

**NEW SOUTH WALES MINERALS COUNCIL LTD**

MINING ENLIGHTENMENT

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11 July 2008

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National OHS Review Advisory Panel

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Dear Panel Members

**National Review into Model Occupational Health and Safety Laws**

The NSW Minerals Council (NSWMC) represents the State's \$12.5 billion mining industry, directly employing 47,000 people in mining and minerals processing, and supporting the employment of a further 200,000 people working in businesses that service the mining sector.

NSWMC and its members are resolutely committed to health and safety in the workplace. As outlined in the attached submission, NSWMC firmly believes that national harmonisation of health and safety laws is crucial in order to achieve better safety outcomes. A single OHS Act will also reduce the burden of compliance on corporations and individuals, especially corporations spanning more than one state or territory.

The model OHS Act is an opportunity to establish best practice workplace health and safety legislation throughout Australia. NSWMC strongly urges the Panel to avoid taking the line of least resistance in making its recommendations to Government. To this end, the model OHS legislation must embody and promote the following principles;

1. Fairness - Persons subjected to criminal prosecution must be entitled to the fundamental legal rights and fair process afforded to all persons accused of a criminal offence in Australia. The legislation must clearly uphold basic human rights and the rule of law in accordance with international standards. Legislative obligations such as 'absolute liability' are contrary to the principle of fairness and breaches Article 16 of the International Labour Organisation Convention No. 155.
2. Honesty - The legislation should encourage and foster a relationship of open and honest communication regarding safety.
3. Effectiveness – Compliance with OHS legislation must be achievable.
4. Consistency – Safety is the responsibility of all persons at a place of work. OHS obligations must apply equally to both employers and employees.
5. Objectivity – Prosecutions cannot be affected by individual or sectional interests. The authority to commence a criminal prosecution should rest solely with the Director of Public Prosecutions.

NSWMC looks forward to the release of the first report in October 2008. As requested in our letter dated 27 May 2008, NSWMC and senior representatives from NSW mining companies would like to meet with the Advisory Panel to further discuss these issues. Sue-Ern Tan, Director Policy & Strategy, will contact you shortly to arrange an appropriate time.

**Dr Nicole B Williams**  
CHIEF EXECUTIVE OFFICER



## PUBLIC SUBMISSION COVER SHEET

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**Post:** Attention: National OHS Review Secretariat  
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<b>Length of submission (pages, including cover sheet):</b> 61	
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**AUSTRALIAN GOVERNMENT - NATIONAL REVIEW INTO  
MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS**

**NEW SOUTH WALES MINERALS COUNCIL  
– SUBMISSION – JULY 2008**

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**11 JULY 2008**

# AUSTRALIAN GOVERNMENT - NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

## NEW SOUTH WALES MINERALS COUNCIL – SUBMISSION – JULY 2008

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### EXECUTIVE SUMMARY

The NSW Minerals Council (NSWMC) represents the State's \$12.5 billion mining industry. Health and safety are the number one priority of the minerals industry in this state. NSWMC welcomes the opportunity to contribute to the National Review into the Model Occupational Health and Safety Laws (the Review).

The fundamental problem that must be addressed is the existence of 8 different pieces of OHS legislation. Most companies operate across jurisdictions and are required to manage the different compliance regimes on a daily basis. This is a grossly inefficient system for a nation of 21 million people and it certainly does not assist in achieving better safety outcomes.

NSWMC strongly supports the implementation of a single national OHS Act, particularly given our experiences with the NSW OHS Act. The NSW OHS Act exemplifies many of the worst practice principles that could be contained in OHS legislation. The Review presents a critical opportunity to establish best practice OHS legislation. To achieve such a standard, the model OHS Act must embody the following principles:

- A single OHS Act covering all industry sectors supported by nationally consistent industry specific regulations and national codes of practice and guidelines.
- The model OHS Act must take a performance based legislative approach rather than a prescriptive legislative approach. General duties should be specified in the model OHS Act and where necessary, prescriptive processes should be contained in the supporting regulations and codes of practice.
- The general duty of care must be consistent with ILO155 (which Australia signed and ratified in March 2004). There must be no obligation of absolute liability. The duty imposed on employer corporations should be a duty to ensure 'as far as is reasonably practicable' that a workplace, plant, substances or processes within their control, are safe and without risk to harm. Where it is not reasonably practicable to eliminate the risk, the model OHS Act should impose a duty on the employer corporation to control or reduce the risk, as far as is reasonably practicable.
- The test to determine the liability of individuals must be conduct based and must be one of recklessness. Every person at a workplace is responsible for health and safety at work. The same duties and maximum penalties must apply to all individuals.
- A defendant must be able to rely on compliance with regulations and codes of practice as a ground of defence.
- There must be a hierarchy of enforcement measures and the model OHS Act or regulation must clearly state that prosecution should be used as a last resort.
- Persons subjected to criminal prosecution must be guaranteed fundamental legal rights and fair process, including:
  - The onus of proof must be on the prosecutor to prove each and every element of the offence beyond a reasonable doubt. This is in line with basic criminal law principles and stems from the proposition that the prosecutor is the entity

making the accusation. A defendant should not be required to defend his or her position unless and until the prosecutor can prove his or her accusation is founded.

- There must be a right to silence. In line with fundamental principles of criminal law, a person should not be required to answer questions when they are facing possible criminal charges. This right is founded on principles of fairness and justice.
- All criminal offences must carry a right of appeal to the Supreme Court, Court of Criminal Appeal and where appropriate, the High Court.
- There must be no prosecution right of appeal against the acquittal of a defendant in relation to an OHS prosecution as it contravenes the principle of double jeopardy.
- There must be no automatic assumption of guilt for 'officers' of a corporation. This artificially creates liability and is fundamentally at odds with the principle of "innocent until proven guilty". The inappropriateness of the assumption is exacerbated where the finding of guilt involves a criminal conviction, a fine and a possible gaol sentence.
- The authority to commence a criminal prosecution (of corporations and individuals) must rest solely with an independent authority, such as the Director of Public Prosecutions, which represents the entire community rather than private or factional interests. Unions must not be able to commence prosecutions.
- Prosecutions of serious offences must be heard by juries and dealt with by courts experienced in dealing with criminal matters.

NSWMC believes that the proposed harmonisation of OHS legislation is a step in the right direction. While we recognise that the process of harmonising different jurisdictions is a difficult one, it is a critical process for the long term economic viability of all industries in Australia and should receive the highest priority from the Federal Government.

It is also important to recognise that there is other reform work currently taking place that can be complementary to the OHS harmonisation process. NSWMC and its member companies have been participating in the review of mining safety legislation through the National Mine Safety Framework (NMSF). The NMSF has made significant progress towards a nationally consistent legislative framework for the mining industry across Australia. NSWMC strongly believes that a nationally consistent framework for the mining industry will greatly promote health and safety. Until such time as harmonisation occurs, in the form of a single, nationally uniform law and more specific industry based guidance in regulations, codes of practice and other explanatory documentation, NSWMC strongly supports the continuation of the NMSF process as it will assist the industry in achieving better health and safety outcomes. The important work being undertaken by the Review should not adversely impact on the progress and achievements of the NMSF.

# CHAPTER 1: LEGISLATIVE APPROACH

## REGULATORY STRUCTURE

### **Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?**

- General duties of care should be maintained but be supported by further guidance by way of regulations, ministerial notices, codes of practice etc. Such documentation needs to provide effective guidance as to how health and safety in the workplace can be achieved in compliance with the legislation.
- The general duty should be consistent with ILO155 with regard to employers who are corporations (or other legal entities), i.e. the general duties should incorporate a test of reasonable practicability.
- With regard to individuals the test must be one of recklessness. This is the only test which adequately distinguishes right from wrong actions. Health and safety should be the responsibility of everybody at a place of work. Consequently, the test to determine liability of individuals should be conduct based. It should not be influenced by the individual's position within the organisation or the outcome of an incident.
- In order to promote health and safety the focus of the legislation should be to punish behaviour which wilfully or recklessly causes a risk to health and safety.
- A test which focuses on such behaviour targets undesirable and morally reprehensible acts and does not punish honest errors. Such a test is more conducive to reducing workplace accidents as it encourages persons to discuss honest errors openly so that others can avoid making the same mistakes.
- A test which focuses on wilful or reckless behaviour rather than outcome is also fairer as such a test would punish blatant disregards for health and safety. NSWMC does not believe that health and safety conscious behaviour which, despite best intentions, never the less leads to serious injury should receive greater focus whilst behaviour displaying a blatant disregard for health and safety which results in a more minor injury should receive lesser focus.
- Punishment of intended behaviour as opposed to unintended behaviour is particularly important as prosecution may result not only in the imposition of a fine, but also in a criminal conviction and a possible gaol sentence.

### **Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?**

- The model OHS Act should provide general duties of care. Subordinate regulations and codes of practice should provide more tangible processes to be followed in order to comply with the OHS Act.
- Corporations (including other legal entities) or persons being prosecuted must be able to rely on compliance with regulations and codes of practice as a ground of defence. Note that the present New South Wales OHS Act, s 29, states that compliance with the regulations is not a defence to a prosecution. However, a contravention of the regulation is admissible in evidence in prosecution proceedings. Consequently, if an accident happens and the employer has complied with the regulations, the employer cannot raise this in its defence. On the other hand, if the employer has not complied with the regulations, the prosecutor can raise this in its prosecution of the employer.
- This situation is manifestly unjust and must be rectified.

## TITLE, OBJECTS AND PRINCIPLES

### Q3. What is an appropriate title for the model OHS Act?

- The title 'Workplace health and safety' seems to best reflect the purpose of the legislation.

### Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?

- Yes.
- We recommend the following:
  - To promote the health and safety of people at work.
  - To promote safe and healthy work environments.
  - To promote the understanding that health and safety are the responsibility of every person at a place of work.
  - To provide for consultation and cooperation between employers and employees in achieving the objectives of the legislation.
  - To develop and promote workplace awareness of health and safety.
  - To provide a legislative framework that allows for high standards of workplace health and safety.
  - To deal with the impact of particular classes or types of dangerous goods and plant at places of work.
  - To allow industry to participate in developing strategies for improving workplace health and safety.
  - To foster a relationship of open and honest communication regarding workplace health and safety.
  - To provide achievable goals for promoting workplace health and safety.
  - To promote identification, assessment, elimination or, where elimination is not possible, minimisation of risks to health and safety at work.

The model OHS Act should explicitly recognise that where prevention is not possible, the objects of the legislation can be achieved by *minimising as far as reasonably practicable* a person's exposure to the risk of death, injury or illness caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a workplace.

### Q5. Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

- Yes. The principles of health and safety protections should include:
  - The importance of health and safety requires that all persons be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.

- The importance of health and safety requires that all persons are responsible for identifying foreseeable hazards, assessing the risks and eliminating or controlling the risks as far as is reasonably practicable.
- All persons at a place of work should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
- Employers and employees should be encouraged to exchange information and ideas about risks to health and safety and measures that can be taken to identify foreseeable hazards, assess the risks and eliminate or control the risks.
- Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

**Q6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?**

- NSWMC seeks to understand how interstate judicial decisions will be applied. In other words, how does the model OHS Act propose to deal with any potential differing interpretations of the legislation that may arise in each state and territory? How is it proposed to ensure initial intended consistency is maintained once different courts in different states and territories start to hand down judgments which interpret wording and concepts differently?
- Also, what, if any, bearing will a decision made by a court in one state or territory have on a court in another state or territory deciding the same or similar issues?

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

### **INDUSTRY SECTORS**

**Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?**

- No. The status quo should not be maintained. Coverage of all industries under a single law will greatly assist in clarifying responsibilities and ensuring that employers cannot be prosecuted for the same offence under different Acts.
- More specific industry based guidance should be placed in model regulations, model codes of practice and other explanatory documentation.

**Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?**

- See above. There should be model regulations and codes of practice or guidance material to ensure consistency. This will minimise the problem highlighted at question 6 with regard to the decisions of interstate courts and the bearing that these decisions should have on courts in other states or territories.



**Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?**

- If a single regulatory agency is established, as proposed above, there will be no need to coordinate between safety regulators as there will only be the one regulator.
- If multiple regulatory agencies are established, in order for the harmonisation process to truly provide consistent legislation across the states and territories, there must also be a nationalised enforcement policy with independent third party verification at regular intervals. A nationalised enforcement policy will promote consistent enforcement of legislation across the states and territories. Independent third party verification will promote legislation that is enforced with the same level of objectivity, fairness, and honesty throughout the states and territories.

## **WORKPLACES AND NON-WORKPLACES**

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

- General duties should be tied to the conduct of work and the confines of the workplace.
- Notions of control should be introduced and clearly defined. For example, an employer should not be held liable where the work activity or undertaking is being undertaken at a place of work over which the employer has no control (i.e. when an employee attends a worksite being run by another employer). In such a circumstance the employer should be held liable if he failed to *'monitor'* health and safety (ie. failed to ascertain that there were health and safety processes in place at the worksite) but the employer should not be held responsible for failing to *'manage'* health and safety at that worksite as, quite clearly, the employer would not have the requisite presence and control of the worksite.

### *PUBLIC SAFETY*

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

- General duties of care should be extended to members of the public but only in the same way that they are currently extended. That is, providing for the health and safety of third parties during the conduct of the employer's work (undertaking).
- These general duties, however, should make provision for situations where members of the public are exposed to risk as a result of their own criminal or otherwise illicit activities (ie. Where they are trespassing and/or deliberately acting in defiance of verbal or written warnings not to do a particular activity).

