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Harmonising Occupational Health and Safety Regulation in Australia: The First Report of the National OHS Review

Richard Johnstone *

Occupational health and safety (OHS) in Australia has, to date, been regulated by one Commonwealth, six State and two Territory general OHS statutes,¹ together with a number of specific statutes covering public safety and OHS in industries such as mining, the maritime industry, transport, electricity and dangerous goods.²

The Australian model of OHS regulation³ places broad general duties on a range of parties materially influencing OHS (employers, self-employed persons, persons in control of workplaces, employees, designers, manufacturers and suppliers of plant, substances and structures), supplemented by regulations and codes of practice which provide further detail and guidance. Compliance with these standards is monitored and enforced by inspectorates with broad powers of inspection and empowered to take enforcement measures ranging from informal measures (advice and persuasion), to administrative sanctions (improvement, prohibition and infringement notices), accepting enforceable undertakings, and formal prosecution. All of the statutes now contain provisions for the election of employee health and safety representatives and committees. Health and safety representatives are given significant powers and functions including inspection, information, consultation rights, and in some jurisdictions, the power to enforce via

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¹ The general statutes are the *Occupational Health and Safety Act 1991* (Cth) (federal public sector employment and self-insurers under the Commonwealth workers' compensation legislation), the *Occupational Health and Safety Act 2000* (NSW), the *Occupational Health and Safety Act 2004*, the *Workplace Health and Safety Act 1995*, the *Occupational Health, Safety and Welfare Act 1986* (SA), the *Occupational Safety and Health Act 1984* (WA), *Workplace Health and Safety Act 1995* (Tas), the *Occupational Health and Safety Act 1989* (ACT), and the *Workplace Health and Safety Act 2007* (NT).

² Examples include the *Electrical Safety Act 2002* (Qld), *Coal Mining Safety and Health Act 1999* (Qld); and the *Dangerous Goods Safety Management Act 2001* (Qld).

³ The model was originally based on the British Robens Report (Robens A. (Lord) *Report of the Committee on Safety and Health at Work, 1970-72*, HMSO, London, Cmnd 5034, 1972).

provisional improvement notices and the right to direct that dangerous work cease. While all of the OHS statutes conform to this basic model, closer scrutiny reveals sometimes quite major differences in form, detail and substantive matters between the OHS statutes and the regulations and codes of practice made under those statutes.

The differences in the Australian OHS statutes, regulations and codes of practice mean that workers in different jurisdictions who face essentially similar risks are afforded different levels of legal protection; that organisations conducting business in more than one State or Territory are faced with inconsistent standards and enforcement approaches which make compliance complex and costly; and that there are incentives for industry to move to jurisdictions with less stringent or costly regulation, and for State and Territory governments to compete by reducing the levels of their OHS standards and enforcement activity.⁴ Not surprisingly, since the early 1980s, at least, there have been calls for a more uniform system.

This article examines a current major initiative aimed at harmonising Australian OHS regulation. In April 2008, the Federal Labor government commissioned a major National Review into Model Occupational Health and Safety Laws. The Panel conducting the Review has been asked to examine the principal Commonwealth, State and Territory OHS statutes to identify areas of best practice, common practice and inconsistency and to make recommendations to the Workplace Relations Ministers Council (WRMC) on the optimal structure and content of a model OHS Act, which would then be adopted by each of the Australian States, Territories and the Commonwealth. This is the first thorough and serious attempt to establish uniform OHS legislation in each jurisdiction and there appears to be considerable political support for the process. Despite the poor

