



**The Highest Standards for Harmonised OHS Law**

Submission by the Australian Council of Trade Unions for  
the National Review into Model Occupational Health and  
Safety Laws

11 July 2008

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### **INTRODUCTION**

1. The Australian Council of Trade Unions (ACTU) is the peak union body in Australia representing the interests of some 2 million workers and their families.
2. The ACTU is the worker representative body on the Australian Safety and Compensation Commission (ASCC) and the International Labor Organisation (ILO) where it advocates for improving health and safety and workers' compensation standards and reducing to zero, death, injury and illness at work.
3. The ACTU welcomes the opportunity to submit comment to the review and looks forward to ongoing consultations as the review proceeds and any subsequent legislation and regulations are written.
4. The current Australian OHS laws were enacted as a result of significant campaigning and lobbying by workers and their trade unions. The current laws reflect the activity of generations of Australian workers and the ACTU is committed to continuing our tradition of protecting all working people.
5. The ILO recognises the importance of tripartism and the role of workers and their trade unions as essential to the creation and maintenance of healthy and safe workplaces.

### **SUMMARY SUBMISSION**

6. This submission is designed to lay out the fundamental principles for the achievement of the highest standards in model OHS laws.
7. The ACTU's position is based on ACTU policy that has guided union participation in OHS since 1979, restated most recently in the ACTU Charter of Workplace Rights for OHS and Workers' Compensation.
8. Informing the ACTU's position are the overarching principles that OHS law must deliver:
  - The right of all workers to be represented by unions at all levels in regard to all health and safety matters;
  - The right of all workers to the highest level of effective protection to prevent injury, illness and disease;
  - Persons who control and manage workplaces must have responsibility for providing and maintaining a safe and healthy workplace by eliminating hazards at the source;
  - All workers have the right to elect health and safety representatives who have rights and powers to seek resolution on health and safety issues and are protected by the law from discrimination and harassment;
  - No worker shall suffer discrimination, harassment or detriment in their employment due to raising health and safety issues

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- Unions have a recognised role in improving OHS and must retain the right to enter workplaces on health and safety issues, obtain information and the right to prosecute employers who breach OHS law;
  - All workers have a right to take collective action over any health and safety matter including the right to cease unsafe and unhealthy work
  - Social legislation not a cost cutting exercise for business and regulators
9. The foundation stone of the ACTU's position is the *ACTU Charter of Workplace Rights for OHS and Workers' Compensation* drawn from ACTU OHS policy. The ACTU recognises that OHS law is rights based law. The Charter sets out the rights and responsibilities we believe all workplace parties should have in the provision of decent and fair health and safety practices in Australian workplaces. The Charter is attached.
10. Two key principles from the Charter are worth noting:
- I. *that changes to occupational health and safety... law must not result in a diminution of the rights and entitlements of any worker.*
  - II. *all occupational health and safety... laws are to be developed in a tripartite manner.*
11. The ACTU submits that these two principles are fundamental to a successful transition to model national OHS laws for Australia.
12. OHS laws must be designed to provide a safe and healthy work environment. This will then ensure that the exposure to hazards is eliminated so that workplace deaths, illness injury and disease are eliminated. Up to 1.5million Australian workers are currently exposed to carcinogenic substances<sup>1</sup> and with nearly 690,000 workplace injuries or illnesses occurring at work every year<sup>2</sup> and up to an estimated 8,168 work-related fatalities every year;<sup>3</sup> this Review must set out to achieve the highest standards of protections in the world.
13. Necessarily, there is a role for government, the OHS regulator and other agencies, employers, workers and their representatives in the delivery of a safe and healthy workplace. The notion of 'regulatory space' must be acknowledged in model laws. That is, there are other laws that are complementary to the goals of the OHS Act. For example, in Australia, ASIC has a role to play in applying corporate law when a company liquidates to avoid corporate OHS responsibilities, including fines. An international example is in the USA, the Massachusetts Toxic Use Reduction Act 1989, which has created an emphasis on reduction of toxic materials, includes benefit to workers of lowering exposure.
14. The importance of a genuine tripartite approach to occupational health and safety cannot be overstated. Tripartism has a long history in Australia and is widely

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<sup>1</sup> NOHSC, Occupational Cancer in Australia, April 2006, p.5

<sup>2</sup> Australian Bureau of Statistics, 6324.0 - Work-Related Injuries, Australia, 2005-06

<sup>3</sup> Access Economics Pty Limited, Review Of Methodology And Estimates Of Workplace Fatalities For The National Occupational Health And Safety Commission September 2003, P.8.

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recognised as being advantageous to improving OHS standards<sup>4</sup>. It is a principle recommendation coming out of the influential British Robens Report<sup>5</sup> 1972 and is recognised by the United Nations International Labor Organisation (ILO) through Occupational Safety and Health Convention, 1981 No.155<sup>6</sup>; a convention Australia has ratified. In fact, tripartism underpins the whole structure of the ILO. A strong and robust health and safety framework must be built on a tripartite approach to health and safety.

15. Any revisions to OHS law must be viewed in the context of the enormous economic, social and human costs of occupational injury and disease to the Australian community. In 2004 the then National Occupational Health and Safety Commission estimated the economic costs of occupational injury and disease in Australia in the year 2000-1 at \$34.3 billion or 5% of GDP.<sup>7</sup> In terms of the burden to economic agents, only 3 per cent of the total cost is borne by employers, 44 per cent by workers and 53 per cent by the community. The cost of pain, suffering and early death could conservatively add a further \$48.5 billion to the total cost figure (net of human capital costs already included in total costs), leading to a total cost estimate of \$82.8 billion.<sup>8</sup>
16. At the same time, business is making record profits. Over the past 10 years the seasonally adjusted profit share of total factor income has increased by 3.6% from 23.5% to 27.1%, the highest on record representing profits of \$68,906 million. Business can afford to improve standards and claims of the need to reduce the regulatory to burden and cost to business should be treated with scepticism.
17. The majority of the economic costs of work-related injury and disease are not recorded in workers' compensation claims data used for OHS performance monitoring in Australia. Further, even ignoring serious inconsistencies in the recording of workers' compensation claims (such as the use of the 10 day threshold in Victoria) many work-related injuries and diseases do not result in a workers' compensation claim (due to deficiencies in recognition/surveillance of occupational disease and also having regard to such matters as work-related mental health problems) and changes to work arrangements (such as the growth of 'self employment' and other contingent work arrangements) has almost certainly exacerbated this under-reporting. There is a growing international recognition that under-reporting is a serious problem and means that official OHS statistics,<sup>9</sup> and

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<sup>4</sup> Johnstone, R, Occupational Health and Safety Law and Policy, Text and Materials, 2<sup>nd</sup> Ed., Thomson Legal, 2004 P. 131 & South Australia, Report of the Occupational Safety, Health and Welfare Steering Committee, Volume 1, The Protection of Workers' Health and Safety (1984).

<sup>5</sup> Lord Robens, Report of the Committee on Safety and Health at Work 1970-1972.

<sup>6</sup> ILO Occupational Safety and Health Convention, 1981 No.155, Article 4 & Article 15

<sup>7</sup> National Occupational Health and Safety Commission (2004), The cost of work-related injury and illness for employers, workers and the community, Australian Government, Canberra, p2.

<sup>8</sup> NOHSC, The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community, August 2004, p.2-3.

<sup>9</sup> Rosenman KD, Kalush A, Reilly MJ, Gardiner JC, Reeves M, Luo Z. (2006) How much work-related illness and injury is missed by the national surveillance system? J Occup Environ Med. ;48:357-365; Miller, G. Chair, (2008), *Hidden Tragedy: Underreporting of Workplace Injuries and Illness*, Committee on Education and Labor, United States House of Representatives, Washington.

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especially apparent trends suggesting some improvement should be treated with extreme caution if not outright scepticism. Important conclusions can be drawn from this. First, the evidence is clear that OHS remains a critical issue that legislation is yet to fully address. Second, therefore model OHS legislation must be directed to an overall lifting of OHS standards – standards expected by the community – not a series of trade-offs or, worse, a lowest common denominator cost cutting approach.

18. In addition to the economic costs there are enormous social and human costs. Serious injury or disease can and does affect job prospects, career advancement, social and family activities. Especially in the case of disablement or death there can be severe emotional/traumatic and financial impacts on the family. The ACTU is not aware of any attempt to fully identify let alone measure these effects and in a very real sense the loss of a loved one is incalculable. However, as evidence given to a number of government inquiries testify<sup>10</sup>, the social and human toll of occupational injury and disease must be borne in mind when considered changes to OHS legislation. It is absolutely essential that the wellbeing of workers and their families be at the forefront of any consideration of changes to law and that the highest levels of protection be pursued, notwithstanding the alleged inconvenience this may cause to others who seldom if ever personally experience these social and human costs.
19. The real cost of failing to provide healthy and safe workplaces both in terms of human life and economically is overwhelmingly borne by workers, their families and the community. Given ethical grounds of the points just made, as well as practical grounds<sup>11</sup>, it should be guiding principle that Model legislation should give workers and their representatives substantial input in protecting their health, safety and wellbeing at work.

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<sup>10</sup> See for example the evidence of Fran Kavanagh to Legislative Council Standing Committee on Law and Justice, (1998), *Final Report of the Inquiry into Workplace Safety*, 2 vols, Parliament of New South Wales, Sydney. See also evidence of families in Nile, F. chair (2004), *Serious injury and death in the workplace*, Legislative Council General Purposes Standing Committee No.1, Parliament of New South Wales, Sydney.

<sup>11</sup> For an excellent overview of the extensive international evidence on the value of worker involvement in OHS and also the critical importance of collective/representative methods of participation see Walters, D. and Nichols, T. (2007) *Worker representation and workplace health and safety*, Palgrave Mcmillan, Basingstoke.

# Union Charter of Workplace Rights

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

Regardless of jurisdiction, changes to occupational health and safety, compensation and rehabilitation law must not result in a diminution of the rights and entitlements of any worker.

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

Consistent with ACTU OHS and Workers' Compensation Policy and international standards, Australian law must ensure healthy and safe workplaces and a compensation and rehabilitation system which ensures that no worker is disadvantaged should they be injured at work.

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

## 1. Workers

Every worker has the right to:

- A safe and healthy workplace
- Travel to and from work in safety and with appropriate protections
- Return home from work free of injury or illness
- Enjoy retirement without suffering adverse consequences of workplace injury or illness
- Enjoy the highest level of protection, representation, compensation and rehabilitation, regardless of the jurisdiction within which they work
- The highest level of protection to prevent injury illness and disease
- Take collective action over any health and safety matter, including the right to cease unsafe or unhealthy work
- Discuss, negotiate and be consulted and involved in all issues affecting their health, safety and welfare

## 2. Representation

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

Unions have the right to:

- Enter workplaces on health and safety issues
- Investigate breaches of health and safety laws
- Represent members and prospective members
- Initiate investigations and prosecutions for occupational health and safety breaches
- Initiate cessation of work in unsafe areas
- Access all relevant information and reports

Workplace Health and Safety Representatives have the right to:

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

## 3. Discrimination and Bullying

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

## 4. Employer Responsibilities

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

## 5. Role of Regulator

OHS law must be effectively enforced by regulators in all jurisdictions. The regulator must also consult and provide information, support and advice to all workplace parties, including unions. They must ensure that workplace representatives are supported and protected and bring prosecutions in a timely, appropriate and courageous manner. Regulators will actively monitor self-insuring companies and ensure transparency and fairness of their workers compensation and return to work systems. An inspectorate must be adequately resourced, pro-active and willing to fulfil an enforcement role as well as an advisory role.

## 6. Compensation

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

Workers' compensation standards are to:

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

## 7. Rehabilitation

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

Rehabilitation will include the right to:

- Union representation
- Early intervention of workplace injury and illness
- High quality, appropriate, effective and timely rehabilitation plans and services
- Consultation about all aspects of rehabilitation
- All documentation and information relating to their rehabilitation
- Fair and equitable rehabilitation plans and services
- Privacy in the management of all records and information
- Personal choice of medical provider and rehabilitation service

## 8. Penalties

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

## 9. Development of Laws

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

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

**your rights at work**  
worth fighting and voting for

# ACTU

# CHAPTER 1: LEGISLATIVE APPROACH

## 1.1 REGULATORY STRUCTURE

20. Since the 1972 Lord Robens' Report, written over 35 years ago, we have the collective knowledge of international research, experience and practice over that period offering an enormous base of knowledge and successful responses to health and safety issues. Combined with a harmonised approach to OHS law making that will remove the ad hoc approach so criticised by Robens, it is now time for Australia to codify that knowledge in law and, through a harmonised tripartite approach, continue to adopt higher standards of protections into the future.
21. In the post-Robens era, Australia's health and safety laws must reflect community expectations (see: Pearce & Geddes 2001)<sup>12</sup>. Families want certainty that their loved ones will be kept safe and healthy while at work, but at the moment Australia's system is failing Australian families.
22. The ACTU endorses an approach that the law must be<sup>13</sup>:
  - a. Transparent: using words with well-defined and universally accepted meanings within the regulated community
  - b. Accessible: applicable to concrete situations without excessive difficulty or effort
  - c. Congruent with underlying policy objective: the substantive content must produce the desired behaviour
23. Laws including the Act and Regulations and other subordinate legislative instruments including Standards and Codes should be clearly and simply expressed in plain English *prescriptive* and *process* terms. This approach would provide workers and their representatives with certainty about their rights, and duty holders with certainty about their rights and obligations under the Act. This approach details how duty holders can meet their obligations and compliance costs can be easily calculated.<sup>14</sup>

## 1.2 TITLE, OBJECTS AND PRINCIPLES

24. It is important a modern OHS law reflects the issues confronting the contemporary Australian workplace. Therefore the title of the new Act should include the words "Occupational Health, Safety and Welfare". Welfare focuses attention on important contemporary workplace issues<sup>15</sup> and is in the SA OHSW Act title.
25. The Act should contain separate objects and principles. Objects set out the goals of a piece of legislation. Principles provide guidance in how objects are interpreted and

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<sup>12</sup> The courts must bear in mind that statute reflects "the changing ideas of justice and increasing concerns with safety in the community" see: *Bankstown Foundry Pty Ltd v Braistina* [1986] 160 CLR 301, *Shannon v Comalco Aluminium Ltd* [1986] 19 ir 358.

<sup>13</sup> Johnstone, R, *Occupational Health and Safety Law and Policy: A Comparative review*, ACTU OHS Seminar 2008

<sup>14</sup> Johnstone, 2004, p. 155

<sup>15</sup> SA OHSW Act S 55 in relation to "inappropriate behavior"

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achieved. Objects should be clear and broad, including roles for employer and worker organisations. Principles should detail the principles of consultation, participation and representation, anti-discrimination, elimination of hazards, risk control, the precautionary principle, and enforcement penalties.

26. Objects should be along the lines of the NSW OHS Act 2000 and the SA OHSW <sup>16</sup> and Principles should be based on the Victorian OHSA 2004 and the Swedish Work Environment Act.

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<sup>16</sup> Particularly (d) to involve employees and employers in issues affecting OHSW; and (e) to encourage registered associations to take a constructive role in promoting improvements in OHSW practices and assisting employers and employees to achieve a healthier and safer working environment of the SA OHWS Act 1986.

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# CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS

## 2.1 INDUSTRY SECTORS

27. The ACTU does not support a complete takeover of all other industry-specific health and safety laws, such as electrical, mining and maritime. It is an approach that fails to consider:
- the effectiveness of the existing laws and regulations upon the reduction of deaths and injuries in the industries concerned;
  - the need for specific and enforceable health and safety laws in those industries, many of which are of a high risk nature;
  - the harmonisation processes already occurring in those industries particularly for mining through the National Mine Safety Framework (NMSF).
  - A number of these laws (such as mining legislation in NSW and Queensland) contain provisions with regard worker involvement/check inspectors that are superior to any provisions found in OHS legislation).<sup>17</sup>

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28. With regard to mining, only one jurisdiction fully incorporated its mine safety provisions within existing OHS legislation (the Workplace Health and Safety Act) while other jurisdictions have maintained a degree of separation (albeit within a more coordinated framework in the case of NSW). When this change was introduced there was to our knowledge no detailed assessment of what regulations etc should be retained. This approach was criticised by the coroner in his findings in relation to the death of three miners at the Renison Bell mine in Tasmania who stated at paragraph at 362. *“At all relevant times the applicable legislation relating to occupation health and safety at mines in Tasmania was the Workplace Health and Safety Act 1995 and Workplace Health and Safety Regulations 1996 (hereinafter referred to as “the Act”). The Tasmanian legislation, unlike mainland states, does not have “mines specific” OH&S legislation. This means that the same standards apply to all workplaces, regardless of the danger or complexities of the tasks carried out. This would be an acceptable legislative infrastructure, provided the legislation could be drafted to be applicable to all industries, but mining, in my view, is not an industry which readily falls under a general umbrella of workplace health and safety.*

29. The coroner went on to observe at paragraph 377 *“that the lack of regulatory framework is to be compared with states such as Queensland, Western Australia, New South Wales and Victoria, all of which have mine specific regimes. It is notable that Queensland and Western Australia have effective regulations dealing with geotechnical and ground support aspects.<sup>151</sup> The regulations ensure that there is*

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<sup>17</sup> For details of this and other evidence justifying the retention of separate legislation see the submission of the CFMEU – mining and energy division.

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*appropriate geotechnical input into the planning and development phases of mining. They provide models of practical standards that can be adopted to ensure risk management systems for mines. It has been suggested that the Queensland and New South Wales models are the most advanced.” Drawing on this he recommended that whilst “the current legislation, the Workplace Health and Safety Act 1995 is applicable to mining, it is a more generalized approach while mining requires more industry specific legislation due to the nature of its operations.”<sup>18</sup>*

30. The adequacy of mining legislation in Tasmania and the role of Workplace Standards Tasmania were also part of the terms of reference of the Independent Investigation into the Anzac Day rockfall at the Beaconsfield Mine and its findings (when released) may provide further evidence on this decision. What is clear is that mining represents a high hazard industry with very particular characteristics that require specialist attention (note: other countries to maintain this separation include the USA). We are aware of no evidence that integration has improved OHS in mining.
31. It should also be noted that a National Mine Safety Framework Steering Group has been operating for some years with the goal of securing nationally consistent mining legislation and is currently undertaking drafting work in this regard. It should also be noted that in recent years mining legislation has been amended to make it more consistent with modern OHS laws, including the incorporation of general duty provisions. Further, specifically responding to a query as to whether the maintenance of separate trajectories of legislative development the Steering Group stated in its submission to this review “*it should be noted that these drafting instructions can be amended to address any areas of inconsistencies between them and the Model Occupational Health and Safety Act. Therefore, the NMSF Steering Group does not perceive a risk of legislative inconsistencies between mining and other industries.*”<sup>19</sup> In sum, the risk of inconsistencies is not seen to justify subsuming mining within model OHS legislation.
32. The ACTU believes a separate regulatory structure should be retained with regard to mining. This would not prevent a level of cooperation between the respective OHS and mining inspectorates – and this should be encouraged. But legislative integration is neither necessary nor the best way to promote such cooperation (rather parallel provisions in OHS and mining legislation could facilitate exchange on information and regular meetings of representatives of inspectorate managers and operational inspectors representing different jurisdictions).
33. The ACTU believes that similar arguments hold for other industries where separate industry legislation presently exists and where there are existing moves to national consistency such as the maritime industry.

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<sup>18</sup> Report by Coroner D J Jones in the matter of Inquests into the deaths of three miners at Renison Bell Tin Mine in Tasmania, handed down Wednesday 21st May 2008.

<sup>19</sup> Submission of the National Mine Safety Framework Steering Group.

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34. The maritime industry is recognised globally as one of the most dangerous industries for workers [seafarers]. The dangers of working at sea are not limited to ‘normal’ occupational hazards. Seafarers work on vessels that are constantly in motion on multiple planes. Additionally ships have the added risk of sinking if the watertight integrity of the vessel is significantly compromised.
35. The Maritime Industry is regulated by International Conventions of the IMO that impinge on every aspect of work on board ships. Australia is a signatory to many if not all of these Conventions. Compliance with the IMO Conventions is secured principally by the vehicle of the Navigation Act and Marine Orders. These are administered by the Australian Maritime Safety Authority [AMSA]. AMSA is also the inspectorate for the OSH(MI). Any other set of regulatory arrangements would be potentially problematic for Australia’s compliance with international requirements.
36. Notwithstanding the above:
- Under OSH(MI) the relevant unions DO NOT have the right to prosecute. Prosecution is for the inspectorate, AMSA, and has only rarely been used;
  - Under OSH(MI) the relevant unions DO NOT have right of entry – indeed the ISPS Code has restricted the traditional level of access enjoyed by Australian union officials;
  - OSH(MI) places primary responsibilities [duty of care] on the operator [not the employer] – this is because the operator is very often the person in control of the vessel and not the employer who may just be a manning agent – see ss.4 & 11 – 14 OSH(MI);
  - OSH(MI) does provide for OHS committees but these are not currently obligatory [query what will be the case if and when Australia ratifies the ILO Maritime Labour convention 2006];
  - OSH(MI) does not specify particular defences for employers accused of breach of OSH(MI).
37. However:
- OSH(MI) is administered by the Seacare Authority which has tripartite representation; and
  - The OSH(MI) Act is unique in that it is administered co-jointly with the Seafarers Rehabilitation and Compensation Act by the Seacare Authority. This model gives the policy body oversight of both ends of the problem of occupational injury and allows for ready response to emerging problems.
38. The ACTU strongly supports the retention of separate legislation for the offshore oil and gas industry. OHS in the offshore oil and gas industry is regulated under Schedule 3 of the *Offshore Petroleum Act 2006* (OPA) which has just come into effect (replacing the *Petroleum (Submerged Lands) Act 1967*, where OHS was covered by Schedule 7). The same principles outlined in relation to shipping also apply to the offshore oil and gas industry, including the fact that it has its own regulator, NOPSA.

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39. NOPSA is unique in Australia in that its OHS arrangements are managed through a safety case model. The Maritime Unions have major concerns with the safety case model (essentially a deregulated, non transparent and non participative model). We have no reason to be confident that union concerns will be addressed through the current NOPSA review process. In that context, harmonization may be a vehicle through which to establish an OHS regulatory model in the offshore oil and gas industry that is consistent with the models applying to all other sections of the Australian workforce.
40. In addition, the offshore industry is also strongly linked to international offshore oil and gas practices supervised under such bodies as the International Regulators Forum.
41. Having stated our in-principle position i.e. these two separate pieces of legislation should be retained with their independent regulators (Seacare and NOPSA) the ACTU would be prepared to support the harmonisation of these pieces of legislation based on a model law, provided the harmonisation revolved around the highest standards of regulatory practice as proposed by the ACTU. It should be noted that both the OHS(MI) Act and Schedule 3 of the OPA have been modeled on the Commonwealth OHS Act, so there is already a high degree of harmonisation.
42. In relation to the stevedoring aspects of the maritime sector, OHS is essentially regulated through State and NT OHS legislation. However, when stevedoring workers go on board vessels at wharves to participate in the loading or unloading of vessels eg to operate cranes or to undertake lashing work, aspects of their safety becomes regulated by AMSA under the provisions of the *Navigation Act 1912* (Navigation Act) and Marine Orders issued under that Act (if the vessel is one covered by the Navigation Act). If the vessel is not one covered by the Navigation Act, then a combination of State/NT OHS law and State/NT Maritime Safety laws cover the vessel and therefore, aspects of worker safety.
43. The interface between the operation of the Navigation Act on the one hand, and the operation of the OHS(MI) Act and Schedule 3 of the OPA, as far as the Commonwealth jurisdiction is concerned, has been managed through a set of MOUs between the regulators. Similarly, the interface between the Navigation Act and State/NT OHS laws and between the Navigation Act and State Maritime safety laws has also been addressed through MOUs between regulators.
44. The Maritime Union of Australia has the support of the Rudd Government for national regulation in relation to stevedoring OHS, and this process is proceeding under the auspices of the Australian Safety and Compensation Council (ASCC). This itself is a harmonisation process, as we are seeking a nationally consistent application of OHS standards for the entire Australian stevedoring workforce. While the current approach favoured is to apply the national standard through the vehicle of State/NT OHS law, if national harmonisation resulted in some other model, our objective could still be attained, so the ACTU sees no inconsistency between harmonisation as a concept and our objectives for stevedoring.

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45. Returning to the situation in shipping, it is important to note that there is an Australian Transport Council (ATC) decision of 2 May 2008 to undertake further work towards implementing a single national approach to maritime legislation for consideration in July 2008. ATC also approved more streamlined arrangements for implementation of national marine safety standards. The ACTU understands that considerable progress is being made in discussions between the Commonwealth and States/NT towards getting in-principle agreement to a model to achieve a single national approach to maritime safety at the next ATC meeting on 25 July 2008 (that would essentially result in a transfer of State powers so that national maritime safety for commercial vessels was administered under the Navigation Act, and we expect, AMSA as the beefed up regulator).
46. Subject to satisfactory progress towards that objective, this should have the effect of bringing many more vessels under the maritime safety responsibility of AMSA and the Navigation Act, essentially only leaving recreational vessels under the responsibility of State Maritime safety regulators. The ACTU anticipates that in time, this outcome will result in a much higher degree of harmonisation between the operation of the OHS(MI) Act and the Navigation Act, and will reduce the role of State Maritime safety regulators, which has been the source of a considerable amount of disharmony in vessel safety to date.
47. Given the strong interface between OHS legislation (at both Commonwealth and State levels) and Maritime safety legislation (such as the Navigation Act and State/NT Maritime Safety Acts) **and the continuing need for both types of legislation**, there will remain a need for MOUs and other arrangements to assist regulators administer the interface. However, it is important for all parties to understand that OHS harmonisation, no matter how pure the model, will not result in an either-or situation in shipping – there will still be a need for both types of legislation – OHS legislation and maritime safety legislation. In other words, even a harmonisation model resulting in a single national OHS Act would not obviate the need for a Navigation Act and AMSA as a regulator (and to the extent that there are still vessels that do not fall under a single national marine safety jurisdiction, a need for State/NT Marine Safety Acts and State Regulators).
48. Beyond the issue of separate industry legislation there is the question concerning industry specific codes of practice and regulations found within OHS legislation. At present, despite some level of cooperation between state jurisdictions there are sometimes significant differences in regulations and codes between states and between states and the federal jurisdiction. While some differences may be inevitable (for example due to different work methods in relation to forestry for example) attention needs to be given to industry-specific regulations where they entail different standards of protection. The long haul transport industry provides an example of this. The NSW OHS Fatigue Regulation in long haul trucking sets a superior standard to those found in a number of other jurisdictions.<sup>20</sup> Moreover, as

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<sup>20</sup> NSW Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005

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detailed by the Transport Workers Union submission to the Comcare Review<sup>21</sup> it sets standards that are superior to the existing federal code relating to fatigue and that being developed by the National Transport Commission.