## **RESPONDING TO CHANGE**

### *WORK ORGANISATION*

**Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?**

- Yes. A model OHS Act which encompasses general duties in line with ILO155 would be sufficiently broad and flexible to accommodate new and evolving types of work arrangements.

## *EMERGING HAZARDS AND RISKS*

**Q13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?**

- NSWMC is not aware of current or emerging hazards and risks that are not effectively addressed under model comprising of general duties of care.

## **DEFINITIONS**

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

- The following terms should be defined in the model OHS Act:
  - Workplace.
  - Conduct of the work/undertaking.
  - Control.
  - Reasonably practicable.
  - Consultation.
  - Director/manager.
  - Hazard.
  - Risk.
  - Reasonable excuse.
  - Adequate supervision.
  - Adequate instructions.
  - Adequate information.
  - Adequate training.
  - Due diligence (if a recklessness test for individuals is rejected and due diligence is made a defence for officers of a corporation).
  - Health.
  - Safety.
  - Reasonable.
  - Recklessness.
  - Officer.
- We attach to these submissions, as Annexure A, a list of some example definitions in relation to these terms. This is a not exhaustive list.

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

- NSWMC is not aware of any other issues relating to the scope, application and definitions of a model OHS Act.

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

### **CONTROL**

#### *CHAIN OF RESPONSIBILITY*

**Q16. Should the model OHS Act include a ‘control’ test or definition? If so, why and what should it be?**

- Yes. Such a test must incorporate principles of fairness, effectiveness and achievability. Control must be limited to actual control and not merely a concept of theoretical control.

**Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?**

- Control should be central to determining who is a duty holder.
  - The concept of control must take into account particular expertise. That is, a defendant must be able to claim a defence where they relied on the expertise and skills of a person properly qualified to carry out the particular job (for example where a mine engages a professional electrician to perform maintenance work on air-conditioning and the air-conditioning creates a risk to workers in the mine due to faulty work by the electrician). Such a provision is included in section 189 of the *Corporations Act 2001* (Cth).
  - Control must also take into account temporal considerations (see, for example, *Gretley* where one of the defendants was a mine manager who had left the site two years prior to the incident occurring).

**Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?**

- If a concept of actual control is adopted then the court can look beyond delegation or relinquishment and determine who, in fact, has control. The tests must take into account matters such as those outlined above.

#### *SHARED RESPONSIBILITIES*

**Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?**

- Yes. In the interest of health and safety, the model OHS Act must ascribe with clarity and certainty the responsibilities of multiple duty holders at a workplace.
- The current focus appears to be on ascribing liability to everybody. This imprecision and vagueness undermines the ability of all persons at a place of work to know:
  - Whether they have a duty at a workplace.
  - What that duty is.

- How to enforce that duty.

## **WORK RELATIONSHIPS**

### *THE TREATMENT OF WORKERS IN OHS LAWS*

**Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations?**

- NSWMC supports the principle that employers must take reasonable steps to provide a safe workplace. However, primary reliance on employment relationships alone is not a valid basis for framing health and safety obligations. The appropriate basis for framing health and safety obligations is the principle of control, that is, who is responsible for the work at the workplace?

**Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?**

- The model OHS Act must provide for duties owed to such persons based on who has control of the place of work.

**Q22. Is there a broader concept that more effectively covers the various work arrangements?**

- See above.

## **DUTIES OF EMPLOYERS**

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

- The model OHS Act must specify an employer's duty of care with sufficient detail to provide guidance to the employer.
- The duty with regard to corporations must entail a test of reasonable practicability.
- The duty with regard to individuals must entail a test of recklessness.

**Q24. To whom should these duties be owed?**

- A duty should be owed to employees and third parties during the conduct of the work, bearing in mind who has responsibility for and control of the work at that workplace.

## **DUTIES OF WORKERS AND OTHERS**

**Q25. How, and to what extent, should the model OHS Act specify worker's duties of care?**

- Health and safety is the responsibility of every person at a place of work. Consequently, there should be no distinction between individuals.
- The test to determine the liability of individuals should be conduct based and should be one of recklessness. The only criterion should be the **conduct** of the individuals and not their **position** i.e. manager or director etc (see our comments at Q 1).

- The penalty range must be identified. The appropriate penalty amount can be determined by a court having regard to the personal circumstances of the person being sentenced.

**Q26. Should the model OHS Act include duties of care for persons who are not performing work (e.g. visitors to a workplace, members of the public)? If so, what should the duties be?**

- Yes, the model OHS Act should include duties of care for persons who are not performing work but are visiting a workplace.
- The duties should be similar to the duties of individuals (see above).

## **APPOINTED PERSONS AND OFFICERS**

**Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?**

- No. Health and safety must be the responsibility of everybody at a place of work.

**Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?**

- See above. Health and safety must be the responsibility of everybody at a place of work.

**Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?**

- See above. Health and safety must be the responsibility of everybody at a place of work.

**Q30. Should the model OHS Act include positive duties for officers of bodies corporate?**

- The test for officers of a corporation should be one of recklessness. If this proposition is rejected, the duties of officers should be defined in order that compliance with the specified duties can provide a full defence to a prosecution of an individual.

## **DUTIES OF PERSONS IN CONTROL**

**Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?**

- No. Please see our responses to questions 16-18.

**Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?**

- There should be no distinction between a work area, a temporary workplace and a place of work for the duty to apply. As stated above the focus must be on the actual control of the workplace or the conduct of the work.

## ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

### *DECOMMISSION AND DISPOSAL*

**Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?**

- Yes. The duties should be to provide plant or item that is structurally safe and to provide any information that will enable the end user to avoid risk. However, the issue of control as discussed in our comments in questions 16-18 needs to be looked at in this context also.

**Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?**

- Health and safety duties should apply to designers.
- Manufacturers should have a duty to take reasonable steps to provide safe plant or substance. However, it may not always be possible for a manufacturer to know that a plant is faulty due to its inherent design. The duty needs to take into consideration what is reasonably practicable and issues such as what the manufacturer knows or ought reasonably to have known about the shortcomings of the plant in question (see Q17 – our discussion regarding reliance on particular expertise).
- Obligations must also be placed on the importer to make sure that the plant or substance being imported meets Health and Safety standards.
- Where the prosecutor can positively prove, beyond reasonable doubt, that the manufacturer knew, or ought reasonably to have known that the plant or substance was faulty, then liability should be ascribed to the manufacturer. To ensure consistency of interpretation of the liability, guidelines must be given as to matters the court needs to have regard to in considering whether the manufacturer “ought reasonably to have known”. Matters such as ‘information available at the time’ could be included in these guidelines.
- The same principles should apply where the plant or substance is in the hands of an employer and is determined to be faulty due to its design or manufacture.

**Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?**

- Supply should retain its ordinary meaning. However, reliance on expertise must provide a defence, i.e. where a manufacturer supplies to a company who then on-supplies the item or items, the company/supplier must be able to rely on the expertise of the manufacturer.
- Where the prosecutor can establish that the company/supplier on-supplied plant or substances which it knew, or ought reasonably to have known to be faulty, then liability should follow. To ensure consistency of interpretation of the liability, guidelines must be given as to matters the court needs to have regard to in considering whether the company/supplier “ought reasonably to have known”. Matters such as ‘information available at the time’ could be included in these guidelines.

**Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?**

- NSWMC is not aware of any other issues in relation to the duties of care that should be addressed in the model OHS Act.

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

### **CONCEPT OF ‘REASONABLY PRACTICABLE’**

**Q37. Should a test of “reasonably practicable” be included in the model OHS Act?**

- Yes. A test of ‘reasonably practicable’ would make the model OHS Act compliant with ILO155. As previously discussed, this test is appropriate to determine the liability of corporations.
- A test of recklessness should however, apply to all *individuals* charged with any offences under the legislation.
- If it is not intended to apply a test of recklessness to individuals then a defence that all reasonably practicable steps were taken must be available to individuals. The test must be objective and not be applied with the benefit of hindsight (i.e. It should be based on the information available at the time and what a reasonable person in the defendant’s position would have done in the circumstances).

**Q38. If not, what alternative standard should be included?**

- See above.

**Q39. How should the standard be defined? What level of detail should be provided?**

- A test of reasonable practicability should apply to corporations. The definition of reasonable practicability must specify the types of things a court must have regard to. These will include matters such as:
  - What the person knows or could have known about the hazards giving rise to the risk.
  - The likelihood of the risk eventuating.
  - The degree of harm that would result if the risk eventuated.
  - What the defendant knows or reasonably ought to know about ways of eliminating or reducing the risk.
  - The availability and suitability of ways to eliminate or reduce the risk.
  - The cost of eliminating or reducing the risk.
  - Industry standards.
  - Information available at the time of the incident regarding the particular hazard, including any professional or expert advice received.

The above should not be interpreted as an exhaustive list but merely as an example of the kind of detail that should be entered into.

- A test of recklessness should apply to individuals. The Concise Oxford Dictionary defines recklessness as 'disregarding the consequences or danger'. Recklessness has also been defined as careless conduct where the person can foresee some probable or possible harmful consequence but nevertheless decides to continue with their actions with an indifference to, or disregard of, the consequences (R V Nuri [1990] VR 641).
- A concept of recklessness implies that the defendant's conduct was done consciously and voluntarily and with indifference to the foreseen probable consequence of danger.

**Q40. Should control be an element of the standard? (see Chapter 3)**

- With regard to corporations, control should be an element in determining what was reasonably practicable.
- With regard to individuals, control and intent must be elements of the standard.

**Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?**

- Yes. The test should be clearly defined in the model OHS Act, using examples. Such clear definition and examples will ensure consistency amongst the jurisdictions and will avoid the situation whereby different courts interpret the same wording in differing manners.

## **RISK MANAGEMENT**

**Q42. Should 'hazard' and 'risk' be defined in the model OHS Act?**

- Yes. This will assist in providing clarity and consistency.

**Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?**

- Yes. The definition of reasonably practicable must incorporate the hierarchy of controls and take into account human factors/behavioral based issues (i.e. where incident occurs as a result of person willfully and deliberately disregarding all controls put in place by the employer/person in control of the place of work).

**Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?**

- Yes. However, the model OHS Act should provide that where the risk cannot be eliminated, it should be reduced as far as reasonably practicable.

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

### **DUTY TO CONSULT**

**Q45. What provisions should be made in the model OHS Act for consultation?**

- The model OHS Act should provide for consultation with key stakeholders at a place of work. The concept of consultation must be defined.



**Q46. What are the work relationships to which a consultation provision should apply?**

- Work relationships should take second place to health and safety. Health and safety should drive the consultation process. In practical terms this would mean that any issue regarding health and safety should be addressed to the person who has control of that issue.

**Q47. Should there be different levels of consultation required for different work relationships?**

- The issue must be decided as follows:
  - Who has control of this job.
  - Has this person been consulted with regard to health and safety issues which may arise in carrying out the tasks.

**Q48. How should consultation be provided for:**

- **a multi-employer worksite;**
- **an employer with operations across more than one worksite;**
- **small business;**
- **remote workplaces;**
- **precarious employment; and**
- **workers from culturally and linguistically diverse backgrounds?**
- Consultation should be limited to consultation regarding health and safety risks linked to a particular worksite. Where there are multiple employer worksites or an employer with operations across more than one worksite the emphasis must be on *communication* between employers and/or worksites. The emphasis should not be on *consultation* as such, i.e. where an issue arises at a particular worksite which may or may not be relevant to other worksites, this issue should be dealt with at that worksite and the people consulted with regard to that issue should be the particular persons responsible for the job at that worksite. Any learnings can then be *communicated* to other worksites.
- With regard to small business, remote workplaces, precarious employment and workers from culturally and linguistically diverse background, the model OHS Act should encourage employers and employees to work together to promote health and safety in a practical manner.

## **PARTICIPATION AND REPRESENTATION**

### *HEALTH AND SAFETY COMMITTEES*

**Q49. Should there be a requirement for establishing HSRs and HSCs?**

- Yes. However, their role needs to be clearly defined. HSRs and HSCs are valuable if their role is to be proactive in providing information to employers regarding health and safety issues with a view to improving health and safety in the workplace.

**Q50. What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?**

- There should be a positive duty on employees to participate in improving health and safety outcomes at work.
- NSWMC is of the view that the model OHS Act should adopt the following provisions in relation to consultation:
  - An OHS Committee is to be established if the employer has 20 or more employees and the majority of those employees make such a request.
  - An OHS Committee is to be comprised of employer and employee representatives.
  - An OHS representative is to be elected if at least one employee makes such a request.
  - OHS representatives are to be elected by employees.
  - Other arrangements as agreed to between the employer and their employees are permissible.
  - An OHS Committee may also be established or an OHS representative may also be appointed by an employer whether or not the employees have made such a request.

**Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?**

- HSRs should be appointed and/or HSCs should be established based on their qualifications and experience. The emphasis should be on the best health and safety outcome.
- HSRs and HSCs members should be elected as outlined in question 50. They must be required to undertake a health and safety consultation course through a nationally accredited trainer.

**Q52. Where an election is required, who should be entitled to vote?**

- All employees from the relevant work area.