⁴ See Kirby, M, 'Occupational Health and Safety – Time for Reform', paper delivered at the National Safety Council of Australia Occupational Health and Safety Seminar, Canberra, 27 July, 1984, 1984, 9-10; Lee, M and Quinlan, M, 'Co-ordinating the Regulation of Occupational Health and Safety in Australia: Legal and Political Obstacles and Legal Developments' (1994) 7 *Australian Journal of Labour Law* 33, 38; Gunningham, N, *Safeguarding the Worker: Job Hazards and the Role of Law*, Law Book Co, Sydney, 1984, 29-31; Industry Commission, *Work, Health and Safety*, Industry Commission, Melbourne, 1995, Vol I, pp 47, 147-157; Vol II, Appendix H), and Productivity Commission, *National Workers Compensation and Occupational Health and Safety Frameworks, Report No 27*, Productivity Commission, Canberra, 2004, 69-72; National Review into Model Occupational Health and Safety Laws, *First Report to the Workplace Relations Ministers' Council*, Commonwealth of Australia, October 2008, 6.

track record of past efforts to achieve national consistency,⁵ there is a widespread view that the current process has a reasonable chance of success.

The article briefly outlines the history of attempts to develop nationally uniform OHS statutes, regulations and codes of practice. It then introduces the National OHS Review and analyses the First Report of the Review Panel to the WRMC in late October 2008.

1. A Brief History of Uniformity Processes

The first major initiative towards national OHS policy came in 1985, with the establishment of the National Occupational Health and Safety Commission (NOHSC), a tripartite body comprising representatives of the Australian federal, State and Territory governments, and of employers and trade unions. NOHSC's powers were quite limited, and largely concerned with promoting OHS awareness and debate; and providing a national focus and a forum for OHS policies and strategies.⁶

A 1990 review⁷ of OHS in Australia concluded that for OHS to improve there needed to be uniform legislation and standards throughout the country. The Ministers of Labour Advisory Committee (MOLAC), comprising Commonwealth, State and Territory Ministers of Labour, agreed in the same year that, 'as far as practicable, any standards endorsed by the NOHSC will be accepted as minimum standards and implemented in the State/Territory jurisdiction as soon as possible after endorsement.' Then in November 1991 the Premiers of the States and Chief Ministers of the Territories reached an agreement (which was supported by the Commonwealth) that they would 'achieve nationally uniform OHS standards and uniform standards in relation to dangerous goods by the end of 1993.'⁸ The basic strategy was to work towards removing legislative impediments to adoption, by State and Territory governments, of national standards and codes of practice developed by NOHSC. MOLAC, through a Senior Officers' Group,

⁵ See the discussion below.

⁶ See *National Occupational Health and Safety Commission Act* 1985 (Cth), especially ss 7 (Objects) and 8 (Functions).

⁷ Australia. Department of Industrial Relations, *Review of Occupational Health and Safety in Australia*: report by the Review Committee to the Minister for Industrial Relations, Australian Government Printing Service, Canberra, 1990, p 25.

⁸ National Uniformity Taskforce, *National Uniformity for Occupational Health and Safety Standards, Policies and Procedures*, National Occupational Health and Safety Commission, Sydney, 1992, p 1.

was to work towards standardising the principal OHS Acts. NOHSC, through a tripartite National Uniformity Taskforce established in December 1991, would develop national standards, which State and Territory governments would uniformly adopt through their processes to make regulations and codes of practice.

The principal focus of the national uniformity effort in the early 1990s was the development of national OHS standards and codes of practice for ‘first order’⁹ priority issues (manual handling, plant, hazardous substances, noise, certification of occupations and major hazards). Uniformity of the OHS statutes was a lesser focus with limited initiatives aimed at facilitating the adoption of national standards and codes of practice by removing differences in the OHS statutes with regard to the coverage of OHS legislation, the evidentiary status of approved codes of practice, regulation making powers and inconsistencies in drafting conventions.¹⁰ Priority was also given to harmonising compliance and enforcement policies. But even these issues were not fully addressed, and the current OHS statutes still have significant differences on these matters.

