to provide and maintain a safe and healthy working environment, with more detailed and specific elements of the duty provided in a separate sub-section.[38]

6.110 The reference to a 'working environment' is often misunderstood as being limited to the physical environment in which the work is undertaken, subject to extension to process matters (systems of work, instructions etc) provided in the subsequent sub-section. This means that the duty is sometimes (incorrectly) thought to be limited to the specific element noted.

6.111 A 'working environment' includes all of the circumstances in which work is undertaken. This may include elements that are not specifically identified but influence the safety of the work being undertaken, such as:

- remuneration structures (performance based remuneration may drive unsafe behaviour);
- organisational structures and accountabilities (which may positively or adversely impact the effectiveness of safety measures, or may impact the ability of individuals to affect health and safety);
- employment and business processes (which may give rise to or lessen the prospect of psychological harm); and
- third party arrangements (contracts with suppliers or contractors may impact the ability to take measures to control health and safety risks).

6.112 Each of these matters will be covered by the broad duty of care that we recommend. By casting the duty of care as we have recommended, the term 'working environment' would be redundant.

[38] Examples are s.19 of the WA Act and s.21 of the Vic Act.

Explicit elements of the duty of care

6.113 The duty of care of an employer, in each of the jurisdictions that impose a duty of care on the employer, has various specific obligations associated with it.[39] These are generally consistent across the jurisdictions.[40]

6.114 Each of the specific elements is well known and understood and is appropriate for inclusion in the primary duty of care that we recommend be included in the model Act. Each relates to an aspect of what is required or provided for work to be undertaken and each is usually provided by, or at the direction of, or is under the control of, the person in whose business the work is being undertaken.

6.115 While we propose that the primary duty of care include each of these elements, normally required to be met by an employer, there would not be any reference to an 'employer' in the primary duty of care. These elements would be required to be met by any person conducting a business or undertaking.

RECOMMENDATION 19

The primary duty of care should include specific obligations, namely ensuring so far as is reasonably practicable that:

a) the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health or safety of any person;

b) the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances;

c) each workplace under the control or management of the business operator is maintained in a condition that is safe and without risks to health;

d) the provision of adequate welfare facilities; and

e) the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their safety and health from the conduct of the business or undertaking.

[39] Section 19 of the SA Act; s.9 of the NSW Act; s.21(2) of the Vic Act; s.9 of the Tas Act; s.19 of the WA Act; s.16 of the Cwth Act.

[40] Section 29 of the Qld Act has similar provisions applying to an 'employer' conducting a business or undertaking, although it does not include all of the elements applying to an employer in other jurisdictions; the NT Act takes a different approach with an 'employer' being required to apply a risk management approach.

Accommodation provided to a worker

6.116 In our consultations, we were asked to consider how a particular provision of the WA Act might be provided for in the model Act. Division 4 of Part III of the WA Act provides a duty of care of an employer for the safety of residential premises occupied by an employee in certain circumstances. The duty of care only relates to circumstances where:

- the premises are owned by or under the control of the employer; and
- the occupancy by the employee is necessary for the purposes of the employment, because other accommodation is not reasonably available in the area.

6.117 The duty is only owed to employees (which includes apprentices and trainees) and not to other persons. It does not apply where the occupancy is pursuant to a written agreement containing terms that might reasonably apply to letting the premises to a tenant. It is deliberately limited to remote areas.[41]

6.118 This duty in the WA Act is to provide for circumstances, such as in a remote mining camp or town, where the only accommodation available to an employee is that provided by the employer. The submission by the Western Australian Government[42] recommends that a duty of this nature, with the limitations noted, be included in the model Act, but extended to cover requirements for reasonable improvements, in addition to maintenance.

6.119 We do not consider that a separate duty of care of this nature would be required to be included in the model Act, as it would be effectively provided for by the primary duty of care owed by a person conducting a business or undertaking.[43]

6.120 The provision of accommodation would be part of the conduct of the business or undertaking. The duty of care owed by the duty holder to workers and others would extend to ensuring so far as is reasonably practicable that the accommodation is safe and without risks to health. We consider that to be appropriate. We do not consider that the duty should be owed only to employees, but should extend to workers (as more broadly defined) and others (e.g. family members residing with the worker).

6.121 The model Act should not place a positive duty on a person conducting a business or undertaking to provide accommodation. We do, however, consider that if the duty holder does so, where the accommodation is provided to enable a worker to be located conveniently to undertake work as part of the business of the duty holder, the duty holder should owe a duty of care related to the safety of the accommodation.

41 See the definition of 'residential premises' in s.23G(1)(a).

42 Western Australian Government, *Submission No.112*, p. 15.

43 This situation may not, however, be the subject of the proposed duty of care owed by a person with the management or control of a workplace, as the residence may not be a workplace.

6.122 We note that the WA Act is deliberately restricted to remote areas, including through reference to certain other State Acts. The scope might need to be varied from time to time and the local references to legislation may change in a particular jurisdiction, or be inappropriate. This kind of detail would be appropriate for regulations.

6.123 The occupation of the residential premises would not be during the undertaking of work by the worker and the premises would therefore not be a workplace. The occupation of residential premises would not be covered by the explicit part of the primary duty of care that requires the duty holder to ensure that a workplace under its management or control is without risk to health and safety. It will, therefore, be necessary for a separate, specific duty of care to be included. An example is provided in the next section.

RECOMMENDATION 20

The model Act should extend the primary duty of care to circumstances where the primary duty holder provides accommodation to a worker, in circumstances where it is necessary to do so to enable the worker to undertake work in the business or undertaking (along the lines of that currently found in Part III, Division 4 of the WA Act). Detailed requirements and the specified scope should be contained in regulations.

Drawing all the elements together in a section

6.124 There are a number of elements to the proposed primary duty of care. The interaction of these elements will be important to the effectiveness of the provision. The drafting of the provision will require care to ensure that all of the matters discussed above are provided for, with sufficient clarity to limit the need for interpretation. They should be in the one section (or collocated if in more than one).

6.125 We provide the following wording to illustrate how the various elements could be drawn together in a section:[44]

1) A person conducting a business or undertaking (other than in the capacity of a worker or officer) must ensure so far as is reasonably practicable that workers engaged in work as part of the business or undertaking, and any other persons, are not exposed to a risk to their health or safety from the conduct of the business or undertaking.

[44] In our second report we will deal with the issue of the role of hazard and risk management. We will consider whether this section should also include provisions relating to this matter as provided in s.55(2) of the NT Act. In our second report we will also deal with other duties and obligations of the primary duty holder, including in relation to consultation, engagement or appointment of a suitably competent person to advise in relation to OHS and other obligations ordinarily imposed upon the employer.

2) *Without limiting sub-section (1), a person conducting a business or undertaking must so far as is reasonably practicable ensure:*

   a) *the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health or safety of any person;*

   b) *the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances;*

   c) *each workplace under the control or management of the business operator is maintained in a condition that is safe and without risks to health;*

   d) *the provision of adequate welfare facilities;*

   e) *the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their health or safety from the conduct of the business or undertaking; and*

3) *Where:*

   a) *a person conducting a business or undertaking supplies accommodation for occupancy by a worker; and*

   b) *the occupancy of that accommodation by the worker is necessary to enable work to be undertaken by the worker because other suitable accommodation is not reasonably available;*

   the person conducting the business or undertaking must ensure so far as is reasonably practicable that the accommodation and the means of entering and leaving it are safe and without risks to the health and safety of any person when used for the purpose for which it is provided.

4) *In this section:*
   [provide definitions of 'business or undertaking', 'worker' (if not defined elsewhere in the model Act) and 'accommodation']

5) *For the avoidance of doubt, the duties and obligations imposed by this section apply without limitation notwithstanding anything provided elsewhere in this Act.*

RECOMMENDATION 21

In giving effect to the recommendations relating to the primary duty of care, the proposed model clause at paragraph 6.125 should be taken into account.

Providing for detail in regulations and guidance material

6.126 Currently, various regulations and legislation unrelated to the central OHS legislation impose obligations on business operators in specific industries. Examples include 'chain of responsibility' regulation in the road transport industry[45] and the regulation of various parties to clothing outworker arrangements.[46]

6.127 These and other industries have safety issues and requirements that are specific to the nature of the industry. The changing nature of work and work relationships and arrangements means that other specific requirements may be needed in the future. We consider that the detail required is not appropriate for the model Act, but is appropriate for regulations, codes of practice and guidance material under the model Act.

6.128 The proposed primary duty of care, being sufficiently broadly cast, would provide legislative support for specific regulations for existing and emerging industries and work arrangements.

6.129 The scope of this duty of care is also relevant to whether industry specific safety legislation should be maintained, or whether all industries might appropriately be regulated under the model Act. This is a matter which we will discuss in our second report.

RECOMMENDATION 22

The primary duty of care should be supported by codes of practice or guidance material to explain the scope of its operation and what is needed to comply with the duty.

[45] See *Fair Work Act 1994* (SA); *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW); and P James et al, 'Regulating supply chains for safety and health', Industrial Law Journal, 36(2): pp. 163–187, 2007; and M Rawling, 'A generic model of regulating supply chain outsourcing' in C Arup et al (A. Eds) Labour Law and Labour Market Regulation, Federation Press, Sydney, pp. 420–441, 2006.

[46] See Occupational Health and Safety (Clothing Factory Registration) Regulation 2001; and I Nossar et al, 'Regulating supply-chains to address the occupational health and safety problems associated with precarious employment: The case of home-based clothing workers in Australia', Australian Journal of Labour Law, 17(2), pp. 1–24, 2004.

Chapter 7: Specific classes of duty holders

7.1 All OHS legislation in Australia places duties of care on specified classes of persons who, in the course of a business or undertaking, undertake activities that may materially affect the health and safety of persons at work. Those classes comprise persons other than the direct employer of the persons undertaking work. The duties of care relate to elements required for work to be undertaken (e.g. plant, substances, the workplace). The activities are undertaken in relation to those elements (e.g. design, manufacture, supply).

7.2 The proposed primary duty of care would apply to each of the activities, as they are undertaken as part of the conduct of a business or undertaking. It is, therefore, not necessary to provide further duties of care for specific classes of persons (other than officers, workers and others not conducting a business or undertaking). However, we consider that there are advantages to expressly providing duties for specified classes of persons. Specific provisions will:

- clarify that such persons have duties; and
- allow for detailed requirements to be provided that would not be appropriate in a provision with broad application, such as the primary duty.

7.3 The specific classes of persons who we consider should have duties of care under a model Act include:

- those with management or control of workplace areas;
- designers of plant, substances and structures;
- manufacturers of plant, substances and structures;
- builders, erectors and installers of structures;
- suppliers and importers of plant, substances and structures; and
- OHS service providers.

7.4 Each of these classes of duty holder has the following common elements:

- They all relate to the conduct of a business or undertaking; and
- They are all subject to the qualifier of reasonably practicable.

7.5 There are additional duty holders, namely officers, workers and others at the workplace, whose duties of care are subject to different qualifiers. Those duty holders will be discussed in the next two chapters.

Duties of persons with management or control of workplace areas

Current arrangements

7.6 Most OHS Acts in Australia have incorporated duties for persons in control of a workplace.[1] Those that do not have such a duty for persons in control of a workplace instead place duties on occupiers and owners of a workplace. However framed, the duty requires persons with actual or (in the case of the owner) assumed control over the condition of the workplace to ensure that the workplace, including the means of entering and exiting, are safe and without risks to health. Queensland has introduced additional duties for persons in control of workplace areas, and for fittings, fixtures and plant in a workplace area.[2]

7.7 Half of the OHS Acts with a duty for persons in control specifically state that the duties are owed to persons other than the duty holder's own employees.[3] Two jurisdictions state that the duties do not apply to domestic premises.[4]

7.8 Under the NSW and WA Acts the duty of a person in control of a workplace is also owed where a person has, by virtue of a contract or lease, an obligation to any extent in relation to the maintenance or repair of a workplace.[5] Conversely, the Qld Act allows for the duty to pass from an owner to another where there is lease, contract or other arrangement which provides, or has the effect of providing, for the other person to have effective and sustained control of the workplace.[6]

7.9 The majority of OHS Acts also contain a duty for persons in control of plant. Three jurisdictions have also included a duty for persons in control of substances.[7] Only the ACT Act includes a duty for persons in control of systems, and has also used the approach for upstream duties (e.g. person in control of design).

7.10 The ASCC has used 'person in control' provisions in recent National Standards (such as Manual Tasks, Construction Work and Control of Major Hazard Facilities).

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1 The Commonwealth does not include any duties for persons in control or occupier/owners. Instead, the employer has a duty to ensure any workplace under the employers control is safe and without risks to health. This approach is consistent with the limited coverage of the Cwth Act.

2 See ss.15B, a5C & 30 of the Qld Act.

3 This applies in NSW, Qld, WA, and Tas. Note that where the duty holder is an employer, the employees of the duty holder are owed an equivalent duty of care, imposed on the duty holder as an employer.

4 See s.10(3)(b) of the NSW Act and s.30(2) of the Qld Act.

5 See s.10(4)(b) of the NSW Act, and s.22(2) of the WA Act.

6 See ss.15B & 15C of the Qld Act.

7 NSW, Qld and Tas.

Stakeholder views

7.11 The submissions that address the issue of persons in control, such as that from the AiG[8] indicate dissatisfaction with current legislative provisions, citing a lack of clarity around who owes the duty, when and to whom it is owed, and what is meant by 'control' and by 'workplace' (temporary or otherwise).

7.12 Many of the submissions from companies provided examples to illustrate issues with 'control' for:

- owners and tenants of workspaces;
- company management of an employees home workplace arrangements;
- company management of 'vehicle workplaces'; and
- contracting arrangements with owners, property managers, commissioner of contractors, contractors.

7.13 The Property Council of Australia requested that the model Act not be prescriptive, but that it be supported by extensive examples illustrating the extent of control in these situations.

7.14 Section 22 of the WA Act was nominated by ACCI as an appropriately clear and confined description of duties for persons in control of a workplace.

7.15 The Victorian Government does not support inclusion of duties for persons in control of items or areas in the model Act, because such duties "could effectively reduce the general duties to delegable duties and create confusion in the workplace about who actually has the duty."[9]

7.16 Instead the Victorian Government advocates the use of one broad duty for any person who has to any extent, the management or control of a workplace.[10] This expression of the duty would "ensure that it covers owners and occupiers and a broad range of contemporary business arrangements such as franchising, contracting out and 'proprietor' arrangements."[11]

7.17 The Queensland Government suggested that its treatment of 'person in control' is similar to that adopted by the courts in that it addresses the critical issue of 'capacity to control'.[12] On this basis the Queensland Government proposes that its approach (i.e. a hierarchy of duties combined with a measure to allow control to pass via contract in certain circumstances) be adopted in the model Act.[13]

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8 AiG, *Submission No. 182*.
9 Victorian Government, *Submission No. 139*, p. 35.
10 As per s.26 of the Vic Act.
11 Victorian Government, *Submission No. 139*, p. 35.
12 Queensland Government, *Submission No. 32*, p. 17.
13 ibid.

Who should owe the duty of care and over what?

7.18 The discussion of current arrangements above notes that there are some differences between the jurisdictions on the scope of matters covered by this duty. The scope of the duty is relevant to determining who will have management or control and therefore who will owe the duty of care. There are therefore some issues to be addressed for the purposes of the model Act.

7.19 As indicated by the title of this section of our report, and consistent with current OHS legislation, we consider that the duty holder would in broad terms be the person with management or control of the relevant physical environment.

Options for who should owe a duty of care and over what

7.20 We have considered the duties of care in current Australian OHS legislation relating to the management or control of a workplace and associated areas, as well as the views expressed in submissions and during consultation. We have identified two options.

7.21 ***Option one*** – Place a duty of care on a person who has, to any extent, management or control of:

- a relevant workplace (or part thereof);
- any area adjacent to a relevant workplace area;
- fixtures;
- fittings; or
- plant.

7.22 The duty would create an obligation on such a person to ensure that the area (including the means of entering and exiting), fixtures, fittings and plant within it are safe and without risks to the health and safety of any person at the workplace. The duty would be limited to those matters over which the person has management or control.

7.23 The definition of a 'workplace' will be considered in our second report. However, the application of the duty of care to adjacent areas would cover any circumstances where the relevant area might not be considered to be a part of the 'workplace' (for example, because work is not done there) but it is under the management or control of the duty holder and used or travelled through by workers at the workplace or by other persons coming onto the workplace.

7.24 Specific reference to those things that are connected to the workplace (fixtures, fittings or plant) would remove arguments as to whether such items are part of the workplace. They are likely to be under the management or control of the person who has management or control of the workplace, but if they are not, then the duty would not apply to that person. Including fixtures, fittings and plant in the duty follows the approach already adopted in Queensland.[14]

7.25 ***Option two*** – Limit the duty of care to the 'workplace' and would place a duty of care on a person who has, to any extent, management or control of a 'workplace' to ensure for any person:

- the workplace is safe and without risks to health; and
- there is a safe means of entering and exiting the workplace.

Discussion of the options and associated issues

7.26 We consider the first option to be appropriate as it provides broader coverage and limits uncertainty as to what is included within the duty of care.

7.27 The objective of the proposed duty of care would be to ensure that the health and safety of persons at or adjacent to an area at which work is being conducted is not put at risk from the state or condition of the workplace etc. The state or condition of the workplace should be such as to allow it to be safely performed.

7.28 It is also important that the means of entering or exiting a work area are safe and without risks to health and safety. It has been suggested that this may extend in remote locations to include the means by which persons are ferried to and from areas or work activity.[15]

7.29 The duty of care would therefore require that the person with management or control of the workplace etc ensure so far as is reasonably practicable that the workplace etc and the means of entering and leaving the workplace are safe and without risks to health and safety.

RECOMMENDATION 23

The model Act should include a specific duty of care owed by a person with management or control of the workplace, fixtures, fittings or plant within it to ensure that the workplace, the means of entering and exiting the workplace, and any fixtures, fittings and plant within the workplace are safe and without risks to health and safety.

[14] See s.34D of the Qld Act.

[15] Creighton, B., Rozen, P., *Occupational Health and Safety Law In Victoria*, The Federation Press, NSW, 2007.

What is meant by 'management or control'?

7.30 The question of what is meant by 'management or control' is central to determining who owes the duty of care and in relation to what.

7.31 The approaches and findings of the courts on the issue of 'control' have been inconsistent and resulted in confusion.[16] This inconsistency has to some degree resulted from the many uses to which 'control' is put in current OHS legislation.[17]

7.32 We consider that the model Act should define 'management or control', either in the duty of care provision or in the definition section. We recommend that 'control' not be used in the model Act other than in the duty of care placed on a person with management or control of the workplace etc. This should assist in defining this term clearly and in a way that is directed only to this particular use.

7.33 While we will deal with the definition of 'management or control' in our second report, we note the Qld Act is an example of providing certainty by defining the term. The Qld Act provides clarity about who has 'management or control' by deeming the owner of the workplace etc to be that person.[18] That Act does, however, recognise common commercial arrangements for long-term, exclusive occupation and use of a workplace etc, providing that a person who has effective and sustained control over the workplace etc pursuant to a lease, contract or other arrangement is the duty holder.[19]

RECOMMENDATION 24

The model Act should define 'management or control' of the workplace, fixtures, fittings and plant to make it clear who owes the duty of care.

***Note**: A definition of 'management or control' will be provided in our second report.*

7.34 It is important to appreciate more than one person or entity may have 'management or control' of a workplace. This may occur where there is a shared responsibility (e.g. between the landlord and tenant) or where there is more than one undertaking being conducted at the workplace. The various persons may each have 'management or control' only over specific aspects of the workplace.

7.35 'Management or control' over a workplace or parts of it may change over time. An example is a construction worksite where various expert contractors may consecutively have effective 'management or control' over work areas, while the principal contractor may retain overall 'management or control' of the site.

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16 This issue was discussed by B Sherriff in "The concept of control in determining OHS responsibilities: A need for clarity", 2007, 35 ABLR 298.

17 Control is used variously to determine the scope of operation of the legislation, the identity of the duty holder, the subject matter of the duty, the limits of the duty, exclusions and defences.

18 See ss.15B and 15C of the Qld Act.

19 See ss.15B(2) and 15C(2) of the Qld Act.

7.36 We recommend that the model Act make clear that each person with management or control would owe the duty of care, in relation to the matters over which they have management or control and while they do so.

RECOMMENDATION 25

The duty should make it clear that more than one person can have management or control of the same matter at the same time or at different times. The duty should be placed on a person who has, to any extent, management or control of:

a) a relevant workplace area (or part thereof);

b) any area adjacent to a relevant workplace area;

c) fixtures;

d) fittings; or

e) plant.

To whom should the duty be owed?

7.37 The duty is owed by those persons with 'management or control' of the workplace etc to any person at, entering or leaving the relevant area. This may include the public, regulators and workers.

RECOMMENDATION 26

The duty of care should be owed to any person at the workplace or any adjacent areas.

The qualifier of 'reasonably practicable'

7.38 We have recommended above that the qualifier of 'reasonably practicable' should be included in the primary duty of care which would be placed on a person conducting a business or undertaking. Consistent with that approach, we recommend that the duty of care of a person with management or control of a workplace should also be qualified by what is 'reasonably practicable'.

RECOMMENDATION 27

The duty of care of a person with management or control of a workplace etc should be qualified by the standard of 'reasonably practicable'.

Domestic premises

7.39 Domestic premises may be a workplace if the traditional definitions (place where work is done) are applied. This may occur where a person conducts work at home as part of the business of another (as a worker), or where the person conducts a business or undertaking at the person's home. It may also be a workplace for a short time while a tradesperson undertakes work at or on the premises (e.g. a plumber), or where services are provided to persons within the premises (e.g. home help, child-minding).