**Q53. What should the powers and functions of HSRs be?**

- Again, the emphasis should be on the best health and safety outcome. HSRs should have the specific function of bringing health and safety issues to the attention of management. If, after discussion, the issues cannot be resolved, then the matter should be referred to a regulator to resolve. HSRs should not have any powers as such.

**Q54. What should the structure and functions of HSCs be?**

- The structure of HSCs should be a structure that best suits the working arrangements of the employer and employees. The employer and employees should be encouraged to develop the most appropriate arrangement by agreement.
- The functions of HSCs should include the following:

- to facilitate consultation and cooperation between employers and employees in relation to health and safety matters;
- to keep informed as to standards relating to health and safety;
- to bring any perceived health and safety risks to the attention of management;
- to consider and make recommendations to the employer as to any changes or intended changes to the workplace that may reasonably be expected to affect the health and safety of employees at the workplace; and
- to consider any matters referred by a health and safety representative or equivalent.

**Q55. What training and qualifications should members of HSRs and members of HSCs have?**

- As a minimum they should have health and safety training and relevant experience in risk and hazard identification. To ensure consistency there should be a nationally agreed set of criteria.

**Q56. Are there alternative mechanisms that should be considered?**

- NSWMC does not have any view as to whether alternative mechanisms should be considered.

**Q57. To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?**

- Clear requirements, driven by a health and safety outcome, must be specified in either the model OHS Act or regulation to ensure consistency.

**Q58. Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?**

- NSWMC is not aware of any classes of workers for whom current representation requirements are ineffective.

*RIGHT OF ENTRY*

**Q59. Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?**

- Yes.
- Inspectors should be the only ones granted a right of entry under the model OHS Act, as they have the responsibility for administering the Act. Any third party, including unions, should not be able to access a site without the approval of the site 'owner'/operator.
- If union officials are to be granted a right of entry then this right of entry needs to be delineated so as to ensure that it is not abused. Union officials must be compelled, 24 hours in advance, to:
  - provide written notice of their intention to enter premises;
  - provide written reasons for the entry; and
  - provide in writing a description of the particular risk they wish to address.

- If the union official is of the view that the danger is imminent they can always contact a certified inspector. This inspector will then have the right to enter premises based on a reasonable belief that persons are being placed at risk of injury.
- Such a process will guarantee that the power to enter premises is not abused whilst at the same time also ensuring that no misunderstandings can arise between employers and union officials.

**Q60. Should the model OHS Act specify training and qualifications for such persons?**

- Yes. A nationally certified competency based model needs to be created. This will ensure consistency in the training and qualifications of such persons.

**Q61. In what circumstances should the right of entry be exercisable?**

- The right of entry should only be exercisable where the inspector has reasonable grounds to suspect a contravention of the legislation. The test to determine what reasonable grounds are must be objective and not subjective, i.e. what a reasonable person, in the 'shoes' of the inspector, would have thought at the time.
- Rights of entry by union officials should be limited as outlined above.

**Q62. What powers should be exercisable upon entry, and subject to what conditions or limitations?**

- It is acknowledged that inspectors should have powers to carry out investigations where a breach of the Act has occurred. In this regard, they should be allowed to do the following:
  - Make searches, inspections, examinations and tests and take photographs. Inspectors should not be empowered to make videos and audio recordings as such powers can and have been used to circumvent the Listening Devices Act.
  - Take a sample of a substance or thing for analysis which, in the inspector's reasonable opinion may be, or may contain or be contaminated by a substance that is a risk to health. This power must not be used by an inspector to take samples from a person without the person's consent.
  - Where the inspector is a medical practitioner they may carry out medical examinations with the consent of the person proposed to be examined.
  - They can carry out biological tests.
  - Ask questions. However, the power to compel answers as exists in the current NSW OHS Act must be curtailed. Persons potentially subject to criminal sanctions must have a right to silence.
  - Require the occupier of the premises to provide the inspector with assistance and facilities reasonably necessary to enable the inspector to exercise his or her functions.
  - Require the production of an inspection of documents on those premises.
  - Take copies of such documents.

- The exercise of the powers should include a concept of reasonableness. For example, where the occupier of the premises is required to provide the inspector with assistance and facilities that are reasonably necessary, the concept of reasonably necessary should be determined objectively and not simply based on what the inspector determines to be necessary. Similarly, when determining whether an inspector has legitimately exercised his or her powers, the court should have regard to what a reasonable inspector would have done in the circumstances.
- The powers given to inspectors must not breach the right to legal representation (Article 14(3)(b) of the International Covenant on Civil and Political Rights) or the right to silence (Article 14(3)(g) of the International Covenant on Civil and Political Rights).
- We note that the right to silence is acknowledged as a fundamental right of the accused in criminal law generally, and is recognised and upheld in many health and safety Acts around Australia, including in Victoria and Queensland. The right to silence should not be abrogated in legislation, unless such abrogation is justified by, and in proportion to, an object in the public interest (as noted by the Legislation Review Committee to the NSW Parliament in their Discussion Paper, 'The Right to Silence'). We note that the right to silence is upheld in criminal law generally. NSWMC does not believe that the public interest in bringing an individual who has breached health and safety law to justice is more important or greater than the public interest in bringing a murderer or child molester to justice. Consequently, we do not understand how the right to silence can be preserved for persons accused of murder or child molestation, yet be abrogated for persons accused of having committed a breach of OHS legislation.
- The right to silence protects individuals under accusation from giving potentially ill informed and inaccurate replies whilst under the stress of being questioned. It prevents persons being prosecuted merely because they could not explain themselves properly at a time of emotional stress. Consequently, it prevents prosecutions being based on potentially unreliable information.
- We are also of the view that the right to silence should only be abrogated if the information that an individual is required to give could not reasonably be obtained by any other lawful means. There is no reason why the information an inspector seeks to obtain by questioning a director or manager cannot be obtained by other means. It is not sufficient justification for abrogation of the right to silence to state that an inspector will be inconvenienced if such abrogation does not occur.

#### *ISSUE RESOLUTION*

##### **Q63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?**

- The model OHS Act should provide that health and safety is the responsibility of everyone at a place of work. Consequently, where a risk arises as to health and safety, this should be communicated to the employer as soon as possible. The employer should then consider the matter and respond in a timely manner. If the matter is not resolved after the employer has been given a reasonable opportunity to consider the matter, then the matter can be referred to the regulator. A procedure should be included for sanctions where consultation between the employer and the employees does not follow these steps.

##### **Q64. When should issue resolution procedures be activated?**

- See above.

**Q65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?**

- Issue resolution procedures should be inserted in the regulations.

**Q66. How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?**

- See answer to question 63.

#### *RIGHT TO CEASE UNSAFE WORK*

**Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?**

- Yes. However, penalties should be provided in relation to frivolous or vexatious actions in this regard.
- A section needs to be included whereby a person must not, without reasonable excuse, deliberately create a risk (or the appearance of a risk) to the health or safety of people at a place of work with the intention of causing a disruption of work at that workplace.

**Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?**

- No. A HSR should not have such a power. In the interest of resolving the risk to health and safety as expeditiously as possible there must be a requirement to provide particulars of the risk to the employer as soon as possible so that the employer can identify and rectify the issue.

**Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?**

- The model OHS Act should restrict itself to not allowing an employer to alter an employee's position to his or her detriment because the employee has exercised their rights under the Act not to work in an unhealthy or unsafe environment.

**Q70. In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?**

- Yes, but only in relation to disputes regarding whether an employer has altered an employee's position to his or her detriment as a result of the employee exercising their rights not to work in an unhealthy or unsafe environment. It is important that this issue does not traverse into the area of industrial dispute resolution.

#### **PROTECTION FROM DISCRIMINATION AND VICTIMISATION**

**Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?**

- The model OHS Act should restrict itself to not allowing an employer to alter an employee's position to his or her detriment because the employee has exercised their rights under the Act not to work in an unhealthy or unsafe environment.
- The present section 23 of the NSW OHS Act provides that the defendant has the onus of proving a dismissal was not a result of the employee having raised health and safety considerations. This reversal of the onus of proof is unacceptable in

criminal matters. The onus of proving that an employee was dismissed or victimised because he or she raised a complaint in relation to occupational health and safety issues should lie on the prosecutor.

**Q72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?**

- No, the model OHS Act should not allow representative actions. If a breach has been committed then the prosecutor should bring the action in line with basic fundamental principles of criminal law.

**Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?**

- The breach of the provisions should be the subject of criminal proceedings and abide by those standards.

**Q74. Who should have the burden of proving relevant elements of offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?**

- The onus of proof must be on the prosecutor to prove each and every element of the offence beyond a reasonable doubt. This is in line with basic criminal law principles and stems from the proposition that the prosecutor is the entity making the accusation. A defendant should not be required to defend his or her position unless and until the prosecutor can prove his or her accusation is founded.

**Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?**

- No. Such powers should lie only with the court. If a court determines that a breach has occurred then the court will impose a penalty.

**Q76. What remedies should be available to the victims?**

- A 'victim' should be allowed to be reinstated but only if a court finds that he or she was in fact dismissed due to having raised health and safety concerns. At present, under section 23A of the Occupational Health and Safety Act NSW (subsection 7) an application for reinstatement of the employee can be made regardless of whether the employer has been convicted of an offence of that section. This is unfair and unacceptable. It is for this reason that we submit that a victim should only be allowed to be reinstated if a court finds that the employer in fact dismissed the employee due to the employee having raised health and safety concerns. We note this is the case under Victorian OHS legislation.

**Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?**

- No. It is important that concepts of industrial dispute resolution do not traverse into health and safety legislation. Conciliation or arbitration between victim and employer should be left to civil and other processes and procedures.

**Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?**

- NSWMC is not aware of other issues.

# CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

## ROLE AND FUNCTIONS OF REGULATORS

### COMPLIANCE AND ENFORCEMENT POLICIES

**Q79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?**

- Yes. Functions, powers and accountability of regulators should be clearly specified to enable transparency.
- Accountability of regulators should include the creation of an Ombudsman's office.

**Q80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?**

- Yes. Regulators must be required to make public their enforcement and prosecution policies.
- To ensure consistency between states and territories, a verification process is required (i.e. by of audits or otherwise) to ensure that the approach *remains* consistent between states and territories.

**Q81. Should the model Act include provisions that allow the making of interpretative documents?**

- Yes. However, procedures are required to ensure that the interpretive documents themselves remain consistent across different jurisdictions. Failure to do so may result in regulatory bodies giving different interpretations of key issues and provision in the Acts and regulations.

**Q82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?**

- Clear, consistent and transparent guidelines must be issued as to the use of enforcement options. Enforcement options cannot be left to the discretion of an inspector.

**Q83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?**

- The advisory and enforcements functions of a health and safety regulator must be separate to avoid potential conflicts of interest. Situations where an inspector may be less inclined to provide vital health and safety advice if he or she thinks it may later prevent him or her from being able to prosecute a defendant is intolerable. The decision to prosecute must be made objectively and based on the facts of the matter. It must not be tainted by any personal dealings of the inspector.
- NSWMC believes that there should be a single regulatory agency. Branches within this single regulatory agency can then be established to deal with each industry. Each branch should have two separate inspectorate arms (one arm for advisory functions and one arm for enforcement functions) in order to provide clear and transparent demarcation between the advisory and enforcement roles of the regulator and to avoid a conflict of interests arising. The functions of the advisory arm should include auditing and providing assistance and guidance as



to compliance. The enforcement arm should deal with investigation of possible breaches and the issuing of penalty notices. As noted at question 100, the Director of Public Prosecutions should be the body that ultimately decides whether a prosecution is warranted.

## **INSPECTORS**

**Q84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?**

- The appointment of an inspector should be based on his or her qualifications and experience.
- To ensure consistency, a national register of certification should be created. This national register must identify the minimum qualifications required before a person can be appointed as an inspector and outline the process and timing for regular professional development and up skilling.
- Powers, functions and accountability of inspectors should be dealt with by way of a national code of conduct and be overseen by an ombudsman's office.

**Q85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?**

- Yes. Advice and assistance by inspectors should be able to be relied upon in defence of a prosecution.
- The role and capacity of inspectors to provide advice and assistance can be further strengthened by ensuring that they have immunity from civil liability for any advice given. This will mean that the inspectors will not be able to be sued and will be able to provide frank and fearless advice.

**Q86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?**

- No.

**Q87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?**

- Modifying, amending or cancelling any legal notice or instrument issued by the inspector should only occur where the inspector becomes aware he or she has made a mistake and the modification amendment or cancellation does not prejudice the recipient of the notice in any way.

## **INTERNAL REVIEW OF INSPECTORS' DECISIONS**

**Q88. What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?**

- Generally, the disclosure of reasons for prosecution decisions is consistent with principles of transparency and accountability (this principle is recognised and acknowledged, for example, in the NSW DPP guidelines). Consequently, to promote consistency and transparency, all decisions, working papers, drafts and reasons for decisions affecting an employer, controller, etc. should be able to be obtained by that person.
- Decisions to prosecute should be reviewable by an independent external body as a preliminary step. Ultimately, an appeal should lie to a court of law.

- With regards to appeal rights, defendants convicted of criminal offences under the OHS Act should have the same rights as defendants convicted of other criminal offences.