49. In a similar vein a number of state jurisdictions have introduced regulations providing for the better protection of clothing outworkers (or more generically applying to outworkers in the case of South Australia). This includes a mandatory code and contractual tracking mechanisms (discussed below in relation to supply chain regulation).
50. Any coordination of regulations should ensure that this entails a leveling up of OHS standards by adopting the highest standard not a compromise/trade off or lowest common denominator approach. To do otherwise would be to make national uniformity a tool for lowering OHS standards across the community.
51. In this regard it is also absolutely critical that jurisdiction-shopping is not permitted in a way which (like the current arrangements regarding moving to Comcare) effectively enables employers to adopt regulations entailing a lower standard. This has already occurred, for example, with regard to transport companies moving into the Comcare scheme and the ACTU is concerned about similar developments in construction and other industries. It should also be noted that the movement of employers into Comcare, far from actually rationalizing legislative coverage, often results (with employers using multi-tiered subcontracting arrangements as is common in construction, road transport and the like) in dual inspectorate coverage (Comcare and state/territory) of the same work-site. This is a more complex situation with implications for OHS management and worker involvement as well as inspectorate effectiveness. Joint ventures (common in construction and also found in other industries) and complex corporate structures can further complicate the question of jurisdiction as well as providing avenues to manipulate or limit union access to the workplace.
52. A case of a CFMEU official who sought to investigate a suspected breach of the *Occupational Health and Safety Act 1989* (ACT) at the National Portrait Gallery site illustrates some of the problems just mentioned. The suspected breach involved a subcontractor and an employee of John Holland Pty Ltd ("John Holland"). John Holland (a self-insurer under Comcare and subject to provisions of the *Occupational Health and Safety Act 1991* (Cth)) refused to give the official documents relating to bullying and harassment at the workplace. John Holland claimed that the *Occupational Health and Safety Act 1989* ("the ACT Act") did not apply to them in any way due to the application of section 4 of the *Occupational Health and Safety Act 1991* (Cth) ("the Commonwealth Act").
53. It was and remains the position of the CFMEU that the ACT Act still applies to John Holland in their capacity as the principal contractor in control of a workplace. John Holland further claimed that policies addressing violence, bullying and harassment in the workplace were employment policies rather than site policies and

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<sup>21</sup> Submission of Transport Workers Union, Federal Office, to the Comcare Review, 2008.

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that CFMEU Authorised Representatives cannot have access to such documents. The CFMEU position is that such policies are usually covered in a site-specific induction and cover site wide procedures. The ACT Act includes an obligation for John Holland to provide such policies on a site basis.

54. The ACTU is aware of other cases similar to that just mentioned. Model OHS legislation needs to give consideration to issues of jurisdiction ‘shopping’ and how this also entails standard shopping (and how the recommendations of this Review will ‘link’ to those resulting from the Comcare Review).
55. Any worker currently not covered by state or territory OHS law should be covered by the model OHS laws. Police are not considered “employees” but are “holders of public office”. To provide clarity that police are captured by the model OHS Act, the ACTU supports the Police Federation of Australia’s submission that S134 NSW OHS Act 2000 be the model clause:
56. “To avoid doubt, a police officer is, for the purpose of this Act:
- (a) an employee of the Crown, and
  - (b) at work throughout the time when the officer is on duty, but not otherwise.

### 2.2 WORK AND NON-WORKPLACES

#### *Public safety*

57. In many instances the public visit workplaces on an irregular or regular basis. In some cases it is impossible to isolate considerations of public health and safety from occupational health and safety. Examples include persons riding on a ski chair lift, visiting a fair or shop, or near a building where asbestos removal is occurring. In other cases, members of the public are placed at risk even when not present at a workplace. Examples include persons using and nearing highways where potentially dangerous workplaces are present (ie trucks) or persons passing a construction site. Further, some locations are workplaces at some points and non-workplaces at other times (such as homes where home-based work occurs). In these circumstances the capacity of model of OHS legislation to cover public health and safety as well as occupational health and safety (already found in the laws in Queensland and Victoria, for example) is essential.
58. The ACTU would also make the point that systems of work can also adversely impact on the health, safety and wellbeing of workers and customers, clients or members of the public simultaneously. Unsafe systems of work in road transport place other road users at risk while there is also international evidence linking reduced staffing levels in hospitals to increases in error and infection rates.<sup>22</sup> These issues require further recognition.

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<sup>22</sup> For a summary of this evidence see Quinlan, M. and Bohle, P. (2008), ‘Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work’, *International Journal of Health Services* 38(3): 489-525.

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59. Following on from the last points a ‘duty to other persons’ should be incorporated into OHS legislation. It needs to deal with health as well as safety risks.

### *Shield Of The Crown*

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

## 2.3 RESPONDING TO CHANGE

### *Work Organisation*

61. Over the past 25 years the organisation of work has undergone profound changes in Australia and internationally.<sup>23</sup> These changes include:

- The growth of more attenuated production/service delivery systems based on elaborate subcontracting networks or supply chains, franchising or licensing agreements;
- Repeated rounds of downsizing and related forms of organizational restructuring resulting in a reduction in staffing levels, job tenure and job security;
- Use of more intensive work regimes, including ‘lean production’, ‘business process re-engineering’ and the like.
- Increased use of both direct hire and indirect hire (labour hire) temporary, fixed-term contract, on-call and casual workers; and a commensurate decline in permanent employees.
- Increased use of independent contractors and micro-businesses often as a result of outsourcing and franchising arrangements as well as the deliberate ‘conversion’ of employees to self-employed contractors;
- A growth in part-time employment (both temporary and permanent);
- Growing relocation of work activities to the home (on both a part and full-time basis) or transient locations (including vehicles or temporary workplaces such as temporary call centers);

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

- Increased female participation in the workforce raising issues about work/family balance including childcare;
- Growth of young workers (including children) undertaking part-time (and overwhelmingly casual) work.
- An ageing population (raising issues about changes to work ability especially in the context of work intensification and where older

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<sup>23</sup> For a recent summary of the labour force in Australia see Australian Bureau of Statistics (2008), *Forms of Employment, Australia, Nov 2007*, Canberra

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workers made redundant having to take on temporary jobs or self-employment).

- A growing use of overseas workers, both permanent migrants and temporary foreign born workers (foreign students studying in Australia, backpacker/tourists and guestworkers under the s457 visa scheme).

63. There is evidence that a number of these changes, and perhaps most, present challenges for OHS. For example, there is now extensive international evidence that job insecurity/downsizing and contingent work arrangements are associated with a significant deterioration in OHS.<sup>24</sup> A growing body of evidence also indicates that these same changes are undermining OHS laws.<sup>25</sup>

64. In other areas the evidence is more fragmentary but sufficiently disturbing to warrant attention. For example, the challenges posed by an ageing workforce have received little consideration even though these could be profound, especially when changes in work processes such as work intensification and the failure to modify work performance and design to take account of age are considered.<sup>26</sup> The combined effect of workforce ageing and changes in employment conditions such as the growth of precarious employment need attention.<sup>27</sup> There is evidence that the health and wellbeing of older workers is more adversely affected by downsizing.<sup>28</sup> Mature or older workers losing their jobs are more likely than younger workers to remain unemployed for longer periods and suffer the well documented adverse health affects associated with joblessness – or to obtain jobs that are markedly inferior in terms of working conditions than their previous employment. The latter include insecure jobs that result in intermittent bouts of work and unemployment, which recent research suggests has a complex set of adverse health effects including those linked to poverty and psychological adjustment problems.<sup>29</sup>

65. As an Australian study demonstrates<sup>30</sup>, for mature workers the dichotomy between the health benefits of having a job as compared to being unemployed that has informed policy-makers is too simplistic and ignores the serious health effects of

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<sup>24</sup> This evidence is summarised in the submission of Johnstone, Bluff and Quinlan to this review. See also other references in the ACTU submission.

<sup>25</sup> *Ibid.*

<sup>26</sup> Griffiths, A. (2007), 'Healthy work for older workers: Work design and management factors' in Loretto, W. Vickerstaff, S. & White, P. eds. *The future for older workers: New perspectives*, Policy Press, Bristol, 121-137.

<sup>27</sup> Wegman, D. & McGee, P. eds. (2004), *Health and Safety Needs of Older Workers*, National Academic Press, Washington.

<sup>28</sup> Gallo, W. Bradley, E. Falba, T. Dubin, J. Cramer, L. Bogardus, S. & Kasl, S. (2004), Involuntary job loss as a risk factor for subsequent myocardial infarction and strokes, *American Journal of Industrial Medicine*, 45: 408-416.

<sup>29</sup> Clarke, M. Lewchuk, W. de Wolff, A. King A. (2007) "This just isn't sustainable": Precarious Employment, Stress and Workers' Health', *International Journal of Law and Psychiatry*, 30: 311-326; and Malenfant, R. LaRue, A. & Vezina, M. (2007), 'Intermittent Work and Well-Being: One foot in the door, One foot out', *Current Sociology*, 55(6): 814-835.

<sup>30</sup> Broom, D. D'Souza, R. Strazdins, L. Butterworth, P. Parslow, R. & Rogers, B. (2006), 'The lesser evil: Bad jobs or unemployment? A survey of mid-aged Australians', *Social Science and Medicine*, 63: 575-586.

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poor quality and insecure jobs. While part-time or temporary work and self-employment may be seen to assist older workers to extend their working careers or the transition to retirement, there is no compelling evidence that this is the norm or that flexible work arrangements have been designed to achieve this outcome. One general consequence of an increase in flexible work is shortened job tenure. While the inexperience of younger workers has been seen to expose them to particular risk, a recent Canadian study found short job tenure was a risk factor for all workers and was actually highest for older workers.<sup>31</sup> Further, the growth of multiple jobholding amongst part-time and temporary workers can suggest a mismatch (where a second job is used to offset inadequate income in one job) rather than an accommodation. Older workers holding insecure or temporary jobs may experience immediate financial stress due to family and other commitments<sup>32</sup> and will find it difficult to plan/budget for their retirement (with consequent effects on the community).

66. From a legislation and policy perspective the foregoing raises major issues. For example, how to ensure 'safe systems of work' accommodate to the changes in work ability amongst older workers and how to safeguard older workers from the more profound effects of downsizing/restructuring on their health and wellbeing of older workers? Similarly, the Canadian study of short job tenure and injury indicates agencies will need to focus on all short job tenure workers in terms of induction and training (rather than to concentrate on younger workers as has been often the case in the past).
67. The foregoing discussion of the challenges posed by changes to work is by no means exhaustive. Nonetheless, the changes just described require more explicit recognition in modern OHS legislation and associated guidance material so that employers and other duty-holders better understand their obligations.
68. For example, research carried out for WorkCover NSW<sup>33</sup> indicated that most employers failed to appreciate that downsizing or organisational restructuring commonly entailed changes to work processes (staffing levels, workloads, range of job tasks, communication, training and supervision) that could affect OHS, and as such required risk assessment and appropriate management. Indeed, there is now a considerable weight of international evidence to suggest downsizing and job insecurity result in adverse effects on OHS.<sup>34</sup> Similarly, misunderstanding of duties under OHS laws is common in relation to subcontracting, franchising, labour hire and analogous relationships (such as share farming or the activities of registered training providers).

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<sup>31</sup> Breslin, F. & Smith, P. (2006). Trial by fire: a multivariate examination of the relation between job tenure and work injuries', *Occupational and Environmental Medicine*, 63: 27-32.

<sup>32</sup> Aronsson, G. Dallner, M. Lindh, T. & Goransson, S. (2005), Flexible pay but fixed expense: Personal financial strain among on-call employees, *International Journal of Health Services*, 35(3): 499-528.

<sup>33</sup> Quinlan, M. (2003), Developing strategies to address OHS and workers' compensation responsibilities arising from changing employment relationships, Research Report to the WorkCover Authority of New South Wales.

<sup>34</sup> Bohle, P., Quinlan, M. and Mayhew, C. 2001 'The Health and Safety Effects of Job Insecurity: An Evaluation of the Evidence', *Economic and Labour Relations Review* 12(1):32-60.

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69. As a result, model legislation and the attached explanatory notes should make it clear, for example, that in subcontracting and labour hire arrangements, there are multiple duty holders. It is also important to identify the broad scope of activities that fall under the rubric of work organization and indicate that employers and other duty holders need to recognize the changes to work organization that commonly arise from downsizing, restructuring and the like. Employers also need to be made aware of their obligations to younger workers, short tenure workers and older workers.
70. In a similar vein the legislation also needs to clarify the duties of employers and others in relation to home-based work (including home-care as well as cases where the home is an adjunct location to normal work activities or the centre of work), remote, mobile and transient workplaces. As far as the ACTU is aware these work arrangements are not recognized in any general duty provisions and nor is there systematic and comprehensive guidance material to explain and assist duty holders in meeting their obligations. These types of work arrangements are no longer exceptional and require explicit recognition especially given evidence of misunderstanding/confusion amongst those responsible.<sup>35</sup>
71. The growing use of temporary foreign workers also raises critical issues because these workers often appear less well-aware of their OHS rights and there is evidence they are more vulnerable to exploitative practices that can expose them to great risk.<sup>36</sup> There is evidence that guestworkers under the s457 visa scheme are in particularly vulnerable position because their position depends on the nomination of an individual employer (who may revoke this at any point and has additional power in terms of their capacity to influence prospects of obtaining permanent residency) and some recruitment (including that by some overseas labour hire firms) appears to have less than scrupulous in ensuring the workers have the requisite skills.<sup>37</sup> To this can be added illegal immigrants who are, if anything, in an even more difficult situation when it comes to accessing their rights under OHS laws.<sup>38</sup> Affiliated unions of the ACTU have addressed a number of tragic cases involving both s457 visa holders and illegal immigrants. Their capacity to do this has been inhibited by some employers who have used s457 guestworkers as part of a union avoidance

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<sup>35</sup> Quinlan, M. (2003), Developing strategies to address OHS and workers' compensation responsibilities arising from changing employment relationships, Research Report to the WorkCover Authority of New South Wales.

<sup>36</sup> Guthrie, R. & Quinlan, M. (2005), "The Occupational Health and Safety Rights and Workers Compensation Entitlements of Illegal Immigrants: An Emerging Challenge" *Policy and Practice in Safety and Health*, 3(2): 69-89.

<sup>37</sup> Toh, S. & Quinlan, M. (forthcoming), "Protecting a new class of guestworker: The occupational health and safety rights and entitlements of s457 visa holders in Australia" *International Journal of Manpower*. See also a recent Victorian prosecution with regard to serious breaches of OHS laws affecting s457 visa holders (with further cases pending) *Herald Sun* 18 June 2008, p12 and Worksafe Victoria website.

<sup>38</sup> Seixas NS, Blecker H, Camp J, Neitzel R. (2008) Occupational Health and Safety Experience of Day Laborers in Seattle, WA. *Am J Industr Med*; Cho, C., Oliva J, Sweitzer E, Nevarez J, Zanoni J, and Sokas RK A workers' center approach to rights, health & safety. *Journal of Occupational & Environmental Medicine* 2007. 49(3):275-281.

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strategy as well as restrictive rules relating to right of entry in a number of jurisdictions (such as the federal jurisdiction).

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

### *Emerging Hazards and Risks*

73. Changes to work organisation (including those affecting psychosocial risks) and other changes, such as the proliferation and use of chemicals in industry, new technologies (such as nanotechnology), increased reliance on foreign born workers (including temporary guestworkers), and ageing population and the increased use of elaborate supply chains bring with them new hazards and risks. Emerging hazards and risks have been the subject of recent reports in the European Union, New Zealand<sup>39</sup> and elsewhere as governments try to assess and grapple with these challenges. As noted elsewhere in this submission (Chapter 9) it is vital that Australia has the infrastructure and research capacity to scope the extent of problems to guide the development of new standards and other policy interventions.
74. These changes require consideration of new standards and regulatory measures as well as resourcing. For example, the proliferation of small and even mobile or transient workplaces requires not only recognition in general duties but also changes to resourcing of enforcement practices. Supply chain regulation (discussed elsewhere) provides another device to aid this process. For example, in the European Union new regulatory devices have been introduced with regard to hazardous chemicals that try to address subcontracting networks and smaller workplaces (REACH). These initiatives warrant attention in the Australian context.
75. The ACTU wishes to stress that these examples represent only the tip of a large raft of potentially profound problems requiring considering not only in the introduction of model OHS legislation but also in its subsequent development and evolution.

## 2.4 DEFINITIONS

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<sup>39</sup> Bohle, P. Cooke, A. Jakubauskas, M. Quinlan, M. and Rafferty, M (2008) The Changing World of Work and Emergent Occupational Disease and Injury Risks in New Zealand: A benchmark review prepared for National Occupational Health and Safety Advisory Committee (NOHSAC), Wellington.

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### Work

76. Limiting definitions in relation to work have long presented problems regard the application of OHS legislation in at least some jurisdictions (for example, the problems posed by terms like ‘at the employers place of work’ when considering an owner/driver truck on the highway engaged by that firm). This issue has been exacerbated by recent changes to work organisation. Widespread use of outsourcing, the use of information technology (computers, internet, mobile phones etc) and other business practices have resulted in profound changes to the location of work.<sup>40</sup> This includes the movement of work to the home, transient or mobile workplaces. It is a matter of principle and a common sense response to the changing nature of work that all workers (and others including the general public) be protected by the health and safety law regardless of the type of work they perform or where they perform it. It is not enough that the law be flexible enough to incorporate these workers, it must ensure their inclusion and protection.
77. For example, the broad definition of workplace in the SA OHSWA 1986 enabled OHS inspectors to gain access to a ship where others have failed. The ship, the *Destiny Queen*, is moored just outside the SA territorial waters near Port Lincoln. It grows abalone in its hull using foreign workers employed from China and because there is no right of entry of unions and all Government departments have found it very difficult to check the standards for these workers who have no rights to go ashore, only the OHS inspectors have been able to check conditions.
78. The ACTU recommends work is defined without reference to where that work occurs. The definition of worker must embrace all persons performing work regardless of “employment relationship” and regardless of industry/sector. eg. Victoria OHSA 2004 s. 5. The definition should include independent contractors, students undertaking work experience programs, outworkers and volunteers as well as paid employees (see definition in the ACT Work Safety Bill 2008).
79. Confusion and misunderstanding about the meaning of the terms ‘hazard’ and ‘risk’ is widespread. The model legislation should define both these terms but in broad ways that in no way narrows the application of the legislation (such as defining the evaluation of risk principally with reference to costs).

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<sup>40</sup> Quinlan, M. and Bohle, P. (2008), ‘Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work’, *International Journal of Health Services* 38(3): 489-525.

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

*“It is often suggested that OHS should be the top priority. While this is a worthy ideal every organisation should strive for, the reality is that making a profit will always be the highest priority of a business.”*

(Australian Industry Group, Workplace Health and Safety, Autumn 2008)

#### 3.2 CONTROL

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

#### 3.3 WORK RELATIONSHIPS

83. A Duty of Care is also owed by:
84. Controllers, designers, manufacturers, importers and suppliers of: goods and substance, plant and premises, directors, managers, principal contractors and up through the supply chain including purchasing, hire and procurement.
85. As stated, all duty holders will have concurrent and overlapping duties and they must not be able to abrogate or delegate their duties under the Act.
86. Some use of hold harmless clauses has been made in the labour hire industry (and possibly elsewhere) and has aroused the concern of a number of state inquiries into OHS or related matters (such as labour hire). These clauses represent an attempt to defeat the purpose of OHS legislation in terms of the non-delegability of duties. Model OHS legislation should explicitly prohibit or declare void such clauses in

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contracts governing subcontracting or labour hire arrangements in as much as they purport to apply to matters relating to OHS.

87. All duty holders must be subject to the consultation and participation clause in the model OHS law. Given the extensive use of contractors and temporary workers explicit recognition of their inclusion needs to be given in consultation and participation provisions. Compliance with these provisions should also be monitored by OHS inspectors. At present, OHS inspectors seldom make more than a very cursory consideration of participation and consultation procedures during workplace visits (let alone whether contractors and temporary workers have been adequately involved).
88. The performance of work throughout contemporary market economies increasingly occurs in the context of extensive contract networks, such as supply chains. These supply chains are regulated by means of private contractual “governance structures” in contrast to the more traditional public regulation by way of “legislation”. There is a growing recognition of the need to regulate supply chains both at the national and international level, especially in the case where elaborate subcontracting networks have compromised OHS standards.<sup>41</sup>
89. Vulnerable workers are often engaged in precarious employment within these supply chains, in situations which risk their health, safety and welfare such as where client pressure or completion bonuses cause unsafe systems of work. As with supply chains/outourcing more generally, there is extensive Australian and international evidence attesting to these problems.<sup>42</sup> In Australia, particular jurisdictions have introduced regulatory protection (including supply chain regulation) with regard to two vulnerable groups, namely clothing outworkers and long haul truck drivers.<sup>43</sup> In part, these regulations articulate how duties are to apply in a supply chain. The ACTU believes that there is an urgent need to extend these forms of protection to cover these and other vulnerable workers on a national basis.

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<sup>41</sup> EMCONET 2007 *Employment Conditions and Health Inequalities: Final Report to the WHO Commission for the Social Determinants of Health*, Employment Conditions Knowledge Network. <http://www.emconet.org/EMCONETREPORT.pdf> [accessed 6/4/08]; James, P., Johnstone, R., Quinlan, M. and Walters, D. (2007) Regulating supply chains for safety and health, *Industrial Law Journal*, 36(2): 163-187; and Nossar, I. (2007) ‘The scope for appropriate cross-jurisdictional regulation of international contract networks (such as supply chains) presentation to ILO/international meeting of labour inspectors, Toronto.

<sup>42</sup> Quinlan, M. and Bohle, P. (2008), Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work *International Journal of Health Services* 38(3): 489-525.

<sup>43</sup> Nossar, I., Johnstone, R. and Quinlan, M. 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*, 2004, 17(2): 1-24; James, P., Johnstone, R., Quinlan, M. and Walters, D. (2007) Regulating supply chains for safety and health, *Industrial Law Journal*, 36(2): 163-187; and Rawling, M. (2006), ‘A generic model of regulating supply chain outsourcing’ in Arup, C. Gahan, P. Howe, J. Johnstone, R. Mitchell, R. and O’Donnell, A. eds. *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 420-441.

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90. Duties must be imposed upon the effective business controllers (and other powerful participants) in these supply chains for the purpose of appropriately harnessing these private contractual 'governance structures' in order to improve occupational health and safety for these vulnerable workers. As evidence attests,<sup>44</sup> only by addressing the top of supply chains (where economic power tends to reside) can the root causes that give rise to OHS problems be addressed.

### 3.4 DUTIES OF EMPLOYERS

91. Various duties and duty holder obligations cannot be delegated. In instances where duties between duty holders operate concurrently and overlap the primary duty to ensure worker health and safety is protected must reside with the employer.

92. The employer must be the primary duty holder at work. It is the employer who controls the budget, gives directions and allocates resources, so is thus best placed to control health and safety at work.

93. The employer/employee relationship remains the predominant employment relationship in Australia with 61%<sup>45</sup> of workers in traditional full-time or part-time work and a further 22% in casual employment. It is appropriate to recognise this in law; to do otherwise would have the effect of abrogating the employer's obligations to other duty holders.

94. OH&S duties should be applicable to employment relationships in a modern labour market, increasing the protection afforded to all types of employment categories.

95. Contractors, labour hire personnel, volunteers, outworkers, apprentices/trainees and other persons performing work – should be afforded the same level of protection and rights as conventional workers.

96. Duties on the employer must include:

- ensuring the health, safety and welfare of all workers; and others involved in the workplace
- providing and maintaining a healthy work environment
- providing and maintaining safe and healthy plant
- ensuring safe use, handling and storage of substances
- ensuring safe and healthy systems of work

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<sup>44</sup> James et al 2007 Regulating supply chains for safety and health, *Industrial Law Journal*, 36(2): 163-187

<sup>45</sup> In November 2007, there were 10.4 million employed people, aged 15 years and over. Of these, 61% (6.3 million) were employees (excluding owner managers of incorporated enterprises (OMIEs)) with paid leave entitlements, that is, they were entitled to paid sick and/or paid holiday leave. Of the remaining employed people: 2.2 million were employees (excluding OMIEs) without paid leave entitlements (a proxy for casual employees), 1.2 million were owner managers of unincorporated enterprises (OMUEs), 674,100 were OMIEs in ABS 6359.0 - Forms of Employment, Australia, Nov 2007

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- providing adequate training and supervision to ensure health, safety and welfare and an obligation to ensure health and safety representatives can attend training at a training provider of their choice
- providing adequate facilities for the welfare of workers at any workplace under the management and control of the employer
- monitoring health and safety
- reporting injuries/illnesses or dangerous incidents to the inspectorate
- systematically addressing hazards
- embedding OHS in the management of work
- consult health and safety representatives, workers and unions about all OHS matters
- notify regulators of all workplace incidence

97. The ACTU is aware of situations where bonus payment systems contain a penalty provision that deducts a multiple of the bonus calculated for that day if the worker is absent, including authorised absence related to sickness. Such penalty provisions constitute an inducement for workers to attend work even when they are ill and their attendance could exacerbate their illness or pose a danger to themselves or other workers. These requirements are inconsistent with an employer meeting their general duties under OHS legislation and the model legislation or its attached explanation should make this point or explicitly prohibit such provisions.

98. A number of state OHS laws currently require employers to report workplace injuries or potentially dangerous occurrences at their workplaces. However, the level of reporting is by no means comprehensive in any industry and some (such as agriculture) are poor in this regard. There have also been instances of disputed interpretation between the inspectorate and employers as to what is reportable. Reporting incidents is vital to the effective operation of OHS legislation. For example, reports of dangerous incidents (even when no injuries result) can provide the inspectorate with information to warrant further investigation of a workplace (the reporting process will also reinforce the importance of taking account of 'near misses' as well as injuries to the employer). Model OHS should therefore include requirements for the reporting of all injuries/diseases as well as dangerous incidents (including near misses). These requirements should be consistent, sufficiently broad in scope and defined. Incident reporting should be the subject of education programs and strategic auditing, with failure to report being treated as a serious offence.

99. Examples in existing law:

- NSW OHSA 2000 – s.8
- SA OHSWA 1986 – s.19

### 3.5 DUTIES OF WORKERS AND OTHERS

100. Worker duties should be limited to:

- taking reasonable care; and

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- not knowingly endangering others (or themselves) (eg Victorian OHS Act section 25)

101. The worker duties must include the right of workers to remove themselves from unsafe and unhealthy work (eg Tasmanian WHS Act s17). A clearly established right of workers to refuse work or withdraw from a work situation which they believe poses a imminent risk to their health, safety and wellbeing must be regarded as fundamental human right and central to model OHS legislation. The ACTU also notes with concern that while federal industrial relations legislation used to provide that workers taking such action should still be paid the Workchoices legislation reversed the onus of proof. No evidence was provided to support this change and any measure that might discourage workers from taking measures to protect themselves should be removed for industrial relations legislation.