7.40 A question arises whether the person with the management or control of the domestic premises should have the duty of care of a person with the management or control of a workplace.

7.41 We note that, in many of these cases, the person with the management or control of the domestic premises will not be conducting a business or undertaking and would not be subject to the primary duty of care. Whether the duty owed in relation to a workplace applies may determine whether that person has any duty of care under the model Act.

7.42 Different approaches are taken to this issue in different jurisdictions. The current provisions for persons in control of a workplace in the Vic Act[20] operate without limitation or exclusion to domestic premises (although there is some exclusion that applies under the regulations). Continuation of the existing NSW position, that common areas of strata titled residential premises be excluded from such provisions, was recommended by the NSW WorkCover Review. The Queensland provision for workplace areas operates to exclude only those domestic premises occupied by the person with management or control for a workplace area.

7.43 Some submissions requested that a provision for persons with management or control of a workplace not extend to domestic premises.

7.44 The scope of the primary duty of care would ensure that where the domestic premises are used as part of the conduct of a business or undertaking, the person with management or control would have a duty of care in relation to the premises anyway.

7.45 We recommend that domestic premises be excluded from the definition of a 'workplace' for the purposes of the duty of care of the person with management or control. We recommend that the regulation making power permit the making of regulations to include specific premises or classes of premises.

[20] See s.26 of the Vic Act.

RECOMMENDATION 28

Domestic premises should be excluded from the definition of a 'workplace' for the purposes of the duty of care of the person with management or control unless specifically included by regulation.

Note: *'Workplace' will be defined in our second report.*

Persons undertaking activities in relation to plant, substances and structures

7.46 A fundamental principle in OHS is to eliminate hazards and risks, or where elimination is not reasonably practicable, to minimise them. This principle recognises that the earlier the intervention, the more effective it is to eliminate or reduce the hazards and risks.

7.47 In some jurisdictions this concept (eliminating or reducing hazards at source) is reflected within an object of the Act.[21] In all jurisdictions, this is reflected in duties of care placed on those undertaking activities, such as design, that relate to the nature and condition of things used at work (e.g. plant).

7.48 This principle is not, however, restricted in its operation to the design stage. It might involve intervening and placing duties on all those involved in any aspect of design, manufacture, import and supply of plant (or components), structures and substances intended for use in the course of work.

Current arrangements

7.49 All Australian OHS Acts have specific duties of care for persons who undertake activities that affect OHS. These duties (sometimes referred to as 'upstream duties') apply variously to designers, manufacturers, importers and suppliers of plant, substances and buildings or structures used in the course of work.

7.50 Some OHS Acts have established one set of duties that apply to all activities.[22] Others have addressed each activity separately. The Maxwell Review recommended that a separate section be dedicated to each duty holder for the sake of clarity.[23]

7.51 There are also variations in the OHS Acts in relation to whether the duties of care apply to plant, substances, buildings and structures. For example, the NSW Act has a duty for design but only in respect of plant and substances; whereas most other OHS Acts have a duty for design of plant and structures but not substances.

[21] For example see s.3(a) of the SA Act; s.2(1)(b) of the Vic Act; s.6(1)(b) of the ACT Act.
[22] SA, WA, Tasmania and the NT apply duties collectively.
[23] Maxwell Review, p. 187, paragraph 839.

7.52 Table 5 illustrates the variation in applying the duties across jurisdictions.

7.53 The duties for activities in relation to plant and substances that will be used at a workplace are expressed through a general duty to ensure items are safe and without risks to health, followed by more specific duties which usually require duty holders to:

- carry out or arrange, testing and examination necessary to ensure plant and substances are safe when used properly;[24] and
- provide adequate information with the plant or substance and on request.

[24] The NSW, Tas and the NT Acts do not require any party to test plant or substances.

TABLE 5: Duties for activities relating to plant, substances and structures

Jurisdiction	Activities / Items	Design	Manufacture	Supply	Import	Erect	Notes
Vic	Plant	✓	✓	✓	X	*	Manufacture includes install, erect and commission plant. Import is covered in regulations.
	Substance	X	✓	✓	X	N/A	
	Structure	✓	X	X	X	X	
NSW	Plant	✓	✓	✓	X	✓	Import is covered in regulations.
	Substance	✓	✓	✓	X	N/A	
	Structure	X	X	X	X	X	
Qld	Plant	✓	✓	✓	*	✓	Importer has the duties of a supplier.
	Substance	X	✓	✓	*	N/A	
	Structure	✓	X	X	X	X	
SA	Plant	✓	✓	✓	✓	✓	
	Substance	X	✓	✓	✓	N/A	
	Structure	✓	✓	✓	✓	✓	
WA	Plant	✓	✓	✓	✓	✓	Substances covered in Dangerous Goods legislation.
	Substance	X	X	X	X	N/A	
	Structure	✓	X	X	X	✓	
Tas	Plant	✓	✓	✓	✓	✓	Substances covered in Dangerous Goods legislation.
	Substance	X	X	X	X	N/A	
	Structure	✓	✓	✓	✓	✓	
NT	Plant	✓	✓	✓	✓	✓	
	Substance	✓	✓	✓	✓	N/A	
	Structure	✓	✓	✓	✓	✓	
ACT	Plant	✓	✓	✓	*	✓	Importer to ensure duties for design and manufacture fulfilled before supply. Substances covered in Dangerous Goods legislation.
	Substance	X	X	X	X	N/A	
	Structure	✓	✓	✓	*	✓	
Cwth	Plant	X	✓	✓	*	✓	Manufacturer is required to ensure designs are safe. Importer has duties of a manufacturer and supplier.
	Substance	X	✓	✓	*	N/A	
	Structure	X	X	X	X	X	

Key: ✓ In principal OHS Act, X Not in principal Act, * Special arrangement, see note

7.54 Recent OHS reviews have particularly focused on the role of designers in ensuring safety.[25] Eliminating hazards at the design stage is also a national priority under the National OHS Strategy.[26] The Maxwell Review supported imposing duties for designers of both plant and substances, and proposed that these duties extend to the design of safe packaging for any item that is supplied to or used at a workplace.[27]

7.55 While the Maxwell Review and the OHS reviews in the Territories recommended imposing duties for designers of buildings that are to be used as workplaces, the NSW WorkCover Review did not support such a provision. This was due to concerns that a new class of duty holder would significantly extend the scope of the Act.[28]

7.56 Western Australia and South Australia have extended the duties for designers of buildings and structures to ensure the safety of those who construct, maintain, service or repair the buildings or structures, as well as those who use it as a workplace. The Qld Act places an obligation on a designer of a structure to ensure the design of the structure does not affect the workplace health and safety of persons during the construction and when it has been constructed and is being used for the purpose for which it was designed.[29] The Vic Administrative Review supported amending the scope of the duty for designers of buildings or structures to include the construction phase.[30]

7.57 The disposal of substances, decommissioning of plant and demolition of structures are activities that are currently not expressly covered in duties of care in principal OHS Acts.

Stakeholder views

7.58 The majority of submissions support duties of care for activities which affect health and safety, but there are different views about the extent of such duties.

7.59 Some industry associations and design professionals expressed concerns, particularly in relation to the duties of designers of buildings. It was expressed that designers are often unfamiliar with, and have no control over, building processes and that requirements to consult with all participants in the life-cycle would be unrealistic.

7.60 Submissions include suggestions that:

- 'upstream' duty holders should be required to follow a risk management process to meet their duty of care, which would obviate the need for ancillary duties in the model Act;
- duty holders should have reciprocal duties to assess the suitability of products and obtain information;

[25] Maxwell Review, NSW WorkCover Review, NT Review and the ACT Review.
[26] National OHS Strategy 2002–2012, p. 9.
[27] Maxwell Review, pp. 187–191.
[28] NSW WorkCover Review, p. 46.
[29] See s.34B of the Qld Act.
[30] Vic Administrative Review, pp. 29–33.

- clients should have a role in promoting safe construction, maintenance and use; and
- duties of care of a designer should be limited to ensuring safe design for the intended purposes.

7.61 Submissions from governments supported comprehensive 'upstream' duties. The Victorian Government added that it supports the inclusion of a 'buildability' duty on designers,[31] subject to there being evidence to demonstrate it has or will produce improved OHS outcomes in the design and construction of buildings and structures.

7.62 Unions and union organisations support duties of care for all parties who influence health and safety outcomes arising from the conduct of work, including designers, manufacturers, suppliers of premises, plant, systems of work and substances, those who hire products used for work, construction clients and developers.

7.63 Most submissions support defining the activity of 'supply' as occurring every time an item changes hands. Some submissions also noted that the duty in relation to supply should not extend to 'passive' financiers, being those persons who own and 'supply' plant or substances only for the purposes of providing finance for acquisition of the plant or substances by a client.

A single duty of care provision or separate duties for each?

7.64 Whether to combine the duties into a single statutory provision or continue to divide the duties by function is an issue we have been encouraged to consider.

7.65 There has been a tendency in recent years for jurisdictions to move towards specifying separate duty holders based on function. It was suggested in some submissions that such an approach can cause confusion for the duty holder as specified, particularly where the person has more than one duty.

7.66 In one submission, it was suggested:[32]

> *… distinctions between different duty holders on the basis of functions only are arbitrary…*

7.67 A concern was expressed about specifying separate duties of care based on functions because it could result in specific duties of care not existing for some functions. For example, it has been suggested that the activities of transport and storage of substances have not been caught by the Vic Act owing to a narrowing effect in the wording of the relevant duty for manufacturers of plant or substances.[33]

[31] As recommended by the Vic Administrative Review.
[32] R Johnstone, L Bluff & M Quinlan, *Submission No. 55*, p. 16.
[33] B Creighton, P Rozen, *Occupational Health and Safety Law in Victoria* , Federation Press, 2007, p. 742.

7.68 The primary duty of care that we propose be placed on all persons conducting a business or undertaking would apply to all of the various functions associated with plant, substances and structures. As a result, a failure to recognise any particular function in a specific duty of care would not mean that function would not be the subject of a duty of care.

7.69 Overall, we consider that the benefits of providing for specific duties of care in addition to the primary duty of care outweigh the concern about such specificity. We therefore recommend that the model Act provide for separate duties of care to be owed by specific classes of persons undertaking activities in relation to plant, substances and structures intended for use at work.[34]

RECOMMENDATION 29

The model Act should provide for separate duties of care owed by specific classes of persons undertaking activities, as noted in Recommendation 30, in relation to plant, substances or structures intended for use at work.

Safe Design

7.70 A national analysis of work related fatalities was undertaken by the Epidemiology Unit of NOHSC in 2000. That analysis identified in circumstances relating to plant and equipment, some 52 per cent of incidents leading to fatalities (117 out of 225) in Australia, a contributing factor was a design problem. In a further 46 fatalities one or more design problems were identified as contributing factors. Various reports were commissioned by NOHSC.[35]

7.71 The National OHS Strategy identifies safe design as one of the five national priority areas. The Strategy includes a commitment, expressed as:

> *To eliminate hazards at the design stage.*

7.72 In 2006, the ASCC issued Guidance on the Principles of Safe Design for Work.[36] In developing our recommendations, we have considered each of the principles identified in this document, being:[37]

> **Principle 1:**
>
> *Persons with Control – persons who make decisions affecting the design of products, facilities and processes are able to promote health and safety at the source.*

[34] The Maxwell Review (p. 188, paragraph 843) recommended a wide definition of 'use', which we will consider in our second report.

[35] Such as N Gunningham, R Johnstone and P Burritt, *Safe Design Project: Review of Occupational Health and Safety Legal Requirements for Designers, Manufacturers, Suppliers, Importers and Other Relevant Obligation Bears - A report for the National Occupational Health Safety Commission*, AGPS Canberra, 2000; McGregor Tan Research, *NOHSC Safe Design Project - Market Research*, AGPS Canberra, 2000; and NOHSC, *Work-related fatalities associated with design issues involving machinery and fixed plant in Australia*, 1989 to 1992, AGPS Canberra, 2000.

[36] ASCC, *Guidance on the Principles of Safe Design for Work*, AGPS, Canberra, 2006.

[37] ibid.

Principle 2:

Product Lifecycle – Safe design applies to every stage in the lifecycle from conception through to disposal. It involves eliminating hazards or minimising risks as early in the lifecycle as possible.

Principle 3:

Systematic Risk Management – The application of hazard identification, risk assessment and risk control processes to achieve safe design.

Principle 4:

Safe Design Knowledge and Capability – Should be either demonstrated or acquired by persons with control over design.

Principle 5:

Information Transfer – Effective communication and documentation of design and risk control information between all persons involved in the phases of the lifecycle is essential for the safe design approach."

Activities that follow the design phase

7.73 The scope of considerations in achieving safe design must have regard for the life-cycle of activities to be undertaken as the plant, structure or substance is:

- constructed or manufactured;
- imported, transported, supplied and erected or installed;
- commissioned, used or operated;
- stored, maintained, repaired, cleaned and/or modified;
- decommissioned, demolished and/or dismantled; and
- disposed of or recycled.

Who should owe a duty of care?

7.74 The responsibility for achieving safe outcomes relating to plant, substances or structures should rest with those persons or entities that undertake activities that affect the outcomes. There are various activities that occur during the process of providing these items for use at or in a workplace. These range from design, through manufacture, supply, construction, installation and commissioning. Activities such as storage, cleaning, maintenance and repair may also be relevant to safety for use of the plant, substance or structure. Each of the persons undertaking these activities should be subject to a duty of care.

7.75 The definitions for each of these classes of persons is a matter for our second report.

7.76 Any person involved in an activity in relation to items or processes intended for use at work should owe a duty of care. A duty of care should apply at each stage of the process (whether the involvement of the individual duty holder is exclusive or not).

7.77 The various processes, particularly design, may be materially affected by directions, specifications or advice from others. Each of those other persons would be subject to the primary duty of care that we propose (e.g. a client directing specifications for a product or item of plant etc would owe a duty of care if the client does so as part of the conduct of a business or undertaking). We also note our recommendation below that a specific duty of care be placed on providers of OHS services.

RECOMMENDATION 30

The model Act should place specific duties of care on the following classes of persons:

a) designers of plant, structures or substances;

b) manufacturers of plant, structures or substances;

c) builders, erectors or installers of structures; and

d) importers or suppliers of plant, structures or substances.

RECOMMENDATION 31

The duty of care would be to ensure that the health and safety of those contributing to the use of, using, otherwise dealing with or affected by the use of plant, structures or substances is not put at risk from the particular activity of:

a) construction;

b) erection;

c) installation;

d) building;

e) commissioning;

f) inspection;

g) storage;

h) transport;

i) operating;

j) assembling;

k) cleaning;

l) maintenance or repair;

m) decommissioning;

n) disposal;

o) dismantling; or

p) recycling.

The purpose and use of the plant or substance

7.78 An item of plant or a substance may be intended for use for a particular purpose. It may be designed and manufactured for that purpose and the intended way by which it would be used is for that purpose. Hazards and risks associated with the particular purpose and the intended way of using it may be identified and appropriate measures applied to eliminate or control those hazards or risks.

7.79 Often there are many ways in which an item may be used for a particular purpose. Such ways of using the item may be common, or at least easily foreseen. Using the item in a way that was not intended may occur for a number of reasons (e.g. failure to read instructions, inadvertence, short-cuts or a lack of instruction or advice).

7.80 Legislation in some jurisdictions limits the obligation of the designer, manufacturer and others to ensuring the item is safe when 'properly used', for example in accordance with instructions provided with the item.

7.81 The Maxwell Review criticised the "proper use" test that applied to plant and substances in Victoria prior to 2004, suggesting that of the statute linked "…that phrase with the information or advice that is available relating to its use. If the plant or substance is not used in accordance with that information or advice, then, for the purposes of s.24 [of the then Victorian OHS Act], the plant or substance is not to be regarded as properly used".[38]

7.82 The Maxwell Review went on to recommend the term "when properly used" should be removed and a purpose test be applied in its place. Such a test would require a designer of plant for use at a workplace to ensure so far as is reasonably practicable, that the plant is designed to be:[39]

> *…safe and without risks to health when it is used for any purpose for which it was designed or any other reasonably foreseeable purpose and also in respect of other relevant activities…*

7.83 'Reasonable foreseeability' in relation to the use of plant has been canvassed by the Full Bench of the NSW IR Court.[40]

7.84 We have carefully considered this issue and note that there is a difference between the purpose for which an item is intended to be used and the ways in which it may be used for that purpose.

7.85 We consider that a person who designs, manufactures or supplies plant or substances should ensure, so far as is reasonably practicable, that it is safe and without risks to health when used for the intended purpose. That obligation should extend to the safety of use, however it may be reasonably foreseen it may be used for that purpose. We do not consider this would be an onerous obligation.

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38 Maxwell Review, p. 188, paragraph 844.
39 Maxwell Review, op cit, paragraph 846.
40 *WorkCover Authority of NSW v Arbor Products International (Aust) Pty Ltd* (2001) 105 IR 81.

7.86 We do not recommend, however, that the model Act extend as far as suggested in the Maxwell Review, to safe use for any reasonably foreseeable purpose. An item may be used for many possible purposes, there being specific risks associated with each purpose. The person undertaking the design, manufacture or supply of the item should take into account those specific risks and ensure they are eliminated or controlled, so far as is reasonably practicable. Controls applied to an item to control the hazards and risks associated with the intended purpose may not control hazards or risks associated with use for other purposes. The design etc would be directed at the safe and healthy use of the item for the intended purpose. A supplier may recommend and supply a particular item specifically for the intended purpose that may not be safe for other purposes, which they are not aware of but arguably could foresee.

7.87 We note that 'use', unless given an extended definition, will not ordinarily include things done with or to an item that support the use. We agree with comments made in the submissions and various reports and literature that the duty of care should require that the items be designed to enable activities such as construction, installation, cleaning, maintenance and repair of items to be undertaken safely and without risks to health. The limits on this extended application of the duty of care would be the intended purpose of the item and the qualifier of reasonably practicable.

7.88 We therefore recommend that the duties of care relating to plant, substances and structures apply in relation to any reasonably foreseeable activity undertaken for the purpose for which it was intended to be used.

RECOMMENDATION 32

The duties of care should apply in relation to any reasonably foreseeable activity undertaken for the purpose for which the plant, structure or substance was intended to be used (e.g. construction, installation, use, maintenance or repair).

To whom should the duty of care be owed?

7.89 The duty would be owed to any person who may use, or be affected by the use of, plant (its associated components), structures or substances. An example of the extent of the application of duties of this nature is the provision in the WA Act which refers to the specific persons who should not be exposed to hazards.[41] The breadth of application is stated or implied in all other jurisdictions.

RECOMMENDATION 33

The duties of care are owed to those persons using or otherwise dealing with (e.g. constructing, maintaining, transporting, storing, repairing), or whose health or safety may be affected by, the use of the plant, substance or structure.

[41] See s.23 of the WA Act.

What should the duty of care require?

7.90 The duty should require the duty holder to ensure the particular function is undertaken without risks to health or safety to any person who might be affected by the activity. There are specific processes involved in each activity that are recognised in current OHS legislation and in the literature as being required to achieve that outcome. These include:[42]

- a process of hazard identification, risk assessment and risk control (collectively referred to as 'risk management');
- testing and examination as appropriate; and
- providing information to enable persons using the plant or substance to be aware of the hazards and risks involved and risk controls.

7.91 In many circumstances, particularly in relation to substances, relevant information concerning hazards, risks or appropriate risk controls becomes available after the design or manufacture. This may occur through experience in the use of the plant or substance, or through further research, or by other means. The risk management process should require the provision of such information from the designer through the manufacture and supplier to the end user, when it becomes available, to ensure safe use.

7.92 An issue that has been raised in the consultation process has been the extent of detail to be provided in the duties of care in the model Act. This has included whether to specify the elements of a risk management process within each of the duties of care in the model Act, or to provide for detailed requirements in the regulations. We consider broad risk management processes should be provided for in the specific duties of care. Additional detail of risk management requirements may be provided in either codes of practice or regulation (this is a matter which will be considered in our second report).

RECOMMENDATION 34

The specific duties of care should incorporate broad requirements for:

a) hazard identification, risk assessment and risk control;

b) appropriate testing and examination to identify any hazards and risks;

c) the provision of information to the person to whom the plant, structure or substance is provided about the hazards, risks and risk control measures; and

d) the ongoing provision of any additional information as it becomes available.

[42] *Towards a Regulatory Regime for Safe Design* (2002), National Research Centre for OSH Regulation, Regulatory Institutions Network.

Supply

7.93 An item of plant may change hands on a number of occasions. An item of plant or a substance may be provided in a number of different ways (e.g. sale, lease, loan). The passing of ownership of an item may occur some time after the item has been physically provided to the person using it.

7.94 This raises an issue as to when supply occurs, attracting the operation of the duty of care placed on a supplier. The case law on this issue is unclear, although suggesting that supply occurs at the time that physical possession of an item passes from one person to another.[43]

7.95 Some current OHS Acts include definitions of 'supply', but these relate to the means of supply (e.g. lease) rather than the time at which supply occurs.[44]

7.96 We consider that the model Act should include a definition of supply that makes clear the time at which, and the means by which, 'supply' would be considered to occur.

7.97 While the definitions for terms such as this are to be dealt with in our second report, we note at this time that supply could take the following forms:

- wholesale;
- retail;
- second hand;
- by loan; or
- by hire.

RECOMMENDATION 35

The model Act should include a definition of 'supply'.

Note: *The definition of 'supply' will be dealt with in our second report.*

Financing the acquisition of plant, etc

7.98 The acquisition of substances, items of plant and structures is regularly financed by banks and other financial institutions. A common means of financing, and securing the associated debt, is for the financier to own the item and allow for its use by the client pursuant to a lease, charter or some other commercial arrangement.