**Q89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?**

- As discussed in our response to question 62, the legitimacy of the exercise of an inspector's powers should be able to be determined by reference to an objective test based on what was reasonable in the circumstances.
- We are also of the view that inspectors' powers should be limited in accordance with the basic fundamental criminal law right to silence, as guaranteed in Article 14(3)(g) of the International Covenant on Civil and Political Rights. That is, an individual should not be obliged to answer questions in relation to an incident pursuant to the model OHS Act.
- Inspectors' powers should be limited in relation to modification, amendment and cancellation of notices in accordance with our response to question 87 above.
- Further, defendants should be able to rely on compliance with the advice of inspectors as a defence to a prosecution.

## **CHAPTER 7: COMPLIANCE & ENFORCEMENT**

### **ENFORCEMENT MEASURES**

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

- A hierarchy of enforcement measures should be contained either in the OHS Act or Regulation and must clearly state that prosecution is an avenue of last resort.
- Enforcement action must be based on the conduct of the offender rather than on the outcome. The emphasis of the legislation must be on risks not outcomes. Anecdotal evidence exists of inspectors making statements such as "*we are prosecuting you because there has been a death*". This attitude is contradictory to legislation that needs to concentrate on risks rather than outcomes.
- In regards to the enforcement pyramid provided at paragraph 7.1 of the Issues Paper, infringement notices provide a stronger form of enforcement than improvement notices and prohibition notices. Consequently, 'infringement notice' and 'prohibition notice' should be reversed on this pyramid.
- The pyramid does not take into consideration a possible intermediate step between notices and enforceable undertakings. An appropriate intermediate step would consist of a meeting of the parties to discuss whether the matter can be resolved by means other than enforceable undertakings or fines or other punitive action: for example, something akin to a premier's memorandum procedure, currently in place in New South Wales, whereby the parties meet and discuss the issues. At the moment, the procedure is only available to other government authorities and is not available to private individuals. If such an intermediate step were to be introduced, measures (including amending the *Evidence Act 1995 (NSW)*) must be enacted to ensure that information arising out of these discussions cannot be later used in a prosecution of the defendant.

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

- Requirements for the appropriate use of enforcement measures should be contained in the model OHS Act to ensure consistency.

## **MEASURES EXERCISED AT THE WORKPLACE**

### *PROHIBITION NOTICES*

**Q92. What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?**

- The model OHS Act should make provision for PINs, improvement notices and prohibition notices. The test for issuing these notices should include the concept of reasonableness as an objective test, i.e. an inspector should only be authorised to issue such notices if he or she has *reasonable* grounds to believe they are necessary (note that, at present, the NSW OHS Act does not require the inspector's belief to be reasonable – the inspector need only have *an opinion* that the defendant is contravening or has contravened the legislation for the notice to be validly issued).
- PINs, improvement notices and prohibition notices must be subject to third party review: for example, by way of an administrative appeals tribunal. Appeals from decisions of such a tribunal must be determined by a court.
- Provision for PINs, improvement notices and prohibition notices need to provide for greater clarity within these notices. At present, in New South Wales, these notices tend to simply state that a person has 'committed an offence pursuant to a section (usually 8(1) or (2))'. Notices should not be offence based. Notices must be risk based and the inspector must specify the steps to be taken to eliminate or control the risk.

**Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?**

- Yes. See above.

**Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?**

- See above.

**Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?**

- Timeframes to allow for compliance with notices need to incorporate a notion of reasonableness, i.e., they should not provide a timeframe that is impossible to meet in light of the steps required to be carried out.

**Q96. Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices? If so, what should the effect be?**

- Notices should be stayed pending determination as to their appropriateness.

## *INFRINGEMENT NOTICES*

**Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?**

- Yes. The model OHS Act should provide for infringement notices in order to enable consistency across jurisdictions. They should be available to an inspector where the conduct of the defendant constituted a minor breach. 'Minor breach' can be defined in the legislation.
- The model OHS Act should also include a provision which states that if the amount of penalty is paid pursuant to the infringement notice the person is not liable to any further proceedings for the alleged offence.
- The criteria for issuing notices should be nationally consistent.

**Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?**

- The administration of infringement notices should occur under the model OHS legislation so as to ensure consistency.

**Q99. What amounts should be specified as fines for infringements?**

- The model OHS Act should provide a hierarchy based on the conduct of the offender and the risk.

## **MEASURES EXERCISED BEYOND THE WORKPLACE**

### *REMEDIAL ORDERS AND INJUNCTIONS*

**Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?**

- No. A regime which includes prohibition, infringement and other notices provides enough power to ensure compliance with the model OHS Act.

### *ENFORCEABLE UNDERTAKINGS*

**Q101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?**

- Yes, provided there are certain safeguards built into the legislation (i.e. in regard to who can withdraw the undertaking and why, who can decide whether an undertaking has not been complied with, and limitation periods if an enforceable undertaking is withdrawn).
- Provision for review must be included.

**Q102. Should the giving of an enforceable undertaking result in an admission of fault or liability?**

- No. This would defeat the purpose of enforceable undertakings as an alternative to prosecution in that a defendant would have to accept fault or liability in the absence of any clear evidence being presented and accepted by an independent arbitrator such as a court.

**Q103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?**

- NSWMC does not support any alternative enforcement arrangements which result in direct compensation of a party (i.e. enforceable undertakings which require the defendant to pay x amount to the alleged victim) as such compensation is available through other legal mechanisms.

## **CHAPTER 8: PROSECUTIONS**

### **CRIMINAL OR CIVIL LIABILITY**

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

- Breaches of duties or obligations should be criminal offences provided certain criteria are met:
  - The powers of inspectors must be balanced against the rights of individuals. There must not be a power imbalance.
  - Defendants must have a right to silence.
  - The onus of proof must be on the prosecutor at all times.
  - The standard of proof must be beyond reasonable doubt.
  - There must be an independent prosecutor.
  - Offences should be dealt with by a proper court of law experienced in dealing with criminal matters.
  - Prosecution of serious offences should be heard by juries.
  - The normal appeal processes in criminal matters should be applied.
- The above criteria are fundamental features and rights of criminal and/or human rights law. It is inconceivable that these rights are afforded to persons accused of serious intentional violent crimes, and not to those accused of breaching health and safety law. The model OHS Act must guarantee these features and rights to ensure that health and safety defendants are afforded the same rights as others accused of breaching a criminal law.

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

- The model OHS Act should not contemplate a mixture of civil and criminal offences (see above).

## **WHERE PROSECUTIONS SHOULD BE HEARD**

### **Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?**

- If health and safety breaches are to be dealt with as criminal offences, courts experienced in dealing with criminal matters are the only appropriate courts.
- All individuals accused of a crime must have the right to a public hearing by an independent and impartial tribunal as set out in Article 10 Universal Declaration of Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights. They also must have the right to be tried without undue delay as provided under Article 14(3)(c) of the International Covenant on Civil and Political Rights.

### **Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?**

- Yes, it may be appropriate for prosecutions to be heard by specialist criminal courts or tribunals (or specialist criminal divisions in courts). However, it is not appropriate for prosecutions to be heard in industrial courts, as these courts could be perceived, by an independent observer, as being biased when dealing with health and safety matters.
- In this regard it is interesting to note the comments made by Adam Searle, barrister, at a conference on industrial manslaughter organised by the Building Trades Groups of Unions (the CFMEU, ETU, AMWU and CEPU plumbing division), on 21 July 2004.
- Other speakers at the conference were John Della Bosca, Reverend Fred Nile, ACT IR Minister Katy Gallagher and Sydney Uni Dean of Law (at the time) Ron McCallum.
- Adam Searle was on the panel of experts commissioned by WorkCover NSW to provide advice in relation to a review of the NSW OHS Act 2000. In the course of this conference, Barrister Adam Searle noted, amongst other things, that the NSW IRC was "very sympathetic to the aspirations of working people".
- Whether Mr Searle was correct in this observation or not is irrelevant. What is relevant is that the statement no doubt reflects the views of some persons within the community. Importantly it illustrates how the community could perceive bias in a Court which deals with both industrial matters and OHS matters. The community could conclude that decisions on breaches of the legislation are made on industrial grounds rather than legitimate health and safety grounds, bearing in mind basic principles of criminal law. The removal of any perception of bias is of fundamental importance to the proper functioning of our legal system. The perceived bias outlined above is eliminated where the matters are dealt with by a Court specialising in criminal matters rather than industrial matters.

### **Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?**

- The right of appeal must follow the normal right of appeal in criminal matters.

### **Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?**

- Yes. A person accused of having committed a criminal offence, and faced with the possibility of a gaol sentence (or fine), should be judged by a jury of their peers as these are the people who are more aptly equipped to determine whether

the defendant's actions are likely to be an aberration of the normal behaviour of a person in the defendant's position. Trials by judge alone should be allowed only with the express consent of both parties.

- Health and safety offences should be dealt with in the same manner as other criminal offences.

## **WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES**

### **Q110. Who should be entitled to commence criminal proceedings?**

- The Director of Public Prosecutions is the only appropriate entity to commence criminal proceedings.
- Unions or any other sectional interest group must not be able to commence prosecutions. A prosecutor is an administrator of justice whose principal role is to assist the court to arrive at the truth. A prosecutor must represent the interests of the entire community and not private or factional interests. Unions, by their very nature, represent the interests of one group of employees, not the entire community.
- In this regard, the NSW Director of Public Prosecutions, Nicholas Cowdery QC has noted:

*“The watch word for any modern prosecution service (including prosecutors in regulatory agencies) is “independence”. It means independence in prosecution decision making from inappropriate influence by politics, the media or individual or sectional interests in the community”.*

- Further, the UN Guidelines on the Role of Prosecutors (1990) notes that prosecutors:

*“shall protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect” (Article 13(b)).*

Such a role appears to conflict with a Union's function to act in the best interest of its members and advance their members' cause where ever possible and over and above any other interest.

- Further, Article 12 provides that prosecutors:

*“shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights”*

- The statement made by Unions NSW at the ALP State Conference held in April – May 2008, that any harmonisation process must ensure, amongst other things, that current state provisions *imposing an onus of proof on the defendant be preserved* conflicts with this requirement.

### **Q111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?**

- The model OHS Act cannot provide for civil proceedings for a breach.

**Q112. What should appropriate time limits be for the commencement of a prosecution and why?**

- Time limits should operate with due regard to the enforcement pyramid. They should allow for a proper consideration of all available steps within the enforcement pyramid. At the same time, they should not be protracted in such a manner as to diminish the ability to defend an accusation (for example because all persons involved in the incident have since resigned and/or are uncontactable).
- The present system of a two year limitation period under the NSW OHS legislation recognises that persons should not have the spectre of criminal proceedings "hanging over their heads indefinitely". It also recognises that proof of one's innocence becomes harder to obtain with the passage of time as, by the time the matter comes to court, most of the evidence may have been lost or forgotten.
- We are of the view that the appropriate time limit for the commencement of a prosecution is two years from the date of the incident.

**Q113. Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?**

- The conduct of prosecution should be left to the rules of criminal law and rules of the relevant court.

## **EVIDENCE**

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

- Evidence obtained during the course of an OHS investigation should follow the normal rules and procedures laid out in the Evidence Act 1995 (NSW).

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

- No.

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

- These should be able to be used as a defence to a prosecution where they have been followed (see Q2).

## **THE BURDEN OF PROOF AND DEFENCES**

**Q117. Is 'reasonably practicable' an appropriate standard for the model OHS Act?**

- It is an appropriate standard for corporations given that it is in line with ILO155.
- In relation to individuals, a test of recklessness needs to apply (see discussions with regard to this issue at questions 1, 23,25,37 and 40).

**Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?**

- The prosecutor must be required to prove the standard was not met.



- As with all other criminal matters, the onus of proof is on the prosecutor to prove each and every element of the offence. Basic principles of fairness require that the prosecutor be compelled to prove its case rather than the defendant having to prove that the allegation was incorrect. This is in line with basic fundamental criminal law principles and stems from the proposition that the prosecutor is the entity making the accusation. A defendant should not be required to defend his or her position unless and until the prosecutor can prove his or her accusation is founded.

**Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?**

- No, the burden of proof in criminal matters must always remain on the prosecutor for the reasons stated above.

**Q120. What, if any, defences should the model OHS Act provide?**

- Defences should include compliance with any order, direction, practice note, industry standard, other official publication or direction by an inspector. They should also take into consideration the notion of control discussed in our responses to questions 16-18.
- Individuals should be entitled to raise a defence that their actions were reasonable in the circumstances. The notion of control must also be considered in the concept of reasonableness.

**Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?**

- No. The burden of proof should remain the same (see above).
- With regard to the defences, these will necessarily differ if it is accepted that different tests should apply to corporations and individuals (see above Q.120).

## **LIABILITY OF OFFICERS**

**Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?**

- No. Individuals should only be liable for actions they themselves carried out. An officer should only be liable for an offence he or she has committed (see Q.25). Health and safety is the responsibility of everybody at a place of work. Liability should be based on a consideration of the particular actions of the individual, not their position within an organisation. Deeming provisions and reliance on due diligence as a defence has produced unsatisfactory results in New South Wales. The concept of 'all due diligence' in the defence has proved to be such a vague concept that courts have often rejected steps taken by an officer, although perfectly thorough and reasonable, as evidence of all due diligence.
- All individuals accused of a crime have a right to be presumed innocent until proven guilty (Article 14(2) of the International Covenant on Civil and Political Rights and Article 11(1) of the Universal Declaration of Human Rights).
- We note that although derivative liability does exist in other Australian legislation, including the *Corporations Act 2001* (Cth) and the *Protection of the Environment Operations Act 1997* (NSW), legislation that includes derivative liability provisions usually provides detailed guidance to directors and managers in relation to the types of actions that will result in liability an/or does not impose gaol sentences and/or does not create absolute liability offences and/or provides for a greater number of defences. For example, the *Corporations Act 2001* (Cth) provides specific guidance in relation to the acts that will result in liability and does not

impose periods of imprisonment in relation to derivative liability provisions, and both the Corporations Act 2001 (Cth) and the *Protection of the Environment Operations Act 1997* (NSW) do not create absolute liability offences in relation to derivative liability.