The process of standards development and adoption, overseen by the National Uniformity Task Force, proved to be cumbersome, slow and lacking consistency across the different Australian jurisdictions. It usually involved a tripartite process within each jurisdiction in which the national proposals might be accepted, accepted with modifications on the grounds of unique jurisdictional differences, or rejected. As the Industry Commission noted in its 1995 Report into *Work Health and Safety*¹¹ noted, adoption by States and Territories was inconsistent as some incorporated the provisions into their OHS statutes or regulations (making them mandatory) while others incorporated them into codes of practice or guidance notes (which permitted duty holders to achieve the required results in a variety of ways). The actual content of implemented standards varied markedly from jurisdiction to jurisdiction, and progress in

⁹ The Taskforce developed a set of priorities (based on a scale of 1 to 12) based on judgments about the severity of the hazard, the capacity to enhance productivity and the significance in terms of national uniformity. See National Uniformity Taskforce, *National Uniformity for Occupational Health and Safety Standards, Policies and Procedures*, National Occupational Health and Safety Commission, Sydney, 1992.

¹⁰ Ibid, 3.

¹¹ Australia. Industry Commission, *Work, Health and Safety: an inquiry into occupational health and safety*, Industry Commission, Melbourne, 1995, Vol 1, 152-157.

the implementation of the standards was slow as a result of the consultation and regulatory impact requirements in some jurisdictions, and the difficulties of tailoring national standards and codes to the needs of the different jurisdictions. The Industry Commission recommended the development of template legislation for the core elements of OHS legislation, together with consistency in enforcement across jurisdictions.¹²

The national uniformity process was not complete when the Howard government came to power in 1996, and that government significantly down-sized NOHSC. The move towards national uniformity slowed dramatically after mid-1996. By the end of 1996 NOHSC had declared six first order priority national standards – noise, manual handling, hazardous substances, plant, certification for users and operators of industrial equipment and major hazards facilities. From 1997, the National Uniformity process was conducted under the WRMC. The Dangerous Goods standard was subsequently declared in 2001.¹³ In 2002, NOHSC formulated a *National Occupational Health and Safety Strategy 2002–2012* which established nine national targets and priorities, including ‘a nationally consistent regulatory framework’.¹⁴ Implementation of the Strategy rests with the individual jurisdictions and while some would argue their action plans lack uniformity in both content and pace, the Strategy has not only provided a common focus and de facto organising principles for planning and use of resources for the various OHS regulators, but also influenced the national approaches of the social partners national approaches.¹⁵

In 2005 NOHSC was replaced by the Australian Safety and Compensation Commission (ASCC), implementing a recommendation of the Productivity Commission’s 2004 Report on *National Workers Compensation and Occupational Health and Safety Frameworks*.¹⁶ That Report also addressed the issue of harmonising OHS regulation in Australia. It

¹² Ibid, 162–6.

¹³ *National Standard for the Storage and Handling of Workplace Dangerous Goods*, National Occupational Health and Safety Commission:1015, 2001

¹⁴ National Occupational Health and Safety Commission, *National Occupational Health and Safety Strategy 2002-2012*, National Occupational Health and Safety Commission, Canberra, 2002, p 10.

¹⁵ See:

<http://www.ascc.gov.au/ascc/newsevents/mediareleases/mediarelease20november2008australiansafetyandcompensationcouncilmeetsincanberra.htm>.

¹⁶ Productivity Commission, *National Workers Compensation and Occupational Health and Safety Frameworks*, Report No 27, Productivity Commission, Canberra, March 2004, p 72.

assessed five approaches to developing a national framework for OHS regulation. These included:¹⁷

- a single national OHS regime to replace those operated by the States and Territories;
- an alternative national regime operating in parallel with State and Territory regimes;
- template legislation and regulation;
- mutual recognition; and
- progressive development of national uniformity through strengthening aspects of the existing cooperative approach.

One of the difficulties with the first approach is that there is no clear Commonwealth government head of power upon which to base a National OHS Act. Of course, the High Court decision in the 2006 *Work Choices Case*¹⁸ significantly expanded the corporations power (placitum 51(xx) of the Australian Constitution), suggesting the head of power could be appropriate for national OHS regulation. However, many OHS actors, particularly small businesses (including tradespeople and other contractors) would be excluded from coverage of legislation based on that head of power. The heads of power that might best support national OHS legislation would either be the external affairs power (placitum 51 (xxix)) or the referral of powers by the states power (placitum 51 (xxxvii)). The former is not ideal as it is difficult to find an appropriate international convention upon which to base the power. The International Labour Organisation (ILO) *Convention Concerning Occupational Safety and Health and the Working Environment No 155* of 1981, ratified by Australia in 2004, is too narrow in its scope to be able to support the enactment of an OHS statute able to address contemporary OHS issues in Australia. A more likely prospect would be national legislation based on ILO Convention 187 of 2006, *Convention Concerning the Promotional Framework for Occupational Safety and Health*, which came into force earlier this year, but which has yet to be ratified by Australia. That Convention requires countries that ratify the convention to have a safety management system framework at a national level.