7.99 The provision of the item to the client would ordinarily come within the current definitions of 'supply', with the financier owing the duty of care of a supplier.

[43] *Inspector Ruth Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 298; although Wright, J. in the earlier case of *Inspector Forster v Osprey Manufacturing Pty Ltd* [2003] NSWIRComm 161 left open the issue whether supply could occur when title passed, some time after physical delivery.

[44] See the definitions of supply found in s.3(1) of the WA Act; s.5(1) of the Vic Act; and in the dictionary at the end of the ACT Act.

7.100 We received a submission stating that it is inappropriate for the financier to have the obligations of a supplier in these circumstances, because:[45]

- the physical possession of the relevant item has passed directly from a third party to the client, with the financier not at any time taking physical possession;
- the client and the third party have determined between them the requirements and specifications and intended purpose of the item; and
- the supply of the particular item (other than by way of financing the supply by the third party to the client) is not the ordinary business or undertaking of the financier, meaning that the financier is not the most appropriate person to undertake the OHS activities required to be undertaken by a supplier.

7.101 In these circumstances there may be little that may be reasonably practicable for the financier (commonly known as a 'passive financier' as the financier does not take active steps in the supply) to do.

7.102 We accept the merit of the submission that it is the third party that is the actual supplier of the item who should be the supplier of the item for the purposes of the duty of care of a supplier.

7.103 We note that a number of the current State OHS Acts provide for an exclusion of a passive financier from the obligations of a supplier, with those obligations instead owed by the third party from who the plant etc was obtained.[46]

RECOMMENDATION 36

The model Act should exclude passive financiers from the application of the duty of care of a supplier.

Note: *Passive financiers are persons who may own the plant, structure or substance concerned only for the purpose of financing its acquisition.*

The Provision of occupational health and safety services

7.104 Some submissions raised the issue of whether people or organisations who provide OHS information, advice or OHS services (including the provision of safety management systems) to the workplace should be subject to a duty of care under the model Act.

[45] Australian Finance Conference & Australian Equipment Lessors Association, *Submission No. 47*, pp. 6–7.
[46] See s.11(2)(f) of the NSW Act; s.30(2) of the Vic Act.

7.105 The justification for placing a duty of care on providers of OHS services is that these persons may, in providing the services, materially influence health or safety by directing or influencing things done or provided for health or safety. That influence may be direct, or indirect through influencing downstream design of systems, workplaces or plant. The service providers may influence decisions that are critical to health and safety in relation to a specific activity, or across an organisation (e.g. advising on governance structures, safety policies or systems).

7.106 Tasmania is the only jurisdiction that currently directly places a duty of care on a 'service provider'.[47]

7.107 Arguably, a number of current provisions in OHS legislation relating to the conduct of a business or undertaking would apply to a service provider,[48] although some are limited to where the person undertaking the business or undertaking is an employer or self employed person,[49] and some may only apply to persons at the place of work of the service provider (employer).[50]

7.108 The primary duty of care that we propose be placed on a person conducting a business or undertaking would apply to persons providing OHS services as part of the business or undertaking. As noted above, we consider, however, that there are advantages to providing a separate duty of care for specific classes of persons. We accordingly recommend that the model Act place a duty of care on service providers.

7.109 In recommending that the model Act impose a duty of care on service providers, we note that this should not require them to do more than they ought be doing under other current laws. The service providers would owe duties of care at common law and owe obligations under the *Trade Practices Act 1974* and other consumer protection legislation. They would also owe a duty of care under the primary duty of care that we recommend be placed on a person conducting a business or undertaking.

Who should owe the duty of care?

7.110 The Tasmanian Act defines a 'service provider' as a person engaged to provide a service at, or in connection with, a workplace; or a person who is licensed, registered or holds a certificate under regulations. The Tas Act does not define a 'service'.

7.111 We recommend that the model Act include definitions of 'service' and 'service provider' to provide clarity in the scope of the proposed duty of care.[51] That would allow those on whom the duty of care would be placed to understand that they are subject to it, while preventing any unintended application of the duty of care.

[47] See s.14B of the Tas Act.
[48] For example see s.55 of the NT Act; s.21 of the ACT Act.
[49] For example see ss.23 & 24 of the Vic Act.
[50] For example see s.8(2) of the NSW Act.
[51] Definitions will be addressed in our second report.

7.112 To indicate at this point the intended scope of the duty of care, the class of persons within the definition of 'service providers' might include:

- a health and safety organisation;
- consultants providing advice or intellectual property (e.g. policies, systems);
- training providers;
- lawyers;
- occupational hygienists or others undertaking environmental or biological testing or analysis; or
- any person or entity (claiming to have knowledge and/or expertise in the area of occupational health and safety) providing a service to a business or undertaking.

RECOMMENDATION 37

The model Act should place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act.

RECOMMENDATION 38

The model Act should include a definition of a 'relevant service' and a 'service provider' to make it clear what activities fall within the duty and who owes the duty.
The definition will be discussed in our second report.

To whom should the duty be owed?

7.113 The duty would be owed to anyone who might be affected by the service offered. As an example, if a trainer is providing training to supervisors and managers then the duty is owed to the persons undertaking the training.

What should the duty of care require?

7.114 The objective of the duty of care would be to ensure that care is taken in the provision of services to ensure, so far as is reasonably practicable, that the health or safety of persons is not put at risk as a result of the provision of the services. The risks to health or safety may occur during the provision of the services, by the conduct of the service provider. The risks may occur some time later, as a result of reliance on the services. The duty of care should be drafted in such a way as to ensure that these risks are all considered and eliminated or reduced so far as is reasonably practicable during the provision of the services.

RECOMMENDATION 39

The duty of care should require the service provider to ensure so far as is reasonably practicable that no person at work is exposed to a risk to their health or safety from the provision of the services.

Chapter 8: Duties of 'officers'

8.1 Current Australian OHS legislation provides for individual accountability. This is to ensure that those persons who might affect the health or safety of others by their conduct or omissions, do not expose others to health or safety risks.

8.2 While some businesses or undertakings are conducted by individuals (self-employed, sole traders), it is common for business to be conducted collectively, through a company, partnership, unincorporated association or other grouping of individuals.

8.3 A company is an artificial entity, which cannot make decisions or act other than through individuals. A company cannot comply with a duty of care placed upon it, unless those who manage the company make appropriate decisions and ensure necessary actions are taken. The values and culture of the company, which are important to encourage appropriate attitudes and behaviours for health and safety, are determined and influenced by those who make the relevant decisions. Decisions relating to the availability and allocation of resources that are important for health and safety are also made by those who manage the corporation.

8.4 Those who manage the company and make these decisions are commonly known as 'officers'. The same considerations apply to entities other than companies, such as partnerships and unincorporated associations.

8.5 OHS legislation throughout Australia recognises the need to ensure that the officers of a company or other entity behave in a way that will provide for compliance by the entity of which they are an officer. The legislation provides, in various ways, for liability of an officer where the company or other entity has breached a duty of care owed by it.

Current arrangements

8.6 Most Australian OHS Acts extend liability to officers for breaches by the company of which they are an officer that are attributable to a specified action or failure on the part of the officer.

8.7 The SA Act places a positive duty on specified officers to ensure that the company complies with the Act. That Act provides for the appointment of a 'responsible officer' with the specific duty to take reasonable steps to ensure that the company complies with its obligations under the Act.[1] In the absence of that appointment, all 'officers' of the corporation have the duty. In addition, all officers may be guilty of an offence where a contravention by the corporation is attributable to a failure of the officer to take reasonable care. [2]

[1] See s.61 of the SA Act.
[2] See s.59C of the SA Act.

8.8 A variation on this approach is taken in the Tas Act where the employer is to appoint a 'responsible officer' for each workplace at which the employer carries on business.[3] That person is responsible for performing the duties of the employer at the workplace.[4] All officers may also be guilty of an offence where the company contravenes a provision of the Act, unless the officer is able to prove a defence (either lack of knowledge of the contravention or the exercise of due diligence).[5]

8.9 All Australian OHS Acts provide, in effect, for officers as those who are involved in decision making affecting the conduct of the business of the organisation as a whole, but they differ as to how far down the management chain the definition of officer may extend. Some OHS Acts follow the definition of 'officer' in the *Corporations Act 2000* (Cwth).[6] Others define 'officer' in different ways, which include:

- executive officers (Qld Act);
- directors (NSW, WA and Tas Acts);
- persons concerned in management of the corporation or making decisions that affect the whole or a substantial part of the corporation (NSW Act);
- secretary (WA Act); and
- members, if the entity is controlled by members (WA Act).

8.10 In Victoria, the definition of an 'officer' also applies to those involved in a similar manner in the management of an unincorporated association or partnership, but officers who are volunteers of a company or other specified entity are not liable to be prosecuted.[7]

8.11 Some OHS Acts make company officers automatically liable for company breaches, providing that an officer has committed the same offence as the corporation, unless the officer proves a relevant defence (e.g. exercise of due diligence or lack of influence).[8]

[3] See s.10 of the Tas Act.
[4] See .s.11 of the Tas Act.
[5] See s.53 of the Tas Act.
[6] See s.5 of the Vic Act, s.4 of the SA Act ,and s.4 of the NT Act.
[7] See s.144 and s.145 of the Vic Act.
[8] See s.26 of the NSW Act, s.167 of the Qld Act and s.53 of the Tas Act.

8.12 Other OHS Acts provide for a breach by the officer where the offence by the corporation was attributable to an act or omission of the officer.[9] The prosecution must prove the relevant act or omission of the officer, and that the offence of the corporation was attributable to it. In Western Australia, the officer must be shown to be guilty of wilful neglect, consent or connivance – that is, the officer knew of the relevant matters and either caused or permitted the offence to be committed by the corporation.[10] In other OHS Acts, the prosecution must prove the offence by the corporation was attributable to the failure of the officer to exercise reasonable care.[11]

8.13 Maxwell recommended that each officer of a company have a positive duty, whereby the officer must take reasonable care to ensure that the company complies with its duties under the Act.[12] This recommendation was not adopted by the Victorian Government when drafting the current Vic Act. Maxwell also recommended that an 'officer' be defined using the definition contained in s.9 of the *Corporations Act 2000* (Cwth) in addition to an officer meaning 'a person concerned in the management of the body corporate'.[13] While the recommendation relating to the use of the *Corporations Act 2000* (Cwth) definition was adopted, the additional element was not.

8.14 On the other hand, the Stein Inquiry did not support adopting the definition in the *Corporations Act 2000* (Cwth) and recommended that the use of the term 'concerned in the management' in s.26 of the NSW Act remain. He agreed with the NSW WorkCover Review that liability of an officer should occur on a contravention by the corporation being found to be attributable to the officer failing to take reasonable care (that is, adopting the Victorian position).

8.15 The ACT Review proposed that an officer of a corporation should be liable for the breach of a duty by a corporation if that officer was reckless, was in a position to influence the conduct of the corporation and did not take reasonable steps to do so.[14] This recommendation has been adopted in the new ACT Act.[15]

8.16 Maxwell further recommended that volunteer officers should be exempt from the officer duty.[16] The Stein Inquiry, however, did not support such an exemption.[17]

9 See s.144 of the Vic Act, s.55 of the WA Act, s.59C of the SA Act and s.86 of the NT Act.
10 See s.55 of the WA Act.
11 See s.144 of the Vic Act, s.86 of the NT Act, and s.59C of the SA Act.
12 Maxwell Report, p. 171.
13 ibid, p. 172–173.
14 ACT Review, p. 47.
15 See s.219 of the ACT Act.
16 Maxwell Report, p. 174.
17 Stein Inquiry, p. 52.

Stakeholder views

8.17 The liability of officers is an issue that has attracted some controversy and the submissions generally reflect a wide range of views. ACCI,[18] is of the view that such a duty should not be included in the model Act, while the ACTU[19] asserts that liability must remain with the corporation and relevant corporate officer.

8.18 Some submissions support making officers liable for only their actions and those they can control, for instance, the Australian Institute of Company Directors (AICD) and the Business Council of Australia (BCA).[20] Others support liability of an officer where a company breach has occurred ('deemed liability') unless a defence is proven.

8.19 There are also various views expressed on the type of factors to take into account when determining the liability of officers, with the most commonly proposed tests being whether or not the officer:

- was not in a position to influence or control;
- took reasonably practicable steps or exercised reasonable care; or
- acted with due diligence.

8.20 Most submissions support the adoption of the *Corporations Act 2000* (Cwth) definition of an 'officer', as it is said to be clear and well understood by the persons who are in the relevant positions in a company and are intended to be held accountable for non-compliance by the company. Such was the view presented by the AICD.[21] However, some submissions, such as that tendered by the ACTU,[22] preferred the definition of officer contained in the NSW Act.

[18] ACCI, *Submission No. 136*, p. 28.
[19] ACTU, *Submission No. 214*, pp. 27–8.
[20] Australian Institute of Company Directors, *Submission No. 187*, p. 15, Business Council of Australia *Submissions No. 56,* p. 4.
[21] Australian Institute of Company Directors, *Submission No. 187*, p. 15.
[22] ACTU, *Submission No. 214*, p. 71.

Should officers have a positive duty of care?

8.21 Maxwell noted advantages of placing a positive duty on officers, stating:[23]

> *…there is in my view a strong case for placing officer liability on the same basis as company liability and employee liability. As already discussed, a company will not be guilty of an offence unless it could prove that it failed to take those steps that were reasonably practicable in the circumstance – that is, it failed to do that which it could reasonably have been expected to do.*
>
> *In my view, a similar test should apply to officers. Where a company commits an offence, an officer should be liable if it is true that he/she failed to do that which he/she could reasonably have been expected to do in the circumstances to procure compliance by the company or entity having regard to such things as –*
>
> a) *what he/she knew about the relevant matter;*
>
> b) *what he/she ought to have known about the relevant matter;*
>
> c) *his/her ability to make decisions and/or influence decisions within the company in relation to the relevant matter.*
>
> *In short, the officer should be liable if he/she failed to do whatever was reasonably necessary – to the extent of his/her ability to do so – to cause the company to comply.*

8.22 The recommendation to insert a positive duty on officers was not adopted by the Victorian Government when drafting the current Vic Act.

8.23 The alternative to placing a positive duty of care on officers is to incorporate a provision which requires, in the first instance, a breach by a corporation. This is known as attributed liability. However, this stands in stark contrast to the position of all other persons in OHS legislation, who owe positive duties of care to themselves and others, with liability being attributable only to their direct conduct or omissions (or those of officers, employees or agents in the case of a company).

Options

8.24 Having regard to the current legislative arrangements in Australia and overseas, together with the submissions made, we consider the following as available options for the liability of an officer under the model Act:

8.25 ***Option one*** – This would be to create a positive duty on an officer to ensure a corporation complies with its duties under the model Act. That duty would be qualified by a requirement to exercise due diligence, as it applies to the responsibilities of officers (having regard to their position) within the organisation/entity. The officer would be liable for his/her own conduct or omission, not that of another person (the company). The onus of proving a failure to meet the standard of due diligence would be on the prosecution.

[23] Maxwell Review, pp. 761–763.

8.26 ***Option two*** – This would provide for liability of an officer where a failure by a corporation to comply with the provisions of the model Act is attributable to a failure on the part of the officer to meet the relevant standard (e.g. reasonable care or due diligence). The onus of proving the elements of the offence (failure to meet the standard and relationship between that failure and the breach by the company), would be on the prosecution.

8.27 ***Option three*** – This would provide for an officer to be liable where the company has contravened the model Act, unless the officer could prove:

- the officer was not in a position to influence the behaviour of the corporation in relation to the relevant matter; or
- the officer exercised reasonable (or due) diligence to ensure the corporation complied in the relevant matter.

8.28 In such circumstances the onus would be on the officer to prove the elements of defence.

8.29 We recommend that the first option be adopted. The provision creates a positive duty which is seen to apply immediately, rather than accountability only applying after a contravention by the company. The duty would make clear that the officer must be proactive in taking steps to ensure compliance by the company. The standard of 'due diligence' is well known by those who would be sufficiently directing or influencing the decisions of the company as to be defined as 'officers'.

8.30 By making the officer liable only for his or her own acts or omissions would provide a sense of control by the officer over their personal liability and a sense of fairness. These elements are each concerns expressed in relation to the 'attributed' liability of an officer.

8.31 We, therefore, consider that the first option is more likely than the other options to ensure appropriate, proactive, steps are taken by an officer for compliance by the company with the duties of care placed on the company.

RECOMMENDATION 40

The model Act should place a positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care of that entity under the model Act.

Who is an officer?

8.32 The definition of officer will be dealt with in our second report, but as it is important to a consideration of substance of the duty of care, we briefly comment as follows. We consider the aim of the duty of care owed by an officer is ensuring the company complies with the model Act.

8.33 Having regard to that aim, we consider the type of person intended to owe the duty of care should be those who are in a position to direct or influence the key decisions of the organisation relating to compliance with relevant OHS duties of care. On this basis, the definition of an officer might include:

- executive officers of a corporation;
- the directors and secretary of a corporation;
- those persons on whose wishes or instructions, managers or directors ordinarily act;
- individuals concerned in the management of the corporation or those persons making decisions that affect the whole or a substantial part of the corporation;
- members where an entity is controlled by members;
- managers of unincorporated associations or partnerships;
- managers of unincorporated joint ventures;
- volunteer officers; or
- directors and/or senior managers of the Crown, public sector agencies and statutory authorities.

8.34 Whether an officer under the model Act will include the range of persons specified or be restricted to the definition as per the *Corporations Act 2000* (Cwth) is a matter that will be determined in our second report.

Corporate complexities

8.35 The complexities of corporate structures can give rise to difficulties in identifying the relevant officers, or in identifying the roles and what may properly be expected of the officers. This has been considered as presenting a difficulty in successfully prosecuting officers and may explain the limited number of officer prosecutions undertaken in Australian jurisdictions.

8.36 It has been said:[24]

> *There is an undermining of individual accountability at the level of public enforcement measures, with corporations rather than individual personnel typically being the prime target of prosecution. Prosecutors are able to take the short cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.*

[24] B. Fisse, and J Braithwaite, *Corporations, Crime and Responsibility,* Cambridge University Press, Cambridge, 1993.

8.37 Issues that have been identified with current definitions of 'officer' and provisions for officer liability have included:[25]

1) *What is the meaning of being in a 'position of influence'?*
2) *What is the meaning of 'each person concerned in the management of the corporation'?*
3) *What is the meaning of the phrase 'used all due diligence to prevent a contravention by the corporation'?'*

8.38 The officer liability provision of the model Act and the associated definitions, should address these issues. To the extent necessary, we will consider them further in out second report.

Who would be the beneficiaries of the duty of care of an officer?

8.39 The duty of the officer is related to compliance by the person (company, partnership etc) conducting the undertaking (the primary duty holder). The beneficiaries of the officer duty will be the same as the beneficiaries of the duty of care of the company or other entity (the primary duty or the duty of the specified classes of duty holder). For example, visitors, workers and any other person associated with the activity of work at the undertaking would benefit from the positive duty on the officer, as compliance with that duty would ensure compliance with the primary duty.

What should the duty of care require?

8.40 Having regard for, and, participating in, decisions which influence health and safety can lead to improved performance of the company. The role of any officer in this regard is fundamental. It is the officer who is in a position to ensure compliance by the company. The duty would be, therefore, to ensure the corporation complies with the model Act.

8.41 The duty should be subject to a qualifier of 'due diligence'. That qualifier recognises that a breach may be committed by the company in spite of proper efforts by the officer to ensure compliance. To not qualify the duty in this way may lead to concerns that liability is not associated with the conduct of the officer, but rather another person (the company) and raise concerns of unfairness.

[25] McCallum, Professor R. et al (op cit).

8.42 The due diligence qualifier also recognises the position of the officer in the organisation as being senior to workers and others and therefore is more stringent than that of 'reasonable care'. The provision as recommended recognises that officers are key persons in an organisation.

8.43 The due diligence requirement is well known to officers and would require (and encourage) proactive steps to be taken by the officer.

RECOMMENDATION 41

For the purposes of the model Act, 'officers' should be those persons who act for, influence or make decisions for the management of the relevant entity.

Note: *The definition of 'officers' will be dealt with in our second report.*

RECOMMENDATION 42

The provision should apply to officers of a corporation, unincorporated association, or partnership or equivalent persons representing the Crown.

Note: *These terms will be defined in our second report.*

RECOMMENDATION 43

If our preferred position in recommendation 40 for a positive duty for officers and associated recommendations is not accepted, we recommend that provisions based on s.144 and s.145 of the Victorian *OHS Act 2004* be adopted in the model Act.

Chapter 9: Duties of care owed by workers and others

9.1 As we have noted earlier in this report, OHS legislation in Australia provides for individual accountability by requiring all persons to ensure that they do not, by their conduct or omissions at work, expose themselves or others to risks to their health or safety.

9.2 Employees may put themselves and others at risk by the way they conduct themselves at work (for example by not following instructions or work procedures). OHS legislation in all Australian jurisdictions accordingly imposes a duty of care on employees.

Current arrangements

9.3 All Australian OHS Acts place a duty of care on employees or workers, as defined in each Act, to avoid exposing others to a risk to their health or safety from the conduct of the employee or worker at work. Except for New South Wales, the duty also requires the employees and workers to take reasonable care for their own health or safety.

9.4 An employee or worker must in some jurisdictions, as part of this duty of care:

- cooperate with his or her employer to enable compliance with the Act;[1]
- follow instructions given by his or her employer for health and safety;[2]
- properly use equipment provided for health, safety or welfare;[3]
- refrain from intentionally or recklessly misusing equipment provided in the workplace for health, safety or welfare;[4]
- report hazards/risks and accidents to his or her employer;[5] and
- not endanger themselves and others at a workplace, through the consumption of alcohol or a drug.[6]

9.5 Queensland is the only jurisdiction where the duties of a worker are also owed by 'anyone else at the workplace'.[7]

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1 See s.20(2) of the NSW Act, s.25(1)(c) of the Vic Act, s.20(3) of the WA Act, s.32(b) of the NT Act, s.27(2)(a) of the ACT Act and s.21(1)(b) of the Cwth Act. Please note that the NT Act expresses this by requiring "A worker to be open to suggestions made by the employer on health and safety issues".