**Q123. How should officer be defined?**

- If it is accepted that the test for liability of individuals is recklessness then there will be no need to define the concept of 'officer'.

**Q124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?**

- The test should be one of recklessness (see above). If, however, this test is rejected then the liability of an officer should be subject to the prosecution proving that a specific act or omission by the officer contributed to the offence. Automatic assumption of guilt creates liability artificially – this is inappropriate where the finding of guilt involves a criminal conviction, a fine and a possible gaol sentence. Automatic assumption of guilt also reverses the onus of proof, which is inappropriate for the reasons already outlined above (see Q118). The onus of proof must remain on the prosecutor. It is inappropriate to argue, as Unions NSW has argued at the ALP State Conference held in April – May 2008, that any harmonisation process must ensure, amongst other things, that current state provisions imposing an onus of proof on the defendant be preserved.

**Q125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?**

- Yes. The test must be one of recklessness (see above). If however this test were to be rejected, then clear guidance needs to be given when determining liability of an officer. The test should contain matters such as the following:
  - What the officer knew about the matter concerned.
  - The extent of the officer's ability to make or participate in the making of a decision that affected the corporation in relation to the matter.
  - Whether the contravention by the corporation is also attributable to an act or omission of any other person.
  - The extent to which the officer relied on the expertise and skills of a person properly qualified to carry out the particular job. Such a provision should contain matters as outlined in section 189 of the *Corporations Act 2001* (Cth).
  - Any other relevant matter (It is noted that the first three criteria above were proposed by the NSW Government in their 2006 OHS Amendment Bill).

**Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?**

- See above.

**Q127. What should the approach to officers of unincorporated associations or volunteer officers be?**

- There is no reason why the nature of the organisation should have any bearing on issues of health and safety. Health and safety should be the primary

consideration. It should not matter whether the organisation is unincorporated or its officers are volunteers.

## **SENTENCING OPTIONS**

### *FINES*

#### **Q128. For which offences should monetary penalties (fines) be imposed?**

- Monetary penalties should only be imposed for more prominent offences. Also, the maximum amounts should be equal for all individuals regardless of their position within the organisation. A difference in the amounts of the fine based solely on the persons' position within the organisation may give the impression that less senior employees are being given preferential treatment and that, conversely, more senior employees are being unfairly targeted. The amount of the fine ultimately imposed can be dealt with by a court and any greater ability to influence health and safety can be reflected by the imposition of a higher fine if warranted having regard to subjective and objective circumstances of the individual being sentenced.

#### **Q129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?**

- Maximum fines should be provided in the model OHS Act to ensure consistency.

#### **Q130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?**

- The level of fines should differentiate between breaches of the general duties and administrative/other duties (i.e. failure to consult, failure to comply with an infringement notice, etc). Breaches of administrative/other duties should carry lower fines. Within these subcategories fines should further differentiate between first and subsequent offenders.

#### **Q131. Should there be a statutory minimum fine for some offences? If so, what?**

- No, this would take away from the discretion of judges who will be apprised of all the issues and the information pertinent to the offence.
- To ensure consistency the model OHS Act should make it clear that any provision allowing the court not to record a conviction is available to defendants in OHS prosecutions. At present, the NSW IRC has determined that such a provision should rarely if at all be applied in OHS cases. The provision is, however, more readily available in other jurisdictions. This creates inconsistency in the sentencing process. Inconsistency in the sentencing process must be addressed in the model OHS Act (see also discussion at Q.133 below).

#### **Q132. Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?**

- The level of the penalties should depend on whether the offences are repeat offences. The present system works well. Within those maximum penalties, judges can impose appropriate penalties based on culpability.

#### **Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?**

- The New South Wales IRC has stated that, as all offences are different, outcomes can vary. This has had the unfortunate effect of creating inconsistency and uncertainty in sentencing within New South Wales. This needs to be

rectified. National sentencing guidelines would greatly assist in removing inconsistencies across jurisdictions.

#### *OTHER SENTENCING OPTIONS*

**Q134. What penalty options should be available in addition to or instead of fines?**

- Enforceable undertakings and other such measures (see also discussion above with regard to enforcement pyramid).

**Q135. Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?**

- Terms of imprisonment may be appropriate where the prosecutor can prove recklessness by an individual. However, it is imperative that where there is a possibility of a person's liberty being taken away, the process followed is strictly in accordance with criminal law procedure, and basic fundamental criminal law principles are applied every step of the way, including:
  - Right to silence.
  - Right to trial by jury.
  - Appropriate rights of appeal.
  - Right to legal representation.

(see also discussion at Q.62).

- Gaol sentences are not appropriate where the offence does not require any intent on behalf of the person. At present, in NSW, employers are responsible for ensuring the health and safety of the hasty, careless, inadvertent, inattentive, unreasonable or disobedient employee. This means that officers could potentially be deprived of their liberty where the risk arose, for example, as a result of deliberate disregard of instructions by an employee. It is impossible to see how this could be regarded as a just state of affairs.

#### **WORKPLACE DEATH AND SERIOUS INJURY**

**Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?**

- No. Offences should be based on the creation of a risk and not the outcome. If the risk involves a risk of death then this can be reflected in the penalty ultimately imposed.

**Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?**

- Offences should be based on the creation of a risk and not the outcome. Breaches resulting in death or serious injury should be dealt with in the same way as any other OHS breaches.

**Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?**

- The consequences of the breach should have absolutely no bearing. The degree of culpability must determine the penalties to be imposed.

## **ENFORCEMENT OF PENALTIES**

**Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?**

- NSWMC does not have a view in relation to this matter.

**Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?**

- NSWMC does not have a view in relation to this matter.

**Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?**

- NSWMC does not have any further comments.

## **CHAPTER 9: OTHER ISSUES**

### **REGULATION MAKING POWERS**

**Q142. Should the power to make regulations be limited and if so, in what way?**

- The power to make regulations should be exercised in such manner as to ensure consistency. Model OHS Regulation needs to be created. All state and territory regulations should be consistent with this model.

**Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?**

- Regulations should provide guidance. They must not create further summary offences.

### **CODES OF PRACTICE**

**Q144. What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?**

- The model OHS Act should allow for the development and approval of nationally consistent codes of practice.
- Evidence of compliance with these codes of practice must be able to be presented in court by a defendant in defence to a prosecution.

## NOTIFICATION OF INCIDENTS AND REPORTING

**Q145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?**

- The reporting system should be streamlined so that it is the same in every jurisdiction. The model OHS Act should clearly list the steps to be taken when notifying the relevant State Authority. The New South Wales 'dual reporting' model is confusing and should not be followed.

## EXTERNAL APPEALS AND ISSUE RESOLUTION

**Q146. What provisions should be made in the model OHS Act for the external review of regulatory decisions?**

- The model OHS Act must allow for the external review of regulatory decisions by:
  - an Ombudsman;
  - an Administrative Appeals Tribunal; and
  - an appropriate court. Appeals within the judicial system should be in line with the normal appeal processes applicable in criminal matters and should not be hindered by mechanisms such as privative clauses (in this regard it is noted that whilst the usual appeal rights available in criminal matters are limited by a privative clause in New South Wales, these appeal rights are recognised in Western Australia, the Australian Capital Territory, the Northern Territory, Victoria, South Australia and Tasmania).

**Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?**

- Yes, but only in the manner already outlined at question and answer 90 above - a meeting of the parties to discuss whether the matter can be resolved by means other than enforceable undertakings or fines or other punitive action: for example, something akin to a premier's memorandum procedure, currently in place in New South Wales, whereby the parties meet and discuss the issues. At the moment, the procedure is only available to other government authorities and is not available to the private sector. If such an intermediate step were to be introduced, measures (including amending the *Evidence Act 1995* (NSW)) must be enacted to ensure that information arising out of these discussions cannot be later used in a prosecution of the defendant.

## TRIPARTITE MECHANISMS

**Q148. Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?**

- NSWMC supports the idea of advisory bodies whose function is to provide advice to the Government regarding OHS issues. These advisory bodies should be constituted by representatives of employers, employees and regulators. In order to ensure the best health and safety advice is provided, each industry must have its own advisory body. The advisory body can make recommendations in relation to regulations, codes of practice and other explanatory documentation in relation to its own industry.

**Q149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?**

- See above.

## **MUTUAL RECOGNITION**

### *PERMITS AND LICENSING ARRANGEMENTS FOR WORKERS ENGAGED IN HIGH RISK WORK*

**Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?**

- NSWMC recognises that confusion may follow where states and territories impose different standards with regard to licensing arrangements. This confusion does not promote health and safety. NSWMC believes that national consistency will result in better health and safety.
- Consequently, NSWMC believes that the model OHS Act should facilitate consistency of:
  - Compliance with regard to licences and permits (for example by providing a register of requirements before a licence or permit can be obtained).
  - Administration of licences and permits by regulators in each state and territory (for example by allowing conditions on a licence or permit issued in one state to be recognised in another state).
  - Enforcement measures with regard to licences and permits (for example by allowing suspension or cancellation of a license in one state to be recognised and enforced in another state).

**Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:**

- **better OHS outcomes;**
- **greater efficiency and effectiveness;**
- **lower regulatory compliance and enforcement burdens; and**
- **improved harmonisation of the requirements for such permits and licensing for industry across Australia?**
- The model OHS Act should ensure consistency amongst jurisdictions. With regard to licencing and permits, this may be able to be achieved by providing a national accreditation system. All persons applying for permits and licences would need to fulfill the same criteria across jurisdictions.

## **INTERACTION OF FEDERAL AND STATE LAWS**

**Q152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?**

- Overlap between state or territory and federal legislation can be minimised by providing consistency in:
  - Duties.

- Tests to determine liability.
- Enforcement procedures.
- Review procedures.
- Regulations and codes of practice.
- Sentencing, interpretation of terms, inspectors' powers, appeal procedures and the allocation of licences and permits.



**AUSTRALIAN GOVERNMENT - NATIONAL REVIEW INTO  
MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS**

**NEW SOUTH WALES MINERALS COUNCIL  
– SUBMISSION – JULY 2008**

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**ANNEXURE A – EXAMPLE DEFINITIONS**

**11 JULY 2008**

## EXAMPLE DEFINITIONS

### 1 Workplace

Macquarie Dictionary	-- <i>noun</i> a place of employment.
Encyclopaedic Australian Legal Dictionary	Any premises where employees or self-employed people work: <i>Occupational Health and Safety Act 1989 (ACT)</i> s 5.
<i>Occupational Health and Safety Act 2000 (NSW)</i>	Section 4 - Place of work means premises where persons work.
Occupational Health and Safety Act 2004 (Vic)	Section 5 – Workplace means a place, whether or not in a building or structure, where employees or self-employed persons work.
<i>Workplace Health and Safety Act 1995 (Qld)</i>	Section 9 – A workplace is any place where work is, or is to be performed by –  (a) a worker; or  (b) a person conducting a business or undertaking.
<i>Occupational Health, Safety and Welfare Act 1986 (SA)</i>	Section 4(1) - Workplace means any place (including any aircraft, ship or vehicle) where an employee or self-employed person works and includes any place where such a person goes while at work.
<i>Occupational Safety and Health Act 1984 (WA)</i>	Section 3 - Workplace means a place, whether or not in an aircraft, ship, vehicle, building or other structure, where employees or self-employed persons work or are likely to be in the course of their work.
<i>Workplace Health and Safety Act 1995 (Tas)</i>	Section 3 - Workplace means any premises or place (including any mine, aircraft, vessel or vehicle) where an employee, contractor, or self-employed person is or was employed or engaged in industry.
<i>Occupational Health Safety Act 1989 (ACT)</i>	Dictionary - Workplace means any premises where employees or self-employed persons work.
Case Law	<p>The courts will take a broad approach to interpreting what is meant by a “workplace” or “place of work” (see <i>Mainbrace Constructions Pty Ltd v WorkCover Authority of NSW (Inspector Charles)</i> (2001) 102 IR 84 at 94-96). In <i>TTS Pty Ltd v Griffiths</i> (1991) 105 FLR 255 at 272 Asche CJ examined the meaning of “workplace” in the Northern Territory <i>Work Health Act</i>. He rejected the argument that a “workplace” was “confined to something more permanent or stable in the nature of a premises”.</p> <p><i>“It would seem strange ... that the Act was intended to cover only those workers who worked in the specific business houses or factories of their employers but not those who carried on the work of their employers outside. One can think of many examples where a ‘workplace’ may still be a ‘workplace’, even if it existed as such for a very short space of time, or even</i></p>