### 3.6 APPOINTED PERSONS AND OFFICERS

102. A senior managers/director's duty of care to ensure the health, safety and welfare of workers and others cannot be delegated. The appointment by the employer of an appropriately trained OHS Officer to assist management in their OHS duties is encouraged, but this must not be regarded as a replacement for workplace Health & Safety Representatives (HSRs) or OHS committees. The OHS Officer must not be confused with a "corporate officer" or those deemed for the purposes of liability for a breach, to be in control. Liability must remain with the corporation and relevant corporate officer/Director.

103. There are some examples of appropriate provisions pertaining to OHS officers in existing law. The Qld WHSA 1996 Part 8 provides for the mandatory appointment of Workplace Health and Safety Officers (WHSO) in workplaces with more than 30 employees (the NSW Act contains non-mandatory provisions in this regard). The WHSO must receive training (with a program mandated in stages) and the legislation clearly enunciates that they do not assume the duties of managers/directors (unless the person also happens to hold the latter positions). Overall, the WHSO scheme appears to have been beneficial, bringing a person trained in OHS to workplaces where this was not previously the case. Smaller firms (ie those with less than 30 employees) have also appointed a WHSO (sometimes the owner/manager) because of the value seen in this. The Queensland WHSO provisions also make it clear that this position should not be confused with those of the employer (unless a person occupies both positions) or that of the Health and Safety Representative (HSR) and could serve as a guide for model national legislation.

104. The legislation of some jurisdictions (such as Tasmania) provides for the designation of a 'responsible office' in charge of a workplace with significant obligations under the Act (usually in relation to hazardous workplaces). In the case of Tasmania events at the Renison Bell Mine cast doubt on the value of this provision because subsidiary managers were appointed as the 'responsible officer' and the end result was that no-one was held responsible for decisions that led to the death of three mineworkers. Designating a person as responsible officer who does

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not have complete control of a workplace, and therefore overall budgetary control and powers to make decisions about OHS, defeats the purpose of such provisions. The ACTU would not support any similar provisions in model OHS legislation unless these problems can be overcome.

## **CHAPTER 4: ‘REASONABLY PRACTICABLE’ & RISK MANAGEMENT**

### 4.1 THE CONCEPT OF ‘REASONABLY PRACTICABLE’

105. The ACTU believes that there has been an amount of largely ideological hysteria in relation to the application of general duties provisions and in particular the absence of this clause (except as a ground of defence) in the NSW legislation. It has been suggested that the NSW imposes an overly onerous duty on employers. The ACTU rejects this suggestion. The NSW Act appears to have been targeted by employer groups for reasons beyond this particular provision. For example, both the NSW and Queensland legislation place a mandatory duty on employers with the use of reasonable practicality (or reasonable precaution in the case of the Queensland Act) only available as a defence.<sup>46</sup> This approach should be adopted in the model OHS legislation.<sup>47</sup> Duties should not to be limited by the phrase ‘so far as reasonably practicable’ in the model laws. This defence appropriately remains open to an employer in a court.

106. The ACTU notes that a number of eminent labour lawyers, familiar with recent case law, make similar points. For example, in his submission Neil Foster (University of Newcastle) states that reasonably practicable is a “*good standard for the defence under the model Act*”.<sup>48</sup> The ACTU also draws the attention of the Review to an opinion prepared by Breen Creighton, formerly a professor of labour law at Latrobe University and a partner with Corrs, Chambers Westgarth prepared for WorkCover Victoria where he correctly reflects that the “NSW Act establishes a series of general duties which, on their face, are unqualified. However, section 28 provides a defence to any proceeding for breach of these duties if the accused can prove that it was not reasonably practicable to comply with the provision. The prosecution still has to prove beyond reasonable doubt that there has been a breach of duty. It is then for the defendant to prove the section 28 defence, on the balance of probabilities. This suggests that the reverse onus in NSW is properly described as only a partial reversal.”<sup>49</sup> Finally but not least, the ACTU would draw the Review’s attention to the extensive and detailed submission of Professor Ronald McCallum, Dean of Law at the University of Sydney to the Stein Review into NSW OHS law. Professor McCallum reviews the case law on the application of the reverse onus of proof in the United Kingdom and Australia and finds this approach is not, as has

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<sup>46</sup> In their submission, Johnstone, Bluff and Quinlan state “*Queensland has an absolute duty, but provides the duty holder with defences (section 37): that the duty holder has complied with a relevant regulation, code of practice or, in the absence of relevant regulations/code, has taken reasonable precautions and exercised proper diligence (that is, has taken measure which are ‘reasonably practicable’) to prevent the contravention.*”

<sup>47</sup> For further evidence on these points see the submission of Unions NSW to this Review.

<sup>48</sup> Submission of Neil Foster to the National OHS Review.

<sup>49</sup> Breen Creighton, Reasonable Practicability and the Reverse Onus: Executive Summary of Discussion Paper prepared for the Victorian WorkCover Authority

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been suggested, in anyway unique to NSW or a breach of human rights. Nor in his view has it placed an onerous burden on employers. The ACTU urges the Review to carefully consider the weight of evidence provided by these authorities, especially when compared to the lack of substantial evidence that marks submissions critical of this approach. Further, a key piece of the alleged evidence cited with regard to the superiority of particular models of legislation is unconvincing. The suggestion that the Victorian legislation delivers superior OHS outcomes in terms of workers' compensation claims loses all credence once the different rules governing the making of claims is recognised (see the discussion of OHS statistics earlier in this submission where it was pointed out a claim in Victoria requires a 10 day absence from work – a much higher threshold than NSW or Queensland).<sup>50</sup>

107. The use of 'reasonably practicable' clauses has also been widely criticised in the European Union where it had been dropped from EU Directives following debates in 1987-89 when "*both the Commission and a big majority of the Member States and the European Parliament categorically chose to drop this clause, which had been a feature of Community health and safety directives.*"<sup>51</sup>

108. The ACTU notes with concern the submission of some employer groups such as the Australian Bankers Association which has called for greater freedom of employers to control risks but also the use of the term 'reasonably practicable' in offence provisions. This seems to distil to a request to give employers more flexibility about the decisions they make relating to OHS but with a diminished legal responsibility should these decisions prove to be wrong.

### 4.2 RISK MANAGEMENT

109. Risk assessment is a critical task in terms of implementing effective OHS management but our observation is that ignorance of what risk assessment entails is common and that efforts to undertake risk assessment are far from systematic even in critical situations. The ACTU notes that risk assessment has been the focus of attention with regard to a number of serious incidents.<sup>52</sup> A Risk Management clause must be included in OHS laws (eg Qld WHSA 1995 – s.27(A))

110. It should make it clear that the object is to eliminate the hazard, and if that is not possible, control it and require the duty holder to be proactive utilising a systematic process as distinct from an ad hoc reactive response. Consistent with OHS knowledge the risk management clause must specify the hierarchy of controls.

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<sup>50</sup> See submissions of the Master Builders Association, the Australian Chamber of Commerce and Industry and the Australian Industry Group that all uncritically cite workers' compensation evidence on this point to this Review. Since a number of submissions to the Comcare Review also dealt with comparative performance with regard to workers' compensation the report of this Review may also include relevant information on the difficulty of comparing jurisdictions on the basis of workers' compensation data.

<sup>51</sup> Cited in European Foundation for the Improvement of Living and Working Conditions, (2008), *Annual review of working conditions in the EU 2007-2008*, Dublin, p4.

<sup>52</sup> See for example media reporting of preliminary hearings of the coronial inquest into Anzac Day rock fall at the Beaconsfield mine. *Australian* 2,3 and 9 July 2008.

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It needs to be recognized that risk assessment will always entail social and normative judgements and as such the involvement of workers is essential (along with their particular knowledge of workplace hazards). Consultation must be part of the process at every stage and HSR's and their union must have access to risk management records.

111. The Risk Management process must be legally enforceable to ensure it is activated. The Model OHS Act should require duty holders to implement risk management principles which would involve <sup>(53)</sup>:

(a) assessing the risk (that is, the likelihood of the risk eventuating and the degree of harm if it did eventuate) to health, safety or welfare of workers and other persons (see above for our submission in relation to the scope of the general duties) arising from each hazard, as the basis for determining the measures necessary to eliminate or minimise risks;

(b) determining risk control measures, and giving preference to measures that eliminate or minimise risk at source, by redesign, substitution, isolation, engineering or organisational means;

(c) using safe work practices, administrative procedures, or personal protective clothing and equipment to supplement the risk control measures determined in (b);

(d) implementing the relevant risk control measures unless the cost, time and trouble of doing so would be *grossly disproportionate* to the risk as assessed and disputes to be determined by the OHS tribunal;

(e) maintaining, monitoring and reviewing risk control measures to ensure their effectiveness;

(f) giving the right to HSRs to demand detailed written justification of management decisions over disputed controls. Recourse to bland arguments of management prerogative will not satisfy such demands;

(g) HSRs and workers having the right to have their objections to the specific use of risk management controls recorded in risk management records;

(h) mandating regular documented HSR consultative review of risk management controls;

(i) the OHS tribunal having jurisdiction to determine disputes over risk management, consultation and controls.

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<sup>53</sup> Bluff, E. and Johnstone, R. (2005) 'The relationship between "reasonably practicable" and risk management regulation', *Australian Journal of Labour Law*, 18: 238.

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112. The Model OHS Act should clearly state that the requirements relating to risk management should be implemented in consultation with relevant workers, in order to fully understand risks and determine effective and suitable control measures. It should also specify that a life cycle approach to risk management should be adopted in which hazard identification, risk assessment and implementation or modifications of risk control measures are undertaken<sup>54</sup>:
- (a) Periodically in the ongoing operations of the business;
  - (b) In the planning, design, manufacture, procurement, construction and modification of work premises, plant, substances or materials for use at work;
  - (c) Before changes to work practices and systems of work are introduced;
  - (d) Prior to the shut down, decommissioning, dismantling or demolition of premises or plant;
  - (e) When new or additional information becomes available from an authoritative source; and
  - (f) When a hazardous exposure or incident, injury or illness, or adverse result of work environment monitoring or health surveillance indicate that risk control measures are inadequate.
113. Further guidance to assist duty holders carry out effective systematic OHS management should be set out in a code of practice and in other guidance material, which should (<sup>55</sup>):
- a. Address the development of the necessary knowledge, skills and experience for OHS risk management within organisations or the need to engage OHS specialists to lead and support this process.
  - b. Explain how different methods can be used, in different life cycle phases, to identify all foreseeable hazards; and should emphasise that the key purpose of risk assessment is to understand the nature of risks in order to make well informed decisions about suitable risk control measures; and
  - c. Provide guidance about the application of the ‘gross disproportion test’, and how the factors of cost, time and trouble are taken into account in determining risk control measures.

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<sup>54</sup> Bluff and Johnstone, 2005: 238.

<sup>55</sup> Bluff and Johnstone, 2005: 238-239. For a recent case highlighting the importance of having guidance material see *Inspector John Sibilant v Stowe Australia Pty Ltd under s8(1) of the OHS Act, 2000 [2008] NSWIRComm 119*,

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114. Providing guidance to risk assessment is especially important in the context of widespread outsourcing of activities (often involving smaller employers).<sup>56</sup>
115. The guidance would also address good practice and common pitfalls in risk management. These include the need for a rigorous process of information gathering with input from those working with or near the hazard about their concerns and when devising new control measures. Hazard/risk indicators and monitoring should be used to prompt reassessment of risks when controls are inadequate. There is a need for a clear focus on eliminating or minimising OHS risks - not risk estimation at the expense of risk control or transferring risk to manage the business risks/costs rather than sources of harm. Attention to a wide range of risks is also needed, including those arising in the organisation of work (restructuring, downsizing, hours of work, flexible work relationships).<sup>57</sup>
116. The model legislation should require that when undertaking a substantial risk assessment process in connection with a change in work processes or in response to other circumstances mentioned above the employer should notify the relevant inspectorate of this. The legislation should also require that inspectorates develop and implement programs for monitoring risk assessment undertaken, including targeted auditing and interviews with workers involved in the process.

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<sup>56</sup> *Ibid.*

<sup>57</sup> For a review of common pitfalls in risk assessment and a guide to good practice see Gadd, S., Keeley, D. & Balmforth, H., (2003), *Good practice and pitfalls in risk assessment*, prepared by the Health and Safety Laboratory for the Health and Safety Executive, Sheffield, UK. See also Bell, J. & Healey, N. (2006), *The causes of major hazard incidents and how to improve risk control and health and safety management: A review of the existing literature*, Health and Safety Laboratory, Harpur Hill, Buxton Derbyshire.

## **CHAPTER 5: CONSULTATION, PARTICIPATION AND REPRESENTATION**

### 5.1 DUTY TO CONSULT

117. Effective mechanisms for consultation and participation are a pivotal feature of modern OHS legislation (part of the Robens model and adopted in ILO Convention 155). Unions have long played a critical role in providing support for those mechanisms and in other ways ensuring workers have a say in OHS at their workplace (including protecting them from victimization). Indeed, it is arguable that the Robens model presumed a level of collective worker organisation to make participation meaningful. Changes to industrial relations laws over the past decade have inhibited the capacity of workers to organise and for unions to represent their interests in terms of OHS. The problems need to be addressed and model OHS laws should provide workers with effective mechanisms for raising issues and articulating grievances.
118. The need for such mechanisms is grounded in ethical considerations. Workers who bear the risk should have a say in deciding what level of risk is acceptable and to have the right to take actions to protect their health, safety and wellbeing. The need is also grounded in the participatory principles underpinning post-Robens OHS legislation and very practical considerations of enhancing OHS.
119. A SafeWork SA review of consultative arrangements found that effective workplace consultative and participative arrangements lead to **improved OHSW** as determined by the cost of workers' compensation.<sup>58</sup> There is now extensive international and Australian evidence on the value of worker involvement in terms of improving OHS outcomes, increasing awareness of OHS and identifying and resolving OHS issues.<sup>59</sup> At an earlier point in its submission the ACTU pointed to the need to take account of changing work arrangements in model OHS legislation. The same point applies to the ethnic diversity of the workplace. Some states have already produced guidance material that seeks to address how consultative procedures should accommodate to include such groups.<sup>60</sup> However, as the submission of Unions NSW points out, even in jurisdictions with regulations addressing these issues further action is required so that, for example, contract and labour hire workers have access to both workplace OHS committees and representation by a HSR.<sup>61</sup>

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

<sup>59</sup> For a detailed and critical overview of this evidence see Walters, D. and Nichols, T. (2007) *Worker representation and workplace health and safety*, Palgrave Mcmillan, Basingstoke.

<sup>60</sup> See WorkCover NSW (2001) *Code of Practice on OHS Consultation*, Sydney.

<sup>61</sup> See submission of Unions NSW to this Review.

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120. In their review, Walters and Nichols<sup>62</sup> point to the importance of representative forms of participation in terms of enhancing the overall quality and effectiveness of participation. In other words, direct participation (especially individualised forms of this such as incident and 'idea' reporting systems, toolbox meetings and one-on-one conversations between managers and workers) are not a substitute for representative processes - notably workplace OHS committees and HSRs as well as union representatives - where workers can raise concerns collectively. This enhances the prospects that the issue will be addressed and that more contentious issues will be aired. Whereas effective participate structures can enhance OHS their absence can, on occasion have disastrous consequences. Poor communication and exchanges of information have been linked to a number of workplace disasters both in Australia (such as the Esso Longford incident) and overseas. The importance of such processes has even been recognized in countries, like the USA, where (exceptionally amongst most developed countries) laws do not provide for such mechanisms. For example, the Report of the BP US Refineries Independent Safety Review Panel into the explosion at BP's refinery in Texas City (killing 15 workers and injuring 180) found that a "*good process safety culture requires a positive, trusting, and open environment with effective lines of communication between management and the workforce, including employee representatives...At Texas City, Toledo and Whiting, BP has not established a positive, trusting and open environment, with effective lines of communication between management and the workforce...*"<sup>63</sup> In sum, meaningful and representative forms of participation play a critical role in OHS and therefore model OHS legislation needs to ensure these arrangements are both implemented as widely as possible and duly supported.

121. Consultation is not a one-way flow of information or merely an exchange of information. There must be a mandated duty on the employer to consult and to take into account those consultations when making decisions about health and safety. Again, the ACTU would direct the review's attention to incidents where such one-way flows of information have had disastrous consequences.

122. Consultations should be structured as follows:

1. Relevant unions must be consulted.
2. Health and Safety Representatives (HSRs) must be consulted. They are the trained and often independently supported worker representatives best placed to make recommendations about improvements in OHS.
3. The workplace OHS Committee is to be included in consultations - and elected HSRs must automatically be representatives on the OHS Committee, or where there are too many HSRs, HSRs and workers will determine who will be nominated to the committee

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<sup>62</sup> See WorkCover NSW (2001) *Code of Practice on OHS Consultation*, Sydney..

<sup>63</sup> Baker, J. (2007) Report of the BP US Refineries Independent Safety Review Panel, United States of America at pxii

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4. Workers - particularly affected workers - are to be consulted. This is done by empowering HSRs to consult with the group of workers they represent and the relevant trade unions to call worker meetings to discuss health and safety issues.

123. The model laws must state that consultations should occur at the earliest possible time prior to changes or decisions being made or after an incident or injury or when a significant change in work processes is contemplated.

124. Fundamentally, a HSR is there to protect the health, safety and wellbeing of workers in workplace. They must have the confidence of workers and be able to articulate disagreements with management. As such their appointment and activity needs to be entirely independent of the employer. Employers must not be able to:

- Choose whom they will or will not consult with,
- Run HSR elections or select HSRs. This is the current situation under federal OHS legislation. It is open to manipulation and undermines a genuine representation of worker interests (this matter was raised by unions to the Comcare Review and the ACTU therefore believes it has probably been addressed by the Comcare Review),
- Determine the makeup of work groups (if applicable),
- Determine the worker representatives on OHS Committees or the number of worker representatives.

125. These issues are to be determined by the HSRs and workers, in conjunction with their relevant union if they choose. Where there is failure to reach agreement on issues after consultation, the issues resolution procedure is initiated.

### 5.2 PARTICIPATION AND REPRESENTATION

#### *Health And Safety Representatives*

126. Workplace health and safety representatives are fundamental to achieving improvements in health and safety. The WA government stated: "Recognising, valuing and supporting the role played by elected workplace health and safety representatives is the **key to improving workplace safety**..."<sup>64</sup> Studies undertaken shortly after the initial introduction of post-Robens OHS laws showed conclusively that the presence of HSRs lifted the general standard of OHS management in workplaces where they were present. This is supported by international research too. For example, a report into safety behaviour in the Irish construction industry found that the factor most strongly associated with safety compliance was the presence or absence of a health and safety representative. The report concluded:

This study has demonstrated the potentially strong role which safety representatives can play in influencing both behaviour and compliance with safety requirements, and ensuring that both audits and hazard reports are effectively dealt with. All sites

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64 WA Government Media Office Ministerial Media Statements, "Elected workplace health and safety representatives key to workplace safety: Minister", 29/10/04.

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should have safety representatives and their role and functions should be reinforced as part of the safety management system.<sup>65</sup>

127. Research has also indicated that the effectiveness of HSR was directly linked to their training (generally undertaken by union-related bodies at this time) and the powers and responsibilities they exercised under the legislation. In short, in jurisdictions where they were granted more extensive powers they were more effective.<sup>66</sup> Equally, despite initially vociferous fears in some quarters that HSRs would abuse their powers, especially the right to provisional notices in the over 20 years since the legislation was introduced in states where such powers were granted (such as Victoria) there is no evidence these fears were in anyway justified. There are more than adequate controls on HSR behaviour (through the involvement of an OHS inspector following the issuing of a notice by a HSR and the possibility of removing a HSR from office who was found to have abused their powers). The real problem is that the decline in union representation has been associated with fewer workplaces having HSRs and the absence, under existing legislation for roving or regional HSRs to cover contractors, small and non-union workplaces.
128. Given the foregoing, the ACTU strongly urges that model OHS legislation provides for adequate training of HSRs (in paid employer time and with union involvement), that HSRs be granted meaningful powers (as in Victoria and see below), that they be protected from victimisation and that the law include measures for roving or regional safety representatives.
129. HSRs must have clearly defined strong and detailed rights and powers, however their duty of care is the same as that of a worker. HSRs will have responsibilities when exercising their rights and powers which is distinct from a 'duty of care'. They have no additional duties of care to those described in "worker" duties above.
130. An HSR should incur no civil liability arising from his or her performance or failure to perform any function of an HSR under the model OHS law (eg WA OSHA 1984 – s.33 (3)).
131. Model OHS laws should specify that they be democratically elected by a process determined by workers, in conjunction with their union and be empowered to:
- Utilise legal rights and powers to represent workers on health and safety matters;
  - Inspect the workplace;

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<sup>65</sup> McDonald and Hrymak, 2002: 4

<sup>66</sup> Biggins, D. and Holland, T. (1995), 'The Training and Effectiveness of Health and Safety Representatives' in Eddington, I. ed. *Towards Health and Safety at Work: Technical Papers of the Asia Pacific Conference on Occupational Health and Safety*, Brisbane, 75-9. Biggins, D., Phillips, M. and O'Sullivan, P. (1991), 'Benefits of worker participation in health and safety', *Labour and Industry*, 4(1): 138-159; Biggins, D and Phillips, M (1991) A survey of health and safety representatives in Queensland Part 1: Activities, issues, information sources, *Journal of Occupational health and Safety — Australia and New Zealand*, 7 (3): 195-202

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- Access relevant information and be informed of all incidents;
- Be consulted by the employer before any workplace decisions occur that may affect health and safety;
- Issue notices when breaches are detected;
- Call in government inspectors;
- Direct workers to cease work where there is a belief of immediate risk to health and safety;
- Seek resolution of health and safety issues;
- Perform all OHS activities on paid time and have adequate facilities;
- Be assisted by any person at any time;
- Be protected by law from discrimination, harassment, bullying, intimidation and prosecution for exercising their rights and powers;
- Access training of their choice in paid work time;
- Appeal any decision of a regulator or court regarding any health and safety, compensation or rehabilitation matter;
- have a term of office no longer than 3 years and are able to be re-elected;
- be automatically appointed to the OHS Committee, or where there are too many HSRs, nominated by the HSRs in consultation with workers;
- be notified of accidents/incidents/injuries;
- be notified when inspectors enter the workplace by both the inspector and the employer and take part in any inspections;
- be provided all relevant information by the employer;
- investigate OH&S complaints ;
- investigate systemic causes of injury or disease;
- keep complainant's identity confidential;
- meet with workers on paid time;
- meet with other HSRs on paid time;
- not be financially disadvantaged as a result of performing their duties including attending meetings or training - and to be paid for work done outside usual hours;
- initiate monitoring and reviews of OHS at the place of work;
- exercise their rights and powers across multiple employers, employment relationships and work groups (to take into account the nature of work arrangements eg labour hire, subcontracting, multiple employer sites);
- recommend the initiation of public enquiries into OHS issues through the tripartite Commission;
- initiate prosecutions with unions acting as their agent.

132. The size of the place of work must not limit workers' ability to elect an HSR.

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

134. Examples in law:

- Vic OHSA 1985 S.33 & 34
- SA OHSWA – s.34(1)(h) – employer obliged to inform HSR of an injury

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- ACT OHSA 1989 – s.67-70 – Provisional Improvement Notices

135. Johnstone, Quinlan and Walters (2005, 110-112) researched ways of promoting OHS in small enterprises and argued that there are benefits of legislative measure for roving or regional health and safety representatives that are organised by trade unions<sup>67</sup>. Such arrangements exist in Italy, Sweden and Norway and “Checkies” are used in the NSW and Queensland mining industry. The ACTU supports the inclusion of roving reps in model OHS law.

136. Anecdotal evidence from HSRs points to a need for more training to ensure HSRs can exercise their rights and powers with confidence. The ACTU recommends at least 10 days paid HSR training for new HSRs and 3 day refresher courses per year for existing HSRs.

### *Roving Or Regional Safety Representatives*

137. As noted earlier in this submission, changes in the workplace have meant that in many workplaces there is no formal worker representation, either via a committee or a HSR. This is a serious shortcoming that must be addressed in model OHS legislation. The ACTU advocates a three-pronged response to this problem. First, duty provisions should be revised so that where there is no committee or HSR, the employer should hold meetings twice a year their workers to discuss OHS. The obligation to consult with workers (expanded to include a duty to record their views and actions taken) when considering workplace changes that may effect OHS should apply even where a committee or HSR are not present. Second, as discussed in the next section the critical input of unions needs to be recognised and facilitated. Third, the ACTU advocates the establishment of a scheme for roving or regional safety representatives and that employers negotiate arrangements for roving reps with the relevant unions.

138. This system has been used successfully over many years in Sweden.<sup>68</sup> As Johnstone, Bluff and Quinlan note in their submission to this review in “Sweden legislative provisions for regional health and safety representatives (RSRs) have applied across all economic sectors since the Work Environment Act 1974. They provide for the appointment of RSRs to represent workers in firms with less than 50 workers where there is at least one trade union member. The RSRs have rights of access to such workplaces and similar rights to investigation and inspection to those held by ordinary health and safety representatives in Sweden. The mandated RSRs tasks are threefold:

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<sup>67</sup> Johnstone, R., Quinlan, M. and Walters, D. (2005) ‘Statutory occupational health and safety workplace arrangements for the modern labour market’, *Journal of Industrial Relations*, 47(1): 93-116.

<sup>68</sup> Frick, K. and Walters, D. (1998), ‘Worker representation on health and safety in small enterprises: Lessons for a Swedish approach’, *International Labour Review*, 137(3):367-389.

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- *to act as itinerant representatives who inspect and investigate OHS conditions in small enterprises, and request changes they consider necessary to achieve improvements in the working environment;*
- *to promote employee participation in OHS, including the recruitment, training and support of in-house health and safety representatives;*
- *to activate local OHS work, within the overall framework for systematic management of the working environment in small enterprises.”*

139. They go on to note that the “*scheme was originally funded from a worker protection contribution paid by employers, although in recent years this has proved inadequate and the shortfall has been met by trade unions. The scheme has been generally regarded as a success, attracting considerable international interest and serving as a model for policy initiatives in other countries.*”<sup>69</sup>

140. Other countries to adopt variants of this scheme include Norway and Italy. In principle these schemes are not dissimilar to regional check inspectors found within the mining industry in Australia (most notably in the Queensland and NSW coal mining industry). In 2002 a scheme of roving safety representatives was trialed in three industries the UK The construction advisers were selected by the building workers union UCATT, paid for by the HSE and trained by TUC tutors.