2 See s.36(a) of the QLD Act, s.20(2)(a) of the WA Act, s.21(1b)(b) of the SA Act, s.16(b) of the Tas Act, s.59 (1)(b) of the NT Act and s.27 (2)(b) of the ACT Act.

3 See s.36(b) of the Qld Act, s.20(2)(b) of the WA Act, s.21(1b)(a) of the SA Act, 2.59(1)(c) of the NT Act, s.27 of the ACT Act and s.21(1)(c) of the Cwth Act.

4 See s.21 of the NSW Act, s.25(2) of the Vic Act, s.36(c) of the QLD Act, s.20(2)(c) of the WA Act, s.59(2)(a) of the NT Act.

5 See s.20(2)(d) of the WA Act, s.59(1)(d) of the NT Act and s.27(2)(d) of the ACT Act.

6 See s.21(1b)(d) of the SA Act.

7 See s.36 of the QLD Act.

9.6 The Tas Act places specific prohibitions on all persons at a workplace, in relation to the misuse of equipment and being affected by the consumption of alcohol and drugs.[8]

9.7 Most OHS Acts qualify the duty of the worker or employee by requiring only that they take 'reasonable care' at a workplace or at work. The Cwth Act requires employees to take 'reasonably practicable steps'.[9] In Queensland the duty is qualified by way of the defence: that the duty holder has complied with a relevant regulation, code of practice or in the absence of these, has taken reasonable precautions and exercised proper diligence.[10]

9.8 The NSW WorkCover Review recommended that the NSW Act be amended to include a duty for employees to take reasonable care for themselves.[11] This was supported by the subsequent Stein Inquiry, which stated that employees should have an explicit duty to take reasonable care for their own health or safety at work, as is provided in other Australian jurisdictions.[12]

Stakeholder views

9.9 The majority of submissions to the review, across all stakeholder groups, indicate support for inclusion of a duty for workers to take reasonable care for the health and safety of others at the workplace. Of these, most thought that workers should also be required to take reasonable care of themselves.

9.10 Some submissions requested that the duties of workers be more specific, by including requirements for workers to:

- cooperate with their employer to meet OHS obligations;
- follow reasonable instructions in relation to health and safety;
- not act in a reckless manner so as to endanger the health or safety of themselves and others; and
- report workplace injuries and hazards.

9.11 Submissions were divided on whether the model Act should contain a duty of care for 'others' at a workplace (those who are not workers and would not otherwise be a duty holder under the model Act e.g. visitors to a workplace). Those who favour the inclusion of a duty for 'others' propose that such persons should be required to take care for their own health and safety (some suggesting this be that they are not reckless), and be required to follow instructions related to health and safety. Those opposed to placing a duty of care under the model Act on 'others' argue that the duty would be unnecessary as it is provided for at common law.

8 See s.19 and s.20 of the Tas Act.
9 See s.21 of the Cwth Act.
10 See s.37 of the Qld Act.
11 NSW WorkCover Review, p. 39.
12 Stein Inquiry, p. 109, paragraph 12.7.

Duties of workers

Who is a worker?

9.12 While definitions are to be addressed in our second report, the concept of 'worker' is fundamental to the duty of care, and therefore we comment on it at this point.

9.13 Traditionally, labour law and with it OHS law has been based on permanent employment with a single employer and the contract of employment as the centrepiece. In this way, it was easy to identify who was an employee and the relationship of the employee to the employer and other employees.

9.14 As we note earlier, in Australia, as overseas, there has been substantial growth in flexible forms of employment.

9.15 Various patterns of work have developed and continue to develop outside of the traditional form of employment.

9.16 These patterns of work were conveniently described as including:[13]

- *casual (or temporary) workers, engaged on a short term (usually hourly or daily) where each period of work is a distinct period of service and there is no continuity of service or expectation of permanent employment;*
- *short-term fixed contract workers engaged under contracts of less than 12 months' duration;*
- *labour hire or leased workers, supplied by labour hire firms or agencies to work for client employers on a temporary basis – usually there is no contractual relationship between the worker and the client;*
- *own-account self-employed workers operating a business without employees and who supply labour service to clients;*
- *teleworking by workers at a location remote from the employer's premises (for example, at the worker's home, at alternating locations, or entirely mobile) using telecommunication technology such as on-line computer networks;*
- *part-time work, where the worker usually works fixed or variable hours less than a full-time worker (normally between 35 and 38 hours a week);*
- *home-based work carried out at the worker's home (including but not restricted to telework) rather than at the employer's premises – home-based workers might be employees or independent contractors, and some home-based workers might spend some of their working time working at the employer's premises.*

[13] R Johnstone, L Bluff, M Quinlan, *Submission No. 55*. p. 8.

9.17 It is widely recognised that the traditional definition of employee, and the associated duty of care of an employee, is no longer valid for all work arrangements. Our preliminary view is, therefore, to adopt a broad definition of 'worker' to cover all who carry out work activities as part of a business or undertaking. This is similar to the approach in the NT Act. We indicated in Chapter 6 who should be considered 'workers' for the purposes of the primary duty of care and we adopt the same approach for the duty of care of workers.

RECOMMENDATION 44

The model Act should place on all persons carrying out work activities ('workers') a duty of care to themselves and any other person whose health or safety may be affected by the conduct or omissions of the worker at work.

RECOMMENDATION 45

The duty of care should be placed on 'workers', defined in a way as to cover all persons who are carrying out work activities in a business or undertaking.

Note: *The definition of 'worker' is to be dealt with in our second report.*

What should the duty of care owed by a worker require?

9.18 The objective of the duty of care placed on a worker is to ensure that the conduct or omissions of the worker do not expose any person to a risk to their health or safety. The role of the worker is more limited than that of the person for whom, or in whose business, the work is being undertaken. The worker has less ability to take active measures for health and safety. The worker's ability to put themselves or others at risk is usually limited to their immediate conduct in acting in their role within the business or undertaking. The risk associated with the conduct of a worker is usually associated with a want of care or, occasionally, misconduct or failure to cooperate in relation to health and safety (e.g. a failure to follow instructions).

9.19 We therefore consider the duty of care to be owed by a worker should have three elements:

- to take care of himself or herself;
- take care for other persons who may be affected by what the worker does or fails to do at work; and
- cooperate with reasonable action taken by the person conducting the business or undertaking (or the relevant person) in complying with the model Act. [14]

[14] S.27(2)(d) of the ACT Act includes a duty to report any risk, illness and injury, connected with work, that the worker is aware of. We will examine reporting requirements for all persons in our second report and consider what provision should be made in this respect.

9.20 The duty of care, being subject to a consideration of what is reasonable, would necessarily be proportionate to the control a worker is able to exercise over his or her work activities and work environment.

9.21 The test of reasonable care should not, in our view, be confused with the standard of conduct and proof required in a civil case for damages for negligence. A breach of the duty of care under the model Act would be a criminal offence, with significant penalties. We recommend that the model Act make clear that the requirement for proving negligence in other criminal laws apply to allegations of a breach of the duty of care of a worker. The application of that principle would require that the breach by the worker involved such a great falling short of the standard of care, which a reasonable man in their position would have exercised, as to merit criminal punishment.[15]

RECOMMENDATION 46

The duty of care should require workers to:

a) take reasonable care for their own health and safety;

b) take reasonable care that their acts and omissions do not adversely affect the health or safety of others; and

c) cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act.

RECOMMENDATION 47

The workers' duty of care should be qualified by the standard of 'reasonable care' being the standard applied for negligence under the criminal law.

Duties of other persons

To whom should other persons owe a duty of care?

9.22 As is the case for workers, other persons at a workplace may, by their conduct or omissions, expose themselves and others to risks to their health or safety.

9.23 We consider therefore that others at the workplace should owe a duty of care to themselves and others who may be affected by their conduct or omissions at the workplace.

[15] See, for example, R v Shields [1981] VR 717; R v Hodgetts and Jackson [1990] 1 Qd R 456.

What should the duty of care owed by other persons require?

9.24 We consider the duty owed by other persons should be similar to that of a worker, but without the requirement to report unsafe conditions, etc.

9.25 The reasons for requiring other persons to take reasonable care for themselves and other persons at work are similar to those relating to the duty of care of a worker. Similarly, a failure by an 'other person' at a workplace to cooperate with any reasonable action taken by the person conducting the undertaking (or the relevant person) in complying with the model Act may place persons at risk.

9.26 Appreciating such persons in this category might include visitors to a worksite or, alternatively, the public (passing by a worksite) who may be affected by the conduct of the undertaking, there are a range of persons that might be captured by this provision. Therefore such a duty of care would be proportionate to any control such a person is able to exercise, recognising that such duties are complementary to the overall duty of the person conducting the undertaking.

9.27 The comments made above in relation to the qualifier of 'reasonable care' and the test for determining a breach by a worker are equally relevant in relation to the duty of care owed by an 'other person'.

RECOMMENDATION 48

The model Act should place a limited duty of care on other persons present at a workplace (not being a worker or other duty holder under the model Act) involved in work activity:

a) to take reasonable care for their own health and safety; and

b) to take reasonable care that their acts and omissions do not adversely affect the health and safety of others; and

c) to cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act.

RECOMMENDATION 49

The duty of care of such other persons present at the workplace should be qualified by the standard of 'reasonable care', being the standard applied for negligence under the criminal law.

PART 3
OFFENCES RELATING TO BREACHES OF DUTIES OF CARE

- The nature of OHS offences – General features
- Types of offences
- Sentences for breaches of duties of care

Chapter 10: The nature of OHS offences – General features

10.1 In this chapter, we discuss and make recommendations about the nature of offences relating to duties of care under the model Act. We conclude that such offences should be criminal, not civil, that there should be a consistent focus on risk and culpability in the offences, not merely on the outcome of a breach of a duty and that, as now, such offences should be 'absolute liability' offences, subject to the inclusion of the qualifiers on the duty that we recommend earlier.

The criminal or civil nature of offences relating to duties of care

Current arrangements

10.2 Breaches of duties of care under Australian OHS legislation are criminal offences. The Commonwealth is the only jurisdiction in which both civil and criminal sanctions are available under its OHS Act in prosecutions for breaches of duties of care.[1] This was explained on the basis that the common law presumption of immunity of the Crown from criminal prosecution meant that strong civil liability was needed in its place.[2]

10.3 As described in Part 1, all Australian OHS laws have been subject to independent reviews in recent years. Following this scrutiny of their effectiveness, most have been updated or replaced. The issues of offences, defences and sanctions were usually considered and material changes made. Consistently, the reviews supported breaches of duties being criminal offences.

10.4 The UK Act is the legislation that is most similar to Australia's OHS laws (and from which ours derives). We note that breaches of duties are criminal offences under that Act and that the UK Parliament has recently confirmed that approach by updating the criminal penalties.[3] Similarly, breaches of duties of care are criminal offences in certain developed countries, including New Zealand and Canada.

[1] Cwth Act, Schedule 2: *Civil and Criminal Proceedings* – Clauses 18 and 19 of the Schedule make breaches offences if specified criteria are met (the breach causes death or serious bodily harm or the breach involves exposure to a substantial risk of such a consequence and the duty holder was reckless or negligent as to that consequence).

[2] Department of Education, Employment and Workplace Relations, *Submission No. 57*, p. 7.

[3] *Health and Safety (Offences) Act 2008* (UK).

Stakeholder views

10.5 The predominant position expressed in submissions, was that breaches of duties of care should be criminal offences. The ACTU commented that this was essential for ensuring that: [4]

> *…occupational health and safety is treated as the serious social and economic concern that it is.*

10.6 On the other hand, the ACCI observed that OHS breaches should generally be subject to civil rather than criminal penalties, with a civil standard of proof, except where there is: [5]

> *…offensive conduct in the OHS environment that is proven to be not amenable to civil penalty provisions.*

10.7 The South Australian Government's submission included a response that reflects a common view in the submissions, namely that the duties are: [6]

> *…fundamental and the application of the criminal law, including the criminal onus, is appropriate in order to confirm the credibility and deterrent effect of the Act.*

Discussion

10.8 Existing OHS law and practice in Australia, and in comparable countries, rely on a mixture of persuasion and punitive sanctions to secure both better OHS performance overall and compliance with statutory obligations.[7] In each Australian jurisdiction, a policy of graduated enforcement is accepted as the preferred regulatory approach, although the effectiveness of its implementation has been questioned.[8]

10.9 Apart from establishing a framework in which information and advice may be supplied to encourage and facilitate voluntary compliance with duties of care, the relevant OHS laws provide that breaches are subject to fines and other sanctions. Various other mechanisms are provided in the laws to secure compliance before it becomes necessary to take proceedings. We will discuss them in our second report. We emphasise that all of the measures in the model Act (and any supporting instruments) must be seen as a continuum that is designed for a progression through various ways of ensuring safety and health at work, leading up to prosecution for non-compliance.

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4 ACTU, *Submission No. 214*, p. 52.
5 ACCI, *Submission No. 135*, p. 60.
6 South Australian Government, *Submission No. 138*, p. 53.
7 Such an approach is consistent with ILO Convention No.155, *Occupational Safety and Health Convention, 1981* – in particular, see Articles 9 and 10.
8 R. Johnstone, 'Rethinking OHS enforcement' in E Bluff, N. Gunningham, R. Johnstone, (eds), *OHS Regulation for a Changing World of Work*, The Federation Press, 2004, pp. 146–178.

10.10 Providing for a breach of a duty of care to be a criminal offence is an essential element of modern OHS legislation, and is consistent with the graduated approach to securing compliance with the laws. Broadly put, it reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a sanction for placing another person's health and safety at risk. Such an approach is also in line with international norms.[9]

10.11 As we discuss later, further consideration should, in the context of a model Act, be given to the deterrent effect of the laws and how well they sit in the spectrum of graduated enforcement. Our attention has been drawn to a risk that contraventions of OHS laws may be perceived as not being 'real' offences, even though there should be no doubt that they are precisely that.[10]

10.12 Making non-compliance with a duty of care a criminal offence not only reflects the seriousness with which such conduct is regarded, but also reinforces the provision's deterrent effect. As the ALRC has commented:[11]

> *If the aim of penalties is deterrence, then, given effective enforcement, criminal penalties are more likely to deter than civil ones, but they may be more difficult to obtain…*

10.13 The Maxwell Review observed that breaches of OHS legislation should be censured and should remain as criminal offences. Maxwell[12] noted that the nature of OHS prosecutions differs from that of standard criminal prosecutions, including because:

- the offence is committed whether or not harm was caused; and
- proof of a breach of an OHS duty does not depend upon proof of a relevant state of knowledge or intent.

10.14 The Commonwealth's approach of providing for criminal and civil liability allows a wider range of possible responses to breaches, which might be seen as consistent with a graduated approach to enforcement. As well as allowing greater choice about proportionate responses, the availability of civil penalties may entail less cost, speedier proceedings (particularly as proof is to the civil standard) and fewer defended matters.

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9 Art.9 (2) of the ILO's *Occupational Safety and Health Convention, 1981* (C. No 155) requires an OSH enforcement system to provide adequate penalties for violations of the OSH laws and regulations.

10 'We are not concerned with real or mainstream criminal law', Stein, op. cit., p. 36, paragraph 7.27.

11 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95, 2002.

12 Maxwell Review, p. 354, paragraphs 1700 and 1701.

10.15 Nonetheless, that approach had only limited support from those who made submissions to us and, where supported, was seen as more suited to less serious matters, particularly breaches of obligations other than duties of care. We do not favour its use in relation to criminal offences for which relatively high penalties should be available. In our view, proof on the balance of probabilities is inappropriate in such matters. We note that the availability of enforceable undertakings may supply the greater flexibility of regulatory response that should be part of modern regulation.[13] In our second report, we will discuss whether civil sanctions are suitable for other obligations under the model Act.

RECOMMENDATION 50

To emphasise the seriousness of the obligations and to strengthen their deterrent value, breaches of duties of care should only be criminal offences, with the prosecution bearing the criminal standard of proof for all the elements of the offence.

Note: *We discuss and make a recommendation about the onus of proof in Chapter 13 and in Recommendation 62.*

How offences relate to culpability and risk

Current arrangements

10.16 The duty to protect health and safety is, as we discuss earlier, set at a high level. Non-compliance attracts a fine in all cases, a custodial sentence in some cases and may lead to the use of other sentencing options (see Chapter 12). Guidance on what constitutes a breach may be included in the relevant provisions. For example, the Vic Act includes specific types of conduct that will constitute a breach.[14] Some Acts include provisions that specify aggravating factors that may lead to higher penalties. These may be where there was a higher degree of culpability (e.g. 'gross negligence'[15]) or knowledge of the risk of serious harm to another person and reckless indifference to the risk.[16] In other cases, there are specific offences that relate to conduct that causes a work-related fatality.[17] One state provides its highest penalties where there were multiple fatalities, with a series of descending (but substantial) penalties depending on the seriousness of the consequences of the breach.[18]

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13 Enforceable undertakings are discussed in our second report.

14 See s.21(2) of the Vic Act.

15 For example, the WA Act imposes higher penalties where a breach of a duty involved gross negligence (defined in s.18A of that Act).

16 See s.59A of the SA Act.

17 See s.32A of the NSW Act, '*Reckless conduct causing death at workplace by person with OHS duties*'. The ACT provides for industrial manslaughter under the *Crimes Act 1951*.

18 See s.26 of the Qld Act.

Stakeholder views

10.17 In our consultations, most stakeholders stressed that the system of liability under the model Act should focus on culpability and risk, not outcome. This view was expressed by the Chamber of Commerce and Industry WA (CCIWA), among others, which advised us that the level of penalty should depend on culpability of the offender.[19]

Discussion

10.18 Identifying the particular circumstances to which the highest penalties are to apply permits legislators to specify the aggravating factors that are considered to make certain breaches the most egregious and to justify more stringent penalties. Even so, this approach must be carefully applied. Where the highest penalties are reserved for physical consequences of a breach (e.g. a fatality), it reduces the significance of the culpability of the offender. A duty holder's failure to provide and maintain a safe system of work, even where no harm has occurred, may result in extreme levels of risk and merit the strongest sanctions, particularly where the risk was known or clearly should have been. In short, it is consistent with the overall aims of OHS regulation to provide for the sanction to relate to the culpability of the offender, not to the seriousness of the consequences. We consider later how to differentiate between offences where there are aggravating factors.

10.19 It should also be noted that each Australian jurisdiction provides in laws of general application for sentencing principles that are used by courts dealing with criminal matters. These laws typically address aggravating and mitigating factors. The implications of such overlapping laws are discussed in Chapter 19.

RECOMMENDATION 51

Penalties should be clearly related to non-compliance with a duty, the culpability of the offender and the level of risk, not merely the actual consequences of the breach.

[19] Chamber of Commerce and Industry WA, *Submission No. 44*, p. 60.

The nature of criminal liability under OHS offences

Current arrangements

10.20 Breaches of duties of care (which we discuss earlier in this report) under Australian OHS laws are typically offences of absolute liability, qualified by 'reasonable practicability', however expressed, or, in the case of officers, by 'due diligence' and for workers, by 'reasonable care'.[20] Absolute liability means that the offence requires no proof of any mental element (a guilty intention) and that there is no defence of 'honest and reasonable mistake'.[21] Strict liability offences similarly do not require proof of any mental element but allow such a defence.[22]

Stakeholder views

10.21 There was limited discussion of this point. A number of stakeholders pointed out that absolute liability in the OHS regime demonstrated that it was different from the normal criminal law and suggested that there should be greater recognition of the differences.

Discussion

10.22 Although absolute liability is considered to be an exception to the normal criminal standard,[23] it continues to be generally regarded as appropriate for duties of care in OHS legislation, even in circumstances where the penalties have increased substantially in recent years. No strong case has been made for change. We recommend in this report that the duties be qualified by the standards of 'reasonable practicability' (see Chapter 5), 'due diligence' (see Chapter 8) or 'reasonable care' (see Chapter 9), depending on the nature of the duty or the duty holders concerned. This does not affect the type of liability (absolute) that should apply to the offences. The prosecution would have to prove beyond reasonable doubt that those elements were part of the defendant's conduct.

RECOMMENDATION 52

Offences for a breach of a duty of care should continue to be absolute liability offences, and clearly expressed as such, subject to the qualifier of 'reasonable practicability', 'due diligence' or 'reasonable care', as recommended earlier.

[20] Qualifications of the duties of care are discussed in our examination of them earlier in this report.

[21] *He Kaw Teh v R* (1985) 157 CLR 523 at 590.

[22] What constitutes an offence of strict liability is described in cl.6.1 of the Criminal Code as set out in the Schedule to the *Criminal Code Act 1995* (Cwth). The duty of care offences have been variously described in decided cases as 'absolute' or 'strict'. Even so, the duties are properly described as absolute (see Johnstone 2004 at pp. 203–204).

[23] See discussion in Report 7 of the ACT Legislative Assembly's Standing Committee on Legal Affairs, *Strict and Absolute Liability Offences*, February 2008, particularly at p. 18, and in the sources referred to in that report.

Chapter 11: Types of offences

11.1 In this chapter, we deal with:

a) whether breaches of duties of care should be summary or indictable offences;

b) how offences should be differentiated by category; and

c) whether there should be specific offences relating to work-related deaths and serious injuries that are caused by duty-holders.