¹⁷ Ibid.

¹⁸ *New South Wales v Commonwealth* (2006) 231 ALR 1.

After considering the various approaches, the Productivity Commission recommended¹⁹

that a single uniform national OHS regime which is focussed on preventing workplace injury and illness should be the medium term reform objective for OHS. It would build on the initiative of the recently agreed national strategy.

To achieve this, the Commission is proposing two broad approaches, to operate in parallel. The first approach adapts the current cooperative model by strengthening the national institutional structure based on NOHSC and the WRMC — emphasising the timely development of best-practice national OHS standards and their implementation uniformly throughout Australia. Such an approach should be commenced immediately. The second approach is to progressively open up access to the existing Australian Government OHS regime, giving firms the choice of a single set of national OHS rules. The two approaches are not dependant on each other. Each has merits that would warrant their independent introduction.

The second of these approaches was implemented in 2007, through amendments to the *Occupational Health and Safety Act 1991* (Cth) (OHSA(Cth)) which provided that employers licensed to self-insure under the Commonwealth workers compensation Act²⁰ were regulated by the OHSA (Cth), rather than by the State and Territory OHS statutes.²¹ This has resulted in a fractured and complex system with some employers operating under the OHSA (Cth) and engaging contractors who are regulated under various state OHS legislation. At the same time there is a concern that the departure of large employers might progressively undermine the viability of State and Territory workers' compensation regimes. In December 2007 the new federal Minister for Employment and Workplace Relations announced a moratorium on granting further self-insurance licenses²² and in January 2008 initiated a Review of the self-insurance arrangements under the Comcare scheme.²³ At the time of writing this review was not completed.

The first of the approaches recommended by the Productivity Commission, establishing a single national OHS regime, is the focus of the remainder of this article.

2. The National OHS Review

¹⁹ Productivity Commission, 2004, above n 16, p 96.

²⁰ Part VIII of the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

²¹ See *OHS and SRC Legislation Amendment Act 2006* (Cth), and in particular ss 3 and 3A and Schedule 1.

²² The Hon Julia Gillard, Minister for Employment and Workplace Relations, Media Release 11 December 2007, available at <http://mediacentre.dewr.gov.au/mediacentre/allreleases/2007/december/governmentannouncesmoratoriumonnewcompaniesjoiningcomcare.htm>.

²³ The Hon Julia Gillard, Minister for Employment and Workplace Relations, Media Release 23 January 2008, available at <http://mediacentre.dewr.gov.au/mediacentre/allreleases/2008/january/ministerannouncesreferenceforcomcarereview.htm>.

In February 2006, under the former Liberal-National Party Coalition federal government, the Council of Australian Governments (COAG) agreed to improve the development and adoption of national OHS standards, and the ASCC began reviewing the national OHS framework to improve national consistency and identify priorities for harmonisation.²⁴ In October 2007, in the lead up to the 2007 Federal election, the then opposition federal Australian Labor Party (ALP) announced that if it won the election a new national body would replace the ASCC, to drive harmonisation of OHS laws and to streamline workers' compensation through co-operative federalism, rather than a federal takeover.²⁵ The ALP's OHS policy was based on two fundamental, non-negotiable principles – the right of all employees to a safe and healthy workplace, and the right of employers to expect that workers would fully cooperate with providing a safe and healthy working environment and not use OHS issues for unrelated industrial purposes.