141. Another possibility is sharing HSR’s amongst a group of employers - something similar though not identical to the regionally based roving HSR model. In its issues paper on OHS and workers’ compensation, the Government of South Australia (2002 at p27) canvassed this option:

Small business report difficulty in committing stretched resources to cover the role of the HSR. Ways to enable a sharing of HSR resources have been considered. Options might include business groups or employer associations promoting a shared arrangement between willing members. Another option might be through a local arrangement where businesses within a small geographical area come to an agreement to share HSR resources. There have been some successful examples of such arrangements in South Australia, but they have been very limited.<sup>70</sup>

142. The ACTU urges that OHS model legislation incorporate provision for the appointment of roving or regional safety representatives, with appropriate supporting mechanisms (and drawing on the Swedish model).

### *Health and Safety Committees*

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<sup>69</sup> Submission of Jounstone, R. Bluff, L. and Quinlan, M. to this review.

<sup>70</sup> WorkCover Corporation S.A., 2001, Working together – a review of the effectiveness of the health and safety representative and the workplace health and safety committee system in South Australia, available on the internet Workcover Corporation home page <http://www.workcover.com>

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143. Workplace OHS Committees play an important role addressing issues such as developing policies and procedures, planning OHS improvements, engaging consultants etc.
144. At least half the OHS Committee must be elected worker representatives (as indicated previously HSRs must be automatically appointed to the OHS Committee). In large organisations, unions should be represented on national OHS committees. The employer representatives must be drawn from senior management with decision-making powers. The OHS Committee will not have the power to direct HSRs in their role.
145. The OHS Committee should have the power to set their procedures and receive training on paid time except that:
- The Chair of the OHS Committee should be drawn from amongst the worker representatives on the Committee
  - The frequency of meetings should be at least every two months.
146. Examples in existing law:
- ACT OHSA 1989 – s.86-88

### *Right Of Entry*

147. The ILO highlights the crucial role of unions in securing safer, healthier work and “argues strongly for a strengthening of collective voice as the primary means of improving working conditions, and protecting workers’ health.”<sup>71</sup> Unions provide critical logistical support (training, information and protection from victimisation) to formal representative structures in the workplace, especially HSRs.<sup>72</sup> Indeed, it is exceptional to find HSRs in non-unionised workplaces.
148. Right of entry also performs a critical role in monitoring compliance with OHS legislation. At present, no state or territory inspectorate in Australia has the capacity to visit more than a tiny fraction of the total workplaces it covers in any given year. Unions report issues to inspectors but even so the ‘reach’ of inspectorates remains limited. In this regard union OHS activities enhance monitoring and compliance with the legislation. Unions perform a critical role in monitoring compliance, providing an avenue for workers to report problems anonymously, resolve OHS problems with management and identify serious breaches of OHS legislation requiring intervention. Without right of entry union officers would be unable to access workplaces and evidence of what has been found

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<sup>71</sup> Economic Security for a better world, ILO Socio-Economic Security Programme, International Labour Office, 2004. 50 Swiss francs. ISBN 92-2-115611-7.

<sup>72</sup> Biggins, D. and Holland, T. (1995), 'The Training and Effectiveness of Health and Safety Representatives' in Eddington, I. ed. *Towards Health and Safety at Work: Technical Papers of the Asia Pacific Conference on Occupational Health and Safety*, Brisbane, 75-9. Biggins, D., Phillips, M. and O'Sullivan, P. (1991), 'Benefits of worker participation in health and safety', *Labour and Industry*, 4(1): 138-159; Biggins, D and Phillips, M (1991) A survey of health and safety representatives in Queensland Part 1: Activities, issues, information sources, *Journal of Occupational health and Safety — Australia and New Zealand*, 7 (3): 195-202

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- during such visits on occasion indicates that serious breaches would go undetected (resulting in injury and even death).
149. A London School of Economics study showed that where there is a union presence, the workplace injury rate is 24 per cent lower than where there is no union presence.<sup>73</sup>
150. The Australian Bureau of Statistics 2006 Work Related Injuries survey found that "43% (293,000) had not received any occupational health and safety training in the job where the injury or illness occurred"<sup>74</sup>. The value of OHS training is indisputable and union OHS courses have trained thousands of workers, for example, over a two-year period, NSW unions trained 20,000 workers in OHS.<sup>75</sup> Unfortunately where unions are blocked from providing the OHS training, there may not be any training provided at all.
151. The ACTU supports union right of entry for OHS matters, at all work sites, irrespective of union membership - not just for suspected breaches (eg NSW OHSA 2000 – s.76-85 ) but including for the purposes of educating workers about OHS issues.
152. An Australian Chamber of Commerce and Industries (ACCI) 2004 pre-election survey of Australian businesses showed that union OHS inspections caused greater concern amongst employers than industrial action.<sup>76</sup> Government research shows unionised workplaces in Australia are three times as likely to have a health and safety committee and twice as likely to have undergone a management occupational health and safety audit in the previous 12 months<sup>77</sup>. It is therefore curious that some Australian businesses were concerned about union OHS inspections. We believe some employers are concerned about union inspections because they are effective: they give workers a voice, they identify health and safety breaches and they can result in employers being forced to improve standards.
153. In the aftermath of the Anzac Day 2006 rockfall at the Beaconsfield Mine the Tasmanian government initiated a six month trial of authorised (and duly trained) union officials to enter worksites in the construction and mining industry. In the trial period the CFMEU undertook 114 visits to 71 building sites (15 visits were prompted by complaints to the CFMEU). In all, 1155 breaches of OHS laws were identified, an average of 10 safety breaches per visit (including serious breaches such as breaches relating to fall from height protection and electrical safety). This demonstrates the important role unions can and must play with regard

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<sup>73</sup> Litwin, A., *Trade unions and industrial injury in Great Britain*, LSE discussion paper DP0468, August 2000

<sup>74</sup> *Ibid*, p.5

<sup>75</sup> Unions NSW statistics

<sup>76</sup> ACCI, *Modern Workplace: Safer Workplace – An Industry Blueprint for Improving OHS in Australia*, April 2005

<sup>77</sup> Hawke, Anne & Wooden, Mark (1997), *The 1995 Australian Workplace Industrial Relations Survey.*, *The Australian Economic Review* 30 (3), 323-328, doi: 10.1111/1467-8462.00032

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to OHS and the need for entry to be proactive (and not simply responding to complaints).

154. The National Union of Workers submission highlights a number of cases where union inspections have found safety breaches including:

- Window Frame Manufacturer
  - High levels of sawdust in the air due to an inadequate extraction system and lack of PPE.
  - Powder coating rooms had insufficient PPE and poor ventilation.
  - Pedestrian walkways not marked in forklift traffic area.
  - Unlicensed use of forklifts.
- Recycling
  - Excessive line speed caused cuts from recycled glass through rubber gloves used as PPE. Use of chainmesh gloves resulted in needle-stick injuries.
  - Workers request to set up a DWG was ignored by management.
- Warehousing
  - Racking not bolted to floor.
  - Racking still in use after being damaged by forklift.
- Poultry
  - Insufficient PPE to prevent cutting injuries when dissecting carcasses.
  - Repetitive strain injuries due to insufficient workstation rotation.
- Plastics Production
  - employees unaware of any evacuation plan.
  - Machinery guards poorly designed / not in place.
- Food Manufacturing
  - Insufficient wrapping of products stored in warehouse racking was creating hazards of falling product.
  - Power cords across aisles in warehouse.
  - High level of flour dust causing respiratory problems due to an insufficient extraction system.
  - Emergency stop switch in a production area was out of reach of the operator during normal operation.

155. Right of entry needs to be viewed in the context of the fear of victimisation of workers' who raise an OHS issue. Right of entry enables unions to investigate an OHS issue which workers are afraid to raise or pursue directly with an inspectorial agency or to gather evidence when a worker or HSR has been victimised. Recent research on OHS inspectors found fear of victimation was seen to be a serious

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issue.<sup>78</sup> Victimization of a worker for raising an OHS issue is a clear breach of every major state and federal OHS law, but proving such cases is difficult and the few cases where action has been taken overwhelmingly involve employee health and safety representatives. For example, a HSR at a Victorian factory successfully sought reinstatement from the Federal Court when he was dismissed after complaining to his union (CFMEU) that constant surveillance of his activities and discussions with other workers by the manager amounted to bullying and harassment.<sup>79</sup> The ACTU would suggest cases coming before the courts represent only a fraction of the problems actually occurring.<sup>80</sup> A number of employers have tried to use the *Workplace Relations Act* to defeat complaints of victimisation. For example, when a crane driver in NSW dismissed after he had raised concerns about the OHS risk assessment process in a Job Site Risk Analysis required by his employer sought reinstatement the employer attempted to defeat the application by arguing that relief from victimisation was excluded by the operation of s16 of the *Workplace Relations Act*. The bench rejected the challenge, making reference to the Road Transport Mutual Responsibility judgement and endorsing a submission by the NSW Minister for Industrial Relations (who had intervened in the case) regarding the public interest in protecting the freedom of workers to raise health and safety issues in the workplace, and their participation as HSRs or in workplace committees.<sup>81</sup> The judges stated (at para 71) that establishing “*statutory remedies to prevent and to respond to instances of victimisation which might occur where employees seek to engage in those very processes which are aimed at improving and promoting health, safety and welfare at work is vital...It is clear that consultation with, and participation by, employees is certainly seen as an integral component in ensuring that workplace health and safety objectives, as set out in s3 of the OHS Act, are achieved.*”

156. Unions  
must have the powers of an HSR at the place of work, but particularly be able to issue notices, inspect workplaces and systems, copy documents and to make audio/visual recordings for education and information gathering purposes.

157. Union  
right of entry for trained union officials on OHS grounds should not be subject to additional limitations by state or federal industrial relations laws including the BCII Act and the ABCC.

### Issues Resolution

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<sup>78</sup> Johnstone, R. and Quinlan, M. (2007), The implementation of OHS Process Standards in Australia, National OHS Regulatory Research Consortium Workshop, Australian National University, February.

<sup>79</sup> *Claveria v Pilkington Australia Ltd* [2007] FCA 1692)

<sup>80</sup> For another case where a worker was dismissed for pursuing union issues, including bullying and harassment see *Public Service Association v Department of Justice*, NSW IRComm 07/1835.

<sup>81</sup> *CFMEU (NSW) (o/b of Hemsworth) v Brolrik Pty Ltd t/as Botany Cranes & Forklift Services* [2007] NSWIRComm 205, 21 September 2007

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158. The ACTU supports the inclusion of procedures for issue resolution in the model law. These procedures must provide for the employer to respond to issues in a timely and effective manner.
159. The employer must nominate a senior manager (eg Vic OHSA 2004 s.73 with OHS Regulations Part 2.2 2007) who has the power to make decisions and seek resolution in the first instance with an HSR(s) and their union representative (if requested). If there is no HSR then a worker nominated by the affected workers and their union representative (if requested) must be involved in the issue resolution. Workers should raise issues through their HSR.
160. After the resolution of an issue, the employer must ensure that details of any written or oral agreement between the employer and the HSR are brought to the attention of the employees affected by the issue and forwarded to the health and safety committee and the relevant union.
161. Should an issue not be resolved it should be referred to the Tribunal for conciliation and arbitration.

### *Tribunals And Courts*

162. The ACTU supports a conciliation and arbitration Tribunal (eg WA OSHA amend 2006 Part VIB s.511-k) to assist in the resolution of workplace health and safety issues. The Tribunal should be made up of persons knowledgeable in health and safety matters in each jurisdiction.
163. Breaches of duties should remain criminal offences.
164. The Tribunal is to assist the parties to reach agreement. If the dispute cannot be resolved the Tribunal may determine the issue. It should be a cost free jurisdiction.
165. The Tribunal must have the ability to hear grouped/industry wide claims and make industry wide rulings. The Tribunal must also have the capability of hearing bullying claims, one of the fastest growing hazards in Australian workplaces.
166. Unions must have standing before Tribunal and must be able to lodge claims. Appeals against Inspectors' decisions should be heard by the Tribunal.

### *Right To Cease Unsafe Work*

167. While workers have a common law right to cease unsafe work, the ACTU supports including this right in the model OHS law with the condition that it does not limit the common law right.

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168. The ACTU supports the right of HSRs to direct workers to cease work when there is a reasonably held perception of, or actual threat to workers' health, safety or welfare. (eg ACT OHSA 1989 – s.72)
169. Consultation with the employer is to occur as soon as practicable after the HSR takes this course of action. This right should be backed up by strong protections against HSR victimisation for taking this action. Workers are entitled to cease work on full pay.
170. Ancillary to an HSR's right to order the cessation of unsafe work, a worker's common law right to refuse unsafe work should be codified. The ACTU supports a legislative right of workers to refuse unsafe or unhealthy work without penalty.
171. In the event that a worker does refuse unsafe work, an employer must discuss this with the relevant HSR and agree on remedial action regarding the hazard or the risk before any employee is then asked to do such work.

### 5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION

172. Further to the protections detailed in the *ACTU Charter of Workplace Rights*, HSRs must be protected with easily enforceable law against discrimination, bullying, harassment, intimidation and detriment to their employment - or the threat of any of these (eg Victoria OHSA s76-78). In this context:
- A breach of the law must lead to a timely regulatory response including prosecutions and redress;
  - There must be meaningful penalties against employers for breaches of the law;
  - The onus must be on the employer to prove there was no breach;
  - Matters should be able to be brought before the OHS Tribunal in order to effect a speedy remedy;
  - A government inspector can intervene to cease discrimination;
  - Unions/employees must be able to lodge an injunction on employers in the event of a threat or probable threat to discriminate against or victimise an HSR or worker.

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# CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

173. Further to the regulator function detailed in the *ACTU Charter of Workplace Rights*,

## 6.1 ROLE AND FUNCTIONS OF REGULATORS

174. The ACTU supports the laws and the regulator functions remaining within each jurisdiction and increasing resources to enable proactive enforcement of the model OHS laws and cooperation between regulators.

## 6.2 INSPECTORS

175. The ACTU supports inspectors having a full range of powers from issuing notices through to investigating and prosecuting breaches of the Act and being well resourced to use these powers.
176. The inspectorate should reflect the diversity of the workforce and have direct industry experience, especially in industries where this knowledge is essential to carrying out the inspector's task (as in construction).
177. Post-Robens legislation often requires inspectors to make complex judgements about an array of potential hazards in the workplace. Inspectors should receive a detailed training program (with suitable monitored work experience) at the commencement of their appointment (see Victoria and Western Australia for models) covering the range of skills needed to undertake their tasks (including OHS). Inspectors should also be encouraged by their agencies to secure qualifications in OHS (tertiary certificate, diploma or degree).
178. The focus of an inspector's duties must be enforcement of the Act and Regulations. Inspectors should be able to draw on the full range of remedies in deciding the appropriate action to take (including the immediate issuing of improvement, prohibition or infringement notices). The ACTU does not support separation of advisory and enforcement functions, not only because it could lead to conflicts of interests, but because it is in no way necessary. The primary role of inspectors is to enforce but in practice inspectors can and do use their knowledge to assist employers and other duty holders regarding compliance. As recent Victorian experience shows it is possible for the inspector to issue a notice and also provide some advice regarding compliance without compromising the notice or opening the inspector to assume liability. It should also be noted that inspectorates already produce considerable advisory material as well conducting other activities to assist employers (via education campaigns and the like). However, advice without enforcement is meaningless. Where inspectors were directed in the past to advise

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first and only use enforcement as a last resort this was a conspicuous failure and inefficient use of the inspectorate's limited resources. Recent research indicates inspectors value their capacity to select from a range of enforcement tools and take action (including immediate action) as the situation warrants.<sup>82</sup>

179. The inspector should inform the relevant HSR that they are entering the place of work and be subject to and respect the consultative structures. The HSR should be entitled to accompany an inspector during an inspection/investigation.
180. Guidance to inspectors should emphasis the importance of holding meaningful discussions with workers when visiting a workplace (in addition to contact with the HSR). Inspectors should monitor consultative practices at the workplace (including the existence and activities of workplace health and safety committees).
181. The model legislation should specify that details in relation to any workplace visit by an inspector (or action taken in relation to that workplace) should be recorded in the enforcement agency's 'trim' file system. Model OHS legislation should require that there is a degree of uniformity in the recording systems so that information can be readily exchanged between jurisdictions when dealing with the same employer, other duty holder, industry or issue.
182. It is crucial that the OHS regulator be fully accountable for its functions and activities. The Model OHS Act should require inspectorates to make all of their activities as transparent as possible. This includes making public their inspection, and enforcement procedures, policies and guidelines (which will have the welcome by-product of improving general deterrence).<sup>83</sup> It also means requiring inspectorates to publish detailed annual reports on all of their inspection and enforcement activities, for example the number of inspections, whether they are reactive or proactive, the types of inspection programs implemented, the number of notices (and the industries and hazards that they addressed), to enable public scrutiny of all accepted enforceable undertakings; and providing summaries of all prosecutions.
183. An Inspector must immediately issue written reasons if overriding an HSR on an OHS matter.
184. Examples in existing law:
- Vic OHSA 2004 – s.102-103 – entry to workplace
  - NSW OHSA 2000 – s.50-75 - powers
  - NSW OHSA 2000 – s. 89-95 - notices
  - Vic OHSA 2004 – s.63-66 – attendance after an improvement notice and inspectors notices

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<sup>82</sup> Johnstone, R. and Quinlan, M. (2007), The implementation of OHS Process Standards in Australia, National OHS Regulatory Research Consortium Workshop, Australian National University, February.

<sup>83</sup> See for example WorkSafe Victoria, (2007), *Victorian Occupational Health and Safety Compliance Framework Handbook*.

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- SA OHSWA 1986 – s.37(1) – requirement to act within a certain timeframe on HSR cease work order

185. The powers and functions of inspectors cannot be divorced from questions as to the implementation of model legislation. Model legislation subject to very different enforcement practices would provide an almost entirely illusory form of national uniformity. As the latest Draft *Comparative Performance Report*<sup>84</sup> for 2006-7 indicates (and this is consistent with earlier reports) there is at present a significant discrepancy between the activities of state and territory inspectorates on the one hand, and the federal agency Comcare on the other hand in terms of number of workplaces visited, notices issued, prosecutions and other enforcement actions. Put bluntly, Comcare is a relatively inactive agency when compared with other Commonwealth regulatory agencies such as the Commonwealth Workplace Inspectorate – the Workplace Ombudsman, and rarely undertakes any enforcement activity (the ACTU has already made this point to the Comcare Review). The attempt to explain this difference in the CPM report is in our view not at all persuasive. Giving inspectors powers they then make little use of is hardly consistent with implementing the legislation. It is vital that model legislation is also reflected in appropriate levels of enforcement that indicate that the legislation is not merely symbolic and that the parties can have confidence it will be enforced irrespective of location. The significant resources for investigative and prosecuting powers of the Workplace Ombudsman has resulted in increasingly proactive and targeted industry campaigns raising awareness, compliance and where necessary a relatively aggressive litigation policy. A national network of 26 metropolitan and regional offices and 300 staff recovered just under \$53 million in underpayments for workers and just over \$2 million in penalties for breaches in the 2 years months prior to July March 2008<sup>85</sup>. Model legislation should enable the regulator(s) to adequately protect and enforce OHS rights no less than the Workplace Ombudsman is now expected to uniformly protect and enforce workplace rights.

186. The ACTU also notes with concern that the same *Comparative Performance Report* indicates that across all jurisdictions the average fine imposed as a result of conviction in a prosecution in 2006-7 is about \$32,833.<sup>86</sup> This is, in our view, hardly reflective of the gravity of a breach in OHS legislation that leads to prosecution (normally one where one or more workers has been severely injured if not killed). The ACTU also notes with concern that the number of legal proceedings commenced and the number of prosecutions resulting in conviction appears to have been trending down over the past five years (especially in the year 2006-7).<sup>87</sup> Again, this is a disturbing trend given the absence of any convincing evidence that it is linked to an improvement in overall OHS performance (see earlier comments about the reliability of workers' compensation claims data as an indicator of OHS performance).

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<sup>84</sup> Workplace Relations Ministers' Council, (2008), *Draft Comparative Performance Monitoring Report 2006-2007*, 10<sup>th</sup> edition, DEWR, Commonwealth of Australia, pp16-17.

<sup>85</sup> Workplace Ombudsman., 2007, <http://www.wo.gov.au>

<sup>86</sup> *Ibid* Indicator 14 at p17.

<sup>87</sup> *Ibid* Indicator 14 at p17.

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# CHAPTER 7: COMPLIANCE & ENFORCEMENT:

## 7.1 ENFORCEMENT MEASURES

187. In earlier parts of this submission the ACTU has pointed to serious challenges to achieving compliance with OHS legislation such as those arising from changes in work, including the growth of small and transient workplaces (including homes). One effect of these changes is to increase the logistical load on inspectorates (not only in terms of the number of workplaces but in terms of locating workplaces – especially given changes to registration requirements – and, given elaborate contractual arrangements, determining the status of various parties they may encounter). The changes require not only a refashioning of general duty provisions to make sure responsibilities are clearly understood, and increased use of contractual tracking mechanisms and supply-chain regulation (in cases of outsourcing) but also new reporting systems and increases in the size of the inspectorate so effective monitoring and enforcement can occur. Unless model legislation is matched by appropriate infrastructure measures to undertake enforcement, compliance problems will grow and the laws will be rendered a sham.

188. The Model OHS Law must include the ability for the regulator to provide resources and assistance, through services, educational material and advice etc, to *all those involved* in work. This must be independent from and not compromise the role of the Inspectorate in the enforcement of the OHS law (see: ILO C161 Occupational Health Services Convention, 1985).

189. The model OHS law must provide obligations and scope on the regulators to act beyond the limitations of workers compensation data that currently informs and is consistently used by regulators in their benchmarking and reporting of health and safety performance.

## 7.2 MEASURES EXERCISED AT THE WORKPLACE

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

191. The model OHS law should include meaningful level of sanctions for serious offences, both in terms of fines and prison sentences. In the most serious cases where breaches by an employer or other duty holder result in the death or serious injury to a worker the option of a gaol term must be considered. As no road-user is immune to this penalty if their reckless behaviour causes serious body harm to others it is absolutely inconsistent to treat, in practice, workplace death as a special case. Compared to other areas of criminality, OHS legislation is not onerous

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either in the detection or punishment of offences.<sup>88</sup> Research and inquiries into OHS have revealed ample evidence of serious criminality.<sup>89</sup> Even if the pursuit of a gaol term was reserved for the very worst cases – and the resourcing of OHS inspectorates alone would severely limit the number of cases that could be taken – this would send both a powerful deterrent message and indicate the community’s abhorrence of this sort of behaviour.<sup>90</sup>

192. Examples in existing law:
- NSW OHSA 2000 - Part 6/7

### 7.3 MEASURES EXERCISED BEYOND THE WORKPLACE

#### *Enforceable Undertakings*

193. The ACTU does not support that enforceable undertakings be used as an alternative to prosecutions. The use of enforceable undertakings must not limit the right to pursue a prosecution. Enforceable undertaking can only be considered where the defendant admits guilt and consultations have been held with the workforce and relevant unions.

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<sup>88</sup> See *New South Wales Criminal Court Statistics 2006*, Statistical Services Unit, NSW Bureau of Crime Statistics and Research, 2007.

<sup>89</sup> Nile, F. chair. (2004), *Serious injury and death in the workplace*, Legislative Council General Purposes Standing Committee No.1, Parliament of New South Wales, Sydney; and Perrone, S. (2000), *When Life is Cheap: Governmental Responses to Work-related Fatalities in Victoria 1987-1990*, Unpublished PhD thesis, Department of Criminology, University of Melbourne.

<sup>90</sup> For a recent review of Australian legislation see Guthrie, R. & Waldeck, E. (2008), The liability of corporations, company directors and officers for OSH breaches: a review of the Australian landscape, *Policy and Practice in Health and Safety*, 6(1): 31-54.

## CHAPTER 8: PROSECUTION

### 8.1 CRIMINAL OR CIVIL LIABILITY

194. The ACTU strongly believes it is imperative that the principal offences under occupational health and safety legislation be criminal in character. The criminal sanctions currently available for offences under occupational health and safety legislation in all Australian jurisdictions are essential in ensuring that occupational health and safety is treated as the serious social and economic concern that it is.

195. The history of the regulation of occupational health and safety in Australia and around the world has been one of a continuous and ongoing struggle, substantially taken up by trade unions, to convince regulatory authorities and the courts of the seriousness with which the issue of health and safety in the workplace must be taken. Despite the horrific consequences of breaches of occupational health and safety legislation, such offences were frequently treated as quasi-criminal and of lesser seriousness than other criminal offences.

196. Any consideration of a change from the current approach of considering offences under health and safety legislation as criminal in nature would have the effect of trivialising the issue of health and safety in the workplace and constitute a most retrograde step. Such an approach would fail to express the community's moral condemnation of lapses in safety standards that place workers and their families at risk. The community would not accept any dilution of the seriousness with which occupational health and safety offences are treated.

197. For example, the United Kingdom Health and Safety Executive concluded in a recent report surveying international approaches to occupational health and safety regulation that:<sup>91</sup>

Although administrative penalties may appear to be a low-cost and expedient alternative to criminal penalties, their role in creating a climate of compliance is probably not comparable to prosecution ... It is ... not surprising that differences in the form and effect of prosecution and

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<sup>91</sup> UK Health and Safety Executive, *International Comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences* (2007) at p51.

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administrative enforcement action have a significant effect on their relative capacity to produce compliance with the law. Society signifies seriousness of social harm through the criminal law. There is a greater loss of social standing and prestige associated with a criminal indictment and, all things being equal, criminal prosecution is a generally more newsworthy process. The effect is that criminal prosecution performs a far more powerful role in reinforcing social norms as is achieved with administrative enforcement action (which is a far less powerful medium of social signification).

198. The criminal nature of offences under occupational health and safety legislation, applying to employers and directors/managers of corporate employers serve a most important deterrent and symbolic function. The stigma of a criminal conviction serves as a crucial incentive, in addition to the quantum of the monetary penalties that may be imposed, for employers and persons involved in the management of corporate employers to become proactively involved in health and safety management and address risks to health and safety arising in their operations.

### **8.2 WHERE PROSECUTIONS SHOULD BE HEARD?**

#### *Specialist Courts or Tribunals*

199. The ACTU considers that prosecutions for offences under occupational health and safety legislation should be heard in specialist courts having expertise and experience in dealing with occupational health and safety and industrial regulation generally. Accordingly, the prosecution of offences should be heard in industrial courts or by industrial magistrates where such jurisdictions exist.
200. The history of the prosecution of offences under occupational health and safety legislation in various Australian and overseas jurisdictions has been characterised by an ongoing battle to ensure that such offences are treated with the seriousness they deserve. The conferral of jurisdiction to hear prosecutions under occupational health and safety legislation upon the general criminal courts has undermined these efforts.
201. Offences under occupational health and safety legislation have particular characteristics that may be overlooked by courts having general jurisdiction. In particular, offences under occupational health and safety legislation arise from the existence of risks to health and safety of employees or other persons and systemic

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failures to ensure that plant and equipment and system of work are safe and eliminate or prevent risks to safety.