	<p>where it would change continually even in the space of one day”.</p> <p>In <i>George Bull &amp; Sons Ltd v Sill</i> (1954) 52 LGR 508 (quoted in <i>Kelly v Pierhead Ltd</i> (1967) 1 All ER 657 at 660) Lord Goddard said:  <i>‘I cannot see why I am not to give the words “working place” the ordinary meaning of the English language, that is, a place where work is done’.</i></p> <p>In <i>Gough v National Coal Board</i> (1959) 2 All ER 164 at 174 Lord Denning said: <i>“working place” means, I think, every place where we are working or may be expected to work.</i></p> <p>Similarly in <i>Inspector Callaghan v Starr</i> (1992) <i>Australian Industrial Safety, Health and Welfare Case Digests</i> 52-90 the New South Wales Chief Industrial Magistrate held that the expression “place of work” in the OHS Act 1983 (NSW) was broad enough to cover any place where a work activity required a worker to be, and included all parts of the premises which an employee might use in performing acts normally and reasonably incidental to her or his work duties.</p> <p>In <i>Inspector Page v Woolworths Ltd</i> [1994] NSWIRC 95 at 7 Peterson J held that “place of work” included “the immediate environs which may have been affected by the conduct of the business”.</p> <p>In <i>Clarke v W C Meinhardt and Partners Pty Ltd</i> [1990] NSWIRC 1212-1213, 30 June 1992 at 12 Fisher P said that:  <i>“With respect to the duty under s 16 [of the Occupational Health and Safety Act 1983 (NSW)] I consider the place of work includes every area which may be affected by the work being done which would include in this case the hoarding, the external scaffolding above the hoarding and the area of the street beneath the hoarding and the site upon which the scaffolding collapsed”.</i></p> <p>The phrase “place of work” is broad enough to encompass any place where the work activity requires the employee to be:  <i>Inspector Callaghan v Starr</i> (1992) <i>Australian Industrial Safety, Health and Welfare Case Digest.</i></p>
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## 2 Conduct of the work/undertaking

Macquarie Dictionary	<p><i>noun</i> 1. the act of someone who undertakes any task or responsibility.  2. a task, enterprise, etc., undertaken.  3. a promise; pledge; guarantee.</p>
<b>Occupational Safety &amp; Health Act 1984 (WA)</b>	<p>Section 231 – business of an employer means:</p> <ul style="list-style-type: none"> <li>(a) the conduct of the undertaking or operations of an employer; and</li> <li>(b) work undertaken by an employer or any employee of an employer.</li> </ul>

**Case Law**

The meaning of the phrase “conduct of the employer’s undertaking” was considered in *Whitaker v Delmina Pty Ltd* (1998) 87 IR 268.

This was a decision of Hansen J in the Victorian Supreme Court dealing with s 22 of the *Occupational Health and Safety Act 1985* (Vic).

In that case, his Honour said (at 280-281):

*“The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states. The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer ... and the word “conduct” refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable”.*

In *WorkCover Authority of NSW (Insp Campbell) v Hitchcock* (2004) 135 IR 377 it was held that:

*“Although there are obvious connections (indeed, an employer’s place of work will always be part of its undertaking) the two concepts do not always overlap. An employer’s undertaking may be present at a place which is not the employer’s place of work and the key to the distinction lies in the examination of performance of work in the circumstances of a particular case”.*

More than one employer may be conducting an undertaking at a particular site – *R v Mara* [1987] 1 WLR 87.

Activities coming within the scope of the employer’s undertaking are not limited to those activities undertaken by employees – *R v Associated Octel Co Ltd* [1996] 4 All ER 846 (at 851):

*“It is part of the conduct of the undertaking, not merely to clean the factory, but also to “have the factory cleaned” by contractors. The employer must take reasonably practicable steps to avoid risk to the contractors’ servants which arise, not merely from the physical state of the premises but also from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work”.*

An undertaking may persist after the actual work has been completed where a relevant risk to health and safety has been created at the time that work was being undertaken – ie where the work under the contract had been completed and the balance of the work was to be completed under a separate contract – *Inspector Maltby v Harris Excavation and Demolition Pty Ltd* [1997] NSWIRComm 58 (at 21):

	<p>“.. the defendant’s connection with the site cannot be regarded as being at an end until a handover to the proprietor had been effected in circumstances where the proprietor’s project manager signified his satisfaction that the work required had been satisfactorily completed. Until that occurred, the demolisher, in this case the defendant, in my opinion was to be regarded as possessing a place of work, and as conducting an undertaking in relation to that place of work within the meaning of s 16(1) of the [former NSW OHS Act]”.</p>
	<p>The word “undertaking” in the definition of “industry” in the <i>Industrial Conciliation and Arbitration Act 1972 SA</i>, is to be read in its widest natural sense as connoting any enterprise or activity whatsoever, be it of a commercial nature or otherwise, in which person are employed or engaged for remuneration or reward – <i>Tertiary Institutions Staff (Jurisdiction) Case 40 SAIR 229</i>.</p>

### 3 Control

Macquarie Dictionary	<ol style="list-style-type: none"> <li>1. to exercise restraint or direction over; dominate; command.</li> <li>2. to hold in check; curb.</li> <li>3. to test or verify (a scientific experiment) by a parallel experiment or other standard of comparison.</li> </ol> <p>--noun</p> <ol style="list-style-type: none"> <li>4. the act or power of controlling; regulation; domination or command.</li> <li>5. check or restraint.</li> <li>6. something that serves to control; a check; a standard of comparison in scientific experimentation.</li> <li>7. a person who acts as a check; a controller.</li> </ol> <p>--phrase</p> <ol style="list-style-type: none"> <li>13. in control, <ol style="list-style-type: none"> <li>a. in command.</li> <li>b. successfully managing one's emotions.</li> </ol> </li> </ol>
Butterworths Concise Australian Legal Dictionary	To direct, regulate or command.
<b>Occupational Safety &amp; Health Regulations 1996 (WA)</b>	<p>Clause 1.3 - Person having control of a workplace means a person other than an employee who has, to any extent, control of a workplace where persons who are not employees of that person work or are likely to be in the course of that work and where the control is in connection with the carrying on by that person of a trade, business or undertaking (whether for profit or not); and</p> <p>includes a person who has, by virtue of a contract or lease, an obligation of any extent in relation to the maintenance or repair of a workplace.</p>
<b>Occupational Health and Safety (General) Regulation 2007 (ACT)</b>	<p>Section 7 – Meaning of in control of workplace</p> <p>For this regulation a person is in control of a workplace if, and to the extent that, the person has control of:</p>

	<p>(a) the workplace; or</p> <p>(b) a means of entry to, or exit from, the workplace; or</p> <p>(c) plant or a substance at the workplace.</p>
<b>Case Law</b>	<p>The word “control” extends to various degrees of control. In <i>Inspector Page v Growth Equities Services Pty Ltd</i> [1994] NSWIRComm 95 Peterson J said:</p> <p><i>“the possession of the columns by Woolworths may not obviate control by Growth Equities unless possession is a requirement of “control” under s 17(2)(b) [of the OHS Act 1983]. In my opinion, the language of the section suggests the contrary. The qualification of control imported by the words “to any extent” should not be read as confined to a duality of control ... but naturally extends to cover various degrees of control”.</i></p> <p>“Control” is an ordinary English word meaning having the power to compel, direct or command.</p> <p>In <i>McMillan Britton &amp; Kell Pty Ltd v WorkCover Authority (NSW)</i> (1999) 89 IR 464 the meaning of ‘control’ was outlined as follows:</p> <p><i>“..the applicable meaning of “control” in the context of s 17 [of the OHS Act 1983], by reference to its ordinary meaning as earlier outlined, must, it seems to us, have about it the sense of not mere “sway”, “checking” or “restraint” but rather controlling in the sense of “directing action” or “command” – the ability of a person to compel corrective action to ensure safety...”</i> (at 480-481).</p>

#### 4 Reasonably practicable

Macquarie Dictionary	<p><i>Reasonable</i> --adjective 1. endowed with reason. 2. agreeable to reason or sound judgment. 3. not exceeding the limit prescribed by reason; not excessive. 4. moderate, or moderate in price.</p> <p><i>Practicable</i> --adjective 1. capable of being put into practice, done, or effected, especially with the available means or with reason or prudence; feasible. 2. capable of being used or traversed, or admitting of passage.</p>
Encyclopaedic Australian Legal Dictionary	<p>A general term used in various contexts, for example an employer must take all reasonably practicable steps to protect the health and safety at work of the employer’s employees: <i>Occupational Health and Safety (Commonwealth Employment) Act 1991</i> (Cth) - s 16(1).</p> <p>The words ‘reasonably practicable’ are capable of flexible use depending on the circumstances of the case.</p> <p>For example, the question of whether an appellant has done whatever is reasonably practicable to comply with a requirement of service within time is one of fact and degree to</p>

	<p>be decided upon a consideration of the whole of the circumstances: <i>Rough v Rix</i> (1982) 49 LGRA 352 . What is reasonably practicable in any given case must take the purpose of the legislation into account.</p> <p>For example, the test of whether it is not reasonably practicable to drive in the left lane depends on the purpose of the prohibition on driving in the right lane: <i>Rowbottom v Nicolitsi</i> (1986) 4 MVR 35 .</p>
<p><b>Occupational Safety &amp; Health Act 1984 (WA)</b></p>	<p>Section 3(1) - Practicable means reasonably practicable having regard, where the context permits, to —</p> <ul style="list-style-type: none"> <li>(a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;</li> <li>(b) the state of knowledge about — <ul style="list-style-type: none"> <li>(i) the injury or harm to health referred to in paragraph (a);</li> <li>(ii) the risk of that injury or harm to health occurring; and</li> <li>(iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health; and</li> </ul> </li> <li>(c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii).</li> </ul>
<p><b>Workplace Health &amp; Safety Act 2007 (NT)</b></p>	<p>Section 5 – The meaning of reasonably practicable</p> <p>The question whether particular risk management measures are reasonably practicable is to be decided with regard to:</p> <ul style="list-style-type: none"> <li>(a) The likelihood that the risk could result in injury; and</li> <li>(b) The seriousness of any injury that could result from realisation of the risk; and</li> <li>(c) The availability, suitability, effectiveness and cost of the measures; and</li> <li>(d) Any other relevant factors.</li> </ul>
<p><b>Occupational Health and Safety (General) Regulation 2007 (ACT)</b></p>	<p>Section 8 – Meaning of reasonable practicable steps</p> <p>For this regulation, each of the following must be considered to work out what are reasonably practicable steps to eliminate or minimise risk:</p> <ul style="list-style-type: none"> <li>(a) the seriousness of the risk;</li> <li>(b) the current state of knowledge about – <ul style="list-style-type: none"> <li>(1) the hazard giving rise to the risk and the risk itself; and</li> <li>(2) ways of eliminating or minimising the risk;</li> </ul> </li> <li>(c) the availability and suitability of ways to eliminate or</li> </ul>

	<p>minimise the risk;</p> <p>(d) the cost of eliminating or minimising the risk.</p>
<p><b>Case Law</b></p>	<p>In <i>Edwards v National Coal Board</i> [1949] 1 KB 704 at 712:</p> <p><i>“Reasonably practicable’ is a narrower term than ‘physically possible’ and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident”.</i></p> <p>In <i>Slivak v Lurgi (Australia) Pty Ltd</i> (2001) 205 CLR 304 Gaudron J at 322-323 observed that:</p> <p><i>“The words ‘reasonably practicable’ have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words ‘reasonably practicable’ are ordinary words bearing their ordinary meaning. And the question whether a measure or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:</i></p> <ul style="list-style-type: none"> <li>▪ <i>the phrase ‘reasonably practicable’ means something narrower than ‘physically possible’ or feasible;</i></li> <li>▪ <i>what is ‘reasonably practicable’ is to be judged on the basis of what was known at the relevant time;</i></li> </ul> <p><i>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”.</i></p> <p>The Chief Industrial Magistrate adopted a similar approach in <i>Southam v Petersville Ltd</i> (1988) 24 IR 186 at 193. His Honour summarised the test as <i>“a duty to weigh up the risk, both as to its likelihood and as to its severity if it occurs, as against the costs in terms of money, the production and the effort of providing against the risk”.</i></p> <p>Reasonable practicability implies some element of reasonable foreseeability: <i>WorkCover Authority (NSW) v Maitland City Council</i> (1998) IR 362. Reasonable foreseeability of a risk or detriment to safety is relevant to the extent that it assists in determining whether it was reasonably practicable to avoid a risk: <i>Bultitude v Grice Constructions Pty Ltd</i> [2002] NSWIRComm 20.</p> <p><i>Dinko Tuna Farmers Pty Ltd v Markos</i> [2007] SASC 166 - Although the determination of what constitutes the offence of failing to ensure safety so far as is reasonably practicable involves a value judgment, the following common law requirements can be imported as elements of the statutory</p>



	<p>offence:</p> <ul style="list-style-type: none"><li>(a) the phrase "reasonably practicable" is narrower than "technical feasibility";</li><li>(b) what is "reasonably practicable" is to be adjudged on the basis of what was known at the relevant time; and</li></ul>
	<ul style="list-style-type: none"><li>(c) to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary</li></ul>

	<p>to avert that risk.</p> <p>In <i>WorkCover Authority (NSW) v Cleary Bros (Bombo) Pty Ltd</i> (2001) 110 IR 82 the meaning of reasonably practicable was addressed as follows - "...the assessment of the reasonable practicability of those steps requires a balancing of the quantum of the risk with the sacrifice (in money, time and trouble) in adopting the measures necessary to avert the risk". [Paragraph 88].</p>
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## 5 Consultation