In its meeting in March 2008, the COAG agreed that OHS harmonisation was a top priority and stated that its commitment to the reform would be reflected in an intergovernmental agreement, which would be finalised by May.²⁶ The COAG endorsed a national OHS review reporting to the WRMC, and intended to lead to harmonised OHS legislation within five years.

In late April 2008, the federal Workplace Relations Minister announced the terms of reference and membership of the three-person panel that would conduct the National OHS Review.²⁷ Chaired by former NOHSC Chief Executive Officer, Mr Robin Stewart-Crompton, the National OHS Review Panel was charged with reviewing OHS legislation in all jurisdictions and making recommendations to the WRMC on the optimal structure and content of a model OHS Act. The Review was to be conducted in two stages. The first stage was to include a review of the provisions pertaining to the duties of care

²⁴ Council of Australian Governments' Communique, 10 February 2006, available at http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm.

²⁵ Policy announced 24 October 2007 and available at http://www.alp.org.au/download/now/20071023_ohs_policy_final_electronic_distribution.pdf.

²⁶ Council of Australian Governments' Communique, 26 March 2008, available at http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm.

²⁷ The Hon Julia Gillard, Minister for Employment and Workplace Relations, Media Release 4 April 2008, available at <http://mediacentre.dewr.gov.au/mediacentre/allreleases/2008/april/gillardlaunchesnationaohsreview.htm>.

(including the identification of duty holders and the scope and limits of duties) and the nature and structure of offences and defences. It was to report to the WRMC by 31 October 2008. The second stage was to consider the remaining issues, including provisions for workplace-based consultation, participation and representation; provisions for enforcement and compliance; regulation making powers; permits and licensing arrangements for high risk workers; and the role of OHS regulatory agencies, and was to report by the end of January 2009.

The key terms of reference required the National OHS Review to consult widely; to examine the principal OHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency; to take into account the changing nature of work and employment arrangements; and make recommendations on the optimal structure and content of a model OHS Act that would promote safe workplaces, increase certainty for duty holders, reduce compliance costs for business and provide greater clarity for regulators without compromising safety outcomes.

The National OHS Review Panel is to be guided by the following principles:

- an inclusive approach to the harmonisation process, where the concerns and suggestions of all jurisdictions and interested stakeholders are sought and properly considered;
- development of model OHS legislation to be accompanied by an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions;
- consideration of the resource implications for all levels of government in administering harmonised laws;
- the observance of the directive of the COAG that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns.

In July 2008 the Commonwealth, State and Territory governments concluded the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and*

Safety which formalised the protocol and timetable for the harmonisation of OHS laws.²⁸ The parties agreed to (i) the development of legislation for a new body to replace the ASCC; (ii) the development, monitoring and maintenance of model OHS legislation; and (iii) the adoption and implementation of the model OHS legislation by each jurisdiction. The Intergovernmental Agreement (IGA) specifies that the WRMC is to work cooperatively (i) to harmonise OHS legislation (the model OHS Act, regulations and codes of practice), (ii) to develop a nationally consistent approach to enforcement, and (iii) to ensure terms of agreement are complied with.

The process for harmonisation outlined by the IGA is as follows. The WRMC will consider and respond to recommendations of the National Review and will decide on the optimal structure and content of a model OHS Act to be adopted by all jurisdictions. The body replacing ASCC (which we now know will be Safe Work Australia)²⁹ will be responsible for the development, monitoring and maintenance of the model OHS Act and model regulations and codes of practice, and a national compliance and enforcement policy. When the WRMC agrees to the proposed model OHS Act by consensus, it will become the agreed model OHS Act. Each Party will then take all necessary steps to give effect to the model Act by December 2011, and they have committed themselves to ensure that their OHS laws will remain nationally uniform over time. Jurisdictions can enact additional provisions, but if these provisions affect the operation of the model OHS laws, the party has to submit a proposal to the WRMC for approval.

From its inception in April, the National OHS Review Panel conducted extensive consultations with all interested parties, and in late May it released an Issues Paper,³⁰ based on its consultations. The Issues Paper invited written submissions in response to the matters discussed in the paper. The Issues Paper contained 152 questions, and addressed nine broad areas of OHS Regulation:

1. *Legislative approach* (regulatory structure, title, objects and principles).