202. Whilst a prosecution will not infrequently arise from the circumstance of a particular accident, undue focus upon the incident itself is likely to detract attention from the systemic failings which permitted it to occur.<sup>92</sup> The general criminal courts are customarily concerned with crimes that are by their nature “event-focused”, that is, arise for a particular act or omission of an individual. The approach and procedures of the general criminal courts are less suited to the determination of offences involving systemic failings, work practices, the safety of equipment and the liability of corporate employers.<sup>93</sup>
203. In a study of Magistrates’ Court occupational health and safety prosecutions in Victoria, for example, Richard Johnstone concluded that arguments advanced in mitigation of penalty in the general courts direct the court’s attention away from an analysis of the failure of the defendant employer’s health and safety systems, by focusing attention on the minute details of the events leading up to an injury. Johnstone argues that this approach:<sup>94</sup>
- ... enables defendants to shift blame onto workers and other; and facilitates [the making of] uncontested claims to be good corporate citizens; coupled often with the allegation that the accident was a ‘freak’ or ‘one-off’.
204. The efficacy of these techniques in achieving reduced penalties in prosecutions for occupational health and safety offences heard in the Magistrates’ Court reveals a lack of judicial understanding and appreciation of the culpability involved in such offences.
205. Specialist industrial courts have the necessary expertise and experience in dealing with workplace disputes and have the perspective which permits focus upon systemic failings in a workplace or across industry generally. Conferral of jurisdiction on specialist industrial courts is likely to improve the consistency of approaches to the duties imposed by occupational health and safety legislation and consistency in sentencing outcomes. The ACTU recommends, in jurisdictions where there are no specialist industrial courts, that a specialist court be established with appropriately skilled and knowledgeable judges.

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<sup>92</sup> *Haynes v C I & D Manufacturing Pty Ltd* (1995) 60 IR 149 at 157 and *Drake Personnel Ltd (t/as Drake Industrial) v WorkCover Authority (NSW)* (1999) 90 IR 432 at 452-454.

<sup>93</sup> McCallum, Hall, Hatcher and Searle, *Report to WorkCover Authority of NSW* (2004) at [125]-[127].

<sup>94</sup> Johnstone, *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Federation Press, Sydney, 2003.

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206. In NSW, prosecutions under the *Occupational Health and Safety Act 1983* (NSW) were initially heard in the Supreme Court or a magistrate. In 1987, the NSW Government conferred the jurisdiction upon the Industrial Commission (later the Industrial Court). In the second reading speech to the amending legislation, the Minister said:<sup>95</sup>

The provision concerning the Industrial Commission hearing safety matters is an important one, as the Commission has a particular expertise in dealing with workplace issues. Occupational health and safety is a familiar area for the Industrial Commission, as all appeals against the decision of the Chief Industrial Magistrate and magistrates on occupational health and safety matters are heard by the Industrial Commission. The decision of the Commission in these matters is final. The provision is merely a logical extension of the commission's role in occupational health and safety matters. Another important consideration is that the Industrial Commission enjoys the same legal status as the Supreme Court, and in this context the prosecution cases would be heard only by judicial members of the commission.

207. Proceedings brought in specialist industrial courts are likely to significantly faster, less costly and less formal than criminal proceedings untaken through the general criminal courts. The advantages in the use of specialist industrial courts benefits all persons involved in proceedings under occupational health and safety legislation, including prosecutors, victims and their families and defendants.

208. It is appropriate that a range of courts at different levels of the judicial hierarchy have jurisdiction to hear prosecutions in recognition that there are a spectrum of offences that may require prosecution. Serious offences require prosecution in courts have status of superior courts of record equivalent to the Supreme Courts of the various states whilst less serious offences may be prosecuted before magistrates. The concentration of prosecutions in magistrate's court in some jurisdiction contributes to the trivialisation of occupational health and safety offences.

### *Trial by Jury*

209. The provision for a jury trial for offences under occupational health and safety legislation is inappropriate and unnecessary, likely to compromise the effectiveness of the prosecution regime and has the potential to greatly increase the

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<sup>95</sup> *NSW Parliamentary Debates*, Session 1986-87-88, ser 3rd, vol 197, p12,207, Mr Hills, 2nd reading 14 May 1987, (full second reading from 12,204-12,213).

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cost and complexity of occupational health and safety prosecutions for all parties concerned. Jury trials are not a necessary feature of all criminal prosecutions. The procedure of committal followed by trial by jury has been replaced by summary proceedings before a Judge across a wide range of white collar crimes.<sup>96</sup> This is an accepted part of the administration of the criminal law across Australian jurisdictions.

210. The inappropriateness of jury trials in this area is emphasised when regard is had to the highly technical nature of occupational health and safety offences and proceedings in respect of such offences.<sup>97</sup> Jury trials customarily concentrate upon “event-focused” crimes rather than upon offences involving failures to comply with general duties and frequently involving complex questions of appropriate work practices, management structures and systems of work.

### 8.3 WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES

#### *Who May Prosecute?*

211. The ACTU considers that it is an essential aspect of effective system for the prosecution of offences under occupational health and safety legislation that trade unions having a legitimate interest in the circumstances of an offence be permitted to prosecute. It is critical the entitlement to prosecute extend beyond regulatory authorities.

212. The right of trade unions to prosecute offences under occupational health and safety legislation serves important functions:

- The independent right to prosecute optimises the efficient use of resources by permitting trade unions having extensive experience in a particular industry or workplace to deploy resources in a manner calculated to bring about organisational and cultural change to improve health and safety.
- The independent right to prosecute further encourages trade unions to be actively involved in occupational health and safety management and has the potential to encourage employers to actively involve trade unions in the management of occupational health and safety concerns.

213. New South Wales is, at present, the only jurisdiction that makes provision for trade unions to commence prosecutions from breaches of occupational health

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<sup>96</sup> *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661 at 645.

<sup>97</sup> See discussion at paragraphs 8 and 9 above.

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and safety legislation. Section 106(1) of the *Occupational Health and Safety Act 2000* (NSW) permits proceedings for an offence under the Act to be instituted by any person with the written consent of a Minister of the Crown or a prescribed officer, by an inspector or by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the prosecution relates.<sup>98</sup>

214. The NSW legislation strikes an appropriate balance between the interests of the promotion of workplace safety, the encouragement of participation in occupational health and safety management in the workplace and appropriate protection of defendants. A trade union may only institute proceedings if a member or members of the union was concerned in the circumstances to which the prosecution relates. The legislation does not permit unions to act as mere busybodies in commencing proceedings in which they or their members have no proper concern.

215. There is nothing unusual in persons other than the government authorities being able to commence criminal proceedings or proceedings seeking the imposition of civil penalties. Environmental protection legislation in various States permits individuals or other bodies such as local councils to commence proceedings prosecuting offences under that legislation.<sup>99</sup> The history of these provisions does not suggest that the right of persons other than government authorities to prosecute offences undermines the integrity of the criminal law in the area of environmental protection.

216. It is common for unions to be empowered to commence proceedings seeking the imposition of penalties for contraventions of industrial laws affecting the interests of their members. For example, trade unions have the capacity to bring proceedings for contraventions of the *Workplace Relations Act 1996* (Cth).<sup>100</sup> Whilst these are proceedings involving the imposition of civil penalties rather than criminal sanctions, contraventions can give rise to very substantial monetary

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<sup>98</sup> Some other jurisdictions permit prosecutions to be brought by third parties where consent is given by a Minister or other designated officer: *Workplace Health and Safety Act 1995* (Qld), section 164(5); *Occupational Safety and Health Act 1984* (WA), section 52(1). The *Occupational Health, Safety and Welfare Act 1986* (SA) permits an employee suffering an injury as a result of a contravention to bring proceedings if the Minister, the Director of Public Prosecutions or an inspector has not commenced proceedings within 1 year of the alleged offence (section 58(7)).

<sup>99</sup> For example, section 219 of the *Protection of the Environment Operations Act 1997* (NSW) permits any person to institute proceedings for an offence under the Act with leave of the Land and Environment Court.

<sup>100</sup> *Workplace Relations Act 1996* (Cth), section 718 and 807.

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penalties.<sup>101</sup> The long-standing rights of unions to bring penalty proceedings has not undermined the capacity of employers and unions to work together to ensure compliance with industrial laws.

217. The necessity for including an independent right for trade unions to prosecute offences under occupational health and safety legislation is underlined by the marked inconsistency in prosecution practices between jurisdictions. There are remarkable disparities in the number of prosecutions commenced in the various States.<sup>102</sup> These disparities cannot be accounted for by differences in rates of workplace injury and reveal an aversion to prosecution on the part of authorities in some States.<sup>103</sup> A right for trade unions to commence prosecutions operates as an important supplement to address circumstances in which regulators are unwilling to prosecute contraventions of occupational health and safety legislation.

218. The experience in New South Wales has been that the capacity of unions to commence prosecutions under occupational health and safety legislation has worked well and has enabled prosecutions to occur in circumstances in which regulators have been unable or unwilling to prosecute. In particular, trade unions have been able to assist in bringing cases that aid the development of the law relating to occupational health and safety to recognise emerging areas of concern such as psychological injuries, repetitive strain injuries and the commission of criminal acts in the workplace.

219. Examples of prosecutions brought by trade unions in New South Wales include:

- *O'Sullivan v Crown in Right of the State of New South Wales (Department of Education and Training)* (2003) 125 IR 361<sup>104</sup> and *Johnson v State of NSW (Department of Education and Training)* [2006] NSWIRComm 109 – Concerning contraventions arising from failures to take reasonable measures

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<sup>101</sup> In *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462, penalties totalling \$750,000 were imposed upon the respondent. The total penalties were reduced on appeal to \$450,000: *Commonwealth Bank of Australia v Finance Sector Union* (2007) 157 FCR 329.

<sup>102</sup> The Workplace Relations Ministers' Council, *Comparison of Occupational Health and Safety and Workers' Compensation Schemes in Australia and New Zealand (9<sup>th</sup> Edition)*, February 2008, reports (p17) that in 2005-2006 there were 459 prosecutions commenced in NSW, 136 in Victoria, 174 in Queensland, 37 in Western Australia, 71 in South Australia, 15 in Tasmania, 0 in the NT and 19 in the ACT.

<sup>103</sup> Gunningham, "Prosecution for OHS Offences: Deterrent or Disincentive" (2007) 29 *Sydney Law Review* 359 at 362-365.

<sup>104</sup> Subject to an unsuccessful appeal in *Crown in Right of the State of New South Wales (Department of Education and Training) v O'Sullivan* (2005) 143 IR 57.

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to protect teachers and other staff from violence and threats by students with histories of behavioural problems.

- *NSW Branch v Commonwealth Bank of Australia [2001] NSWCMC 97 (20 August 2001)*. Failing to ensure a safe workplace
- *Derrick v Australian and New Zealand Banking Group Ltd [2003] NSWIRComm 406; Derrick v ANZ Group Limited [2005] NSWIRComm 59; Presdee v Commonwealth Bank of Australia [2005] NSWIRComm 389; Derrick v Westpac Banking Corporation [2006] NSWIRComm 76* – Concerning contraventions involving the failure of banking corporations to take appropriate and available measures to protect staff against injury arising from armed robberies. As a consequence there was a marked improvement in the occupational health and safety practices adopted by banks, including improved branch security. This led to a marked decline in bank hold-ups commencing after 2003.
- *Coombs v Patrick Stevedores Holdings Pty Ltd [2004] NSWIRComm 77*<sup>105</sup> – Concerning contraventions arising from repetitive strain injuries to back and neck caused by the operation of machinery and failure to provide necessary rests and exercise.
- *Cahill v State of New South Wales (NSW Police) (No 2) [2005] NSWIRComm 400* – Concerning contraventions arising from an employee of NSW Police who suffered acute acoustic trauma after the siren of a police motor vehicle was sounded close to the employee's ear.
- *Bastian v James Hardie Australia Pty Limited [2006] NSWIRComm 201* – Concerning contraventions arising from burns suffered by a worker when sprayed with hot cement in circumstances in which the specific risk had been identified by the employer and not remedied.
- *Ferguson v Nelmac Pty Limited (1999) 92 IR 188* – Concerning contraventions arising from a fall suffered by a construction worker during a bridge construction project.

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<sup>105</sup> This prosecution was actually commenced pursuant to a consent given by the Minister rather than pursuant to the independent right of a union secretary to prosecute because the Maritime Union of Australia is not an industrial organisation registered under the NSW Act: see *Coombs v Patrick Stevedores Holdings Pty Ltd (2002) 118 IR 401*.

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- *Australian Services Union of NSW (Ms Kristyn Thompson) v Mercy Centre, Lavington Limited [2005] NSWCMC 156 (13 October 2005)*. A worker was attacked by a client and stabbed with a syringe. A second incident occurred where another client seriously assaulted the same worker. This prosecution resulted in fines totalling \$27,300. The Mercy Centre took 'remedial steps' to improve OHS after the prosecution and before their failed appeal to overturn the decision.

220. There is absolutely no evidence to suggest that the long-standing capacity of trade unions to bring prosecutions in NSW has been abused in any way. Trade unions have been able to prosecute breaches of occupational health and safety legislation in New South Wales since the 1940s. The number of union initiated prosecutions has been reasonably small and limited to circumstances in which the regulatory authority has declined to prosecute and the union involved felt strongly that important questions of principle were involved. The recently released report by the Honourable Justice Paul Stein QC found no evidence that the right to prosecute had been abused by unions.<sup>106</sup>

221. Prosecutions are invariably conducted by experienced legal practitioners who have professional obligations as officers of the Court that require adherence to the obligations applying to prosecutors in all criminal proceedings. The conduct of prosecutions is also subject to the supervision of the Court. If a prosecution is improperly instituted or maintained or conducted in an improper manner, the Court can take appropriate action to dismiss and order the union to pay the costs of the proceedings.<sup>107</sup>

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

### *Limitation Periods for Prosecutions*

223. Occupational health and safety legislation should include an appropriate limitation period for the commencement of proceedings for offences. An

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<sup>106</sup> Stein, *Inquiry into the Review of the Occupational Health and Safety Act 2000*, April 2007 at para 10.30.

<sup>107</sup> Stein, *Inquiry into the Review of the Occupational Health and Safety Act 2000*, April 2007 at para 10.29.

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appropriate time limit must ensure that proceedings are commenced in a timely manner but also ensure that sufficient time is available to investigate and prepare what can be complex proceedings and that breaches of the legislation not be permitted to go unpunished due to inaction by regulators. A general limitation period of three years from the date of the act or omission alleged to have constituted the offence is considered appropriate.

224. The existence of time limits in respect of offences under occupational health and safety legislation may be contrasted with the treatment most serious offences under the broader criminal law which are not subject to any time limit. The summary nature of proceedings for offences under occupational health and safety legislation make the imposition of a time limit appropriate.

225. The time limit provisions should also make provision for circumstances, such as cases of long latency diseases, that may require variation to the standard time limit applicable to the commencement of proceedings for offences,. Such circumstances may include:

- Where the prosecutor does not become aware of the circumstances alleged to constitute an offence. In this situation, the general time limit should apply from the time that the prosecutor becomes aware of the act or omission alleged to constitute the offence.<sup>108</sup>
- Where the circumstances surrounding the alleged offence are subject of an inquiry such as a coronial inquest that should be permitted to run its course prior to the commencement of any proceedings for offences arising from the same circumstances. A time limit of three years after the completion of a coronial inquest or other inquiry is appropriate.<sup>109</sup>

226. A general discretion should be conferred for the courts to grant leave to commence proceedings for an offence outside the general limitation period where it is necessary in the interest of justice. For example, prosecutions for serious offences should be able to be permitted to continue if it is shown that that the limitation period has been exceeded as a result of oversight by the regulatory technicality.

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<sup>108</sup> See, for example, *Occupational Health and Safety Act 2000*, section 106(2); *Workplace Health and Safety Act 1995* (Qld), section 165. The *Workplace Health and Safety Act 1995* (Tas) permits a prosecution to be brought within 12 months after an inspector becomes aware of the act or omission alleged to constitute the offence (section 55).

<sup>109</sup> See, for example, *Occupational Health and Safety Act 2000*, section 106(3).

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### 8.4 EVIDENCE

227. The ACTU does not consider that specific evidentiary procedures are necessary for occupational health and safety prosecutions. In particular, whilst the ACTU supports the existence of industry codes of practice, it is not appropriate that compliance with the code be deemed to be compliance with general duties under occupational health and safety legislation or provide a complete defence.

228. The ACTU refers the Review Panel to the CFMEU's submission to the Review<sup>110</sup> on the provision of Corporate Inquiry reports for the purposes of evidence. The ACTU supports the CFMEU's position.

### 8.5 THE BURDEN OF PROOF AND DEFENCES

#### *Burden of Proof*

229. The ACTU strongly believes it is of vital importance that the onus of proof in relation to the defences available under occupational health and safety legislation be upon the defendant. Any other approach would significantly compromise the prospects of the effective enforcement of the general duties imposed by occupational health and safety legislation and inhibit the achievement of the objectives of that legislation.

230. The appropriate balance is struck between achieving the objectives of occupational health and safety legislation and the proper administration of the criminal law in this area by imposing upon the prosecutor the onus of establishing the essential elements of the offence (that there was a risk to health or safety) but permitting the defendant to avoid liability if it is able to prove on the balance of probabilities that the risk arose in a manner outside its control or that it was not reasonably practicable to make provision against the occurrence.

231. This is, of course, the structure of the New South Wales legislation. The duties imposed upon employers and others are absolute and require, for example, employers to ensure the health, safety and welfare at work of all the employees of the employer.<sup>111</sup> The Act provides, however, a defence if the defendant is able to prove it was not reasonably practicable for the person to comply with the provision or the commission of the offence was due to causes over which the person had no

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<sup>110</sup> CFMEU Submission, Paragraph 159

<sup>111</sup> *Occupational Health and Safety Act 2000* (NSW), section 8(1).

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control and against the happening of which it was impracticable for the person to make provision.<sup>112</sup>

232. The New South Wales model is to be preferred. The general duties imposed upon employers should be absolute, that is, requiring an employer (or designer, supplier, manufacturer or person in control of work premises) to ensure the health and safety of employees and other persons at the place of work. Consideration of whether reasonably practicable measures were available to reduce or eliminate the risk should be the subject of a defence not included in the duties imposed by the legislation. This onus of demonstrating that it was not reasonably practicable to reduce or eliminate the risk occasioning the offence should be borne by the defendant.

233. Clearly, the defendant (whether employer, designer, supplier, manufacturer or person in control of work premises) is in the best position to know what has been done, what other available measures could have been taken and the expense, difficulty or inconvenience involved in adopting measures that would have reduced or eliminated risks to safety. Thus, whatever the relationship between the general duties and the defences in occupational health and safety legislation, it is critical that the legislation make clear that the defendant bears the onus in respect of the question of reasonable practicability or the absence of control.

234. The example of the legislation existing for many years in the United Kingdom is instructive. The English courts have for many years found that legislation imposing general duties upon employers that every place of work shall, so far as reasonably practicable, be made and kept safe for any person working there properly construed impose the onus upon the employer to prove that it was not reasonably practicable to make the workplace safe. In *Nimmo v Alexander Cowan and Sons Ltd* [1968] AC 107, the House of Lords formed the view that, with respect to remedial legislation of this nature, it was appropriate and fairer for employers to be required to prove they have done all that was reasonably practicable in the circumstances.<sup>113</sup>

235. The legislation enacted in the United Kingdom following the Robens Report avoided any doubt by expressly placing the onus upon employers to demonstrate

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<sup>112</sup> *Occupational Health and Safety Act* 2000 (NSW), section 28.

<sup>113</sup> The decision concerned section 29 of the *Factories Act* 1961 (UK) which provided that: "There shall, so far as reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work and every such place shall, so far as reasonably practicable, be made and kept safe for any person working there."

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that they had done all that was reasonably practicable. The general duties under the *Health and Safety at Work Act 1974* (UK) include a duty imposed upon every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.<sup>114</sup> Section 40 of the Act provides:

*40. Onus of proving limits of what is practicable etc.*

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

236. The English Court of Appeal has rejected the contention that, in placing the onus upon the employer to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty, the UK legislation was incompatible with the presumption of innocence enshrined in the European Charter of Human Rights. In *Davies v Health and Safety Executive* [2002] EWCA Crim 2949, the Court found the imposition of the legal burden of proof on employers was justified, necessary and proportionate having regard to the social and economic purposes of the legislation, that duty holders are persons who have chosen to engage in work or commercial activity and that the facts relied upon in support of the defence will be within the knowledge of the defendant. The Court said (at [25]):

The reversal of the burden of proof takes into account the fact that duty holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it. They are not therefore unengaged or disinterested members of the public and in choosing to operate in a regulated sphere of activity they must be taken to have accepted the regulatory controls that go with it. This regulatory regime imposes a continuing duty to ensure a state of affairs, a safety standard. Where the enforcing authority can show that this has not been achieved it is not "unjustifiable" or unfair "to ask" the duty holder who "has" either created or is in control of the risk to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it

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<sup>114</sup> *Health and Safety at Work Act 1974* (UK), section 2(1).

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237. There is nothing unusual or remarkable in defendants charged with offences under general regulatory legislation, including offences creating criminal liability, bearing the onus of proving they have taken every reasonable precaution. The rationale for this approach was explained by the Canadian Supreme Court in *R v Wholesale Travel Group* (1991) 3 SCR 154, the Canadian Supreme Court explained

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

238. The approach of creating offences of absolute liability is common in the case of offences under corporate legislation, environmental legislation and occupational health and safety legislation. That approach is not unfair, but rather is essential to the achievement of the broad societal benefits that it is hoped can be realised through occupational health and safety legislation.

239. The New South Wales model has been repeatedly endorsed by a series of major inquiries into occupational health and safety legislation in that State over the last 15 years, including the 1995 Federal Industry Commission Report, the 1997 McCallum Report<sup>115</sup> and the Report of the 1998 NSW Parliamentary Inquiry.<sup>116</sup> The recently released report by the Honourable Justice Paul Stein QC also recommended that the onus of proof to make out a defence under the New South Wales legislation continue to be upon the defendant.<sup>117</sup>

### *'Reasonably Practicable' Standard*

240. The ACTU supports the retention of use of the standard of what is "reasonably practicable" as a defence to the general duties that should be found in occupational health and safety legislation to be proved by the defendant. The standard of "reasonably practicable" or "practicable" is present in most Australian occupational health and safety legislation, is well understood by industrial parties and has been subject of considerable judicial scrutiny.<sup>118</sup> The phrase "reasonably

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<sup>115</sup> *Review of the Occupational Health and Safety Act 1983: Final Report of the Panel of Review*, February 1997; recommendation 14.

<sup>116</sup> NSW Legislative Council Standing Committee on Law and Justice, *Report on the Inquiry into Workplace Safety: Interim Report* (December 1997), at p.27 and *Report on the Inquiry into Workplace Safety: Final Report* (November 1998) at para 5.5.7.

<sup>117</sup> Stein, *Inquiry into the Review of the Occupational Health and Safety Act 2000*, April 2007 at para 7.34.

<sup>118</sup> See, particularly, *Edwards v National Coal Board* [1949] 1 KB 704 *WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd* (2000) 101 IR 239 at 260; *WorkCover Authority of New South*

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practicable” is also used in Article 16 of the *Occupational Safety and Health Convention (No 155)* 1981 of the International Labour Organisation.

241. The High Court has had occasion to consider the meaning of the phrase in *Slivak v Lurgi (Australia) Pty Limited* (2001) 203 CLR 304. Gaudron J said (at 322-323):

[T]hree general propositions are to be discerned from the decided cases:

- . the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
- . what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
- . to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.

242. The standard of “reasonably practicable” provides an appropriate standard in the Australian context for the balancing of the interests of employees and employers and the achievement of the objectives of occupational health and safety legislation. However, the “reasonably practicable” standard must be applied in a manner that acknowledges the clear intention of occupational health and safety legislation that risks to health and safety be eliminated.

243. As Walton J said in *WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182 at [94], the “reasonably practicable” standard:

... plainly calls for a balancing of the various interests of the particular employer in their particular circumstances against the stringent and explicit policy expressed in the Act to ensure that all places of work are safe and without risks to health and safety. ... [I]t must be kept firmly in mind that in order to establish a defence under s 53 a defendant must be able to show that it had done all that was reasonably practicable. This is how the balancing of interests ... must operate. However, for a defendant to establish such a

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*Wales (Inspector Bultitude) v Grice Constructions Pty Ltd* (2002) 115 IR 59; *Shannon v Comalco Aluminium Ltd* [1986] 19 IR 358 at 362 and *WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182 at 206-207.

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defence in the absence of pre-established safe work method, would, in my view, at the minimum, require evidence of the particular or unique circumstances that made the establishment of a safe work method in advance of the activities being commenced, impracticable. By their nature, such situations would be rare

244. In the NSW system, employers have successfully shown on the balance of probabilities, that they took reasonably practicable steps to prevent the breach and have defeated prosecutions (see, for example, *Workcover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182; and *WorkCover Authority of New South Wales (Inspector Belley) v Australian Inland Energy Water Infrastructure t/as Inland Energy and Water* [2003] NSWIRComm 408<sup>119</sup>)

245. The “reasonably practicable” standard is an objective standard. It requires that an employer demonstrate a proactive, imaginative and flexible approach to identifying potential risks to health and safety and the adoption of any measures to address such risks as are reasonably practicable.<sup>120</sup>

### *Burden of Proof and Individual Employees*

246. Different considerations arise in relation to duties imposed upon individual employees. The considerations that favour the imposition of the burden of proof upon defendants who are employers, designers, suppliers, manufacturers or persons in control of work premises do not arise in the case of an individual employee. An individual employee is not likely to be in a position to know what safety measures were in place or could have been implemented or the costs or difficulty in implementing alternative safety measures. An individual employee is not likely to have ready access to evidence in relation to these matters.

247. Any offences contained in occupational health and safety legislation applicable to individual employees (as opposed to managers or officers of corporate employers) should appropriately depend upon a finding that the employee committed a specific act or omission, such as, failing to take reasonable care or failing to follow reasonable directions relating to occupational health and safety. In recognition of the different position of an individual employee, the burden of

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<sup>119</sup> Prof. Ron McCallum AO, Submission to the Inquiry into New South Wales Occupational Health and Safety Legislation, 14 December 2006

<sup>120</sup> See discussion in Bluff and Johnstone, *The Relationship between “Reasonably Practicable” and Risk Management Regulation*, Working Paper 27, National Research Centre for OHS Regulation, September 2004 at p8-22.

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proving that the individual employee failed to take reasonable care or follow reasonable directions must be borne by the prosecutor.