Whether offences are summary or indictable

Current arrangements

11.2 Breaches of duties of care under most Australian OHS laws are summary offences.[1] In such cases, prosecutions are heard by a magistrate or a judge without a jury. Victoria provides for more serious offences (as measured by the size of penalty[2]) to be indictable offences (heard by a judge and jury) and all OHS duty of care breaches are stipulated to be indictable. It is possible for such indictable offences to be heard as a summary proceeding.[3] This alternative is subject to a number of conditions, which differ according to whether the defendant is a natural person or a corporation.[4] South Australia also provides that an offence of endangering persons in a workplace is indictable.[5] The following table sets out the existing position.

1 This may be provided for in the OHS Act concerned or elsewhere.

2 See the *Sentencing Act 1991* (Vic), ss.109 and 112.

3 This is also the case under the, *Crimes Act 1914* (Cwth), s.4J; *Magistrates Court Act 1989* (Vic), s.53; *Summary Procedure Act 1921* (SA), s.5; *Crimes Act 1900* (ACT), s.375. Although indictable offences may be tried as summary offences in NSW – *Crimes Act 1900* (NSW), s.475B – this does not apply to OHS offences.

4 *Magistrates Act 1989* (Vic), ss.48, 53, 54 and Schedule 4. There is a limit on the penalty that may be imposed in such cases.

5 SA Act, s.59.

TABLE 6: Whether offences are summary or indictable

Jurisdiction	Whether offences are summary or indictable	Comment
NSW	Summary	NSW Act, s.105
Vic	Summary and indictable	Section 112 of the *Sentencing Act 1991* (Vic) sets out the rules for differentiating summary and indictable offences.
Qld	Summary	Qld Act, s.164(1)
WA	Summary	WA Act, s.51C
SA	Summary, apart from minor indictable offence, SA Act s.59, endangering a person in a workplace.	SA Act, ss.58(3), 59(2); *Summary Procedures Act 1921* (SA), s.5
Tas	Summary	*Magistrates Court Act 1987* (Tas), s,3B
NT	Summary	Magistrates Court
ACT	Summary	*Magistrates Court Act 1930* (ACT), s.19
Cwth	Summary	*Crimes Act 1914* (Cwth), s.4H

Stakeholder views

11.3 Although many submissions saw summary proceedings as appropriate for breaches of duties of care (the ACTU commented that trial before judge and jury was inappropriate and unnecessary for a variety of reasons[6]), there were some strongly expressed views in favour of there being indictable offences (e.g. the ACCI, South Australian Government for offences that attract imprisonment, and the Victorian Government[7]).

Discussion

11.4 The deterrent value of the more serious offences would be strengthened by making them indictable offences, demonstrating that they are on a par with the most serious breaches of the general criminal law. This would also maintain public confidence in the administration of justice in this area. A view was also put to us that using a jury in proceedings would allow a community standard of 'reasonable' to be more readily applied in serious offences.

6 ACTU, *Submission No. 214.*

7 ACCI, *Submission No. 136*; South Australian Government, *Submission No.138*; Victorian Government, *Submission No. 139.*

11.5 On the other hand, others have suggested that breaches of duties of care would generally be better dealt with by a court or tribunal on which the judge or magistrate is experienced in OHS matters and the involvement of a jury may be either redundant or likely to impede the appropriate disposition of the prosecution. The necessary level of deterrence would be provided by the availability of substantial penalties, including imprisonment. It is also important for there to be speed in the handling of such matters and this is seen as more likely in summary proceedings. The Tasmanian Government expressed its concern that trials before juries may not be feasible in that State and, if it were possible, could also harm the development of OHS jurisprudence as written decisions would not be given.[8]

11.6 On balance, however, we consider that treating serious breaches as indictable offences would be consistent with the goals of graduated enforcement, reserving the most significant prosecution option for the most serious breaches.

RECOMMENDATION 53

Prosecutions for the most serious breaches (i.e. Category 1 offences, see Recommendation 55) should be brought on indictment, with other offences dealt with summarily.

RECOMMENDATION 54

There should be provision for indictable offences to be dealt with summarily where the Court decides that it is appropriate and the defendant agrees.

Proposed categories of offences

Current arrangements

11.7 Typically, Australian OHS laws have different penalty ranges for different classes of duty holders. Those who have general duties of care are subject to higher penalties than those who have less capacity (e.g. workers) to influence the elimination or minimising of OHS hazards and risks. In addition, as we noted earlier, offences may be differentiated by the presence of various types of aggravating factors (e.g. gross negligence[9]) or by the consequences of a breach (e.g. multiple deaths[10]).

8 Tasmanian Government, *Submission No. 92*, pp. 23–24.
9 See s.18A of the WA Act.
10 See s.24 of the Qld Act.

11.8 Some States have taken the approach of specifying levels of penalty that may be applied to breaches depending on the seriousness of the matter (e.g. the WA Act includes four levels of penalty[11] and the SA Act has fines that are classified from Divisions 1 to 7).

Stakeholder views

11.9 Generally, we found that to the extent that the submissions considered the matter and from our consultations with various parties there is general support for the differentiation of offences by reference to the levels of culpability, risk and seriousness involved.

Discussion

11.10 We consider that it is clearly preferable to specify particular penalties for particular offences, so that the relative seriousness of the offences is clear.

11.11 With that in mind, we propose that, in relation to each type of duty of care, there should be three categories of offence. The first category would address the most serious breaches, that is, where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent. The second category would apply to circumstances where there was high level of risk of serious harm but without recklessness or gross negligence. The third category would apply to a breach of the duty without the aggravating factors present in the first two categories.

11.12 We consider that this approach allows a differentiation that takes account of culpability and risk.[12] We also consider that it would allow sufficient room for a sentencing court to adjust the penalty within each category to suit the circumstances of the offence. Such an approach should also allow the potential legal consequences of a breach to be clearly and simply explained to duty holders when advice and information is being given. It might also facilitate warning a duty holder, if that is required, about the implications of particular conduct.

[11] See s.3A of the WA Act; s.4(5)of the SA Act.

[12] The Maxwell Review, in recommending that the Vic Act should contain 'appropriate offence-specific penalties', noted that this was both a contemporary approach and avoided the impression that all offences were potentially liable to the same maximum penalty.

RECOMMENDATION 55

There should be three categories of offences for each type of duty of care:

a) Category 1 for the most serious breaches, where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent;

b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness or gross negligence; and

c) Category 3 for a breach of the duty without the aggravating factors present in the first two categories;

with maximum penalties that—

a) relate to the seriousness of the breach in terms of risk and the offender's culpability,

b) strengthen the deterrent effect of the offences, and

c) allow the courts to impose more meaningful penalties, where that is appropriate.

Offences relating to work-related deaths and serious injuries

Current arrangements

11.13 Under existing Australian OHS laws, non-compliance with a duty of care that results in a work-related fatality may lead to the imposition of a penalty for that offence. The laws impose a variety of discrete or additional penalties in circumstances where such a fatality has occurred. As noted earlier, in some jurisdictions, specific offences relating to causing a work-related fatality have been created, including in the *Crimes Act 1900* (ACT).[13] Generally speaking, this is a relatively recent development. Table 7 provides an overview.

[13] Part 2A – *Industrial Manslaughter*.

TABLE 7: Offence provisions relating to work-related fatalities

Jurisdiction	Act and section	Description of provision	Penalty
NSW	NSW Act, s.32A	Conduct of duty holder causes death of a person to whom a duty is owed and duty holder is reckless as to danger of death or serious injury.	*Corporation:* $1,650,000 *Natural person:* $165,000 or 5 years imprisonment.
Vic	Vic Act, s.32	Recklessly place another person at a workplace in danger of serious harm.	*Corporation:* $1,020,780 *Natural person:* $204,156 or 5 years imprisonment.
Qld	Qld Act, s.24	Person fails to discharge workplace health and safety obligation causing multiple deaths or death or grievous bodily harm.	*Corporation:* $750,000 (multiple deaths), $ 375,000 (single death). *Natural person:* $150,000 or 3 years imprisonment (multiple deaths), $75,000 (single death) or 2 years imprisonment.
WA	WA Act, s.19A(1), (2)	Breach of general duty to 'employee' with gross negligence; breach of general duty causing death or serious harm to 'employee'.	*Breach by corporation with gross negligence:* $500, 000, first offence; $625,000 subsequent offence. *Breach by individual:* 50% of corporation fine or 2 years imprisonment. *Breach by corporation causing death, etc:* $400,000 first offence; $500,000 subsequent offence. *Breach by individual:* 50% of corporation fine.

Jurisdiction	Act and section	Description of provision	Penalty
SA	SA Act, s.59	Person must not act in a manner that creates a substantial risk of death or serious harm to another person in a workplace.	*Corporation:* $1,200,000 *Natural person:* $400,000 or 5 years imprisonment
Tas	Tas Act, s.9	Duty of care to other persons at work.	*Corporation:* $150,000 *Natural person:* $50,000
NT	NT Act, s.82	Offence against the Act is committed intentionally, offender ought to know it may result in death or injury and death of a person occurs.	*Corporation:* $1,375,000 *Natural person:* from $27,500 to $275,000 or 5 years imprisonment.
ACT	ACT Act, ss.33,34 Note: The ACT provides for industrial manslaughter in Part 2A of the *Crimes Act 1900* (ACT)	Non-compliance with safety duty causes serious harm to someone and duty holder is either negligent about the matter or reckless.	*Corporation:* $750,000 (negligence), $1,000,000 (recklessness). *Natural person:* $150,000 or 3 years imprisonment (negligence), $200,000 or 7 years imprisonment (recklessness).
Cwth	Cwth Act, Schedule 2, cl.18, 21	Breach of duty or other specified obligation causes death or serious injury and offender was negligent or reckless as to consequence of breach.	*The Commonwealth or Commonwealth authority or a licensee* (normally a corporation): $495,000 *Natural person:* $99,000

11.14 The general criminal law may also apply, depending on the circumstances of the offence (e.g. manslaughter, grievous bodily harm, recklessly causing serious injury). Also, where a fatality occurs in circumstances where another type of health and safety regulation applies, the offender might be subject to the penalties that apply under the relevant law (e.g. road safety laws, mining safety laws in some jurisdictions).

11.15 We are, however, unaware of any successful Australian prosecutions for manslaughter in such circumstances.

11.16 By contrast, such prosecutions are not uncommon in England and Wales. Analysis of 24 incidents in those countries that involved at least one death (54 deaths in total) resulting in a conviction for the criminal law offence of manslaughter showed that there were convictions of seven companies, 17 directors and nine business owners who were sole traders or partners.[14] The longest sentence of imprisonment that was imposed was nine years (reduced to seven years on appeal).[15] In many cases, the periods of imprisonment were suspended.

11.17 Previous reviews of OHS laws in Australia have all recognised the seriousness of work-related deaths, but have been divided on how the OHS Acts should deal with the matter.

11.18 The Maxwell Review distinguished offences of non-compliance with duties of care from other criminal law offences of negligently or recklessly causing serious injury and manslaughter. This was because, unlike other criminal law offences, OHS offences were punishable whether or not harm occurred, without any question of causation. In the event, Maxwell found that manslaughter fell outside his review.[16]

11.19 The SA Review expressed the view that there would be little benefit in pursuing industrial manslaughter under SA's OHS laws, given that a charge for manslaughter against anyone where death was caused either intentionally, recklessly or negligently at the workplace could be brought under the *Criminal Law Consolidation Act 1935* (SA).[17]

11.20 On the other hand, the McCallum Review,[18] considered that a separate category of offence, involving both higher penalties and a wider range of penalty options, would be the best way to ensure that cases of workplace death are dealt with appropriately and that the necessary general deterrent effect is achieved. McCallum reached this view after finding that there was a failure of sentencing patterns to keep pace with legislated increases in maximum penalties, and the apparent associated failure of general deterrence. McCallum indicated that this initiative:[19]

> *…would put employers on extra notice as to the need for them to be vigilant in ensuring that risks which might lead to death are to be eliminated from the workplace, which would in turn, in our opinion, have a cascading effect on all areas of occupational health and safety."*

[14] Centre for Corporate Accountability, *Statistics on convictions in England and Wales* (as at 3 September 2008) – see http://www.corporateaccountability.org/manslaughter/cases/convictions.htm. The convictions precede the commencement of the UK *Corporate Manslaughter and Corporate Homicide Act 2007* in April 2008.

[15] ibid.

[16] Maxwell Review, pp. 355–356, paragraphs 1709–1710.

[17] SA Review, op cit, Vol. 3, p. 111.

[18] R McCallum, P Hall, A Hatcher, A Searle, *Advice in relation to workplace death, occupational health and safety legislation & other matters - Report to WorkCover Authority of NSW*, 2004.

[19] ibid, pp. 10–11.

Stakeholder views

11.21 The AiG commented that, if liability under the model Act were based on culpability and not outcomes, it would be difficult to reject a specific offence relating to creating the risk of death or serious injury, based on reckless behaviour by any person. The AiG also saw a reckless endangerment provision as useful in reinforcing the seriousness of consequences for poor safety.[20]

11.22 Some government submissions expressed the view that it was either unnecessary or inappropriate to provide an express provision to deal with workplace fatalities. The submissions from the governments of South Australia, Tasmania, Queensland and Western Australia all made the point that the focus of the OHS offences should be on culpability and risk and not merely the outcome (a fatality).

11.23 The ACTU proposed a specific offence of negligently causing death in the workplace.[21]

11.24 The Victorian Government stated that the model Act should include a specific offence of reckless endangerment like s.32 of the Vic Act, but that manslaughter should remain within the principal criminal statutes.[22]

Discussion

11.25 Against this background, we have considered a range of options.

11.26 One option would involve not making any specific provision in relation to work-related deaths. The model Act would not single out particular consequences (including work-related deaths) of non-compliance with duties of care. The focus would instead be on the culpability of the duty holder in failing to meet the duty concerned. Such an approach is consistent with the thrust of modern OHS regulation. If sentencing guidelines (see Chapter 16) were considered appropriate and could be designed for a harmonised OHS regulatory context, the weight to be given to such a consequence of a failure to satisfy a duty of care might be included.

11.27 In considering this option, we are aware that other laws relating to such deaths would be available (e.g. the general criminal laws). Even so, we note that they have been little tried and not successfully used in Australia and that there may be some difficulties in securing convictions where complex corporate arrangements exist.

11.28 A second approach, which is taken under some Australian OHS laws, is to provide for an increase in the available sanctions where there is a work-related death. This usually occurs where aggravating factors (negligence or recklessness) were present.

[20] AiG, *Submission No. 182*, pp. 77, 78.
[21] ACTU, *Submission No. 214*, p. 77.
[22] Victorian Government, *Submission No. 139*, p. 103.

11.29 A third option is to create a specific offence that relates to work-related deaths arising from non-compliance with a duty of care. This approach has been taken under the NSW Act and is expressly contingent on recklessness.

11.30 Only the ACT has enacted an industrial manslaughter law in its criminal law, with provision for imprisonment of up to 20 years. If such a provision were to be contemplated for the national regime, we do not consider that it should be included in the model Act.

11.31 Our approach in dealing with non-compliance with duties of care has been to ensure that the statutory responses are consistent with the graduated enforcement of the duties. We are concerned that the natural abhorrence felt towards work-related deaths should not lead to an inappropriate response. The seriousness of offences and sanctions should relate to the culpability of the offender and not solely to the outcome of the non-compliance. Otherwise, egregious, systemic failures to eliminate or control hazards and risks might not be adequately addressed.

11.32 Even so, where non-compliance with duties of care involves a high degree of negligence or recklessness and results or could result in a work-related death or other grievous harm to a person to whom a duty is owed, we consider that it is appropriately placed at the highest end of the scale of offences.

11.33 We propose that the provisions relating to penalties for non-compliance with duties of care be expressed so that this relativity is recognised. We deal later with the penalties that should be provided in the model Act, including for non-compliance which has these characteristics.

RECOMMENDATION 56

The model Act should provide that in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was serious harm (fatality or serious injury) to any person or a high risk of such harm, the highest of the penalties under the Act should apply, including imprisonment for up to five years.

Note: *This would be a Category 1 case in our recommended three-category system. Recommendation 57 proposes a range of penalties for each category and for the holders of the various recommended types of duty.*

Chapter 12: Sentences for breaches of duties of care

Current arrangements

12.1 As we observed earlier, there is a wide disparity in the sentences under Australian OHS Acts for breaches of duties of care. The tables below compare the fines and periods of imprisonment for such offences. The first table shows the maximum fine in each jurisdiction for a breach without specified aggravating factors (the highest fine is 10 times greater than the lowest). The second table shows the maximum if there is an aggravating factor (again, the highest fine is 10 times greater than the lowest). The third table shows the maximum periods of imprisonment that may be imposed, which vary from six months to seven years.

TABLE 8: Fines where there is no specified aggravating factor

Jurisdiction	Maximum fine under OHS Act for a breach of a general duty of care without specified aggravating factors - corporations	Maximum fine under OHS Act for a breach of a general duty of care without specified aggravating factors – individuals
NSW	$550,000	$55,000
Vic [1]	$1,020,780	$204,156
Qld	$225,000	$37,500
WA	$200,000	$100,000
SA	$600,000	$200,000
Tas	$150,000	$50,000
NT	$550,000	$110,000
ACT	$100,000	$10,000
Cwth	$242,000 (civil penalty)	$48,400 (civil penalty)

[1] Victoria does not specifically include aggravating factors in the relevant provision, but they are given weight by a sentencing court. See ANCON Travel Towers Pty Ltd, unreported, Victorian County Court, 16 December 1998, cited in Creighton and Rozen, *Occupational Health and Safety Law in Victoria*, The Federation Press, NSW, 2007, p. 205.

TABLE 9: Fines where there is an aggravating factor

Jurisdiction	Maximum fine under OHS Act for a breach of a general duty of care with aggravating factors - corporations	Maximum fine under OHS Act for a breach of a general duty of care with aggravating factors - individuals
NSW	$1,650,000 (s.32A, reckless conduct causing death)	$165,000 (s.32A, reckless conduct causing death)
Vic	$1,020,780	$204,156
Qld	$750,000 (multiple deaths)	$150,000 (multiple deaths)
WA	$500,000 ($625,000 if a subsequent offence)	$250,000 ($312,500 if a subsequent offence)
SA	$600,000 (repeat offence)	$200,000 (repeat offence)
Tas	$150,000	$50,000
NT	$1,375,000 (intentional breach causing death)	$275,000 (intentional breach causing death)
ACT	$1,000,000	$200,000
Cwth	$495,000 (criminal offence – death or serious bodily harm or risk of such a consequence and duty holder reckless or negligent)	$99,000 (criminal offence – death or serious bodily harm or risk of such a consequence and duty holder reckless or negligent)

TABLE 10: Custodial sentences

Jurisdiction	Maximum period of imprisonment under OHS Act for a breach of a duty of care where there is an aggravating factor	Legislative provision
NSW	5 years	NSW Act, s.32A
Vic	5 years	Vic Act, s.32
Qld	3 years	Qld Act, s.24
WA	2 years	WA Act, s.3A
SA	5 years	SA Act, s.59
Tas	-	-
NT	5 years	NT Act, s.82
ACT	7 years	ACT Act, s.34
Cwth	-	-

Stakeholder views

12.2 The governments support custodial sentences for serious breaches of duties of care. The Victorian Government draws attention to its approach of having custodial sentences for breaches where health and safety of a person at a workplace is wilfully or recklessly placed at risk. This should be seen as consistent with the view that imprisonment is a last resort sanction for serious offences, where there is repeated or wilful conduct and a fine is not a sufficient response.[2]

12.3 The Western Australian Government also support imprisonment as an option for serious breaches, but considered the maximum period of imprisonment should be two years.[3]

12.4 The Queensland Government similarly favour imprisonment as a response to the most serious offences.[4] The South Australian Government also considers that imprisonment should be available for the most serious offences, such as reckless indifference to the health and safety of others.[5]

12.5 The AiG accepts that imprisonment may be appropriate in the most culpable circumstances.[6] The ACCI considers that the most serious offences should be subject to the criminal law as codified in the various Crimes Acts.[7] The ACTU and unions generally support the availability of terms of imprisonment for serious breaches.[8]

Discussion

12.6 In its 1995 Report, *Work, Health and Safety*, the IC observed that enforcement was needed where other incentives were insufficient to obtain compliance.[9] The IC found that, at that time, deterrence had never been firmly pursued in the OHS field in Australia and that the low incidence of prosecutions and minimal fines meant that there was unlikely to be any real discouragement of non-compliance.[10]

12.7 Among other things, the IC recommended substantially higher penalties, the designation of specialist judges or magistrates to hear OHS prosecutions, sentencing guidelines, a wider range of corporate sanctions and a right to bring private actions (to supplement limited inspectorate resources).

2 Victorian Government, *Submission No. 139*, p. 100.
3 Western Australian Government, *Submission No. 112*, p. 48.
4 Queensland Government, *Submission No. 32*. p. 38.
5 South Australian Government, *Submission No. 138*, p. 61 (this view was supported by the tripartite SafeWork SA Advisory Committee).
6 AIG, *Submission No. 182*, p. 77.
7 ACCI, *Submission No. 136*, p. 82.
8 ACTU, *Submission No. 214*, p. 77.
9 IC, *Work, Health and Safety*, AGPS, Canberra, 1995.
10 ibid, p. 104.

12.8 Changing attitudes towards the regulation of OHS, reinforced by the various reviews of OHS laws and a growing body of regulatory scholarship, have led to increases in fines under the Acts, greater provision for custodial sentences and, as discussed later, other sentencing options. Nonetheless, as shown in the previous tables, there remains considerable disparity in the maximum fines and periods of imprisonment that can be imposed under the various Australian OHS Acts.