Macquarie Dictionary	<p>--noun</p> <ol style="list-style-type: none"> <li>1. the act of consulting; conference.</li> <li>2. a meeting for deliberation.</li> <li>3. an application for advice to one engaged in a profession, especially to a medical practitioner, etc.</li> </ol>
<b>Case Law</b>	<p>In <i>Dixon v Roy</i> [1991] ACL Rep 355 NSW, Young J, in the Supreme Court of NSW noted that consultation involves, at the very least, a 3 pronged process of:</p> <ol style="list-style-type: none"> <li>(a) providing information to the person who is to be consulted;</li> <li>(b) receiving a response to that information; and</li> <li>(c) considering that response.</li> </ol> <p>Please note that although this case involved the interpretation of the word "consult" for the purposes of s 66G of the <i>Conveyancing Act 1919</i> (NSW), Young J's observations regarding the components of the duty to consult are consistent with the meaning prescribed by s 14 of the <i>OHS Act 2000</i> for the purposes of the Act.</p>
<b>Workplace Health &amp; Safety Act 1995 (Qld)</b>	<p>Section 18 – Consultation is about fostering cooperation and developing partnerships between government, employers and workers to ensure workplace health and safety.</p>

## 6 Director/manager

Macquarie Dictionary	<p><i>Director</i> --noun</p> <ol style="list-style-type: none"> <li>1. someone or something that directs.</li> <li>2. <i>Commerce</i> one of a body of persons chosen to control or govern the affairs of a company or corporation.</li> <li>3. the permanent head in certain government departments.</li> </ol> <p><i>Manager</i> --noun</p> <ol style="list-style-type: none"> <li>1. someone who manages.</li> <li>2. a person charged with the management or direction of an institution, a business or the like.</li> </ol>
Butterworths Concise Australian Legal Dictionary	<p><i>Director</i> A person employed as an officer of a company and having a duty to perform the duties of management of the business of the company, acting as a member of the board of directors:</p>

	<i>Corporations Act 2001 (Cth) - Sch 1 Table A art 66.</i>
<b>Corporations Act 2001 (Cth)</b>	<p>Section 9 - "director" of a or other means:</p> <p>(a) a who:</p> <p>(i) is appointed to the position of a ; or</p> <p>(ii) is appointed to the position of an alternate and is acting in that capacity;</p> <p>regardless of the name that is given to their position;</p> <p>and</p> <p>(b) unless the contrary intention appears, a who is not validly appointed as a if:</p> <p>(i) they act in the position of a ; or</p> <p>(ii) the of the or are accustomed to act in accordance with the instructions or wishes.</p> <p>Subparagraph (b)(ii) does not apply merely because the act on advice given by the in the proper performance of attaching to the professional capacity, or the business relationship with the or the or .</p>
<b>Occupational Health, Safety &amp; Welfare Act 1986 (SA)</b>	<p>Section 4(1) - <i>Director</i> means the person for the time being holding, or acting in, the position of Executive Director of that part of the Department that is directly involved in the administration and enforcement of this Act.</p>

## 7 Hazard/risk

Macquarie Dictionary	<p><b>Hazard</b></p> <p>--noun</p> <p><b>1.</b> a risk; exposure to danger or harm.</p> <p><b>2.</b> the cause of such a risk; a potential source of harm, injury, difficulty, etc.</p> <p><b>3.</b> chance; uncertainty.</p> <p>--verb (t)</p> <p><b>10.</b> to venture to offer (a statement, conjecture, etc.).</p> <p><b>11.</b> to put to the risk of being lost; to expose to risk.</p> <p><b>12.</b> to take or run the risk of (a misfortune, penalty, etc.).</p> <p>--phrase</p> <p><b>14. at hazard,</b></p> <p><b>a.</b> at risk; staked.</p> <p><b>b.</b> by chance:</p> <p><b>Risk</b></p> <p>--noun</p> <p><b>1.</b> exposure to the chance of injury or loss; a hazard or dangerous chance.</p> <p>--verb (t)</p> <p><b>3.</b> to expose to the chance of injury or loss, or hazard.</p> <p><b>4.</b> to take or run the risk of.</p> <p><b>5.</b> to venture upon despite the hazards.</p> <p><b>6. at risk,</b> in a state or situation in which injury, loss, the onset of disease, etc., is likely; vulnerable.</p> <p><b>8. take a risk,</b> to decide on a course of uncertain outcome.</p> <p><b>9. take no risks,</b> to behave with extreme caution.</p>
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<p>Butterworths Concise Australian Legal Dictionary</p>	<p><i>Risk</i> A possibility, chance, or likelihood of harm, hazard, or loss. A person is at risk when he or she is exposed to danger, peril, or injury. A risk may be moral, physical or economic.</p> <p>If a person has created a real risk and not taken reasonable steps to eliminate it, he or she has breached his or her duty of care and will be liable for any damage caused by that breach: <i>Wyong Shire Council v Shirt</i> (1980) 146 CLR 40.</p> <p>On the other hand, a person who has voluntarily assumed a risk will not be able to recover damages for another's tortious acts or omissions: <i>Insurance Cmr v Joyce</i> (1948) 77 CLR 39.</p>
<p><b>Occupational Health and Safety Act 2000 (NSW)</b></p>	<p>Clause 3 - <i>hazard</i> means anything (including work practices or procedures) that has the potential to harm the health or safety of a person.</p>
<p><b>Workplace Health &amp; Safety Act 1995 (Qld)</b></p>	<p>Schedule 3 – Dictionary</p> <p><i>Risk</i> means risk of death, injury or illness.</p>
<p><b>Occupational Health, Safety &amp; Welfare Act Regulations 1995 (SA)</b></p>	<p>Clause 1.1.5 -</p> <p><i>Hazard</i> means the potential to cause injury or illness.</p> <p><i>Risk</i> means the probability and consequences of occurrence of injury or illness.</p>
<p><b>Occupational Safety &amp; Health Act 1984 (WA)</b></p>	<p>Section 3(1) - Hazard, in relation to a person, means anything that may result in –</p> <p>(a) injury to the person; or</p> <p>(b) harm to the health of the person.</p> <p>Risk in relation to any injury or harm, means the probability of that injury or harm occurring.</p>
<p><b>Workplace Health &amp; Safety Act 2007 (NT)</b></p>	<p>Section 4</p> <p><i>Hazard</i> means a source of risk.</p>
<p><b>Occupational Health and Safety Act 1989 (ACT)</b></p>	<p>Dictionary</p> <p><i>Hazard</i> – a thing (including an intrinsic property of a thing), or a situation is a hazard if it had the potential to kill or injure a person.</p> <p><i>Risk</i> – means the likelihood of death or harm to a person from a hazard.</p>
<p><b>Butterworths Occupational Health &amp; Safety Law NSW Looseleaf</b></p>	<p>[2031.5] – “Risk” according to the Shorter Oxford Dictionary means “hazard, damage, exposure to mischance or peril”.</p> <p>The English Court of Appeal in <i>R v Board of Trustees of the Science Museum</i> [1993] 3 All ER 853 interpreted the meaning of the word “risks” in s 3(1) of the <i>Health and Safety at Work Act 1974</i> (UK) to mean the mere possibility of danger and not</p>

	<p>actual danger as the defendants in that case had submitted.</p> <p>The Court held that the word “risks” conveys the idea of a possibility of danger.</p>
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## 8 Reasonable excuse

Macquarie dictionary	<p>--<i>verb (t)</i> (<b>excused, excusing</b>)</p> <ol style="list-style-type: none"> <li>1. to regard or judge with indulgence; pardon or forgive; overlook (a fault, etc.).</li> <li>2. to offer an apology for; apologise for; seek to remove the blame of.</li> <li>3. to serve as an apology or justification for; justify.</li> <li>4. a. to release from an obligation or duty. b. to allow to leave a place, or cease an activity.</li> <li>5. to seek or obtain exemption or release for (oneself).</li> </ol> <p>--<i>noun</i></p> <ol style="list-style-type: none"> <li>6. that which is offered as a reason for being excused; a plea offered in extenuation of a fault, or for release from an obligation, etc.</li> <li>7. something serving to excuse; a ground or reason for excusing.</li> <li>8. the act of excusing.</li> </ol>
Encyclopaedic Australian Legal Dictionary	<p><b>Criminal law</b></p> <p>A justification for conduct which is otherwise illegal where that justification is considered appropriate by a tribunal of fact given all of the circumstances in which the conduct occurred.</p> <p>For the purposes of <i>Summary Offences Act 1988</i> (NSW) s 4(1)(b), a <b>reasonable excuse</b> is dependent upon both subjective and objective considerations which are related to the immediately prevailing circumstances: <i>Connors v Craigie</i> (1994) 76 A Crim R 502 .</p> <p>A <b>reasonable excuse</b> in respect of possessing a prohibited item requires a temporal nexus between the excuse and the possession of the item in the sense that possession must be related to a reasonable apprehension of imminent attack: <i>R v Taikato</i> (1996) 186 CLR 454 ; 139 ALR 386.</p> <p>In relation to whether a person has a <b>reasonable excuse</b> not to attend an Independent Commission Against Corruption hearing, neither an obligation of honour, secrecy or confidence, nor a private undertaking arising from the nature of a pursuit or calling is sufficient: (NSW) Independent Commission Against Corruption Act 1988 ss 86, 99.</p> <p>A journalist's desire to keep a source confidential is not sufficient, whereas a fear of self-incrimination may be: <i>Independent Commission Against Corruption v Cornwall</i> (1993) 38 NSWLR 207; 116 ALR 97 .</p> <p>In relation to whether an officer of a corporation has a <b>reasonable excuse</b> not to comply with certain legislation, there must be physical or practical difficulties in compliance: <i>Corporate Affairs Commission (NSW) v Yuill</i> (1991) 172 CLR 319 ; 100 ALR 609 (with respect to the (CSL) Companies Code s 296).</p>

	In relation to witnesses summoned to appear and take evidence on oath or affirmation before the Australian Securities and Investments Commission (ASIC) ((Cth) Australian Securities and Investments Commission Act 2001 s 58), it is not a <b>reasonable excuse</b> for the witness to refuse to give information on the basis that to do so might tend to incriminate the person or to make the person liable to a penalty: <i>Australian Securities and Investments Commission Act 2001 (Cth) s 68(1)</i> ; <i>Hugall v McCusker</i> [1990] 2 WAR 350 ; <a href="#">(1990) 2 ACSR</a> .
<b>Case Law</b>	<p>The courts have been reluctant to provide a comprehensive definition of what constitutes reasonable excuse. Street CJ commented in <i>R v Bacon</i> [1977] 2 NSWLR 507 at 510 that it is “undesirable to attempt to define comprehensively what may be meant by the phrase”. O’Brien J commented in the same case at 514 that the excuse need not be confined to a legal excuse and that it can be a factual excuse provided it is “reasonable”.</p> <p>English cases have held that a person does not have a reasonable excuse when their conduct proceeds from a mistake of law: see <i>R v Reid</i> [1973] 3 All ER 1020. However, Street CJ in the Court of Criminal Appeal of NSW held in <i>R v Bacon</i> that a defendant may be viewed as having acted with reasonable excuse where their conduct proceeded from a bona fide mistake of fact and law based on reasonable grounds.</p>
<b>Workplace Health &amp; Safety Act 1995 (Qld)</b>	<p>Schedule 3 – Dictionary</p> <p>Reasonable excuse does not include a matter of mere convenience.</p>

## 9 Adequate supervision

Macquarie Dictionary	<p><b>Adequate</b> --adjective</p> <ol style="list-style-type: none"> <li>(sometimes followed by <i>to</i> or <i>for</i>) equal to the requirement or occasion; fully sufficient, suitable, or fit.</li> <li><i>Law</i> reasonably sufficient for starting legal action.</li> </ol> <p><b>Supervision</b></p> <p>--noun</p> <p>the act or function of supervising; oversight; superintendence.</p>
<b>Occupational Health, Safety &amp; Welfare Regulations 1995 (SA)</b>	<p>Clause 1.3.6 – Supervision</p> <p>An employer must, in relation to the implementation of these regulations, ensure that an employee is provided with suitable and adequate supervision to ensure his or her health and safety at work.</p> <p>For the purposes of this regulation –</p> <ol style="list-style-type: none"> <li>The amount of supervision (if any) required and the time at which it must be provided, will be assessed according to the nature of the risks at work; and</li> <li>The supervision must be – <ol style="list-style-type: none"> <li>Related to the employee’s level of competence and</li> </ol> </li> </ol>

	<p>experience; and</p> <p>(2) Carried out by a competent person.</p>
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## 10 Adequate instructions

Macquarie Dictionary	<p><i>Adequate</i> --adjective</p> <ol style="list-style-type: none"> <li>1. (sometimes followed by <i>to</i> or <i>for</i>) equal to the requirement or occasion; fully sufficient, suitable, or fit.</li> <li>2. <i>Law</i> reasonably sufficient for starting legal action.</li> </ol> <p><i>Instructions</i> --plural noun</p> <ol style="list-style-type: none"> <li>1. orders or directions for action, behaviour, etc.</li> <li>2. directions for use, assembly, etc.</li> <li>3. <i>Law</i> the factual information and directives given by a client to a solicitor, or by a solicitor to a barrister.</li> </ol>
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## 11 Adequate information