### 8.6 LIABILITY OF OFFICERS

#### *Deemed Liability*

248. The ACTU considers that relevant officers of corporations should be deemed to have contravened occupational health and safety legislation in the event that the corporation commits an offence, subject to the capacity of an officer to make out a defence. Section 26 of the *Occupational Health and Safety Act 2000* (NSW) provides an appropriate model.

249. Responsibility for the management of health and safety of persons in the workplace falls principally upon corporate employers, designers, suppliers, manufacturers or corporations in control of work premises. Corporations, of course, can only act through the natural persons who conduct and control their operations. A critical component of an effective regime for the enforcement of the duties imposed by occupational health and safety legislation is that those in control of the operations of a corporation must be made subject to offences committed by that corporation.

250. The imposition of personal liability upon officers and managers of corporate employers assists in achieving the objects of occupational health and safety legislation by encouraging engagement by managers in occupational health and safety management and ensuring vigilance and diligence in addressing health and safety concerns. Relevantly, the “Report to WorkCover Authority of New South Wales” by McCallum, Hall, Hatcher and Searle said:<sup>121</sup>

198 Law reform in this area should be directed towards encouraging and promoting positive constructive safety conduct.

199 Constructive or positive conduct can be encouraged by raising the potential bar on the liability of individuals. The prospect of personal liability increases vigilance and a proactive culture.

251. The objects of promoting vigilance and encouraging a proactive culture are best achieved by occupational health and safety legislation that deems relevant officers and managers of corporations to have committed an offence whenever the corporation is found to have committed an offence. Defences should be available in

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<sup>121</sup> McCallum, Hall, Hatcher and Searle, *Report to WorkCover Authority of NSW* (2004) at [198]-[199].

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the event that the officer or manager is able to demonstrate that the commission of the offence arose outside his or her control or it was not reasonably practicable to make provision against the occurrence.

252. Legislative regimes which require the prosecution to prove personal fault on the part of an individual officer or manager of a corporation are unlikely to be effective and place unacceptable barriers in the path of successful prosecutions.<sup>122</sup> Consideration of the individual responsibility of an officer or manager is likely to involve detailed consideration of matters including:

- The management and functional hierarchies within the corporation;
- The integration of levels and systems within the corporation;
- The functions and responsibilities of and allocated to individuals, or the chain of senior and middle management and operational divisions of the organisation;
- The power and opportunity to prevent the events occurring.<sup>123</sup>

253. The manager or officer is (as the person responsible) in the best position to know and demonstrate the extent of his or her responsibilities, the nature of the internal management structures of the organisation and what steps he or she has taken or could have taken to address the circumstances giving rise to the contravention by the corporation. The officer or manager should bear the onus of establishing to the civil standard a defence.

254. The evidence indicates that most officers prosecuted under occupational health and safety legislation are officers of small corporations and those closely involved in the specific events leading to injury or fatality.<sup>124</sup> Senior officers and managers of large corporations have only infrequently been subject of prosecutions. Provisions that require the prosecution to prove specific failures on the part of an individual manager are likely to permit senior officers and managers (who actually have the power to make decisions to improve safety in the workplace) to hide behind the complexity of the corporate structure to avoid prosecution.

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<sup>122</sup> See, for example, *Occupational Health and Safety Act 2004* (Vic), section 144(1); *Occupational Safety and Health Act 1984* (WA), section 55(1).

<sup>123</sup> McCallum, Hall, Hatcher and Searle, *Report to WorkCover Authority of NSW* (2004) at [177].

<sup>124</sup> Foster, "Personal Liability of Company Officer for Corporate Occupational Health and Safety Breaches: Section 26 of the Occupational Health and Safety Act 2000 (NSW)" (2005) 18 *Australian Journal of Labour Law* 107 at 113-117.

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### *Defences available to Officers and Managers*

255. It is appropriate that managers have access to appropriate defences. However, it is vital that any defences properly encourage managers at all levels to be involved in occupational health and safety management and do not permit senior managers to hide behind the complexity and size of a corporate organisation to avoid liability. This is best achieved by crafting defences that impose an onus of the officer or manager to demonstrate that he or she took all reasonable means to prevent the commission of the offence.

256. Defences should fall into two broad categories:

- The “position of influence” defence, that is, that the officer or manager was not in a position to influence the conduct of the corporation in relation to the offence. This defence should focus attention upon the formal responsibilities of the officer or manager to influence the conduct of the corporation generally rather than the particular circumstances of the accident.
- The “due diligence” defence, that is, that the officer or manager used all due diligence or took all reasonable steps to prevent the commission of the offence or the offence was due to causes over which the person had no control and against which it was impracticable for the person to make provision.<sup>125</sup> The Panel should take full account of the CFMEU’s submission to the Review regarding the need for a tight definition of “due diligence”<sup>126</sup>.

257. The crafting of the defences in this way encourages officers and managers to become proactively involved in occupational health and safety within an organisation by requiring that a manager demonstrate that all reasonable means have been taken to comply with the duties imposed by the legislation.

### *Officers and Managers to which Personal Liability should Apply*

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<sup>125</sup> *Occupational Health and Safety Act 2000* (NSW), section 26.

<sup>126</sup> CFMEU submission to the Review, para. 96.

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258. Personal liability on the part of officers and managers should extend to all persons having responsibility for the overall management of a corporation as a whole or a substantial part of the corporation's activities. Legislation which limits the applicability of provisions imposing personal liability only to senior or executive officers are likely to prove ineffective.<sup>127</sup> Personal liability of officers or managers should at least extend to all persons concerning or involved in the management of a corporation.<sup>128</sup>
259. It is considered that the definition of "officer" contained in the New South Wales legislation is to be preferred. Section 26 of the *Occupational Health and Safety Act 2000* (NSW) extends deemed liability to each director of the corporation, and each person concerned in the management of the corporation. The phrase "concerned in management of the corporation" has been subject to extension judicial consideration and is now well understood.<sup>129</sup>
260. It is not sufficient for occupational health and safety legislation to be drafted simply by reference to definitions contained in corporations legislation. This is the approach adopted in the Victorian legislation.<sup>130</sup> Such an approach fails to extend the reach of the legislation to persons actually having power to make decisions affecting safety in the workplace. In *Powercoal Pty Limited v Industrial Relation Commission of NSW* (2005) 145 IR 327, for example, Spigelman CJ said:

[98] The formulation "management of a corporation" is not a term of art. It takes its meaning from its surroundings. The context of the *Corporations Act* provision is substantially different to the scope, purpose and object of the OH&S Act. It is most unlikely that cases on the *Corporations Act* sections would be of any significance for present purposes. Insofar as they do have significance they are against the conclusion which the Claimant would seek to have the Court draw.

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[102] In the present context, where the concern is with occupational health and safety issues, the equivalent issue to that of incurring the debt in the case

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<sup>127</sup> *Workplace Health and Safety Act 1995* (Qld), section 167.

<sup>128</sup> Section 26(1) of the *Occupational Health and Safety Act 2000* (NSW) extends to directors and "each person concerned in the management of the corporation": see *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253.

<sup>129</sup> See, for example, *Newcastle Wallsend Coal Company Pty Limited v McMartin* (2006) 159 IR 121; *Powercoal Pty Limited v Industrial Relation Commission of NSW* (2005) 145 IR 327; *McMartin v Newcastle Wallsend Coal Company Pty Limited* [2004] NSWIRComm 202.

<sup>130</sup> *Occupational Health and Safety Act 2004* (Vic), section 144 and the definition of "officer" in section 5 of that Act.

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of the *Corporations Law*, is any aspect of the operations of the company insofar as it raises safety considerations. The manager of a mine is clearly within the scope of this purpose.

261. Given the complexity of many large corporations, the most senior executive officers of corporations may be able to disassociate themselves from the occurrence of an accident and protect themselves from prosecution simply by asserting reliance upon managers at lower levels in the hierarchy of the corporation. The legislation should seek to encourage involvement in the management of occupational health and safety concerns at all levels of management.

### 8.7 SENTENCING OPTIONS

#### *Fines*

262. The ACTU considers that monetary penalties should be imposed on all offences under occupational health and safety legislation. Given the grave consequences which can flow from contraventions of occupational health and safety legislation, the ACTU firmly believes that the highest sanctions for breaches of any corporation related law should be available under the model occupational health and safety legislation and that in an appropriate case a pecuniary penalty calculated as a proportion of a corporation's turnover be able to be imposed.
263. The maximum penalties for breaches of occupational health and safety legislation vary from vary from \$180,000 to almost \$1,000,000 (or up to \$1,650,000 for causing death) and between \$10,000 and \$250,000 for an individual. Currently, in all jurisdictions, breaches of corporate governance laws, the trade practice legislation and environmental protection laws (among others) attract higher penalties than any of the current occupational health and safety laws.
264. For example, offences under the *Trade Practices Act 1974* (Cth) involving false and misleading representations in connection with the supply of goods or services, bait advertising, pyramid selling and failure to comply with product safety standards attract penalties of up to \$1.1 million.<sup>131</sup> Contravention of restrictive trade practices and price fixing provisions can result in the imposition of pecuniary penalties of up to \$10 million, the value of the benefit attributable to the breach or 10% of turnover (whichever is greatest).<sup>132</sup>

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<sup>131</sup> *Trade Practices Act 1974* (Cth), Part VC.

<sup>132</sup> *Trade Practices Act 1974* (Cth), sections 45A-45C.

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265. Undertaking development without consent may attract a maximum penalty of \$1.1 million.<sup>133</sup> Offences of dumping industrial waste without authorisation attract maximum penalties of up to \$550,000 plus daily penalties of up to \$275,000 per day for continuing offences.<sup>134</sup> Offences of handling food in an unsafe manner, selling unsafe food and falsely describing food attract maximum penalties of \$550,000 for a corporation and \$110,000 for an individual.<sup>135</sup>
266. Offences under trade practices, environmental protection and corporations legislation are properly regarded as serious. However, offences under occupational health and safety legislation are more serious resulting as they do in the deaths of thousands of workers each year. Penalties at least of the magnitude available under the other legislation discussed must be available under occupational health and safety legislation.
267. Studies concerning the level of penalties imposed under occupational health and safety legislation have consistently demonstrated that the level of fines imposed by courts is very low. For example, in 2002/2003 the average fine imposed in Victoria was 7.18% of the statutory maximum.<sup>136</sup> In New South Wales, 23% of defendants were fined less than 5% of the maximum penalty, 48% were fined less than 10% of the maximum penalty, 75% were fined less than 20% of the maximum penalty and only 9% attracted a penalty of 50% or more of the maximum penalty.<sup>137</sup>
268. An increase in the maximum penalties cannot in itself remedy the low level of fines that have historically been imposed for offences under occupational health and safety legislation. However, courts will probably have regard to the maximum penalty as the “public expression” by Parliament as to the seriousness of the offence and, in particular, will take into account the actions of Parliament in increasing the level of maximum penalties for a particular class of offences.
269. As monetary penalties are likely to remain the principal sanction for offences under occupational health and safety legislation, it is essential the model occupational health and safety legislation contain effective monetary sanctions.

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<sup>133</sup> See *Environmental Planning and Assessment Act 1979* (NSW), section 126.

<sup>134</sup> See *Environment Protection Act 1970* (Vic), section 27A.

<sup>135</sup> See *Food Act 2003* (NSW), sections 13-15. Similar penalties are imposed in the *Food Act 1984* (Vic), sections 8-10A.

<sup>136</sup> Maxwell, *Occupational Health and Safety Act Review*, March 2004 at para 1799.

<sup>137</sup> UK Health and Safety Executive, *International Comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences* (2007) at p368-369.

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Substantial monetary penalties are likely to have a general deterrent effect. However, the specific deterrence achieved for a particular defendant will depend upon the financial resources it has to meet any fine imposed.

270. Monetary penalties inherently have difficulty in deterring the conduct of large, wealthy corporations that are able to easily absorb any fines imposed. For example, in *DPP v Esso Australia Pty Limited* [2001] VSC 263, Esso was fined \$2 million. Although this was then the largest fine to be imposed in Australia for a workplace offence, media reports indicated that the company's Bass Strait operations generated the same income each day.<sup>138</sup> Ensuring appropriate standards of health and safety for workers can be difficult and expensive. The approach of prescribing flat maximum penalties may cause some employers to form the view that it is more expedient to simply take their chances of being fined rather than implement appropriate safety measures.

271. In order to provide a credible deterrent, the model occupational health and safety legislation should include provision for the imposition of pecuniary penalties calculated as a percentage of the turnover or profits of a corporation. A model for such provisions is to be found in the *Trade Practices Act 1974* (Cth) permitting the imposition of penalties up to three times the value of the benefit attributable to the breach or 10% of turnover if greater than the fixed maximum penalty that would otherwise apply.<sup>139</sup>

272. It is considered that an increased maximum penalty should apply in the event that a defendant has prior convictions under occupational health and safety legislation. Such provisions exist in New South Wales and Victoria. The courts must have the capacity to impose increased penalties in the event that recalcitrate offenders repeatedly contravene the legislation.

### *Approach to Sentencing*

273. The principles to be applied in sentencing of occupational health and safety offences are well established in most jurisdictions. It is not necessary for the model occupational health and safety legislation itself to dictate the approach to be adopted in relation to sentencing. However, the legislation should include provision for the making of guideline judgments setting guidelines to be taken into account when

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<sup>138</sup> UK Health and Safety Executive, *International Comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences* (2007) at p126.

<sup>139</sup> *Trade Practices Act 1974* (Cth), section 76(1A).

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sentencing persons for offences.<sup>140</sup> Having said that, while guideline judgments should provide an effective mechanism for addressing the failure of the courts to impose appropriate sentences for particular offences<sup>141</sup>, current criminal sentencing guidelines in NSW have produced an average fatality fine of 18.1% of the maximum according to research conducted by Peggy Trompf of the Workers Health Centre in NSW. Sentences must be delivered to act as a deterrent. To address this, sentencing guidelines must include the option of unit fines, that is setting fines against a percentage of company turnover or profit to be determined by the courts (within a range of percentages set out by the guidelines) and are based on the seriousness of the offence. CEO's and directors must be also subject to these fines.

274. OHS sentences must keep pace with community expectations that serious offences attract serious sentences. Gaol terms for OHS offences fall well behind sentences for corporate crimes. An analysis of ASIC sentences for crimes such as fraud and embezzlement shows that that gaol terms have been far more severe than under OHS law with a median sentence of 3 years. A crime of \$2million attracts a median sentence of 5 years.

275. Recent research on the value of life<sup>142</sup> found that it is "*likely to be as much as \$6 million or higher for the average person... For adults with dependents, additional several hundred thousands of dollars per dependent would be added to the \$6 million baseline.*" Based on this value and applying ASIC sentences to OHS offences that cause death, gaol terms should be between 12 and 15 years.

276. Subject to what is said below in relation to offences causing death or serious injury or illness, the focus of sentencing should be upon the objective seriousness of the offence. The objective seriousness of the offence involves consideration of the degree of culpability of the defendant in permitting a risk to health and safety to arise in the workplace. The seriousness of an offence is not equated with "recklessness" as is suggested in the Issues Paper.

277. This does not mean that the outcome of a particular contravention is irrelevant to the sentencing function. As was explained by the Full Bench of the

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<sup>140</sup> See, for example, *Occupational Health and Safety Act 2000* (NSW), section 124-131.

<sup>141</sup> See, for example, *R v Jurisic* (1998) 45 NSWLR 209 (concerning dangerous driving causing death or serious injury); *R v Henry* (1999) 46 NSWLR 346 (concerning armed robbery); *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 56 NSWLR 146 (concerning high range PCA).

<sup>142</sup> Posner, E., & Sunstein, C., (2004), *Dollars and Death*, Working Paper, Law School, University of Chicago.

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Industrial Court of New South Wales in *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch'Ng)* (1999) 90 IR 466 at 476:

In the case of an offence under s 15(1) of the OH&S Act, there are a number of factors which may tend to establish the existence of an objectively serious offence. It will be a serious offence where there is an obvious or foreseeable risk to safety against which appropriate measures were not taken, even though such measures were available and feasible: see *Inspector Hannah v Wonar Pty Ltd* (unreported, Fisher CJ, CT90/1214, 30 June 1992) at 9. The gravity of the consequences of an accident does not, of itself, dictate the seriousness of the offence. However, the gravity or otherwise of the potential risk to safety flowing from a breach is relevant as a measure of the gravity of the breach and the culpability of the defendant: see *Tyler v Sydney Electricity* (1993) 47 IR 1 at 5. In *Inspector Hannah v Wonar Pty Ltd*, the Full Bench indicated (at 9), properly in our view, that "a breach that was quite unlikely to lead to serious consequences, might be assessed on a different basis to a breach where there was every prospect of serious consequences".

278. The consequences of a workplace accident may provide good evidence of the seriousness of the risk to health and safety that the employer has permitted to persist in the workplace and the gravity of the failure on the part of the employer to address that risk.

### *Other Sentencing Options*

279. In addition to monetary penalties and imprisonment, a diverse range of sanctions and remedies should be available to courts hearing prosecutions for occupational health and safety offences to meet the needs of general and specific deterrence and to address the consequences of a particular offence. The sentencing options referred to below must be structured on the basis they will be imposed in addition to, rather than in substitution for, monetary or other penalties available under existing occupational health and safety legislation.<sup>143</sup>

280. The following should be included as sentencing options for these types of matters:

- orders for reparation, restitution and restoration;

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<sup>143</sup> See approach in *Cahill v State of New South Wales (NSW Police) No 2* [2005] NSWIRComm 400 at [52] and *Inspector Jennifer Short v Crown in the Right of the State of New South Wales (NSW Police)* [2007] NSWIRComm 138 at [42].

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- orders for the confiscation of offence related profits;
- publicity orders;
- corporate probation orders;
- disqualification orders;
- prohibition orders;
- training orders;
- good behaviour bonds;
- dissolution orders (the liquidations of an offending organisation or part of the organisation);
- tender disqualification;
- equity fines
- victim compensation orders
- outcome responsibility<sup>144</sup>

281. The imposition of a custodial sentence upon an individual should be available for serious breaches of the general duties contained in the model occupational health and safety legislation.

### 8.8 WORKPLACE DEATH AND SERIOUS INJURY

282. The ACTU considers that it is appropriate that model occupational health and safety legislation include a specific offence of negligently causing death in the workplace. Such an offence should apply to employers and directors and officers of corporate employers and should be subject to the harshest penalties, including substantial periods of imprisonment.

283. An offence of industrial manslaughter could, however, remain within the mainstream of occupational health and safety legislation rather than being removed to general criminal statutes.<sup>145</sup> Occupational health and safety law should continue to be regarded as a specialist jurisdiction, separate from the mainstream criminal law, administered by specialist courts. The elements of the offence will ordinarily be:

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<sup>144</sup> An ASCC funded paper (Hopkins, 2006) argues that as well as fault based liability offences, a new offence should be created whereby CEOs should take “outcome responsibility” for health and safety fatalities and serious injuries and permanent disease (p.14), also see (Hall et al, 2004, p17); *Senior officers who accept responsibility for outcomes in this way will act decisively to correct the problems that led to the offence. They will not be satisfied with the practices of due diligence which too easily degenerate into rituals to protect senior officers from legal liability. They will be motivated to ferret out errors and wrong doing...*

<sup>145</sup> See the approach in the ACT of inserting section 49C and 49D into the *Crimes Act 1900 (ACT)* and that of the *Occupational Health and Safety Act 2000 (NSW)*, section 32A where such offences are included in general occupational health and safety legislation and prosecuted in specialist industrial courts.

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- A worker dies in the course of employment or at a place of work or is injured or contracts an illness in the course of employment and later dies;
- The conduct (by way of act or omission) of a person caused the death, injury or illness; and
- The person was reckless or negligent about causing serious harm or death to the worker.

284. The offence should apply not only to deaths that occur at the workplace, but also to instances in which a worker is injured or contracts an illness in the course of employment and later dies as a result of the injuries or illness. Some of the most egregious instances of reckless or negligent conduct by employers have involved the exposure of workers to work practices causing terminal illness. The exposure of workers to asbestos over many years is a particular tragic example. Sections 49A-49D of the *Crimes Act 1900* (ACT) should be adopted in the model occupational health and safety legislation.

285. Another model is found in the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK). That Act creates an offence in the event that the way a corporation's activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.<sup>146</sup> A relevant "duty of care" includes a duty owed by a corporation to its employees or to other persons working for the organisation or performing services for it.<sup>147</sup> The Act permits unlimited fines to be imposed.

286. Whilst a specific offence of recklessly or negligently causing death in the workplace can perform an important function as part of the regulation of occupational health and safety, it must be recognised that in the circumstances of many workplace deaths it will prove difficult to successfully prosecute under provisions of this nature. As a consequence, the ACTU considers that it is necessary for other mechanisms to be included in the model legislation to ensure that community outrage at incidence of workplace deaths gains appropriate expression.

287. The usual approach to sentencing for offences under occupational health and safety legislation is that, in assessing the objective seriousness of the offences, the focus will be upon the gravity of the risk to health and safety of employees and other rather than the actual consequences of the breach (such as injury or death)

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<sup>146</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK), section 1.

<sup>147</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK), section 2.

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although the consequences may demonstrate the seriousness of the risk.<sup>148</sup> The ACTU supports this general approach. That approach focuses attention of systemic failings rather than a particular accident or event.

288. However, it must be recognised that workplace deaths provoke particular concern within the community that demands the potential for additional penalty. In order to express condemnation of deaths in the workplace and provide appropriate deterrence, increased penalties should be applied in the event of breaches of legislative duties imposed that cause death or serious injury. In this respect, the *Workplace Health and Safety Act 1995* (Qld) provides an appropriate model.<sup>149</sup>

### 8.9 ENFORCEMENT OF PENALTIES

289. The ACTU considers that monetary penalties imposed for offences under occupational health and safety legislation should in the first instance be enforced in the same manner as fines imposed upon the general criminal law. For example, in New South Wales, fines imposed upon the *Occupational Health and Safety Act 2000* (NSW) are enforced by the State Debt Recovery Office under the *Fines Act 1996* (NSW).

290. The ACTU is gravely concerned by evidence that a significant number of fines imposed for offences under occupational health and safety legislation remain unpaid.<sup>150</sup> This often occurs as a result of a corporation becoming insolvent and there are certainly instances in which companies have rearranged their affairs in order to avoid fine payment and continue operating through other corporate entities.

291. It is appropriate that model occupational health and safety legislation include specific provision permitting prosecutors to re-open proceedings in the event that fines are not paid and seek alternative orders including publicity orders, orders against directors, managers or shareholders or orders against new corporate entities who are successors, assignees or transmittes of the business of the insolvent company. Furthermore, unpaid fines should increase in severity, culminating in gaol for fine evaders.

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<sup>148</sup> *Haynes v C I & D Manufacturing Pty Ltd* (1995) 60 IR 149 at 156-157 and *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales* (1999) 90 IR 464 at 476.

<sup>149</sup> *Workplace Health and Safety Act 1995* (Qld), section 24.

<sup>150</sup> Reports in NSW have indicated that, in 2006, there were 89 unpaid fines for serious workplace safety breaches totalling almost \$5 million and that 34 of the companies were unlikely to ever pay because they had become insolvent: "Plan to Shame Defaulting Firms", *Sydney Morning Herald*, 25 April 2006, p10.

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

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# **CHAPTER 9: OTHER ISSUES**

## 9.1 REGULATION MAKING POWERS

294. The ACTU opposes dropping items from the Act (the principle statutory instrument) down the legislative hierarchy to the Regulations, Code and Guidance Material.

## 9.2 CODES OF PRACTICE

295. The ASCC prior to the establishment of this review began the process of coordinating the development and harmonisation of Regulations. The ASCC tasked the ASCC OHS tripartite working group with the role but terms of reference for the group had not been developed.

## 9.3 NOTIFICATION OF INCIDENTS AND REPORTING

296. The ACTU seeks substantial improvements in the type of data collected; and the broadening and improving of the data sources. Modern information technology allows for much better reporting of incidents. The replacement body to the ASCC must be resourced so that this information is available on their website and continually updated. The current time lag in this respect is unacceptable. This data should include exposure data gathered by employers in relation to hazardous exposures in the workplace. Exposure by occupation is particularly important, as is an active, well-resourced mesothelioma register.

297. Further the ACTU supports harmonising data reporting across the jurisdictions and for data to be provided in a timely fashion.

298. The ACTU supports the incorporation of the Medicare system, coroners court and ABS survey into the collection system for work related injuries and diseases to ensure that all workers (not just “employees”) and by-standers injured or killed in a work-related incident have their data collected. This should also allow proper identification and evaluation of non-reporting of work related injuries and disease.

## 9.4 & 9.5 EXTERNAL APPEALS AND ISSUES RESOLUTION & TRIPARTITE MECHANISMS

299. The ACTU defines tripartite to mean that there is an equal representation of unions, employers and regulators.

300. In addition to the tripartite national body to replace the Australian Safety and Compensation Council, each jurisdiction should have an independent statutory tripartite body to oversee the implementation of the harmonised scheme, report to

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the relevant Minister and formulate, implement and evaluate the strategic direction of the body.

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

- assisting in the implementation of any National OHS Strategy
- inquiring into and reporting to the Minister upon any matters including those referred to it by the Minister;
- making recommendations to the Minister with respect to:
  - the model OHS Act;
  - any law or provision of a law, relating to occupational safety and health that is administered by the Minister, and any law or provision of a law relating to occupational safety and health that is prescribed for the purposes of this paragraph; and
  - subsidiary legislation, guidelines and codes of practice proposed to be made under or for the purposes of any prescribed law.
- examining, reviewing and making recommendations to the Minister in relation to existing and proposed registration or licensing schemes relating to occupational safety and health;
- providing advice to and co-operating with Government departments, public authorities, trade unions, employer organisations and other interested persons in relation to occupational safety and health;
- formulating or recommending standards to the national tripartite body, specifications or other forms of guidance for the purpose of assisting employers, self employed persons and employees to maintain appropriate standards of occupational safety and health;
- promoting education and training in occupational safety and health as widely as possible;
- in co-operation with educational authorities or bodies, devising and advising on courses in relation to occupational safety and health;
- having regard to the criteria laid down by the replacement body for the Australian Safety and Compensation Commission, advising persons on training in occupational safety and health and formulating and accrediting training courses in occupational safety and health;
- recommending to the Minister the establishment of public enquiries into any matter relating to occupational safety and health;
- collecting, publishing and disseminating information on occupational safety and health;
- formulating reporting procedures and monitoring arrangements for identification of workplace hazards and incidents in which injury or death is likely to occur in an occupational situation; and

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- commissioning and sponsoring research into occupational safety and health. To do this will require a core of research staff within the agency as well as funding of PhD and external research activities (peer-reviewed competitive grants and targeted program funding).