12.9 In our view, the maximum penalties provided in some jurisdictions are too low to have a meaningful value as a deterrent or as a potential punishment for a breach. In this respect, we note the observation of the UK Sentencing Advisory Panel, that "…in principle it should not be cheaper to offend than to prevent the commission of an offence."[11]

12.10 We consider that fines are a key part of achieving the deterrence required to give credibility to a process of graduated enforcement. We consider that higher maximum fines are necessary for the model Act and that they should be complemented by a range of other sentencing options. We discuss later whether guidance should be given as to when the higher end of the range of fines should be imposed.

12.11 Against this background, we have considered three options which would provide the model Act with a more effective and relevant regime of monetary penalties. The options would:

- each be adjusted to fit into the three categories of offences that we recommend,
- be complemented by the wider array of sentencing options that we propose (see later); and
- be governed by applicable sentencing guidelines.

Options

12.12 There are three options:

Option one – the fines under the existing Australian OHS Acts would be brought up to the highest existing levels, with appropriate indexation adjustments to recognise that they will not come into effect until 2011;

Option two – the fines would be substantially increased particularly where there was serious harm to any person (fatality or serious injury) to whom a duty was owed or a high risk of such harm and the duty holder had been reckless or grossly negligent; and

Option three – this is a variation of the second option, reserving the highest penalties in each category of offence for repeat offenders.

[11] *Consultation paper on sentencing for corporate manslaughter*, 2007, p. 17. Available at: http://www.sentencing-guidelines.gov.uk/docs/SAP%20(07)K3%20-%20Corporate%20manslaughter%202007-10-31-v%203.10.AR.pdf.

Discussion of the options

12.13 Option one (levelling up penalties to the existing higher range, with some additional increase to anticipate the effects of inflation) would have the advantage of minimal change for some jurisdictions and access to the jurisprudence of the courts in those jurisdictions with higher penalties. The result could be expected to be a highest maximum fine of close to $2 million.

12.14 The option has disadvantages. It assumes that the existing maximum fines are appropriate and optimally meet the objectives for sanctions in the model Act. This is open to question. It is also difficult to work from the existing range of fines to construct a coherent system of sanctions that give credibility to and encouragement for the system of graduated enforcement that we propose should underpin the model Act. For these reasons we do not recommend option one.

12.15 Option two (a new range of fines, with substantial increases for breaches, particularly those that involve gross negligence or recklessness and a serious failure to address hazards and risks) would reinforce the deterrent effect of the model Act and allow courts a greater capacity to respond meaningfully and proportionately to the worst breaches by duty holders for whom the existing range of fines may have little punitive effect. We note that in a case where death or serious injury results from a breach, the social and economic costs are likely to be far greater than even the maximum fines ($3 million for a corporation in the worst case) that we are recommending.[12]

12.16 We consider option two to conform to the objectives of the model Act and we recommend that option two be adopted.

12.17 Under option three, a first offender in each of the three categories of offence would be liable to a maximum penalty of two thirds of the maximum fine and a repeat offender would be liable to have the entire maximum fine imposed.

12.18 For example:

- for a Category 1 offence, the maximum fine would be $2 million for a first offender that was a corporation and $3 million for a repeat corporate offender;
- for a Category 2 offence the maximum fine would be $1 million for a first offender that was a corporation and $1.5 million for a repeat corporate offender; and
- for a Category 3 offence the maximum fine would be $0.3 million for a first offender that was a corporation and $0.5 million for a repeat corporate offender.

[12] NOHSC, *The costs of work-related injury and illness for Australian employers, workers and the community*, Australian Government, Canberra, 2004. Available at: http://www.ascc.gov.au/NR/rdonlyres/C8FC4DE9-8786-4DD6-BAFC-063F5EFC8C64/0/CostsOfWRID.pdf.

12.19 Similar adjustments would apply to the maximum fines for the other categories of offenders (individuals, officers, workers and others).

12.20 Even though the approach of providing higher fines for repeat offenders exists under the SA Act and the WA Act, we do not recommend option three. We consider that it is not necessarily the case that a first offence will justify a lesser penalty. Offenders may simply have gone undetected despite flagrant disregard for their duties of care. In addition we consider that the courts would, particularly if there is clear sentencing guidance, be able to make appropriate allowance for a previous record of compliance.

The proposed fines

12.21 With this in mind, we propose the following fines, with corporate fines set at five times the fine for individuals:

TABLE 11: Proposed fines for breaches of primary duty of care or specific duty of care

Type of offence	Maximum fine for corporation	Maximum fine for individual
Category 1: Breach of primary duty, specific duty where: • there was serious harm to any person (fatality or serious injury) to whom a duty is owed or a high risk of such harm; and • the duty holder has been reckless or grossly negligent.	$3,000,000	$600,000
Category 2: Breach of primary duty, specific duty where there was a high risk of serious harm to any person to whom a duty is owed.	$1,500,000	$300,000
Category 3: Any other breach of primary duty of care or upstream duty.	$500,000	$100,000

TABLE 12: Proposed fines for breaches of officer's duty of care

Type of offence	Maximum fine for individual
Category 1: Breach of officer's duty of care where: • there was serious harm to any person (fatality or serious injury) to whom a duty is owed or a high risk of such harm; and • the duty holder has been reckless or grossly negligent.	$600,000
Category 2: Breach of officer duty where there was a high risk of serious harm to any persons to whom a duty is owed.	$300,000
Category 3: Other breach of officer's duty of care.	$100,000

TABLE 13: Proposed fines for breaches of duty of care of worker or other person at a workplace

Type of offence	Maximum fine for individual
Category 1: Breach of duty of care of worker or other person at a workplace where: • there was serious harm to any person (fatality or serious injury) to whom a duty is owed or a high risk of such harm; and • the duty holder has been reckless or grossly negligent.	$300,000
Category 2: Breach of duty of care of worker or other person at a workplace where there was a high risk of serious harm to any persons to whom a duty is owed.	$150,000
Category 3: Other breach of duty of care of worker or other person at a workplace.	$50,000

12.22 In making this recommendation, we emphasise that our overall objective is to increase compliance with the Act and decrease the resort to prosecution to achieve that aim. The higher penalties would, in our view, have a salutary effect in raising commitment to good OHS. It must be recognised, however, that the application of the highest levels of fines would, for a variety of legal and practical reasons, continue to be rare.

RECOMMENDATION 57

The model Act should provide for the penalties for Category 1, 2 and 3 offences relating to duties of care, as set out in Tables 11, 12 and 13.

RECOMMENDATION 58

The model Act should separately specify the penalties for natural persons and corporations, with the maximum fine for non-compliance by a corporation being five times the maximum fine for a natural person.

Note: *Other sentencing options are considered later in this chapter.*

Custodial sentences for duty of care offences

Current arrangements

12.23 We have set out in Table 10 the maximum sentences of imprisonment under the Australian OHS Acts for breaches of duties of care. The periods vary from six months to seven years.

Stakeholder views

12.24 The ACCI observed that offences which may lead to imprisonment should be indictable offences and heard before a judge and jury. The maximum penalty should not be more than two years imprisonment. The AiG accepted that imprisonment may be justified for the most culpable behaviour (e.g. reckless endangerment). The ACTU supported the imposition of a custodial sentence for serious breaches of general duties in the model Act. The Tasmanian Government emphasised that imprisonment should be available as part of a range of sentencing options to achieve the required deterrence in the model Act. The Western Australian, South Australian and Victorian Government submissions also expressly supported custodial sentences for serious offences. On the other hand, the Minerals Council of Australia (MCA) and the Chamber of Minerals and Energy (CME) of WA strongly opposed the inclusion of custodial sentences in the model Act.[13]

Discussion

12.25 For the same reasons as we propose significant monetary penalties, we believe that there should be significant periods of imprisonment available for the worst (category 1) breaches. Under our proposals, these would be indictable offences (see Chapter 11). The present position, which ranges from no custodial sentences under the OHS legislation, to sentences of up to seven years imprisonment, is inappropriate and potentially unjust. As we have commented elsewhere,

[13] MCA, *Submission No. 201*, p. 48; CME WA, *Submission No. 125*, p. 46.

the legal consequences of a breach should not depend on the jurisdiction in which the offence occurred.

12.26 We consider that custodial sentences are appropriate for breaches of duties of care where there is a high level of culpability. We are proposing that they be available for Category 1 offences. We consider that a maximum period of five years imprisonment is just. In this respect, we note that criminal law statutes provide for periods of imprisonment of 10 years or more for reckless conduct causing grievous bodily harm.[14]

RECOMMENDATION 59

The model Act should provide for custodial sentences for individuals for up to five years in circumstances (Category 1 offence) where:

a) there was a breach of a duty of care where there was serious harm to a person (fatality or serious injury) or a high risk of serious harm; and

b) the duty holder has been reckless or grossly negligent.

Re-offenders

Current arrangements

12.27 Although there is no uniformity in the OHS Acts or other sentencing laws, to penalties for persons who have previous convictions for non-compliance with duties of care, there are two broad approaches.

12.28 ***Option one*** – Leave it to the sentencing court to decide the consequence for a defendant of prior convictions, subject to the requirements of local general sentencing statutes.[15] It should be noted that the treatment of prior convictions varies between the various applicable sentencing laws of the Commonwealth, States and Territories.

12.29 ***Option two*** – Make specific provision in the model Act for an increased fine for a re-offender. Table 14 sets out the current position under the OHS Acts.

[14] The *Crimes Act 1900* (NSW), s.35, provides for 10 years imprisonment for this offence and the *Crimes Act 1958* (Vic), s. 17 provides for 15 years imprisonment for a similar offence.

[15] *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1904* (Cwth); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act* (NT); *Penalties and Sentencing Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1997* (WA).

TABLE 14: Overview of fines for re-offenders

Jurisdiction	Section	Increase in specified fine
NSW	s.12	50%
Vic	n/a	n/a
Qld	n/a	n/a
WA	ss.3A, 3B	25%
SA	s.60	Additional fine of up to $40,000
Tas	n/a	n/a
NT	n/a	n/a
ACT	n/a	n/a
Cwth	n/a	n/a

Stakeholder views

12.30 The South Australian Government proposed that there should be an express provision in the model Act to deal with re-offenders.

Discussion

12.31 Providing for an additional penalty may add to the deterrent effect of the sanctions for non-compliance and demonstrate the community's intolerance of reoffending where the consequences of non-compliance can be extremely severe for those to whom the duty was owed.

12.32 On the other hand, such a provision limits the discretion of the sentencing court and assumes a high level of culpability, which may not exist, when further non-compliance occurs. The Maxwell Review recommended the repeal of such a provision which existed in the then Victorian OHS legislation,[16] observing that:[17]

> *… courts ultimately have regard to fundamental principles, including the principle that a court ought not to impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which sentence is imposed.*

12.33 We note that provisions concerning re-offending could sometimes operate unfairly. There will usually be a variety of factors that need to be considered when a person has prior convictions, including whether the previous non-compliance is relevant to the matter before the court. Even where it is, other factors might lead the court to discount the previous conviction in all the circumstances of the case then before it. In practice, legal arguments might effectively limit the opportunities for imposing the additional penalty.

[16] *Occupational Health and Safety Act 1985* (Vic), s.53.
[17] Maxwell Review, p. 374, paragraph 1814.

12.34 Since we are recommending significant increases in maximum penalties, it will be possible for a sentencing court to impose substantial fines that take account of prior convictions, where it is appropriate to do so.[18] We also note that we are recommending a range of sentencing options that should allow a sentencing court a wider range of suitably targeted responses to deal with such cases.

RECOMMENDATION 60

In light of our other recommendations for higher maximum penalties and a greater range of sentencing options, the model Act should not provide for a further penalty for a repeat offender.

Other sentencing options

Current arrangements

12.35 In recent years, Australian OHS laws have provided courts with a greater array of sentencing options where there are breaches of obligations. These provisions extend the powers of a court beyond the traditional sanctions of fines and custodial sentences. Table 15 provides an overview of the specified additional options in each jurisdiction.

TABLE 15: Overview of sentencing options

Jurisdiction	Remedial orders/ Corporate probation orders	Adverse publicity orders	Community service orders	Training orders	Injunctions
NSW	Yes	Yes	Yes*	-	-
Vic	Yes**	Yes	Yes*	-	Yes
Qld	-	-	-	-	Yes
WA	-	-	-	-	-
SA	-	Yes	Yes*	Yes	-
Tas	-	-	-	-	Yes
NT	Yes	Yes	-	Yes	Yes
ACT	Yes	Yes	-	-	Yes
Cwth	Yes	-	-	-	Yes

* This order relates to a project for the general improvement of OHS.

** As part of an enforceable undertaking, the court may impose specific conditions on the offender that are similar in nature to the conditions that may be attached to remedial orders in other jurisdictions.

[18] This was a matter to which Maxwell drew attention: ibid, paragraph 1815.

12.36 Remedial orders and corporate probation orders require action by an offender to rectify deficiencies. As the Queensland Government pointed out,[19] this might entail internal discipline, reform of internal structures, processes and practices, or an order to develop and implement an effective OHS Management System. Adverse publicity orders are seen as an effective deterrent, with considerable implications for an offender's corporate reputation. They draw public attention to the particular wrong doing and the measures that are being taken to rectify it. Community service orders require the offender to initiate or participate in activities that benefit the community, with a particular focus on improving OHS. Training orders allow the Court to require action be taken by an offender to develop necessary skills to manage OHS effectively. Injunctions are a powerful tool for ensuring compliance with the relevant duties.

12.37 Enforceable undertakings are now available under several OHS Acts, but as their availability does not always depend on a decision by a court or tribunal, they are not addressed here. They will be considered in our second report.

Stakeholder views

12.38 Generally, those who made submissions on this point support a wider range of sentencing options. There is widespread agreement on the suitability of fines for breaches of statutory obligations under OHS legislation, and on custodial sentences available for serious breaches.

12.39 Even so, while existing sentencing options were generally supported, there were proposals from the ACTU, Unions NSW and various other unions for additional options. The ACTU suggested that the model Act should provide for some sentencing options that would be new to the Australian OHS regulatory context (although they may be found in other Australian regulatory contexts or in other countries). These included incapacitation through dissolution orders, orders disqualifying an offender from government tenders, equity fines, victim compensation orders and 'outcome responsibility'.[20] Unions NSW proposed a further option of share prohibition. The CFMEU also proposed the inclusion of victim compensation orders in the model Act.

Discussion

12.40 Unfortunately, there appears to be limited information available that demonstrates the long term effects on OHS of the application in Australia of the alternative sentencing options. Many of the views expressed to us, and the material that we considered, appear to be principles-based or drawn from individual cases. Even so, there is understandably strong support for this option.

[19] Queensland Government, *Submission No. 32*, p. 37.

[20] A director would be liable for health and safety fatalities, serious injuries and permanent disease.

12.41 The possible weaknesses of particular sentencing options may be reduced or eliminated by the judicious combining of several orders. For example, concern that a fine may not deter further breaches or result in meaningful action by an offender to improve OHS practices and performance would be addressed by orders for remedial action. Adverse publicity orders may have a greater deterrent effect than a fine for a corporation that is concerned about its reputation. In addition, a combination of orders may not only be better targeted, but also permit a more proportionate response.

12.42 We conclude that the overall objectives of OHS regulation are best served by providing a wide range of sentencing options when there are convictions for breaches of duties of care. Gunningham and Johnstone have observed, in relation to corporate sanctions, a combination of measures will yield the best results in terms of achieving the overall goal of reducing the incidence of contraventions and hence the incidence of work-related injury and disease.[21]

12.43 Accordingly, we have considered whether the existing sentencing options are appropriate and sufficient, as well as where there are any others that should be included in the model Act. Subject to our recommendations about fines and custodial sentences, we consider that the model Act should equip the Courts with a wider array of sentencing options.

12.44 We have concluded that injunctions provide a better calibrated option for a sentencing court than an order for incapacitation (e.g. winding-up). We have also concluded that, in this context, restrictions on tendering for government business are better dealt with by the executive than the judiciary. A government policy means that the restriction may be more widely applied than in relation to a single offender under a court's sentence.

12.45 We did not consider that we had sufficient information or analysis to reach a final conclusion about equity fines (which require the issuing of shares to the regulator or another official entity rather than the payment of money as a fine). An equity fine does not by itself produce a change in behaviour or a commitment to improved OHS. We note that the NSW Law Reform Commission considered that they should not be supported in Australia.[22]

[21] N. Gunningham and R. Johnstone, *Regulating Workplace safety: Systems and Sanctions,* Oxford University Press 1999, pp. 262, 263.

[22] Law Reform Commission, New South Wales, *Sentencing: Corporate Offenders*, Report 102 (2003), Ch. 7.

RECOMMENDATION 61

The model Act should provide for the following sentencing options in addition to fines and custodial sentences:

a) adverse publicity orders;

b) remedial orders;

c) corporate probation;

d) community service orders;

e) injunctions;

f) training orders; and

g) compensation orders.

***Note**: We support making provision for enforceable undertakings but they are dealt with in our second report to allow a full examination of the options, including providing for such an undertaking as an alternative to a prosecution and as a sentencing option.*

PART 4
OTHER MATTERS RELEVANT TO DUTY OF CARE OFFENCES

- Burden of proof
- Appeals
- Limits on prosecutions
- Guidance on sentencing
- Avoiding duplicity and double jeopardy
- Related issues

Chapter 13: Burden of proof

Current arrangements

13.1 This is an area in which current Australian OHS laws differ. Of the nine principal OHS Acts, only the NSW and Qld Acts provide for a 'reverse onus of proof' in respect of offences relating to duties of care.[1] This means that in prosecutions for such offences, the prosecutor must prove non-compliance with the elements of the duty of care beyond reasonable doubt, but defences are open to the defendant. The standard of proof for the defendant is on the balance of probabilities. Under the NSW and Qld Acts, 'reasonably practicable' (or its equivalent in Queensland) is not an express element of the duty of care.

13.2 In NSW, the defences are that 'it was not reasonably practicable to comply' or that 'the offence occurred as a result of causes over which the defendant had no control'.[2] In Queensland, the defences are that the defendant applied a relevant regulation, Ministerial notice or code of practice that addressed how to prevent the contravention, or that the defendant used another way to manage exposure to the risk concerned and 'took reasonable precautions and exercised proper diligence to prevent the contravention'.[3] If the prosecution leads any further evidence to rebut a defence, the onus for the prosecution remains beyond reasonable doubt in relation to that evidence.

13.3 Those provisions reflect (but are different from) the reverse onus of proof in relation to reasonable practicability under the UK *Health and Safety at Work etc Act 1974*.

13.4 Under the OHS Acts of the other States, Territories and the Commonwealth, the burden of proof (beyond reasonable doubt) is entirely upon the prosecution in matters relating to non-compliance with duties of care. This includes whether the defendant failed to do what was reasonably practicable (however described) to protect the health and safety of the persons to whom the duty was owed.

Stakeholder views

13.5 Strong, conflicting views have been expressed to us. Broadly, three governments[4] have expressly proposed that the onus of proof should rest entirely with the prosecution (as it currently does in their jurisdictions) while the Queensland Government has stated that that State's current statutory arrangement, which has a reverse onus, is suitable for the model Act. The other five governments expressed no view. Almost all industry bodies and individual employers who expressed a view on the issue strongly opposed a reverse onus. Unions and their peak bodies strongly support a reverse onus. Academic and legal views were divided.

1 See s.28 of the NSW Act and s.37 of the Qld Act.
2 See s.28 of the NSW Act.
3 See s.37 of the Qld Act.
4 SA, Vic and WA.

13.6 We note that recent reviews of State OHS legislation have similarly been divided. For example, the Maxwell Review opposed a reverse onus.[5] The Stein Inquiry recommended that reverse onus remain in the NSW Act, [6] reaching the opposite conclusion from that in the earlier NSW WorkCover Review.[7]

Discussion

13.7 This issue concerns whether a defendant should bear any onus of proof in a prosecution for non-compliance with a duty of care. As previously discussed (see Chapter 10), absolute liability applies to such offences under Australian OHS laws, but is qualified by a standard of 'reasonable practicability', however expressed.[8]

13.8 For the purposes of the model Act, the question arises of upon whom the onus of proving reasonable practicability should rest. This matter is not clear-cut. The underlying issues are at some risk of being clouded by the vehement support and opposition for such a reverse onus that have been expressed by some interested parties.

13.9 An often quoted justification for the reverse onus was stated by the IC: [9]

> *It is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.*

13.10 Our attention was also drawn to the history of this type of evidentiary requirement under UK safety laws, leading up to its inclusion in the UK Act.[10] The Stein Inquiry commented that it was not unusual for:[11]

> *regulatory or remedial offences in a variety of 'social welfare' areas (including occupational health and safety) to have a reversal of the onus of proof in some defences.*

13.11 The opponents of such a reverse onus generally start from the position that it is a fundamental principle of the criminal law that the prosecution should bear the onus of proving all of the elements of the offence.[12] The Law Council of Australia has observed that in respect of criminal sanctions, a reverse onus of proof will rarely be appropriate.[13] These principles are consistent with the views expressed by the governments that oppose such a reverse onus in the model Act.

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5 Maxwell Review, paragraphs 1715–1716.
6 Stein Inquiry, paragraphs 7.9–7.36.
7 NSW WorkCover Review, p. 36.
8 Queensland has also provided for other means of demonstrating compliance with a duty apart from taking reasonable precautions' and exercising due diligence' in addressing risk.
9 IC, *Work Health and Safety,* Report No. 47, 1995, p. 55. The ACTU expressed a similar view – *Submission No. 63*, p. 63.
10 McCallum et al, *Submission No. 42*, p. 7; ACTU *Submission No. 63*, p. 63. See also B Creighton, *Reasonable Practicability: a discussion paper prepared for the Victorian WorkCover Authority*, 2008, p. 18.
11 Stein Inquiry, paragraph 7.29.
12 Maxwell Review, paragraph 1715. The ACCI expressed a similar view – *Submission No. 136*, p. 69.
13 Law Council of Australia, *Submission No. 163*, paragraph 8.16.