Macquarie Dictionary	<p><i>Adequate</i> --adjective</p> <ol style="list-style-type: none"> <li>1. (sometimes followed by <i>to</i> or <i>for</i>) equal to the requirement or occasion; fully sufficient, suitable, or fit.</li> <li>2. <i>Law</i> reasonably sufficient for starting legal action.</li> </ol> <p><i>Information</i> --noun</p> <ol style="list-style-type: none"> <li>1. knowledge communicated or received concerning some fact or circumstance.</li> <li>2. knowledge on various subjects, however acquired.</li> <li>3. the act of informing.</li> <li>4. the state of being informed.</li> <li>5. <i>Law</i> a document used to initiate criminal proceedings in a magistrate's court, which states the details of the alleged criminal conduct; complaint.</li> </ol>
<b>Occupational Health, Safety &amp; Welfare Regulations 1995 (SA)</b>	<p>Clause 1.3.4 – Instructions</p> <p>An employer must, in relation to the implementation of these regulations, ensure that an employee receives suitable and adequate information, instruction and training for any task that he or she may be required to perform at work.</p> <p>For the purposes of this regulation –</p> <ol style="list-style-type: none"> <li>(a) the amount of information, instruction and training (if any) required, and the time at which it must be provided, will be assessed according to the nature of the risks associated with the particular task; and</li> <li>(b) the information, instruction and training must be reviewed and revised at reasonable intervals; and</li> <li>(c) the information, instruction and training must be provided in a language that is appropriate to the relevant employee.</li> </ol>

<b>Butterworths Occupational Health &amp; Safety Law NSW Looseleaf</b>	In relation to s 11 - OHS Act NSW, the information must be about the use for which the plant is designed and to ensure that proper warning is available to the person to whom the plant is supplied of the relevant facts, known or suspected, giving rise to actual or potential risks to safety or health.
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## 12 Adequate training

Macquarie Dictionary	<p><i>Adequate</i> --adjective</p> <ol style="list-style-type: none"> <li>1. (sometimes followed by <i>to</i> or <i>for</i>) equal to the requirement or occasion; fully sufficient, suitable, or fit.</li> <li>2. <i>Law</i> reasonably sufficient for starting legal action.</li> </ol> <p><i>Training</i> --noun</p> <ol style="list-style-type: none"> <li>1. the development in oneself or another of certain skills, habits, and attitudes.</li> <li>2. the resulting condition.</li> <li>3. in training, a. undergoing such discipline.</li> </ol>
<b>Occupational Health, Safety &amp; Welfare Regulations 1995 (SA)</b>	<p>Clause 2.4.8 – Education &amp; training</p> <p>An employer must provide suitable &amp; adequate training for each employee who is required to carry out work in or on a confined space, or associated with a confined space.</p> <p>The training must, insofar as is relevant to the performance of the particular work and the employee's duties, at least relate to the following –</p> <ol style="list-style-type: none"> <li>(a) the hazards associated with confined spaces; and</li> <li>(b) risk assessment procedures; and</li> <li>(c) control measures for confined spaces; and</li> <li>(d) the selection, use, fit and maintenance of safety equipment.</li> </ol>

## 13 Due diligence

Macquarie Dictionary	<p>--noun</p> <p>the process of acquiring objective and reliable information on a person or a company as required, especially before a commercial acquisition.</p>
Encyclopaedic Australian Legal Dictionary	<p>Corporations</p> <ol style="list-style-type: none"> <li>1. A close examination, particularly in a legal sense, of a transaction and its related documentation.</li> <li>2. A minimum standard of behaviour involving a system which provides against contravention of relevant regulatory provisions and adequate supervision ensuring that the system is properly carried out: <i>Universal Telecasters (Qld) Ltd v Guthrie</i> (1978) 18 ALR 531 ; 32 FLR 360 . The expression appears in the <i>Corporations Act 2001</i> (Cth) s 731 dealing with defences to</li> </ol>



	<p>civil liability under (CTH) Corporations Act 2001 s 729.</p> <p>3. A statutory defence to a charge of causing or permitting environmental harm or pollution: for example (NSW) Protection of the Environment Operations Act 1997 ss 118, 169(1).</p> <p>The essence of the defence is that the defendant took such reasonable and practicable measures to avoid committing the offence that a court could conclude the defendant was not negligent or otherwise at fault: for example <i>Environmental Protection Act 1993 (SA) s 124</i>; <i>Environmental Management and Pollution Control Act 1994 (Tas) s 55</i>. It must be shown that defendant's mind was concentrated upon the likely risks; general precautions such as the implementation of a generic environmental management system are unlikely to be enough: <i>State Pollution Control Commission v Kelly (1991) 5 ACSR 607</i>.</p>
<p><b>Case Law</b></p>	<p>In <i>Universal Telecasters (Qld) Ltd v Guthrie (1978) 18 ALR 532</i>, the Full Court of the Federal Court considered the meaning of the words "took reasonable pre-cautions and used due diligence" as they applied to the <i>Trade Practices Act 1974 (Cth)</i>. Bowen CJ said:</p> <p><i>"While these are plain English words, which have to be applied as they stand, it appears to me that two responsibilities which the [Defendant] would have to show it had discharged, in order to establish the defence, would be that it had laid down a proper system to provide against contravention of the Act and that it had provided adequate supervision to ensure the system was properly carried out"</i>.</p> <p>In <i>State Pollution Control Commission v R V Kelly (1991) 5 ACSR 607</i>, Hemmings J commented on the due diligence defence in the context of the then <i>Environmental Offences and Penalties Act 1989 (NSW)</i>, noted that whilst due diligence depends on the particular circumstances of the case, the defence contemplates a mind concentrated on the likely risks. The obligation is not satisfied merely by implementing general business precautions, the precautions must be directed at guarding against the particular contravention. That is, precautions implemented in relation to plant safety, for example, will not suffice to show due diligence in relation to a hazardous substances incident.</p>
<p><b>Butterworths Occupational Health &amp; Safety Law NSW Looseleaf</b></p>	<p>[2301.12] – All due diligence contemplates a mind concentrated on the likely risks, and whether the defendant took the precautions that should have been taken must always be a questions of fact.</p> <p>The defendant would need to establish it had laid down a proper system to provide against contravention of the Act and had provided adequate supervision to ensure the system was properly carried out:</p> <p>See <i>WorkCover Authority (Insp Dowling) v Coster [1997] NSWIRComm 154</i>.</p>

Macquarie Dictionary	-- <i>noun</i> 1. soundness of body; freedom from disease or ailment. 2. the general condition of the body or mind with reference to soundness and vigour: <i>good health</i> .
Occupational Health and Safety Act 2004 (Vic)	Section 5 – health includes psychological health.
Case Law	Asche CJ held in <i>TTS Pty Ltd v Griffiths</i> (1991) 105 FLR 255 at 267:  <i>'although "health" is not defined, I take it to mean the ordinary dictionary definition... of "soundness of body", rather than confining it to something like "freedom from illness or infection'.</i>

## 15 Safety

Macquarie Dictionary	-- <i>noun (plural safeties)</i> 1. the state of being safe; freedom from injury or danger. 2. the quality of insuring against hurt, injury, danger, or risk. 3. a contrivance or device to prevent injury or avert danger. 4. the action of keeping safe.
<b>Butterworths Occupational Health &amp; Safety Law NSW Looseleaf</b>	In <i>McCarthy v Coldair Ltd</i> [1951] 2 TLR 1226 it was held that safe was the converse of dangerous. It means safe for all contingencies that may reasonably be foreseen, unlikely as well as likely, possible as well as probable.  In <i>Larner v British Steel Pty Ltd</i> [1993] 4 All ER 102 it was held that the word safe is an ordinary English word.

## 16 Reasonable

Macquarie Dictionary	-- <i>adjective</i> 1. endowed with reason. 2. agreeable to reason or sound judgment. 3. not exceeding the limit prescribed by reason; not excessive. 4. moderate, or moderate in price.
<b>Butterworths Occupational Health &amp; Safety Law NSW Looseleaf</b>	[2246.20] – In <i>Re Solicitor</i> [1945] 1 KB 368 at 371 the court said that <i>'The word "reasonable" has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know'</i> .

## 17 Recklessness

Macquarie Dictionary	-- <i>adjective</i> 1. utterly careless of the consequences of action; without caution. 2. characterised by or proceeding from such carelessness.
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	<p>--phrase</p> <p><b>3. reckless of</b>, careless of the consequences to.</p>
Butterworths Concise Australian Legal Dictionary	<p><i>Recklessness</i> – Heedless or careless conduct where the person can foresee some probable or possible harmful consequence but nevertheless decides to continue with those actions with an indifference to, or disregard of, the consequences: <i>R v Nuri</i> [1990] VR 641. Recklessness implies something more than mere negligence.</p>
Case Law	<p>The concept of recklessness requires foresight of the probability or likelihood of the consequences of the contemplated act or omission and willingness to run the risk of consequences becoming a reality – <i>Pemble v The Queen</i> (1971) 124 CLR 107; <i>Fontaine v The Queen</i> (1976) 136 CLR 62; <i>R v Crabbe</i> (1985) 156 CLR 464.</p> <p>In <i>R v Crabbe</i> (at 469) it was held that:</p> <p><i>“The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm. Indeed, on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur”.</i></p>

## 18 Officer

Macquarie Dictionary	<p>--noun</p> <p><b>4.</b> a person appointed or elected to some position of responsibility and authority in the public service, or in some corporation, society, or the like.</p> <p><b>6.</b> <i>Obsolete</i> an agent.</p> <p><b>8.</b> to command or direct as an officer does.</p> <p><b>9.</b> to direct, conduct, or manage.</p>
Encyclopaedic Australian Legal Dictionary	<p>A person who holds a position of rank or authority.</p> <p><i>Corporations</i> A director, secretary, or executive officer of the corporation, or a receiver, a receiver and manager, an administrator, a liquidator or a person administering a compromise or arrangement made between a corporation and its creditors: <i>Corporations Act 2001</i> (Cth) s 232(1).</p>
Occupational Health and Safety Act 2004 (Vic)	<p>Section 79 – office and officer of a registered employee organisation have same meanings as in Schedule 1B of the Workplace Relations Act 1996 of the Commonwealth (see below).</p>
Workplace Health & Safety Act 2007 (NT)	<p>Section 4 – officer means, according to context:</p> <p>(a) a workplace safety officer; or</p> <p>(b) an officer of a company or organisation.</p> <p>Note – For the meaning of an officer of a company, see <i>Corporations Act 2001</i>.</p>

<p><i>Workplace Relations Act 1996 (Cth)</i></p>	<p>Section 4 - "officer" in relation to an organisation or a branch of an organisation, means a person who holds an office in the organisation or branch.</p>
<p><i>Corporations Act 2001 (Cth)</i></p>	<p>Section 9 - "officer" of a means:</p> <ul style="list-style-type: none"> <li>(a) a or secretary of the ; or</li> <li>(b) a : <ul style="list-style-type: none"> <li>(i) who makes, or participates in making, that affect the whole, or a , of the business of the ; or</li> <li>(ii) who has the capacity to affect significantly the financial standing; or</li> <li>(iii) in accordance with whose instructions or wishes the of the are accustomed to act (excluding advice given by the in the proper performance of attaching to the professional capacity or their business relationship with the or the ); or</li> </ul> </li> <li>(c) a , or <a href="#">receiver and</a> , of the of the ; or</li> <li>(d) an of the ;</li> <li>(e) an of a <a href="#">deed of company</a> executed by the ; or</li> <li>(f) a of the ; or</li> <li>(g) a trustee or other administering a compromise or between the and someone else.</li> </ul> <p><b>"officer"</b> of an that is neither an individual nor a means:</p> <ul style="list-style-type: none"> <li>(a) a partner in the partnership if the is a partnership; or</li> <li>(b) an office of the unincorporated association if the is an unincorporated association; or</li> <li>(c) a : <ul style="list-style-type: none"> <li>(i) who makes, or participates in making, that affect the whole, or a , of the business of the ; or</li> <li>(ii) who has the capacity to affect significantly the financial standing.</li> </ul> </li> </ul>
<p><i>Occupational Health, Safety &amp; Welfare Act 1986 (SA)</i></p>	<p>Section 4(1) - Officer in relation to a body corporate means:</p> <ul style="list-style-type: none"> <li>(a) a member of the governing body of the body corporate; or</li> <li>(b) an executive officer of the body corporate; or</li> <li>(c) a receiver or manager of any property of the body corporate; or</li> <li>(d) a liquidator.</li> </ul>
<p><i>Occupational Health &amp; Safety Act 1989 (ACT)</i></p>	<p>Section 214(5) – executive officer, of a corporation, means a person, by whatever name called and whether or not the person is a director of the corporation, who is concerned with, or takes part in, the corporation's</p>

	management.
<i>Workplace Health &amp; Safety Regulations 1998 (TAS)</i>	<p>Clause 5 - Accountable person</p> <p>In these regulations, a reference to an accountable person is to be read as a reference to –</p> <ul style="list-style-type: none"> <li>(a) any person who is responsible for the management or control of the relevant place at which work is undertaken; or</li> <li>(b) any person temporarily acting in the capacity of a person referred to in <u>(a)</u>; or</li> <li>(c) any other person on whom the Act imposes a duty or an obligation relevant to the regulation containing the reference.</li> </ul>