302. Examples in existing law:

- WA OHSA amend 2006 - s.14

### 9.6 MUTUAL RECOGNITION

#### *Permits And Licensing Arrangements For Workers Engaged In High Risk Work*

303. The ACTU supports the process of development of the *National Standard for Licensing Persons Performing High Risk Work* undertaken by the ASCC tripartite technical working group.

304. There should be formal mutual recognition provisions between states in the model OHS Act to cover registration of plant as well as permits and licensing arrangements for workers engaged in high risk work as defined by the current national standard. The scope of what is defined as high risk work must be broadened to increase the types of plant. The OHS Act must have enabling clauses relating to permits and licensing arrangements, including the making of regulations. Unions want to maintain at least the same system that is in place now. However there must be strong regulation of licensing and permits to ensure higher levels of skill and competency for safer OHS standards. There must also be strong regulation for registration of plant.

## **SCHEDULE 1**

### **Information concerning Union Prosecutions in New South Wales**

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#### **New South Wales Teachers Federation**

The NSW Teachers Federation has prosecuted the NSW Department of Education and Training (DET) twice using the right to prosecute conferred on secretaries of registered industrial organisations of employees under Section 106 of the NSW Occupational Health and Safety Act 2000. In part because of the high costs involved, the Federation has only prosecuted where the breach has been significant and as a last resort following the failure of other attempts to address problems. It has also only prosecuted where it became necessary to drive system-wide improvements.

The Federation's prosecutions, both successful, related to the failure of the DET's failure to protect the health and safety of teachers from violent student behaviour at two Sydney schools, Dover Heights High School in the eastern suburbs and Rowland Hassall School for Specific Purposes (catering for students with intellectual disabilities) at Parramatta. Both prosecutions canvassed the failure of the DET to provide information it held and/or could have reasonably obtained, on a violent students and had failed to make available to teachers at the school when the students where enrolled. It was argued in both cases that this failure had led to significant injuries to teachers in the schools. In the case of the student at Dover Heights, it was fortunate that a knife-wielding student was disarmed by building workers before he could stab a teacher and students he was pursuing. Two of the four teachers involved at Dover Heights did not recover sufficiently from their injuries (psychological) to return to teaching. In the Rowland Hassall case, a teacher was physically assaulted, with severe bruising, lacerations and a broken tooth.

The DET was convicted of failing to protect the health and safety of teachers at Dover Heights High School in March, 2006 and fined \$220,000. In September, 2006 the DET was convicted of failing to protect the health and safety of teachers at Rowland Hassall SSP, followed by a fine of \$105,000 imposed in June, 2008.

The first of the was prosecutions was only commenced by the Federation after discussions entered into with the DET to secure improvements in inadequate DET policy and procedures concerning enrolments of students with a history of violence and the provision of relevant OHS information to teachers. The Federation also unsuccessfully sought assistance from WorkCover NSW to have the DET address the matters. These discussions

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were sought by the Federation after the Federation obtained workers compensation figures which indicated approximately 27% of successful workers compensation claims by teachers in the DET were for psychological injury, with many of these related to workplace violence, and after a survey of members indicated that there were over 7,000 separate acts of violence (using WorkCover NSW's definition) directed against teachers in DET workplace within a one month period. The survey also made it clear that many teachers were being injured because they were not being provided with relevant information about students with a history of violence and that the employer was not facilitating risk assessments and risk management plans, all requirements under the OHS Act 2000.

As a result of both prosecutions, significant improvements were introduced which have contributed to NSW public schools and TAFE colleges becoming much safer. Within months of first prosecution commencing in December, 2003 the DET changed its Suspension and Expulsion of Students Policy to make it mandatory for the suspension of students whose violence had resulted in pain or injury and included explicit provisions requiring risk assessment and control measures to put in place before the return of such students could be considered.

Further very significant changes occurred between the conviction in 2006 and the conviction in September 2006. These were set out in *Legal Issues Bulletin* No 40 issued to all schools and TAFE colleges in NSW on May 17, 2006. Although the *Legal Issues Bulletin* is headed "Collection, use and disclosure of information about students with a history of violence", it spells out clearly the procedures that must be followed when any current DET student is seeking enrolment in any other DET school or TAFE college or when an existing student is violent. Importantly, it also provides clear procedures to be followed when a student is seeking enrolment from a Department of Community Services or Juvenile Justice institution, a private school or interstate.

*Legal Issues Bulletin* No 40 makes it clear that:

- Violence is not restricted to physical acts. It includes "threats to commit violence, aggressive behaviour which is non-contact in nature and may also include offensive, aggressive or abusive language directed to staff or students".
- Staff must be provided with all relevant information about any risk they may be exposed to and be "provided with any information necessary to ensure the employee's health and safety". This includes new teachers, casual teachers and support staff as appropriate.
- "Staff must be consulted at all stages of the risk assessment process."
- Advice and resources can be sought from the Region via the School Education Director.

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- A student seeking to transfer from one DET school to another DET school is not allowed to attend "until the relevant student records from the previous school have been received and any risk assessment considered necessary is completed, and appropriate solutions, including control strategies, are commenced".
- If a student is seeking enrolment from a private school or interstate and there are reasonable grounds to suspect that the student has a history of violence, enrolment is not to be completed if parents do not give permission to obtain records or if the private/interstate school declines to provide the information. In such circumstances the matter is to be referred to the regional DET office to resolve. Similar arrangements also apply to access information held by the Department of Community Services, Juvenile Justice, Health or similar agency.
- TAFE colleges can, with student's permission, access DET and private school records where there are reasonable grounds to suspect that the student has a history of violence. If a student declines to provide permission the enrolment has to be rejected.
- Information must be obtained and risk assessment occur if violence occurs at anytime after a student is enrolled in a school or TAFE college, regardless of the initial assessment.
- School counsellors must provide relevant information about violent students. When doing so to meet obligations under the Occupational Health and Safety Act, there is no breach of privacy or of professional ethics.
- Principals and TAFE institute managers must ensure "that any violence related incidents occurring in schools or institutes are full [sic] documented and the records retained."

In December 2006 the NSW Government amended the Education Act to provide for the exchange of information regarding students with a history of violence transferring between public and private schools, and for the exchange of information between authorities in different states. It also gave the NSW Director-General of Education and Training the power to direct the enrolment of students with a history of violence in schools with appropriate resources, including special schools and units established to cater for students with a significant history of violence.

In 2007 the NSW DET commenced a program designed to provide every student with a unique identifier number to ensure that any student with a history of violence could be easily tracked if they changed schools. As a consequence of these changes, there is no doubt NSW public schools are safer, with the DET also reporting to the Federation a significant decline in psychological injury as represented by workers compensation claims.

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### **Public Service Association and Professional Officers Association Amalgamated Union of New South Wales**

The Association has undertaken numerous safety investigations that have not been prosecuted and the following are those matters that have been decided by a judge in court session or on appeal to Full Bench by the defendant. In all of our matters the majority of charges were proven or the defendant pleaded guilty.

### **The General Secretary, Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v The State of New South Wales, Tourism NSW, Matter No. IRC 2507 of 1998 Schmidt J.**

#### ***Summary***

The defendant pleaded guilty. The injury occurred in 1996 to a clerk working for Tourism NSW (at times known as the Department of Tourism). The injury was an occupational overuse injury caused by the inadequate information provided to the employee, the inadequate ergonomic equipment provided to the employee and inadequate lighting. The defendant was told of the risk and ways of improving the workstation but delayed in doing so.

#### ***Context***

The case was in a context whereby the Association had been educating our members and employers of the risks of RSI and Occupational Overuse Injuries for nearly two decades, as the knowledge of the condition was made more available and also with the introduction of new technologies in the workplace such as computers with keyboards and mouse. Despite job reengineering success in the late eighties and early nineties occupational overuse injuries were still occurring despite there being well known safety practices to prevent the occurrence of these injuries. This was partly to do with new technologies such as mouse and workstation interface.

Despite being hard to define in the categorisation of injuries as provided by the national statistical data subsets issued by the compliance agencies, the author has been advised that “muscular stress with no objects being handled” includes the category of injury of occupational overuse injury. According to recent statistical data this category makes up 6% of all claims in government administration, and 10% of all claims in education areas that we have large proportion of coverage.<sup>151</sup> The hazards causing OOS still need to be managed and this case allows the Association in an ongoing manner to become actively involved in finding solutions to safety issues surrounding this injury type.

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<sup>151</sup> NSW Workplace Health and Safety Strategy review Committee, *Public Sector Industry Action Plan, Discussion Paper*.

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There are also unidentifiable statistics regarding the number of employees who have resigned, taken non claim absence or been medically retired due to their inability to continue their duties.

### ***Achievements***

It is now common practice in some public sector employers for the employer to provide as part of the induction, instructions on how to adjust one's workstation so that the staff can avoid the occurrence of occupational overuse injuries. Many employers are also now expending additional money on furniture and equipment that is ergonomically designed so as to prevent these injuries from occurring. In some instances employers are also hiring specialist medical para professionals and ergonomists to conduct accredited WorkCover workplace assessments for staff in their workplace environment especially in high risk jobs such as call centres and in courts.

The author is not stating that these initiatives are universally applied but points to the fact that this case has been proven, and has provided more force to our arguments for improvements in workplace ergonomics throughout the industry. The author is aware of another union prosecution for an occupational overuse injury however, is unaware of any WorkCover prosecutions in the OOS category of workplace injury.

An example of how running this case changes the relationship for the better we now have call centres in the NSW public service identifying this issue as a hazard and working with the industrial and safety officers of the Association in order to prevent future injuries and re-injuries through Occupational Overuse.

### **Maurice Michael O'Sullivan v Roads and Traffic Authority of NSW [2002] NSWIRC Comm 214 Matter Number IRC 5325 of 2000 Peterson J.**

#### ***Summary***

The matter occurred in 1998 in Spring Hill roadside rest area 120 kilometres east of Broken Hill out of radio range. The incident occurred when a maintenance patrol person employed by the defendant was required to change the LPG gas cylinders in roadside rest areas' barbeque. The employee had been working in other duties for a period and was unaware of the details of the changes to the new gas cylinder fittings. The new arrangement lead to the capacity for two cylinders being present. The employee was not trained in how to change the gas cylinders when there was a two cylinder capacity. The employee was unaware of the requirement to alter the system of work for checking the gas contents of cylinders.

The employer did not alter the system of work that formerly required lighting the barbeque, failed to conduct a risk assessment, or written procedures for changing the gas cylinders on

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a barbeque. The employer did not inform the employee of any new instructions or systems of work to change the gas cylinders.

This resulted in the employee whilst conducting his normal inspection igniting a pool of LPG that had formed. As the employee was out of communications area he was unable to ask for assistance prior to changing the gas cylinder or after he was engulfed by the fireball. He had to drive himself towards Broken Hill unaided with 2<sup>nd</sup> degree burns to 12% of his body falling in and out of consciousness.

The defendant pleaded guilty at start of trial. The defendant had already been prosecuted previously by the WorkCover Authority and had a previous record.

### **Context and Achievements**

Many of the employers in our industry have excellent overarching safety paper documents. They meet the requirements of a good safety system in theory and first glance but in reality in the workplace, there is either no practice or training of good safety, or large holes in the system when it comes to risk assessing the work that is conducted.

The RTA employs a range of specialised workers who undertake very specialised but high risk work. As demonstrated in the decision, the RTA implemented a Director of Safety and a team of safety personnel to start the process of improving safety in the organisation. Part of what the safety team has done now is actually implement safety systems including Safe Operating Procedures, Safe Work Method Statements and risk assessments for most of the tasks that they undertake not just the projects they manage with contractors.

This prosecution is typical of many in NSW in that it was for traumatic physical injuries, but was designed to make the employer take safety more seriously across the organisation not just at the policy level.

**Maurice Michael O’Sullivan v The Crown in the Right of New South Wales (Department of Education and Training ) [2003] NSWIRComm 74 Matter No.s 607, 608, 609, 610, 611 of 2001 Walton J. Vice-President**

### **Summary**

This case involved teachers and teachers aides at a school for students with special behaviour challenges. Several of the students had particular violent behaviour patterns. The risk assessments conducted on one of the students was not forwarded to the relevant staff supervising these students at this school. On a day of a teachers strike a teachers aide special was required to look after one of the students with the violent behaviour. It was stated by the aide that she did not want to be left alone with these students but the teachers aide was left alone with the students. The aide was then assaulted various times and had

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difficulty summoning emergency assistance. Other aides were also assaulted and put at risk.

There was crucial risk assessment information that was not shared with the teacher aide special. On the return to the school after a period of absence the aide suffered another incident of assault. The aide then suffered post traumatic stress disorder and was absent from work until they were medically retired from employment. Department of Education and Training defended the matter and was found guilty on 3 charges. The defendant then opposed sentencing, and appealed the decision but was unsuccessful.

### ***Context***

The NSW Department of Education has taken a philosophy in some parts of it, on many occasions of the right of the student to have education overriding the responsibility they have for the safety of staff. The Association has for many years witnessed a continuation of assaults to our staff in school facilities (non-teaching staff). Our members do not have a role in the discipline or placement of staff or students as this is solely delegated to teaching staff in NSW. Therefore our members have no ability to affect controls regarding the actual enrolment and placement of dangerous students in their schools and classes. The Association has been pursuing an agenda of better safety and consultation for our members in schools for several decades.

Due to the collegiate professional philosophy of schools non teaching staff have often not been included in educational decisions but also not included in decisions relating to their safety. The NSW Department has many excellent policies regarding health and safety. Unfortunately they did not have much ability to implement health and safety past the peak policy level due to a lack of safety resources for an organisation that employs nearly 100,000 people. The Department continually used the excuse that they did not share the information about students with staff as this was either private information protected by privacy legislation or alternatively other agencies would not provide this information for the same reason.

After this case and another by the Teachers Federation the defendant has been more proactive in risk assessing students and the provision of information and resources.

### ***Achievements***

These can be demonstrated by those items identified in the sentencing decision of Walton J. Vice President.<sup>152</sup> These included a range of educational programs:

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<sup>152</sup> *O'Sullivan v The Crown in the Right of the State of New south Wales (Department of Education and training)* [2003] NSW IRComm 303, Matter No. IRC 607, 608, 609, 610 and 611 of 2001, (The sentencing decision) paragraph 50 onwards.

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- The Department's Access and participation team providing specialist assistance to meet needs of students with complex disabilities.
- Increasing the money spent on special education.
- Engaging school counsellors, district officers and specialist behaviour teachers.
- Providing funding to assist schools employing Teachers Aides (Special) and funding support for additional teacher and Teachers' Aide (Special) time.
- Providing special classes for students with mental health problems and autism and special schools for students with severe behaviour difficulties.
- A spend of \$46 million between 2001 and 2005 to "help students with severe behaviour difficulties overcome their problems and remain engaged in education and training or make a successful transition to the workforce.
- Establishment of 11 new schools.
- Establishment of small tutorial centres where students with severe behavioural problems will work with specialist teachers to improve their literacy, numeracy and social skills.
- 24 additional behaviour teachers and 22 Teachers Aides (Special) to support young students who live too far to travel to the new schools or centres.
- 19 additional guidance officers to work with students with behavioural difficulties.
- Funding to increase transition programs for "students at risk".

Some of the larger macro initiatives have been to actually free the information flow between government agencies so that Departmental staff can get information from other agencies such as DOCS and Police and inside of the Department. These amendments are summarised below.

### EDUCATION LEGISLATION AMENDMENT ACT 2006 - LONG TITLE

An Act to amend the [Education Act 1990](#) with respect to students, with respect to compulsory schooling and with respect to reports; to amend the [Education \(School Administrative and Support Staff\) Act 1987](#) with respect to delegations; to amend the [Teaching Service Act 1980](#) with respect to the making of regulations under that Act; to

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amend the [Freedom of Information Act 1989](#) in relation to information about students; and for other purposes.

Another change has been acknowledgement that the role of safety and OHS legislation actually overrides that of privacy. An example of this and how it is being promulgated is by the issuance of the Premiers Circular C2007-27 Privacy guidelines on disclosure of information during industrial consultations. Many of the reasons why this incident occurred including failure to provide information regarding the risk of students to staff will hopefully be resolved in the future preventing these common incidents and injuries.

### **Cahill v State of New South Wales (NSW Police) [2005] NSW IRComm 33 Matter No. IRC 7034 of 2003 Boland J.**

#### ***Summary***

The case involves a technical officer member of the Association attending to a new winch on a vehicle in a police centre. What appears to be a practical joke lead a senior sworn police officer sitting in the vehicle to let the siren off when the technical officer had his head next to the vehicle's winch that was also next to the vehicle's siren. The member suffered from severe trauma to the ear and suffered severe permanent tinnitus and balance disturbance. The injured worker eventually was medically retired as he was assessed to be unfit for work. The charges related to:

- failure to prevent discharge of siren,
- failure to ensure that personnel were aware of the activation,
- failure to have a noise control policy,
- failure to provide information, training and education to persons working about what noise is, the range of health effects and the appropriate control measures,
- failure to provide personal hearing protectors,
- failure to identify areas that hearing protection should be worn.

The NSW Police defended the case and was found guilty. NSW Police Service has been prosecuted several times previously and has injury rates significantly higher than the state average.

#### ***Context and Achievements***

The NSW Police force has many occupations and areas exposed to large noise levels that we have coverage of. We have radio and telephone operator members with hearing damage

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in Police call centres, in the police band and also in other areas such as this where there is technical work carried out including those dealing with firearms.

There was a haphazard mechanism for dealing with safety issues and in particular noise. There was not an education process about noise nor a policy. Since the time of this incident the Police Service has:

- improved its call centre equipment to remove the high end noise when calls come through with sirens and traumatic events occurring close to the phone.
- the department has reduced the risk of acoustic shock through the radio for radio operators.
- has implemented a sound policy.
- has done testing and implemented controls for the police band.
- has implemented noise controls at the scene of this incident.

Additionally the NSW Police has instigated a safety command that has oversight and responsibility for implementing safety across the NSW Police Service. This safety command meets with both the Public Service Association and the Police Association and works on collaborative projects to improve workplace safety culture and practices.

Of importance in this matter was that there was extensive evidence that the current exposure standards in the Australian Standard and WorkCover guidance were inadequate and not based on up to date relevant scientific information. This is important as if a defence is created in the new law that is based on compliance with codes of practice, guidelines or standards that is inadequate or based on bad science then the defence does not contemplate taking safety seriously.

After having discussed this with health and safety academics anecdotally, the evidence is that these standards were devised on a compromise basis rather than scientific basis to ensure a performance outcome. We have written to WorkCover asking the Authority to review their publications regarding acoustic trauma.

**Cahill v State of New South Wales (Department of Community Services) (No 3) [2008] NSWIRComm 123 (27 June 2008)**

### ***Summary***

This case arose from the occurrence of a client attending a DOCS office over a period of time regarding the care of their child. The child was eventually removed from the care of

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the natural mother due to the behaviour and mental health problems of the mother. This included alleged drug use and witnessed threatening use of a motor vehicle just days before the incident. The mother was assigned to a relatively inexperienced and minimally trained case worker who attended an interview with the natural mother. The natural mother during the interview attacked the case worker with a knife stabbing the case worker. The other staff in the office were required to use reasonable force against the client and provide aid to the case worker. At least one of the other staff suffered a form of psychological injury from witnessing this traumatic event. The particulars of the charges include those relating to the training, risk assessment and control mechanisms in place including the ability to not conduct interviews with some clients or conduct them with security or police officer present, failure to alert employees to risks and risk assessments, and failure to have in place adequate interview facilities and emergency system.

### ***Context***

The Department that looks after child protection in NSW, has been suffering from large case loads for case workers (social workers). This work involves attending dwellings, removing children, putting children into care as well as meeting with parents and managing their care of the children in at risk cases. Many of the clients have a criminal or violent history or potential. The Department has been losing large amounts of staff through turnover for many years and there have been a series of assaults in different centres.

### ***Achievements***

The Government has been trying to address the safety issues of staffing after significant pressure from the Association and has increased funding. The Department is implementing a recruitment program to increase case workers by nearly 1000 case workers. The Department will be required to train these staff in safety and ensure that the premises and systems of work do not put these staff at risk by ensuring properly designed offices, and safety procedures are implemented.

We have recently been involved in the statewide design of reception counters, and interview rooms across the state's customer service centres. It is imperative that we protect the staff that protect our community's children. Despite the recruitment campaign by the Department there is still a large number of staff exiting due to the traumatic and dispiriting role that these officers undertake. They should not need to have to worry about their safety also.

### **Mercy Centre Lavington Ltd v Kristyn Thompson [2006] NSWIR Comm 252**

#### ***Summary***

The defendant pleaded guilty to the ASU NSW prosecution in the first instance. The case arose after a worker in a NSW disability service, the Mercy Centre, was attacked twice by intellectually disabled residents in a group home. The first attack occurred in 2002 where a

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resident stabbed the worker with a syringe and 10 months later the same worker was bashed by another resident. The employer lost an appeal against the penalty totaling \$27, 300.

### ***Context and Achievements***

The case was in an environment where attacks on staff had been occurring regularly including kicking, punching and verbal abuse. As found by ASU NSW the problems faced by Mercy Centre, Lavington, which ran several group homes for people with intellectual disabilities, was typical of such homes. Around that time it was reported that 300 NSW group-home workers had been assaulted in a 2 year period.

The Chief Magistrate in the first instance characterised both incidents as giving rise to issues of staffing levels and planning where individual residents were known to behave violently. It was also noted in the decision that the worker attacked could have had “life threatening consequences” and received “little training in self defence”. Further there was found to be “inadequate supervision” required to ensure the health and safety of both staff and residents.

The case has been relied upon by the ASU as a precedent to negotiate safer work practices at other NSW disability service providers.

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**SCHEDULE 2**

**FSU Appendix to ACTU Submission to the National OHS  
Review**

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<b>Organisation:</b>	<b>Finance Sector Union of Australia</b>
<b>National Secretary:</b>	<b>Leon Carter</b>
<b>Submitter:</b>	<b>Rod Masson National Policy and Communications Director</b>
<b>Date:</b>	<b>25 July, 2008</b>
<b>Address:</b>	<b>341 Queen St Melbourne Vic 3000</b>
<b>Contents:</b>	<ol style="list-style-type: none"><li>1. Union right to prosecute breaches of OHS laws. <b>Case studies of FSU Prosecutions following Bank Robberies in NSW 1998 – 2007</b></li><li>2. Comcare: Not an effective model for the enforcement of Employee's rights <b>Case studies of FSU Consultation and Enforcement</b></li></ol>
<b>Total number of pages (to follow)</b>	<b>71</b>
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## **Introduction**

### **About the Finance Sector Union of Australia (FSU)**

The Finance Sector Union of Australia (FSU) represents approximately 55,000 members working in all areas of Australia. Our industry includes banks, credit unions, insurance companies, superannuation funds, call centres and other financial services providers.

FSU has established National Enterprise Councils (NEC's) and Local Enterprise Councils (LEC's) for each of the major enterprise companies who employ our members. These Councils are made up entirely of FSU members and ensure that the Union is democratically controlled by its members in pursuit of protecting and furthering the interests of our members.

The main functions and purpose of Local Enterprise Councils and National Enterprise Councils include:

- to ascertain and identify the concerns, ideas and interests of the FSU members covered by that Council including the protection and improvement of employee's conditions of employment which includes workplace health and safety;
- to actively contribute to the development, implementation and review of the FSU's strategies and plans;
- to be committed to and actively support the recruitment and retention of FSU members;
  
- to ensure that the views of the FSU Representatives in its members' workplaces are taken into consideration;

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- to actively contribute to the development and implementation of the policies of the FSU.

The FSU adopts and supports in its entirety the submissions of the ACTU to the National Review of OHS laws.

### **Union right to prosecute breaches of OHS laws**

**Case studies of FSU Prosecutions following Bank Robberies in NSW 1998 - 2007**

#### **Banking Industry NSW**

In 1998 there were 180 armed robberies in NSW and in 85% of incidents bank staff were molested or assaulted.<sup>153</sup>

By 2007 the number of NSW bank robberies was reduced to just 34.

From 2001 to early 2005 five successful prosecutions were undertaken by the FSU for the following banks for breaches of the OHS laws. Once under the NSW Occupational Health and Safety Act 1983 and otherwise under the NSW Occupational Health and Safety Act 2000.

- ANZ (twice),
- CBA (twice), and
- Westpac;

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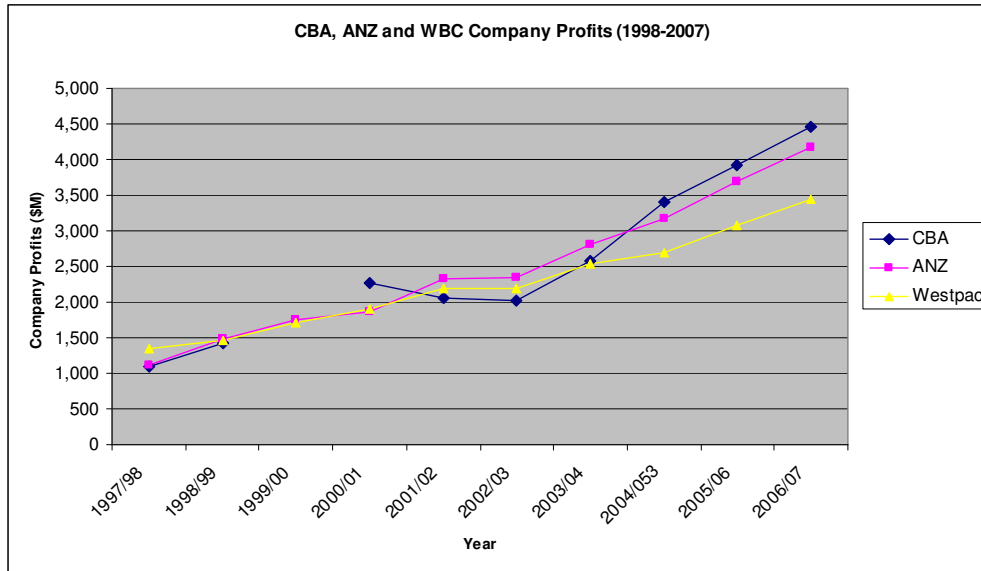
<sup>153</sup> FSU NSW/ACT Branch records.

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### The National Picture

#### National Banking Industry: Profits 1998 – 2007 <sup>154</sup>



#### Comment

For all banks subject to prosecution action for the period 1997 to 2007 profits have substantially increased.

At the time branch security risks were identified bank profits continued to grow

Westpac profits doubled, ANZ's more than tripled and CBA's quadrupled.

The issue of financial capability to remedy the security risks identified in the prosecutorial action was therefore not at issue.

The evidence in this submission will clearly show that despite the continued efforts of FSU to persuade a Bank of the apparent security risks, it often took years and court action before the remedies were commenced.

#### Background

To demonstrate the role and value of Union prosecutions leading to healthier and safer workplaces, an assessment of the security risks that exist in the relevant bank's workplaces needs to be identified before and after the Union prosecutions have occurred.