13.12 We note that the High Court observed in *Chugg* (a matter relating to the then Victorian *OHS Act 1985*):[14]

> *It may reasonably be supposed that an employer will have superior knowledge of matters peculiar to his workplace, including the cost and suitability of the various suggested means of removing a hazard or risk. However, it may also be supposed that an inspector, upon whom … the Act confers various powers "for the purpose of the execution of (the) Act (and) the regulations", will have superior, or at least wider, knowledge than an employer on some other matters which, in a good number of cases, will bear on the question of practicability. Thus, it may be supposed that an inspector would have wider knowledge as to the severity of, the state of knowledge about, and the availability of ways to remove or mitigate, hazards or risks which occur in industry generally, or occur in some general class of industrial undertaking or in relation to some general class of industrial machines, operations or pursuits.*

13.13 We have not been helped in analysing this matter by the apparent lack of substantive evidence about the effect of a reverse onus on OHS outcomes. We were unable to identify objectively whether the legislative approach taken in Queensland and NSW to the reverse onus results in a materially different culture of compliance or OHS performance generally than in the jurisdictions where it does not exist.

13.14 There are two broad options where there is a prosecution for non-compliance with a duty of care. The first is to place the onus of proof (beyond reasonable doubt) entirely on the prosecution. The second is to require the defendant to demonstrate (on the balance of probabilities) how the defendant did all that was reasonably practicable to ensure the health and safety of those to whom the duty was owed.

13.15 The case for the first option – no reverse onus – turns on the generally accepted principle that in a criminal prosecution, the onus of proof beyond reasonable doubt normally rests on the prosecution. The instances in which a reverse onus is provided for do not usually involve heavy penalties or imprisonment.[15] We note that we are recommending increased penalties, including imprisonment (see Chapter 12).

13.16 The case for the second option turns on the view that a defendant will be in the best position to know how the defendant has met the duty at issue and that it is not unfair for the defendant to be required to prove on the balance of probabilities that the defendant did so to a 'reasonably practicable' standard. It has also been suggested that it will make securing a conviction unnecessarily burdensome if the prosecution has to show this beyond a reasonable doubt.

[14] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 per Dawson, Toohey and Gaudron JJ at paragraph 17.

[15] The latter point appeared to be decisive in the findings of the Stein report, op cit, and Stein recommended that the only penalty of imprisonment in the NSW OHS Act (for re-offenders) should be omitted.

While the first proposition has some force, the second does not give enough weight to the investigatory powers of the regulator. In fact, it may be that, if there were to be a reverse onus of proof in relation to reasonable practicability, fairness would require some scaling back of those powers.

13.17 Another consideration relates to the practical effect of placing a burden of proof on the defendant. As the High Court observed in *Chugg*:[16]

> *One consideration tells against overmuch significance being given to the relative knowledge of an employer and an informant. The questions of safety and practicability, in many cases, raise issues of common sense rather than special knowledge … In some cases the mere identification of the cause of a perceptible risk may, as a matter of common sense, also constitute identification of a means of removing that risk, thereby giving rise to a strong inference that an employer failed to provide "so far as is practicable" a safe workplace. In other cases the same inference will arise from the identification of some method which would remove or mitigate a perceptible risk or hazard. And, in such cases, that inference might well be further strengthened by the failure of an employer to call evidence as to matters, such as cost and suitability, peculiarly within his knowledge.*

13.18 In other words, in practical terms, the onus may shift to the defendant once the prosecution has made out its case.

13.19 Although the practical difference between, the two options will often not be great, the matter is not insubstantial.

13.20 We have carefully considered what was put to us, the reasoning in previous reviews and current practice. As discussed earlier, we are recommending (see Chapter 5) that the qualification of 'reasonably practicable' be part of the relevant duties of care. We have concluded that it should be for the prosecution to prove failure to meet this standard and that there should not be a provision placing any onus of proof on the defendant in relation to it. In reaching this conclusion, we also took into account the fact that we are also recommending substantial increases in the size and range of penalties (see Chapter 12), and, that, in our second report, we will address how the regulators should have strong and wide-ranging investigatory powers under the model Act.

RECOMMENDATION 62

The prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.

[16] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 per Dawson, Toohey and Gaudron JJ at paragraph 18.

Chapter 14: Appeals

Current arrangements

14.1 Like other laws creating obligations and penalising non-compliance, OHS laws provide for appeals from convictions. Under existing OHS laws, the rights to appeal against convictions for non-compliance with duties of care are broadly similar. Nonetheless, there are some important differences that should be addressed in the model law. The differences are summarised in the following table.

TABLE 16: Courts with jurisdiction over breaches of duties of care

Jurisdiction	Court or Tribunal with jurisdiction over proceedings for a breach of a duty of care	Appellate Court or Tribunal	Appeal to High Court
NSW	Local Court constituted by a Magistrate: *NSW Act*, s.105 Industrial Relations Commission in Court Session: *NSW Act*, s.105	Industrial Relations Commission in Court Session: *OHSA 2000*, s.105, *Industrial Relations Act 1996*, s.197A	No
Vic	Magistrates Court: *Magistrates Court Act1989*, s.26(4), Sch. 4, cl. 53. County Court: *County Court Act 1958*, s.36A	County Court: *Magistrates Court Act 1989*, s.83. Supreme Court, *Supreme Court Act 1986*, s.10	Yes
Qld	Magistrates Court: *Qld Act*, s.164	Industrial Court: *Industrial Relations Act 1999*, s.248	No
WA	Magistrates Court ('safety and health magistrates'): *WA Act 1984*, ss.51B, 51C, 52.	Supreme Court, *Supreme Court Act 1935*, s.20, *OSH Act 1984* , s.54B	Yes
SA	Magistrates Court, *Magistrates Court Act 1991*, s.92[1] Industrial Court	Supreme Court, *Supreme Court Act 1935*,	Yes
Tas	Magistrates Court	Supreme Court	Yes
NT	Court of Summary Jurisdiction: *Justices Act*	Supreme Court, *Supreme Court Act*, s.14, *Justices Act*, s.163.	Yes

[1] See also the *Summary Procedure Act 1921* (SA) in relation to the classification of offences and jurisdiction.

Jurisdiction	Court or Tribunal with jurisdiction over proceedings for a breach of a duty of care	Appellate Court or Tribunal	Appeal to High Court
ACT	Magistrates Court: *Magistrates Court Act 1930*, s.19	Supreme Court: *Supreme Court Act 1933*, s.20, *Magistrates Court Act 1930*, s.207	Yes
Cwth	*Civil proceedings* - Federal Court of Australia or State or Territory Supreme Court: *Cwth Act,* Sch. 2, cl.1 *Criminal proceedings* – State or Territory Court with jurisdiction	Full Federal Court or Appellate Court for Supreme Court Appellate Court in State or Territory concerned	Yes

14.2 The grounds of appeal are broadly similar under the various Acts. NSW is the only State to provide in its OHS Act for a right of appeal from an acquittal.[2] Only NSW and Queensland do not have appeals to their Supreme Courts and hence no appeal to the High Court of Australia.[3]

Stakeholder views

14.3 The ACCI suggested that the ordinary processes of appeal should remain, which was a reason for not having 'idiosyncratic' tribunals dealing with matters.[4] The South Australian Government proposed that appeals lie to a Judge of a higher court for breaches of duties.[5] The Law Council of Australia and a separate group of NSW based legal practitioners both suggested that the model Act should enable appeals to lie to the High Court of Australia.[6]

Discussion

14.4 We understand that the right of appeal from an acquittal in NSW has been rarely used and we do not consider that such an arrangement should apply to acquittals under the model Act.[7]

2 *Industrial Relations Act 1996* (NSW), s.197A.
3 The Constitution, s.73(ii).
4 ACCI, *Submission No. 136.*
5 South Australian Government, *Submission No. 138*, p. 64.
6 Law Council of Australia, *Submission No. 163*, p. 35; Hodgkinson et al, *Submission No. 199*, p. 2.
7 The *Report on the Review of the Occupational Health and Safety Act 2000* recommended the repeal of the provision – p. 62, section 8.8.

14.5 In the interests of harmonisation, we consider that the appeal provisions should be uniform. Consistency in the application of the laws would be strengthened by having an appeal structure that gave access in all cases (subject to the normal leave requirements) to the High Court of Australia. This has implications for the existing arrangements in some States, where the final court for appeals is not one from which appeals lie to the High Court. We do not consider it appropriate to recommend whether there should be any changes to the provisions that stipulate the courts which hear prosecutions at first instance. This is a matter that would require broader consideration by the governments concerned. On the other hand, we are proposing that the final appeal within each State and Territory be to a court from which a further appeal can lie to the High Court. This is a matter that could be addressed within the States concerned.

RECOMMENDATION 63

The model Act should provide for a system of appeals against a finding of guilt in a prosecution, ultimately to the High Court of Australia, commencing with an application for leave to appeal to the Supreme Court.

RECOMMENDATION 64

The model Act should not provide for appeals from acquittals.

Whether Crown immunity should apply

Current arrangements

15.1 Under all the State and Territory OHS Acts, although expressed in different ways, provision is made so that liability exists for the Crown, government departments and agencies, and employees of the Crown.[1] However, it does not follow that the Crown is liable to be prosecuted in all cases.[2]

15.2 The Commonwealth has a different position. Under the Commonwealth OHS legislation, the Crown in right of the Commonwealth is bound by the Act, but neither the Commonwealth nor a Commonwealth authority is liable to be prosecuted for an offence or to pay a fine or penalty for an offence (government business enterprises are liable). Civil sanctions apply.[3] This has been explained as stemming from a strong common law presumption that the Crown cannot be criminally liable.

Stakeholder views

15.3 There is strong support from industry, unions and other interested persons for the Crown having the same liability as other duty holders.

Discussion

15.4 It is now widely accepted that the Crown should not be exempt from the operation of the offence provisions of OHS legislation.

15.5 As the ALRC has pointed out, there are rule of law considerations:[4]

> *The principle is widely accepted that governments, as representatives of the people, should be subject to the same laws as the people, unless Parliament provides otherwise.*

15.6 The ALRC nonetheless acknowledged that governments differ from ordinary persons in key respects and the Parliament may choose to exempt the Crown where that appeared warranted.[5]

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1 See s.118 of the NSW Act, s.6 of the Vic Act, s.4 of the QLD Act, s.4 of the WA Act, s.5(3) of the SA Act, s.4 of the Tas Act, s.6 of the NT Act, s.11 of the ACT Act and s.11 of the Cwth Act.

2 For example, the ACT Government take the view that prosecution is not appropriate for the ACT public sector.

3 See s.11 of the Cwth Act.

4 Australian Law Reform Commission, Report 92, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, paragraph 22.44.

5 ibid, paragraph 22.47.

15.7 We do not see why the common law presumption to which the Commonwealth has referred should justify the model law making special provision for immunity for the Crown in right of any jurisdiction, when the removal of such immunity from others has produced no difficulties.

RECOMMENDATION 65

Crown immunity should not be provided for in the model Act.

Limitation periods

Current arrangements

15.8 To balance fairness and the public interest in dealing with non-compliance with the law, OHS legislation provides for periods within which legal action must be taken before the courts. Under the existing OHS Acts, however, the periods within which prosecutions (and in the case of the Commonwealth, civil proceedings) may be brought are inconsistent.

TABLE 17: Periods within which actions may be brought

Jurisdiction	Time after occurrence of offence within which prosecution must be brought	Time after matter comes to regulator's notice within which prosecution must be brought	Other limitation periods
NSW	2 years – *NSW Act* – s.107	6 months (certain offences) – *NSW Act* – ss.107, 107A	Within 2 years of coroner's report (or the conclusion of a coronial inquest or inquiry) in which offence has been found – *OHS Act 2000* (NSW) – s.107
Vic	2 years – *Vic Act* – s.132	N/A	At any time with written authorisation of DPP – OHS Act 2004 (Vic), s.132
Qld	1 year – *Qld Act* – s.165	6 months - *Qld Act* – s.165	N/A
WA	3 years – *WA Act* – s.52	N/A	N/A

Jurisdiction	Time after occurrence of offence within which prosecution must be brought	Time after matter comes to regulator's notice within which prosecution must be brought	Other limitation periods
SA	2 years – *SA Act* – s.58	N/A	DPP may extend time period on specified grounds years – *SA Act* – s.58
Tas	N/A	12 months – *Tas Act* – s.55	N/A
NT	3 years – *NT Act* – s.80	N/A	N/A
ACT	As for other summary offences		
Cwth			Civil proceedings for a 'declaration of contravention' or a 'pecuniary penalty order' must be brought within 6 years after the alleged breach – Cwth Act, Schedule 1, cl.6.

15.9 Non-compliance with a duty of care might also amount to a contravention of the general criminal law. Depending on the nature of the offence, a prosecution may still be brought despite the expiry of the limitation period for proceedings under an OHS Act.

Stakeholder views

15.10 Although the submissions generally supported limitation periods, there were quite different views about what they should be. Various time limits were proposed from six months to three years.

Discussion

15.11 Providing for limitation periods in relation to prosecutions for non-compliance with duties of care balances the interests of the community and the individual fairly. We have considered the various provisions that currently exist and the submissions that were put to us. We recognise the importance from the point of view of a duty holder of having proceedings brought and resolved quickly. At the same time, this must be balanced by the need to ensure that the regulator has sufficient time to investigate a matter thoroughly so that a sound case may be brought, if that is ultimately decided upon.

15.12 We have not made a recommendation in relation to allowing prosecutions to be brought out of time (e.g. where authorised by the DPP) as we consider that there is sufficient time allowed in the periods that we recommend. Nonetheless, if there were examples of its use in a way that takes the objectives of OHS regulation forward, we would understand why it might be adopted.

RECOMMENDATION 66

Prosecutions for non-compliance with duties of care should be commenced within two years of whichever is the latest of the following: or

a) the occurrence of the offence; or

b) the offence coming to the regulator's notice;

or within 1 year of a finding in a coronial proceeding or another official inquiry that an offence has occurred.

Victim impact statements

Current arrangements

16.1 Victim impact statements are a means by which the victims of breaches (or, in the case of a fatality, partners or dependants) are able to inform the court of how they have been affected by the breach. This allows them to participate in the criminal justice process in a more meaningful way and help the courts to gain a greater appreciation of the consequences of a breach. Such statements are usually provided for in laws of general application and not in OHS Acts. [1] These laws provide the means for a victim to present a statement to the court concerned.[2] The processes are not identical and differ in what may be presented to a court and how.

Stakeholder views

16.2 The ACCI saw victim impact statements as a possible part of the options open to a court of general jurisdiction. The Victorian Government supported such statements and suggested that they demonstrated why only a skilled professional prosecutor should be permitted to bring an action for a breach.

Discussion

16.3 At present, not all courts can be presented with victim impact statements when hearing a prosecution for a serious breach of a duty. Although some older research suggested that such procedures may not significantly affect sentencing outcomes,[3] modern practice supports this option. We note that there is international recognition of this process.[4]

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1 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss.26–30A; *Crimes (Sentencing Procedure) Regulation 2005* (NSW) rr.8–11; *Sentencing Act 1991* (Vic) pt.6 div.1A; *Sentencing Act 1995* (WA) pt.3 div.4; *Criminal Law (Sentencing) Act 1988* (SA) s.7A; *Magistrates Court Rules 1992* (SA) r.41.06; *Supreme Court Criminal Rules 1992* (SA) r.19.01–19.08; *Sentencing Act 1997* (Tas) s.81A; *Justice Rules 2003* (Tas) part. 9A; *Crimes (Sentencing) Act 2005* (ACT) part. 4.3; *Sentencing Act 1995* (NT) ss.106A–106B. Queensland does not make such provision but a prosecutor may inform the court about harm suffered by a victim - *Criminal Offence Victims Act 1995* (Qld) s.14.

2 *Crimes (Sentencing) Act 2005* (ACT), Part 4.3; *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act* (NT); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1977* (Tas); Sentencing Act 1991 (Vic); Sentencing Act 1995 (WA).

3 E Erez, L. Roeger, and M. O'Connell, *Victim Impact Statements in South Australia*, Australian Institute of Criminology, 1996.

4 UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, article. 6(b).

16.4 We have spoken with persons who have suffered emotionally, socially and economically from the death of loved ones at work. We see benefits all round in involving victims of breaches more effectively in proceedings, but this step requires a supportive environment for the victims and it may be of limited value without such commitment by prosecutors and regulators.

RECOMMENDATION 67

The model Act should provide for or facilitate the presentation of a victim impact statement to any court that is hearing a Category 1 or Category 2 case of non-compliance with a duty of care, including by or on behalf of surviving family members or dependants.

Sentencing guidelines

Current arrangements

16.5 Only the NSW Act provides for sentencing guidelines (by means of a Full Bench guideline judgment under s.124 of the NSW Act). In other jurisdictions, the sentencing guidelines are more likely to be of general application and contained in sentencing laws.

Stakeholder views

16.6 In their submission, Johnstone et al suggested that sentencing guidelines may have an important role in providing transparency for the compliance process. Duty holders would know what to expect, the Courts would have advice on how to exercise their jurisdiction and there would be more consistency.[5]

Discussion

16.7 We see a potential difficulty with sentencing guidelines in that they may not be appropriately framed for an OHS offence. There may be unintended limits on a court from the application of such guidelines where they are more directed at a ordinary criminal breach rather than that under an OHS Act. It would be better for such guidelines to be tailored to suit OHS prosecutions.

RECOMMENDATION 68

Subject to wider criminal justice policy considerations, the model Act should provide for the promulgation of sentencing guidelines or, where there are applicable sentencing guidelines, they should be reviewed for national consistency and compatibility with the OHS regulatory regime.

[5] R Johnstone, L Bluff and M Quinlan, *Submission No. 55.*

Chapter 17: Avoiding duplicity & double jeopardy

Avoiding duplicity

Current arrangements

17.1 Under the criminal law rule against *duplicity,* a prosecutor may not ordinarily charge in one count of an indictment, information or complaint, two or more separate offences provided by law.[1] There are some provisions in OHS laws that address this issue.[2]

Stakeholder views

17.2 There was limited comment on this point,[3] but the issue is undoubtedly of significance for the effective application of the law.

Discussion

17.3 Unless modified, the rule could complicate the prosecution of OHS offences and may impede a court's understanding of the nature of a defendant's failure to meet the particular duty of care at issue. For example, the duplicity rule might prevent a charge from including all the information about how a defendant failed to meet the duty of care in respect of a work environment, process or arrangement. This is particularly unsatisfactory where the offending acts or omissions occur on a continuing basis. Presenting only one aspect of the defendant's failure may deprive the court of an opportunity to appreciate the seriousness of the failure and may result in inappropriate or insufficient penalties and orders upon conviction. We also consider that it is not desirable that there be the cost and delay inherent in litigation over such matters.[4]

17.4 We agree with the Maxwell Review that there should be no legal obstacle to laying a single information containing particulars that refer to more than one instance of a breach of a duty of care.[5] The same applies to any other initiating documents or prosecutions.

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1 *Walsh v Tattersall* (1996) 188 CLR 77 at 104–112 (Kirby J).
2 See s.31 of the NSW Act, See s.164 of the Qld Act.
3 R Johnstone, L Bluff and M Quinlan, *Submission No.55*, pp. 14 and 42.
4 See, for example, the decision of the Full Court of the Supreme Court of South Australia in *Diemould Tooling Services Pty Ltd v Oaten; Santos Limited v Markos* [2008] SASC 197.
5 Maxwell Review, p. 382, paragraph 1854.

17.5 Accordingly, care should be taken in the model Act to ensure that more than one breach of a duty of care provision may be alleged in a single paragraph of an information or count of an indictment in relation to duties of care. Examples of such provisions are provided by s.164 of the Qld Act, s.31 of the NSW Act and s.33 of the Vic Act.

17.6 The same principle should apply to proceedings in relation to the other obligations that are to be covered by our second report.

RECOMMENDATION 69

The model Act should provide that two or more contraventions of duties of care may be charged as a single offence if they arise out of the same factual circumstances.

Double jeopardy

Current arrangements

16.7 Under general principles of criminal law, it is accepted that no person should be liable to be punished twice for the same offence.[6] This is explicitly stated in the WA Act.[7] We note that there is a wider debate about reform of the law relating to double jeopardy, which is a relatively complex area of the law.[8]

Stakeholder views

17.8 The ACCI considers that there should be no double jeopardy under the model Act.[9]

Discussion

17.9 Subject to considerations of criminal justice policy in each jurisdiction, we consider that it would be appropriate to include in the model Act a provision along the lines of that in the WA Act. This should give greater confidence about the availability of the more stringent regime of sanctions that we recommend and reinforce the need for high levels of professionalism in the investigation of OHS matters and decisions to prosecute.

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6 Art.14(7) of the International Covenant on Civil and Political Rights states that, 'No one shall be liable to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

7 See s.55A.

8 COAG has agreed that jurisdictions will implement the recommendations of the Double Jeopardy Law Reform COAG Working Group on double jeopardy law reform, prosecution appeals against acquittals, and prosecution appeals against sentence, noting that the scope of reforms will vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction's criminal law. Victoria and the Australian Capital Territory reserved their positions in relation to the recommendations – see COAG Communiqué, 13 April 2007.

9 ACCI, *Submission No. 136*, p. 85.

RECOMMENDATION 70

The model Act should enshrine the rule against double jeopardy by providing that no person is liable to be punished twice for the same offence under the Act or for events arising out of and related to that offence.

How and where duty of care offences should be located in the model Act

Current arrangements

18.1 The various Australian OHS Acts take quite different approaches to the location of the duties of care. Although the duties of care are readily identified, it is not always easy to find other relevant provisions, such as the penalties. The provisions relating to the various types of duties and duty holders are also not always collocated.