²⁸ *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*, 3 July 2008 available at http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/OHS_IGA.rtf.

²⁹ See *Safe Work Australia Bill 2008* (Cth).

³⁰ Australia, *National Review into Model OHS Laws: Issues Paper*, Commonwealth of Australia, Canberra, May 2008.

2. *Scope, application and definitions* (industry sectors, public safety, workplace and non-workplaces, responding to change - work organisation and relationships, and emerging hazards and risks).
3. *Duties of care: who owes them and to whom?* (the current approach, the issue of control – chain of responsibility and shared responsibilities; work relationships – self-employed persons and various kinds of workers; duties of employers; duties of workers and others, appointed persons and officers – duty holder support; duties of persons in control and activities which impact on health and safety – design, manufacture, supply, import, installation, erection, decommission and disposal).
4. *Reasonably practicable and risk management.*
5. *Consultation, participation and representation* (duty to consult; participation and representation – health and safety representatives and committees; union right of entry; issue resolution and the right to cease unsafe work).
6. *Regulator powers, functions and accountability* (role and functions of regulators: accountability and education, advice and assistance; inspectors; and internal review of inspectors' decisions).
7. *Compliance and enforcement* (enforcement measures; measures exercised at the workplace - safety directions, warnings and cautions; provisional improvement notices; improvement, infringement and prohibition notices; and measures exercised beyond the workplace; remedial orders and injunctions, and enforceable undertakings).
8. *Prosecutions* (criminal or civil liability; where prosecutions should be heard; who may commence prosecutions and relevant procedures; evidence; the burden of proof and defences; liability of officers; fines and other sentencing options; workplace death and serious injury; enforcement of penalties).
9. *Other matters* important to OHS (regulation making, codes of practice, notification of incidents and reporting; external appeals and issue resolution; tripartite mechanisms; mutual recognition; cross jurisdictional cooperation and interaction of Federal and State laws).

The Panel attended over 80 meetings and spoke to more than 260 individuals representing over 100 organisations, including regulators, employer associations, industry

associations, trade unions, lawyers, health and safety professionals and academics.³¹ It received 243 written submissions, although one was subsequently withdrawn. Most were based on current Australian provisions, and the submissions tended to argue for what the submitter has considered to be the best of the current OHS regulatory provisions in the Australian OHS statutes. In particular, the State and Territory governments have tended to base their submissions on their own provisions. Inevitably, the submissions disclose a significant divergence of opinion on key issues – particularly the issue as to whether the duty holder or prosecutor should bear the onus of proving whether measures were reasonably practicable when there is a prosecution under the general duty provisions; whether union officials should have the right to enter workplaces to investigate suspected contraventions of the OHS statutes; and whether trade union secretaries should have the right to prosecute OHS offences. The other point that is striking about the submissions is that very few, if any, of the submissions are supported by strong evidence. This reflects the fact that there has been little funding of empirical OHS regulatory research, and governments have not rigorously evaluated the effectiveness of their regulatory standards and programs, nor have they collected sufficient data about the impact of these.

3. The First Report

The Panel submitted its First Report to the Workplace Relations Ministers Council at the end of October 2008.³² The report focused on the priority areas identified in clause 12 of the Review's Terms of Reference, in particular:

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

The First Report contained just under 180 pages, and was divided into five Parts: the regulatory context; the duties of care; the offences relating to the duty of care; other matters relevant to duty of care offences; and defences. Notably the Terms of Reference only required the Panel to address 'Definitions' in the Second Report. Nevertheless, the

³¹ National Review into Model Occupational Health and Safety Laws, *First Report to the Workplace Relations Ministers' Council*, Commonwealth of Australia, October 2008, 4-5.

³² National Review into Model Occupational Health and Safety Laws, *First Report to the Workplace Relations Ministers' Council*, Commonwealth of Australia, October 2008, (henceforth referred to as the '*First Report*').

nature of the issues in the First Report required the Panel to foreshadow the definitions they were to develop for the Second Report.