<sup>154</sup> FSU Website Facts and Figures, Source: Annual Reports

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In the comment and conclusion section of this report, FSU will clearly demonstrate that bank workplaces have been made healthier and safer as a result of the responsible use of the Union's right to prosecute breaches of occupational health and safety law.

### **Case Study 1: Commonwealth Bank of Australia (CBA), Wellington NSW<sup>155</sup>**

**Jurisdiction:** *Chief Industrial Magistrate's Court of NSW*

**Case Number:** *20069312/2000*

**Prosecutor:** *Peter K Presdee, Secretary of the Finance Sector Union of Australia, Commonwealth Bank Officers Section, NSW/ACT Branch (the FSU)*

**Defendant:** *Commonwealth Bank of Australia (CBA)*

**Robbery Event:** *24 August 1999*

**Decision issued:** *20 August 2001*

#### **Summary**

The Defendant (CBA) **pleaded guilty** to a charge that it had breached Section 15 (1) of the Occupational Health and Safety Act 1983, (the Act).

Section 15 states:

#### **15 Employers to ensure health, safety and welfare of their employees**

- 1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees.
- 2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:
  - a. to provide or maintain plant and systems of work that are safe and without risks to health,
  - b. to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances,
  - c. to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees,
  - d. as regards any place of work under the employer's control:
    - i. to maintain it in a condition that is safe and without risks to health, or
    - ii. to provide or maintain means of access to and egress from it that are safe and without any such risks,
  - e. to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work, or
  - f. to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:

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<sup>155</sup> Section, NSW Branch v Commonwealth Bank of Australia [2001] NSWCMC 97 (20 August 2001)

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- iii. about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health, or
  - iv. about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.
- 3) For the purposes of this section, any plant or substance is not to be regarded as properly used by a person where it is used without regard to any relevant information or advice relating to its use which has been made available by the person's employer.
  - 4) If in proceedings against a person for an offence against this section the court is not satisfied that the person contravened this section but is satisfied that the act or omission concerned constituted a contravention of section 16, the court may convict the person of an offence against that section.

### Context

*An armed hold-up occurred at the CBA's Wellington Branch on 24 August, 1999.*

*Offenders were able to:*

1. *Access the tellers' cash area by jumping over the counter.*

### In issuing its Decision, the Court found among other matters that:

- The FSU had written to CBA prior to the hold up advising of its concerns about the level of security at the Wellington branch;
- There were a number of other known incidents in the town; in effect the robbery event was **foreseeable**;
- There was **no real risk assessment conducted** in response to the Union's request;
- **CBA had adopted a process of reactive risk assessment.** The process of reactive risk assessment undertaken by CBA at that time did not meet the employer's obligations under Section 15 (1) and Section 16 (1);
- The system of effective risk management required by the Act is not met merely by responsive actions...., "**There must be a system of searching for and identifying all possible risks and instituting safety measures to guard against those risks**";
- The measures taken after the event **could have been taken before the event**;
- Shortly after the incident, CBA introduced a **new risk assessment process** which was pro-active; and
- A month after the incident a risk assessment was carried out and because of it, Anti-Jump Barriers (AJB's) (**counter to the ceiling**) and **security cameras** were installed at the **Wellington Branch**.

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### **Outcome**

A fine of \$25,000 was imposed and consistent with the NSW Fines Act, 1996 the fine was paid to the Informant, FSU.

### **Comment**

**The CBA Wellington case** identifies that as early as 1999 the lack of adequate AJB's presented an actual risk to the health and safety of employees.

As a result of the prosecution action, workplace health and safety was improved with the installation of AJB's and security cameras at the relevant branch and cultural change was achieved because the Bank moved from a reactive to pro-active approach to risk assessment, including full risk assessments throughout the branch network on an annual basis..

The Union continued to agitate around the issue of adequate AJB's and other related security concerns present in bank branches from this time onwards.

### **Case Study 2: Australia and New Zealand Banking Group (ANZ), Brookvale Branch<sup>156</sup>**

**Jurisdiction:** *Industrial Relations Commission of New South Wales in Court Session*

**Case no:** *Matter No IRC 432 of 2003*

**Prosecutor:** *Geoff Derrick, Secretary of the Finance Sector Union of Australia, NSW/ACT Branch (the FSU)*

**Defendant:** *Australian and New Zealand Banking Group Limited (ANZ)*

**Robbery Event:** *17 June, 2002*

**Decision issued:** *21 November 2003*

### **Summary**

The Defendant (ANZ) **pleaded guilty** to a charge that it had breached Section 8 (1) of the Occupational Health and Safety Act 2000, (the Act).

Section 8 (1) provides:

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

##### **(1) Employees**

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

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<sup>156</sup> Geoff Derrick v Australian and New Zealand Banking Group Ltd [2003] NSWIRComm 406

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

### Context

*An armed hold-up occurred at ANZ's Brookvale branch on 17 June 2002.*

*Armed Offenders were able to:*

1. *jump the counter, and*
2. *scale an Anti-Jump Barrier (AJB); and*
3. *access the gap between the top of the Barrier and the ceiling to force their way to the teller's cash handling area.*

### In issuing its Decision, the Court found among other matters that:

- Since 1999 FSU had been in **regular written contact with ANZ urging the Bank to replace inadequate anti-jump barriers (AJBs) with full height barriers which would bar entry to offenders;**
- In June, 2001, **ANZ promised to correct the security risk posed by these poorly designed AJBs. Unfortunately they still had not done so seven months later when the Katoomba ANZ Branch was attacked.** In that case Offenders breached the AJB's in place by accessing the gap between the top of the AJB's and the ceiling. Again, FSU raised this security risk with the Bank. **In March, 2002 armed offenders held up the Annandale branch** and gained access to the cash handling area by scaling an internal wall which did not extend to full ceiling height;
- **An adequate risk assessment** undertaken by the employer at the Brookvale branch would have identified the flaw in its security arrangements and would have averted the risk to health and safety;
- In effect, **ANZ had failed to expedite the remedial works required or take adequate short term measures to protect staff against what was now a clearly foreseeable risk; and**
- This delay had to be taken into account when determining the penalty.

### Outcome

A fine of \$156,000 was imposed and consistent with the NSW Fines Act, 1996 half of the fine was paid to the Informant, FSU.

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### **Comment**

**The ANZ Brookvale case** clearly shows that FSU had requested ANZ address the issue of poorly designed AJB's as early as 1999 and that numerous ANZ bank branches were subsequently subject to robbery events because of this security risk.

FSU continued to advocate branch security improvements. Whilst the Bank recognized the security risks identified, it did not address them in a timely manner.

As a result, the health and safety of employees working in the bank branch were put at risk.

The presiding Judge found this risk could have been averted if simple remedial works had been carried out.

FSU took the decision to prosecute in order to secure better workplace health and safety for our members.

As a consequence of the prosecution action, higher security measures were introduced including more effective counter to ceiling anti-jump barriers. The commitment to upgrade bank branches nationally was recorded at \$4 million.

### **Case Study 3: Australia and New Zealand Banking Group (ANZ): Peakhurst Branch**<sup>157</sup>

**Jurisdiction:** *Industrial Relations Commission of New South Wales in Court Session*

**Case no:** Matter No IRC 7170 of 2003

**Prosecutor:** *Geoff Derrick, Secretary of the Finance Sector Union of Australia, NSW/ACT Branch (the FSU)*

**Defendant:** *Australian and New Zealand Banking Group Limited (ANZ)*

**Robbery Events:** *Between 2 December, 2002 and 29 April, 2003*

**Prior Conviction:** *Yes*

**Decision issued:** *3 March 2005*

### **Summary**

The Defendant (ANZ) **pleaded guilty** to a charge that it had breached Section 8 (1) of the Occupational Health and Safety Act 2000, (the Act).

### **Context**

*Armed hold-ups occurred at ANZ's Peakhurst Branch on 21 March, 2003 and 29 April, 2003, respectively.*

*On 21 March 2003 armed Offenders:*

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<sup>157</sup> Geoff Derrick v ANZ Group Limited (No. 2) [2005] NSWIR Comm145

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1. *held up the branch with a baton and*
2. *took the security guard hostage and*
3. *jumped the sales desk attempting to force a staff member to open the security door leading to area behind the counter's teller*

*On 29 April, 2003 armed Offenders:*

1. *gained access to the area behind sales desk by kicking in a door providing access from the public area to behind the sales desk and then*
2. *used a sledgehammer to gain entry to the teller's area.*

The above events both occurred at the same ANZ Bank Branch Peakhurst. Offenders had already attacked this Branch twice previously on 2 August, 2002 and 4 November, 2002, respectively.

**In issuing its Decision, the Court found among other matters that:**

- **Throughout 2002 the FSU had written to the Bank raising concerns about staff working front of house due to the threat of being exposed to a hostage situation;**
- **The FSU during this period had also raised specific concerns** regarding the level and effectiveness of branch security in place at the **Peakhurst branch;**
- In determining the objective seriousness of the offence it was noted the Defendant had pleaded guilty in the time period specified in the charge by failing to ensure that safety of employees by failing to act in a timely manner to provide or maintain adequate plant to ensure the safety of the said employees, namely:
  - Adequately designed and installed anti-jump barriers on the enquiries counters; and
  - Adequately designed and installed security doors capable of preventing access from the public area of the branch;
  - There were two robbery events preceding this prosecution in August and November, 2002 respectively;
  - **There were parallels to the earlier ANZ prosecution in the time taken to address the security deficiencies;**
  - **There existed a clearly foreseeable risk to safety that is likely to result in serious injury or death;**
  - The bank had an obligation to do all that was reasonably practicable to ensure safety.
- It was appropriate to include an element of specific deterrence in determining the penalty taking into account that the Bank was a large organization with the ever present threat of robbery.
- In determining the penalty it was appropriate to recognize the Defendant's second offence as part of a systemic failure that prevailed in the enterprise over the period covering the two offences.

### Outcome

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A fine of \$175,000 was imposed and consistent with the NSW Fines Act, 1996 ultimately half of the fine was paid to the Informant, FSU.

### **Comment**

**The ANZ Peakhurst case** among other matters clearly demonstrates that, the Union had continued to raise the security risks bank branch staff were exposed to generally and raised specific concerns regarding the Peakhurst branch, on behalf of its members. The risks were clearly foreseeable. In parallel with the facts of the ANZ Brookvale case, the employer delayed in responding to them.

In the Peakhurst case, four separate robbery events occurred before the Union initiated prosecution action.

Workplace safety was improved when ultimately the Peakhurst branch was closed and a new improved branch was opened a few kilometres away.

### **Westpac: Avalon Branch**

**Jurisdiction: *Industrial Relations Commission of New South Wales in Court Session*<sup>158</sup>**

**Case No: *Matter No IRC 1465 of 2005***

**Prosecutor: *Geoff Derrick, Secretary of the Finance Sector Union of Australia, NSW/ACT Branch (the FSU)***

**Defendant: *Westpac***

**Robbery Event: *21 September, 2004***

**Decision issued: *20 March 2006***

### **Summary**

The Defendant (Westpac) **pleaded guilty** to a charge that it had breached Section 8 (1) of the Occupational Health and Safety Act 2000, (the Act).

### **Context**

*An armed hold-up occurred at Westpac's Avalon Branch on 21 September, 2004.*

*Armed Offenders were able to:*

- 1. Climb over the AJB and*
- 2. access the gap at the top of the AJB and*
- 3. gain access to the teller's area*

**In issuing its Decision, the Court found among other matters that:**

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<sup>158</sup> Geoff Derrick v Westpac Banking Corporation [2006] NSWIRComm 76

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- Since 1998 FSU had written to Westpac raising security concerns about the need for proper security measures, including the poor AJB design for those branches fitted with them;
- Subsequently the parties entered into an agreement called “*The Joint Security Agreement*” and as part of this Agreement a workgroup was formed that met to discuss security issues. This included discussion of Westpac’s branch security and this matter was subject to on-going review;
- Around 23 letters were exchanged between the FSU and Westpac from 1998 to 2002 about branch security issues, including that counter jumping was a common element of many branch hold-ups and that proper AJB’s needed to be fitted;
- Westpac had indicated “it had never promised to install AJB’s in every branch and that rather, it would assess the security needs and installation on a case by case basis...”. Although some AJB modifications were undertaken, robberies still occurred;
- The Avalon branch was fitted with AJB’s – however there was a gap between the bulkhead and the ceiling;
- In 2002 following an attack at Westpac’s Cronulla branch, the FSU raised specific concerns about the security protection offered by the AJB’s at the Avalon branch identifying that the AJB installed performed the function of a ladder and would enable Offenders to climb up the AJB and enter the teller’s area by passing through the gap at the top of the AJB;
- An individual staff member raised the collective concerns of staff and contacted Westpac Security about it;
- A risk assessment was undertaken concluding that there was little or no risk of an Offender being able to access the tellers’ areas through this gap
- As evidenced by the robbery event – this assessment proved incorrect and inadequate. Staff were assaulted and menaced and placed at real risk of serious injury;
- The WorkCover Authority carried out an investigation into the Robbery and did not take any action in relation to it.

### Outcome

This was Westpac’s first offence. A fine of \$145,000 was imposed and consistent with the NSW Fines Act, 1996 half of the fine was paid to the Informant, FSU.

### Comment

**The Westpac Avalon case** clearly shows that the Union continued to raise with another Bank its concerns about security risks including poorly designed AJB’s, (i.e. where AJB’s don’t extend from counter to ceiling).

A formal consultative forum was established between the Union and the Bank. In this forum the Union identified its concerns about the AJB’s. The Bank indicated it preferred to approach the matter on a “case by case basis...”. In conducting a risk assessment at the Avalon branch the Bank found there was “little or nor risk that the gap between the AJB and the ceiling could be breached”.

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As recorded in the judgment against Westpac, the risk assessment proved incorrect and was inadequate.

The Workcover Authority carried out an investigation and failed to take any prosecutorial action.

The improved health and safety outcome for the Avalon branch included the installation of proper AIB's. The risk assessment process involved the staff and as required by legislation, took into account the staff's concerns about the security risks in their workplace.

### **Commonwealth Bank of Australia: Guildford and Woy Woy**

**Jurisdiction:** *Industrial Relations Commission of New South Wales in Court Session*<sup>159</sup>

**Case no:** Matter No IRC 4730 of 2004

**Prosecutor:** *Peter Presdee, Secretary of the Finance Sector Union of Australia, Commonwealth Bank Officers Section, NSW/ACT Branch (the FSU)*

**Defendant:** *Commonwealth Bank of Australia (CBA)*

**Robbery Events:** *Between 23 April, 2004 and 7 May, 2004, respectively*

**Prior Conviction:** *Yes*

**Decision issued:** *31 October 2005*

#### **Summary**

The Defendant (CBA) **pleaded guilty** to a charge that it had breached Section 8 (1) of the Occupational Health and Safety Act 2000, (the Act).

#### **Context**

##### *Guildford*

*On 23 April, 2004 an armed hold up occurred at CBA's Guildford Branch*

*Armed Offenders were able to:*

*1. Smash a side entrance with a sledgehammer whilst staff were servicing the ATM and demanded an employee open the ATM.*

##### *Woy Woy*

*On 7 May, 2004 an armed hold up occurred at CBA's Woy Woy Branch.*

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<sup>159</sup> Peter Presdee v Commonwealth Bank of Australia [2005] NSWIRComm 389

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*1. Armed Offenders were able to smash the door with a sledgehammer to gain entry while staff were reloading ATM canisters and stole the ATM canisters.*

### **In issuing its Decision, the Court found among other matters that:**

- The FSU had demonstrated that the risk of ATM attacks by the use of a sledgehammer were known to the CBA as evidenced by robbery events at:
  - CBA Surry Hills Branch 5/7/02
  - CBA Beecroft Branch 29/5/03
  - CBA Hamilton Branch 31/7/03
  - CBA Narrabeen Branch 8/5/03
  
- CBA's own security handbook identified that branches were subject to the threat of a surprise "burst in attack";
- By December, 2003 CBA management had issued an internal management recommendation that it review its security in relation to ATMs because they were at that time "security insufficient";
- If proper risk assessments had occurred, there were remediation steps that CBA could have taken prior to the incidents occurring;
- The robbery events that occurred at Guildford and Woy Woy were clearly foreseeable;
- The seriousness of the offence was assessed at being in the mid to higher end of the penalty range; and
- CBA had been subject to a previous prosecution.

### **Outcome**

This was CBA's second offence. A fine of \$162,500 was imposed and consistent with the NSW Fines Act, 1996 half of the fine was paid to the Informant, FSU.

### **Comment**

**The CBA Guildford and Woy Woy case** makes it obvious that the nature of threat to the security of bank workers is continually evolving. As such banks need to be pro-active in the steps taken to ensure the health and safety of their employees.

Again, the Union identified the security risk to employees to the Bank. The risk of sledgehammer attacks was known to the employer because a number of these types of events had occurred in other branches. The Bank's own security manuals identified this risk.

As a result of Union action and in addition to improved security measures at the relevant branch including that a directive that staff were not to service ATM's, the bank endorsed a OHS Performance Sustainable Improvement Work program commenced to integrate various time limited projects so that there would be a holistic approach aimed at delivering improved OHS.

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### **Moiety (from fine imposed on employer)**

In all of the above cases where a moiety has been sought by the Union, this has been granted.

Where it has been contested, the Industrial Relation Commission in Court Session has found that based on the evidence presented to it by the Prosecutor, it was appropriate for the Union to be awarded a portion of the fine imposed on the offending employer.

Moieties have been made available to grievated employees and otherwise used for the OHS education and training of the Union's members.

Given the purpose for which the moiety is used, it is entirely proper that this entitlement be retained and its application expanded, in any revision of Australia's OHS laws.

### **Conclusion**

From 2000 (after the FSU first wrote to all NSW Banks calling for improved workplace design and specifically full height AJBs) to 2003 the average number of bank robberies in NSW was 79.75 p.a.<sup>160</sup>.

This represents an average 7.9% of all NSW banks being the subject of a holdup in each of these years.

In the four years after FSU launched its first prosecution 2004 to 2007 the average number of NSW bank robberies was 28.75.

This represents a 64% reduction with only 2.2% of NSW banks being targeted in each of these years.

The arguments against Union prosecutions also rely on the view that the decision about whether or not to prosecute should be left to the relevant statutory authority.

In the case of the NSW banking industry FSU advises that the NSW WorkCover Authority was aware of all of the incidents as required by the regulations, yet no action was taken. To the best of FSU's knowledge not even an improvement notice was issued.

In the case of Derrick V ANZ No.2 [2005] NSWIRComm 59 the evidence included the fact that the FSU had complained to the WorkCover authority about the risks at ANZ Peakhurst after the second of four armed robberies in nine months. As stated, in Derrick v Westpac [2006] NSWIRComm 76 the court found (at 22) that "The WorkCover Authority carried

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<sup>160</sup> FSU NSW/ACT Branch records.

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out an investigation into the Robbery and did not take any action in relation to it". Both of these complaints to Workcover occurred, before the prosecution action taken by the Union.

To this date the NSW WorkCover Authority has never commenced proceedings against a bank for any breach of OHS laws despite the fact that a recorded 4016 employees were molested in armed robberies between 1998 and 2005.

One of the most significant factors in the reduction of these incidents was the capital investments of millions of dollars to achieve "target hardening" across the industry. As an example, after the ANZ prosecutions branch safety upgrade expenditure has reached \$4 million, (see **AFR report 3 November, 2003, attached**).

The ACTU submission<sup>161</sup> on the OHS and SRC Legislation Amendment Bill 2005 appropriately referenced the Royal Commission into the Building and Construction Industry, Final Report conclusions that:

*There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, and convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important.* (Royal Commission, Final Report, vol.6, p.83).

The inclusion of Unions in the promotion of healthier and safer workplaces is important too, including where attempts to persuade the employer to improve the security of the workplace have failed the right to prosecute.

The fact that some banking employers have faced their second prosecution reinforces this.

For workplace health and safety to be continually improved, the right to prosecute must include Unions.

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<sup>161</sup> **ACTU Submission:** *to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the provisions of the OHS and SRC Legislation Amendment Bill 2005, 24 March, 2006 pages 3-4.*

## **Comcare: Not an effective model for the enforcement of Employee's rights**

### **Case Studies of FSU concerning those Companies under the Comcare system**

The two largest banks in Australia now have their OHS regulated as self-insurers under the Comcare system, namely the Commonwealth Bank of Australia (CBA) and the National Australia Bank (NAB).

The Nab commenced operating under the Comcare system on 13 April, 2007.

The CBA commenced operating under the Comcare system on 31 March, 2008.

### **The Comcare System**

#### **Employee rights to consultation and representation**

These banks have obligations under the Occupational Health and Safety Act, 1991 to provide employees with a safe and healthy workplace and as self-insurers are required to meet the requirements of their licence conditions set by the Safety and Rehabilitation Compensation Commission, (SRCC).

As part of the licence condition grant *Attachment B, Performance Standards and Measures* require that the Bank's develop their prevention, rehabilitation and claims management

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policies and objectives in consultation with its employees and, where requested by any member in the undertaking, their representative organizations.

Both banks have been advised that that FSU was the Employee's representative by the relevant National Enterprise Council.

The provisions of the Cth Occupational Health and Safety Act, 1991 do not mandate formal agreements between the employee's representative (where this is requested) and the employer.

FSU had proposed a framework aimed at providing certainty of outcomes on a range of employee health and safety rights and entitlements; however Nab responded informally that it did not see the need to enter into an agreement with FSU about this and CBA has to date not provided any response.

There has been disagreement between the parties concerning Nab delivering on the rights and entitlements of our members, notwithstanding in addition to the Act's provisions, their licence condition requirements.

<sup>162</sup>By way of example, our members who participate on Nab's National Health and Safety Committee (NHSCC) had to wait some six months before they could participate in appropriate training to inform them of the relevant provisions of the Cth Occupational Health and Safety Act, 1991, pertinent to their work on the Committee.

Members have reported that the lack of delivery of appropriate training has impacted on their ability to effectively participate in decisions concerning what proposals should be provided to staff regarding Health and Safety Management Arrangements HSMA's, including how Designated Work Groups (DWG's) work and the rights and powers of health and safety representatives, (HSR's).

Nab has pressed its HSMA's proposal including 12 Designated Work Groups for 24,000 employees.

CBA has recently announced to staff it also proposes large designated work groups, a total of (11) for some 25,000 staff.

In effect, currently this means 12 Health and Safety Reps for 24, 000 employees for the Nab and in CBA's proposal, 11 Health and Safety Reps for around 25,000 employees.

FSU does not support either model as a truly representative, effective consultative framework to attain better workplace health and safety.

In addition, the above is clearly at odds with the standard of the consultative and representative framework available in other jurisdictions. The ACTU's submission on

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<sup>162</sup> FSU-Nab Transitional Agreement filed with the Australian Industrial Relations Commission requires that NHSCC members receive training from an accredited training provider.

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Consultation, Participation and Representation emphasizes the clear role of involved Unions contributing to improved workplace health and safety and identifies those legislative provisions which best deliver this.

Genuine consultation and proper, effective consultative and representational frameworks under the Comcare system remain at issue between the Union and the Banks.

### **Regulation of OHS in Comcare**

In FSU's view the OHS Tribunals proposed by the ACTU clearly impact on the current constitution and role of the SRCC. FSU submits that in the process of creating any new OHS tribunals established tribunals with OHS regulatory functions need to be taken into account to ensure consistency and fairness of OHS outcomes for all workers.

For inclusion in Section 1 of CSU's Article 5

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# Bank puts up hands over heists

## Marcus Priest

The ANZ Bank has pleaded guilty to failing to protect staff in Sydney branch from armed robbery, raising concerns about security at thousands of other bank branches.

ANZ admitted guilt last week and presented evidence to the NSW Industrial Relations Commission seeking to reduce the size of the fine, which could run to \$500,000.

ANZ said it now intends to introduce higher security on the day a robbery occurred at its Brookvale branch in June 2002.

The plea comes after the Finance Sector Union brought one of its first private prosecutions in NSW against ANZ for breaching occu-

pational health and safety laws.

The FSU is threatening to bring similar cases, asserting that recent open-plan redesigns of bank branches by all banks had made them unsafe for staff and customers.

"The risk of armed take-aways in cash-handling environment is real and predictable when employers like ANZ consider the layout of branches," the union's NSW secretary, Geoff Durrick, said.

"When they consider open and interactive floor plans they need to ensure they don't compromise the safety of employees and customers."

The FSU requested evidence to the commission that it had written to ANZ in 1999 warning that there was

a danger of armed robbery at a number of its NSW branches as a result of a gap between the ceiling and the balustrade of glass in the front bank counter.

It warned that armed robbers would access the cash-handling area by jumping through the gap, and asked the bank to install anti-jump barriers.

It wrote again to ANZ warning of the danger after a robbery at the bank's Kalamunda branch, and again after a robbery at a branch in Arundale, Sydney. According to the FSU, this advice was ignored on each occasion.

Yesterday, an ANZ spokesman admitted that the bank's failure to install anti-jump barriers was un-

acceptable. After the robbery the bank had spent \$4 million nationwide upgrading security, he said.

"It is unacceptable that we did not have security measures in place to protect staff and be in breach of OHS regulations," the spokesman said.

He said there had been a spate of robberies involving thieves getting through the gap in the security screen in the months leading up to the robbery at Brookvale.

"There was clearly an opportunity to react," the spokesman said. Other banks contacted by The Australian Financial Review said that recent redesigns of branches to make them more open had not compromised safety.

## Creators of Kath & Kim get last laugh

### Nell Sheehy

Executives at the AEC are cringing over the Tim Minchin and getting out the 'loopy' friends to celebrate the success of Kath & Kim, the television comedy series they initially rejected.

The first seven episodes of the eight-part second series, which started on September 18 and ends on Thursday, were a success, had an average



# Patterson relieved of Centrelink

## Jason Moutonakis

Finance Minister John Howard has stripped Family and Community Services Minister Kay Patterson of 29-day responsibility for the contentious Centrelink welfare cut each minister's responsibility and sent out on Friday, Senator Patterson was informed that administration of Centrelink would now be handled by Children and Youth Affairs Minister Larry Anthony.

Centrelink delivers social security payments worth about \$55 billion each year to 5.4 million Australians.

The portfolio of Senator Patterson's predecessor, Amanda Vanstone, included Centrelink but Howard is believed to have been reluctant to expose Senator Patterson to excessive media pressure over the handling of the agency. Some for various sportswear months under attack after Centrelink paid out excessive family benefits and then lit the welfare recipients with big rejoinder demands.

Mr Anthony had the responsibility for managing Centrelink before the last election when he was minister for community services.

Mr Howard recently moved Senator Patterson from the health portfolio, where she was consistently criticised for being a poor health performer.

Responsibility for policy and administration of the Child Support

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