Stakeholder views

18.2 In our consultation, we were advised by many stakeholders that they wished the model Act to be structured so that it would be simpler to find and refer to the key provisions, including the duties of care and the consequences of non-compliance.

Discussion

18.3 Although this is not a matter with substantive legal implications, we consider that it should be addressed for harmonisation reasons (currently, no uniform legislative approach exists) and because the offences relating to duties of care need to be readily accessible in the model Act to duty holders. There is also a question of how best to assist duty holders to understand the legal consequences for them of non-compliance.

18.4 The options for locating such offences in the model Act reflect the approaches that are taken in existing Australian OHS laws. Each has attracted some support.

18.5 One approach is to set out the penalty for a breach of a duty in the same provision as the duty.[1] This indicates that a breach is an offence and reinforces the significance of the duty. The consequence of non-compliance is also clearer to the duty holder.

18.6 Another approach is to make separate provision for offences. This allows the duties to be set out in provisions that focus solely on what the duty holder must do to protect health and safety.

[1] This approach is taken in the Vic, SA, Tas and NT Acts.

18.7 Where this approach is taken, the offences may be in provisions that are in the same part of the legislation as the duties[2] or remote from them.[3] In either case, providing for the offences separately from the duties puts in one place all the information about the consequences of non-compliance with a duty. This allows interested persons to see the relativities between the penalties and hence the relative seriousness of the various offences. It may also facilitate subsequent amendments. In addition, it would also permit collocation with other provisions about alternative sentencing options.

18.8 The difference in the approaches is probably partly explained by drafting practices in the jurisdiction concerned. In some instances, an effort appears to have been made to reinforce the impact of the duties of care by making it clear in each duty provision that non-compliance is an offence, punishable by a significant criminal penalty. This is helped where there is information about the actual dollar amount of fines.

18.9 In any case, we consider that the model Act would be more effective by making it easier for interested persons to find the provisions relating to duties and the penalties (or other consequences) for non-compliance.

RECOMMENDATION 71

Penalties for non-compliance with duties of care should be specified in the same provisions as the duties to which they relate.

RECOMMENDATION 72

If Recommendation 71 is not accepted, the provisions relating to penalties for non-compliance with duties of care should be collocated with the provisions specifying the duties.

RECOMMENDATION 73

The model Act should expressly state the dollar amounts of the maximum fines for each category of breach of a duty of care.

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[2] There are stand alone offence provisions in New South Wales, Western Australia and Queensland that are collocated with the duty provisions. For example, see s.12 of the NSW Act; s.24 of the Qld Act; and s.19A of the WA Act.

[3] The offence provisions are remote from the duties under the Commonwealth Act (a Schedule provides for civil and criminal proceedings). A note is included in the duties provisions of the Act to direct attention to the Schedule.

The effects of other laws on offences and penalties

Current arrangements

18.10 Various laws overlap with and affect the OHS laws. There are not uniform sentencing laws in the jurisdictions (these laws affect the approach taken by judges and magistrates when disposing of matters). Similarly, there is not a consistent approach to the procedural law and practice of the courts and tribunals that hear such matters.

Stakeholder views

18.11 This was not a matter upon which we invited written submissions. Even so, in our consultation, the matter was raised. There is a concern that there may be some friction between the aims and operation of OHS legislation and the laws of more general application that may affect the conduct of OHS prosecutions or their outcomes.

Discussion

18.12 We received little comment on the effect of laws of general application on the outcome of prosecutions for breaches of OHS laws. We are not in a position to assess how that might affect the implementation of harmonised OHS laws. Even so, we consider that Ministers may wish to seek further advice on the matter to identify whether it is of such significance that representations should be made to the Standing Committee of Attorneys-General.

RECOMMENDATION 74

Further advice should be sought on the effects of other laws relating to the jurisdiction, powers and functions of the courts with jurisdiction over OHS matters to identify whether those laws have any unintended consequences inimical to the objective of harmonising OHS laws.

PART 5
DEFENCES

- **Defences relating to duty of care offences**

Chapter 19: Defences relating to duty of care offences

Current arrangements

19.1 As discussed in Chapter 13, NSW and Queensland respectively provide for a duty of care that is qualified by a standard of reasonable practicability (in NSW) or reasonable precautions (in Qld), but make proof of taking action to the relevant standard a defence in proceedings for a breach of the duty of care. [1]

19.2 It is an alternative defence under the NSW provision to show that the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.[2]

19.3 The Queensland provision is more elaborate.[3] It is a defence to a prosecution for a breach of a duty of care for the duty holder to show that the duty holder had followed a way of preventing or minimising exposure to a risk that was prescribed by a regulation or ministerial notice or stated in a code of practice.[4] If there is no such regulation, notice or code of practice, the duty holder has a defence where an appropriate way of managing exposure to the relevant risk was adopted and the duty holder took reasonable precautions and exercised proper diligence to prevent the contravention.[5]

Stakeholder views

19.4 There was limited support for specific defences in the legislation.

19.5 The ACCI proposed defences relating to lack of 'realistic and practical control' over a workplace hazard or risk, reasonable reliance on the skill and expertise of a qualified person and to circumstances where the offence was substantially caused by an unlawful or unforeseeable act of a third party.[6]

19.6 The ACTU supported defences where officers of corporations were deemed to be liable for a breach of a duty by the corporation. Under this proposal, the defences would be the typical defences of not being in a position to influence the offending conduct, and a defence of due diligence by an officer who was in such a position.[7]

1 See s.28(a) of the NSW Act; See s.37(2) of the Qld Act.
2 See s.28(b) of the NSW Act.
3 See s.37 of the Qld Act.
4 See ibid, s.37(1)(b)(ii) – A duty holder may follow another appropriate way to manage exposure to the risk, apart from that stated in the code, provided the duty holder took reasonable precautions and exercised due diligence to prevent the contravention.
5 ibid, s.37(1)(c).
6 ACCI, *Submission No. 136*, pp. 74, 75.
7 ACTU, *Submission No. 214*, p. 70.

19.7 The South Australian Government discussed the possibility of a 'deemed to comply' approach, recognising the certainty that it may provide for a duty holder, but expressed reservations about problems of scope, interpretation and unintended omissions.

19.8 The Queensland Government supported the defence that is inherent in its approach to placing liability on a duty holder (see our description of this in Chapter 13).

19.9 Other regulators did not see the need for defences in circumstances where the prosecution bears the onus of proof in relation to alleged breaches of duties of care.[8]

Discussion

19.10 Given our conclusion about the burden of proof, which we deal with in Chapter 13, we do not need to consider whether there should be a defence in the model Act relating to the defendant having taken 'reasonably practicable' measures. It will be for the prosecution to demonstrate all elements of the breach beyond reasonable doubt.

19.11 Similarly, in light of our findings and recommendation about 'control' (i.e. that it is an integral element of 'reasonably practicable' and should not be an element in the duty of care), we do not see any need to provide that it is a defence to a prosecution for a duty of care offence where the act or omission concerned was a result of causes over which the defendant had no control.[9]

19.12 We deal in our second report with the question of defences for other offences under the model Act.

RECOMMENDATION 75

In light of our recommendations about who should bear the onus of proof in relation to reasonable practicability, the model Act should not provide for defences to prosecutions for non-compliance with duties of care.

[8] Victorian Government, *Submission No. 139*, p. 94.
[9] See s.28 of the NSW Act.

Appendices

- APPENDIX A – Reference list
- APPENDIX B – Submissions

APPENDIX A – Reference lists

Texts

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Western Australia

Occupational Safety and Health Act 1984

Tasmania

Workplace Health and Safety Act 1995

Northern Territory

Work Health and Safety Act 2007

Australian Capital Territory

Occupational Health and Safety Act 1989
(currently scheduled to commence on 1 July 2009)

Commonwealth

Occupational Health and Safety (Commonwealth Employees) Act 1991

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APPENDIX B – Submissions

Table of submissions to the Review

Submission Number	Submitter	Organisation/State
1	Mr Paul Harpur	Queensland University of Technology
2	Ken Scannell	Noise and Sound Services
3	Kelvin Johnson	INDOCC Consultants
4	Geoff Taylor	N/A
5	Henning A. Klovekorn	Joint Submission Group S.A.
6	Julian S Richards	NSW
7	Andrew See	Qld
8	William Shannon	NSW
9	Richard Calver	Master Builders Australia
10	Allan Wollard	Vic
11	Karen Thornton	Australian Nuclear Science and Technology Organisation
12	Gena Ginnane	Vic
13	Margaret Riley	Evans Community Options
14	Barrie Mair	Qld
15	Bryan Bottomley	Bryan Bottomley and Associates
16	G.F. Barker	Steam Management Committee, National Historical Machinery Association
17	Tony Cooke	Commission for Occupational Safety and Health (Western Australia)
18	Michael Donovan	Shop Distributive and Allied Employees Association (Vic)
19	Lawrence McIntyre	NSW
20	Graham Pring	SA
21	Kevin Skauge	Australian Institute of Building Surveyors
22	David Frith	Business SA
23	David Foster	WA
24	Marc Steen	Trades Monitor
25	Eric Wilson	Lutheran Education Australia
26	Stafford Sanders	SmokeFree Australia
27	Dianne Haydon	Local Government OHSR Network Group – Southern Region NSW
28	Sue McCarrey	Public Transport Authority (WA)
29	Jeff Brundell	Crane Industry Council of Australia
30	Neil Foster	NSW

Submission Number	Submitter	Organisation/State
31	Warren Doubleday	Association of Tourist and Heritage Rail Australia
32	Queensland Government	Queensland Government
33	Joseph Kelly	Association of Professional Engineers, Scientists and Managers Australia
34	Bruce Ham	N/A
35	Gavin Kenny	ABB Australia
36	Dr Helen J Leonard	Qld
37	Dr Helen J Leonard	Qld
38	Terry George	Tyree Industries
39	Sandra Dann	Working Womens Centre (SA)
40	Greg Kempton	Watpac
41	Anthony Farley	Catholic Commission for Employment Relations (NSW/ACT)
42	Prof Ron McCallum, Dr Suzanne Jamieson, Dr Tony Schofield, Ms Belinda Reeve	NSW
43	Nadia Schoner	Vic
44	Anne Bellamy	Chamber of Commerce and Industry Western Australia
45	Damon Thomas	Tasmanian Chamber of Commerce and Industry
46	Peter Warren	Australian Sugar Milling Council
47	Ron Hardaker	Australian Finance Conference & Australian Equipment Lessors Association
48	Peter Verberne	Airconditioning and Mechanical Contractors Association
49	Donald Dingsdag	Cardiac Arrest Survival Foundation
50	Jeff Priday	Group Training Australia
51	Ardele Blignault	GE Capital Finance Australasia
52	Michael Roche	Queensland Resources Council
53	Wendy Sturgess	Crisis Support Services
54	Martin Jones	CSR
55	Prof Richard Johnstone, Liz Bluff and Prof Michael Quinlan	Qld
56	Ruth Dunkin	Business Council of Australia

Submission Number	Submitter	Organisation/State
57	Melissa Ryan	Australian Government Department of Education, Employment and Workplace Relations
58	Rob Howse	NatRoad
59	Ross Clark	Australian Institute of Architects
60	Judith Fox	Chartered Secretaries Australia
61	Mike Gavin	Edith Cowan University
62	Russell Foote	Toro Australia
63	Paul Cook	Insolvency Practitioners Association
64	Joe Boswell	WA
65	Geoff Hurst	Risk Engineering Society
66	Ferdie Kroon	Tasmanian Forest Contractors Association
67	Marie-Louise MacDonald	Independent Contractors of Australia
68	Dr Rosemary Nixon, A/Prof LaMontagne, Tessa Keegel	Skin and Cancer Foundation (Vic)
69	Fiona Murfitt	Self Insurers Association of Victoria
70	Margaret Hogg	Non-Smokers Movement of Australia
71	A/Prof LaMontagne, Tessa Keegel	McCaughey Centre, VicHealth Centre for the Promotion of Mental Health and Community Wellbeing, The University of Melbourne
72	Nicole Prince	Vic
73	Prof Malcolm Sim	Dept of Epidemiology & Preventive Medicine, Monash University
74	Ross Hansen	Qld
75	Bryan Woodford	Yooralla
76	Ron Yates	Abigroup Contractors
77	Tony Marino	Victorian Construction Safety Alliance
78	Steve Burrows	Queensland Prison Officers Association
79	James Della Bosca, Steve Gambrill, Teresa Richardson	Delta Electricity
80	Duncan West	CGU Insurance
81	Gavin O'Meara	Ramsay Health care Australia
82	Australian Nursing Federation	Australian Nursing Federation
83	Martin Jennings	Australian Insitute of Occupational Hygienists
84	Bill Ludwig	Australian Workers Union Queensland
85	John O'Rourke	Lion Nathan

Submission Number	Submitter	Organisation/State
86	Graeme Peel	Qld
87	Ken Malcolm	SA
88	Peter Whowell	Australian Federal Police
89	Standards Australia	Standards Australia and Standards New Zealand Joint Technical Committee OB7 – Risk Management
90	Grant Purdy	Technical Committee OB7 – Risk Management
91	Ralf Hartmann	Australian OH&S Risk Management Services
92	Tasmanian Government	Tasmanian Government
93	Steve Griffiths	Commerce Queensland
94	Ross Pocock	Ergon Energy Corporation
95	Dale Cole	Recovre
96	Ian Argall	Australian Higher Education Industrial Association
97	John Runnalls	Babcock and Brown Power
98	Richard Croft	N/A
99	Chris White	Civil Contractors Federation
100	A/Prof Lin Fritschi	WA
101	Andrew Ferguson	CFMEU NSW Branch
102	PJ Fleming	ACT
103	Dr Ben Brooks, Dr Diana Bowman	Centre for Applied Behaviour Science, School of Psychology, University of South Australia and Monash Centre for Regulatory Studies, Faculty of Law, Monash University
104	Trish Kerin	Australian Vinyls Corporation
105	Ken Pidd	Alcohol and Other Drugs Council of Australia
106	Andy McMillan	Western Australian Farmers Federation
107	John Holland	John Holland
108	Mary O'Donoghue	Unions NSW
109	Jos de Bruin	Master Grocers Australia
110	Peter Barda	Australian Construction Industry Forum
111	Cheryl Cartwright	Australian Pipeline Industry Association
112	Brian Bradley	Western Australia Department of Consumer and Employment Protection
113	Hugh Macken	Law Society of NSW
114	Fiona Murfitt	Shell
115	Shane Murphy	Onesteel
116	Kath Deakin	Womens Health Victoria

Submission Number	Submitter	Organisation/State
117	Joe de Bruyn	Shop Distributive and Allied Employees Association (National)
118	Christopher Platt	Australian Mines and Metals Association
119	A/Professor Wendy Macdonald	Centre for Ergonomics & Human Factors, La Trobe University
120	Patrick Gilroy	Mining and Resource Contractors Safety Training Association
121	Allison Hutton	Qld
122	John Boshier	National Generators Forum
123	Julie Mills	Recruitment and Consulting Services Association's
124	Medical Technology Association of Australia	Medical Technology Association of Australia
125	Nicole Rooke	Chamber of Minerals and Energy of Western Australia
126	Michael Boyle	Thiess
127	Egon Schwidder	South Australian Wine Industry Association
128	Sue Pilkington	Safety Institute of Australia
129	Keith Jonson	National Safety Professionals
130	Lea Baker	AMP
131	Peter Ramshaw	NSW Taxi Council
132	Greg Ford	QR Limited
133	Susan Hopgood	Australian Education Union
134	Ian Ross	Australian Logistics Council
135	Stephen Jones	Community and Public Sector Union
136	Kellie Quayle	Australia Chamber of Commerce and Industry
137	NSW Government	NSW Government
138	South Australian Government	South Australian Government
139	Victorian Government	Victorian Government
140	John McConnel	Local Government Association of NSW and Shires Association of NSW
141	Allan Mulvena	Electrical Trades Union (Southern States Branch)
142	Stephen Creese	Rio Tinto
143	Ken McKell	Australian Meat Industry Council
144	Deborah Vallance	Vic
145	Dr John Culvenor	Vic
146	Professor Jean Cross	NSW

Submission Number	Submitter	Organisation/State
147	Louise Baldwin	Centennial Coal
148	John Smith	Victorian Employers Chamber of Commerce and Industry
149	Michael Cassar	Bluescope Steel
150	Clare Kitcher	RailCorp NSW
151	P.S. Clarke	Vic
152	Patrick D'Alessandri	Victorian Automobile Chamber of Commerce
153	James Tinslay	National Electrical and Communications Association
154	Greg Pattison	NSW Business Chamber and Others
155	Megan Motto	Association of Consulting Engineers Australia
156	C Harnath	Master Plumbers' and Mechanical Services Association of Australia
157	Andrew Antony	Santos
158	Australian Motor Trades Industrial Council	Australian Motor Trades Industrial Council
159	Australia Post	Australia Post
160	Kate Blenkiron	Association of Independent Schools of Victoria
161	John Knowles	Vic
162	Mark Burgess	Police Federation of Australia
163	Nick Parmeter	Law Council of Australia
164	Peter Olah	Hotel Motel and Accommodation Association
165	Michael Kilgariff	Energy Networks Association
166	Leo Ruschena	RMIT University
167	Anthony Wilson	Woolworths
168	Ross Trethewy	Mirvac
169	John Glover	Group Training Association of Victoria
170	Ken Slattery	Cement Concrete & Aggregates Australia
171	Ian Cairns	Australian Steel Institute
172	Denita Wawn and Justin Crosby	National Farmers Federation
173	Ken Baker	National Disability Services
174	David Bond	Transfield Services
175	Melanie Foster	Housing Industry Association
176	Pamela Marriott	Vic
177	Graham Wilson	Australian Services Union – Victorian Authorities and Services Branch
178	Peter McIntyre	PBS Building

Submission Number	Submitter	Organisation/State
179	Maurice Baroni	Asciano
180	Helen Borger	National Safety Council of Australia
181	James Freestun	Solutions IE
182	Australian Industry Group and Engineering Employers Association of South Australia	Australian Industry Group and Engineering Employers Association of South Australia
183	Dr Nicole Williams	NSW Minerals Council
184	Jim Barrett	Australian Constructors Association
185	Paul Waterhouse	Property Council of Australia
186	Telstra	Telstra
187	John Colvin	Australian Institute of Company Directors
188	Phil Sochon	Australasian Railway Association
189	Brett Holmes	NSW Nurses Association
190	Institute of Public Affairs	Institute of Public Affairs
191	Rob Duckworth	Qld
192	Professor Ian Olver	Cancer Council Australia
193	Andrea Shaw	Shaw Idea
194	Pauline Thorneloe	Australian Tax Office
195	Russell Brandon	Building Designers Association of Australia
196	Dean Smith	Optus
197	David Bell	Australian Bankers Association
198	Jackie Zelinski	Institute of Strata Title Management
199	Bruce Hodgkinson SC, Jeffrey Phillips SC, Wendy Thompson, Michael Tooma, Paul Cutrone and Lea Constantine	NSW
200	Chris Reynolds	Baulderstone Hornibrook
201	Mitchell Hooke	Minerals Council of Australia
202	Barry O'Farrell MP, NSW Opposition Leader	NSW Liberal/Nationals Parties
203	Rod Noble, Warwick Pearce and Serge Zorino	Health Safety Environment Research and Consultancy Services

Submission Number	Submitter	Organisation/State
204	Richard Green	Australian Council of Built Environment Design Professionals
205	Clare Moylan	QBE Insurance
206	Darren De Bortoli	Riverina Winemakers Association
207	Terry McKay	Australian Automotive Air
208	Robert McLean	Murdoch University
209	Shay Deguara	Public Service Association of NSW
210	Linda Morich	UnionsWA
211	Igor Nossar	Textile Clothing and Footwear Union of Australia
212	Ron Monaghan	Queensland Council of Unions
213	Gayle Burmeister	National Union of Workers
214	Geoff Fary	Australian Council of Trade Unions
215	Stuart St Clair	Australian Trucking Association
216	Cathy Butcher	Victorian Trades Hall Council
217	David Oliver	Australian Manufacturing Workers Union
218	John Sutton	Construction, Forestry, Mining and Energy Union of Australia
219	Alice Gibson	National Mine Safety Framework Steering Group
220	Cliff Bromily	Stockland
221	Monica Sarder	Australasian Institute of Mining and Metallurgy
222	Prof Drew Dawson, A/Prof Verna Blewett, Dr Matthew Thomas, Dr Benjamin Brooks, Dr Sally Ferguson, Valerie O'Keeffe	University of South Australia
223	Dick Williams	Electrical Trades Union Queensland
224	Andrew Vickers	CFMEU Mining and Energy Division
225	ACT Government	ACT Government
226	Chris Watt	Independent Education Union of Australia
227	David Tritton	Transport Workers' Union of Australia
228	Andrew Thomas	Australian Rail Tram & Bus Union
229	Peter Tighe	Communications, Electrical and Plumbing Union
230	David Carey	State Public Service Federation Group, the Community & Public Sector Union (SPSF Group CPSU)
231	Simon Cocker	Unions Tasmania

Submission Number	Submitter	Organisation/State
232	Graham Peachey	Australian Maritime Safety Authority
233*	Helen McIntyre	NSW
234*	Nick Dimopoulos	National Transport Commission
235*	Ian Kerr	Post Office Agents Association
236*	Milton Cockburn	Shopping Centre Council of Australia
237*	Mark Dearlove	Energex
238*	Submission withdrawn	
239*	Dusanka Sabic	Accord
240*	Trevor Evans	Australian Hotels Association South Australia
241*	Gavin Jackman	BP Australia
242*	Malcolm Richards	Electrical and Communications Association Queensland
243	Brett O'Donnell	SA

* This submission was made after the closing date for submissions.

Number of Submissions by Grouping