The Regulatory Context

Chapter 1 of the First Report observes that the general Australian OHS statutes are based on the recommendations of the British Robens Committee,³³ which it describes as having two major elements: a single umbrella statute containing broad general duties of care based on the common law duty of care; and ‘the incorporation of “self-regulation” by empowering duty holders, in consultation with employees, to determine how they will comply with the general duties’.³⁴ This seems to be a very narrow description of the British Robens Report, which envisaged two objectives of the OHS regulatory model. The first was the streamlining of the state’s role in the traditional regulatory system (external state regulation), through the ‘creation of a more unified and integrated system’.³⁵ This involved bringing together all of the OHS legislation into one umbrella statute, containing broad general duties covering a range of parties affecting workplace health and safety, including employers, the self-employed, occupiers, designers, manufacturers, and suppliers of plant and substances and employees. The skeletal statutory general duties were to be fleshed out with standards in regulations and codes of practice. A unified OHS inspectorate was to have new administrative sanctions, improvement and prohibition notices, to supplement prosecution. Prosecutions were to be brought against corporate officers, as well as against the corporate employer. The second objective, recognising the practical limitations of external state regulation, was the creation of ‘a more effectively self-regulating system’.³⁶ In the Robens vision, self-regulation involves workers and management, at workplace level, working together to achieve, and improve upon, the OHS standards specified by the state: arguably a larger vision than mere self-determination on general duty compliance.

The First Report also notes that in the past decade each of the Australian general OHS statutes has been reviewed, and that these reviews have addressed many of the issues that

³³ Robens Report, above n 3.

³⁴ *First Report*, above n 32, p 2.

³⁵ Robens Report, above n 3, para 41.

³⁶ *Ibid.*

were of concern to the Panel.³⁷ The Panel acknowledged that the reviews were useful sources of information and analysis.³⁸

Chapter 2 of the First Report outlines at length the significant changes that have taken place in the Australian labour market and in the nature and organisation of work in the past 20 years, and in particular the growth in casual, part-time and temporary work, and the increased use of labour hire, outsourcing, franchising, migrant workers and home workers. The chapter notes that there is now significant evidence showing that these new forms of work have an adverse impact on OHS, and that regulatory frameworks are having difficulty addressing these issues. Further, changes in work relationships and in industry structure will continually lead to changes in the kinds of hazards and risks at work. The chapter also observes that nearly 96 per cent of private sector businesses were small businesses (with fewer than 20 employees). Only 0.3 per cent of Australian businesses employ more than 200 workers. Finally, trade union membership has been falling (to 19 per cent in 2007, compared with 46 per cent in 1986). It is worth noting that the First Report does not discuss the trends in employers' membership of employer associations, an issue of considerable significance for analyses of the possibility of employer associations providing compliance support to employers.³⁹

Chapter 3 analyses Australia's OHS performance and concludes that in the past decade there has been a gradual reduction in both the number and incidence rate of compensated work-related injuries and fatalities. Of course, these statistics must be treated with caution because, like all compensation statistics, they privilege work-related injury over disease. Further, because of the increased percentages of contingent and precarious workers, including self-employed contractors and sub-contractors, the percentage of workers covered by workers' compensation systems is likely to be declining. In any event, the First Report remarked that the number of Australian workers killed and injured at work is still unacceptably high. The significant point to emerge from chapters 2 and 3 is that the 'Model Act should be designed so that it is capable of accommodating such new and evolving circumstances, without requiring amendments as these changes occur',⁴⁰ and that:

³⁷ *First Report*, above n 32, p 2.

³⁸ *Ibid*, xiii.

³⁹ This issue will be addressed in the Second Report.

⁴⁰ *First Report*, above n 32, 7.

OHS legislation must have a wide coverage, so that it applies to all hazards and risks arising from the conduct of work and imposes appropriate duties on those who are in a position to eliminate the hazards or control the risks.⁴¹

The Duties of Care

At the beginning of Chapter 4, the Panel specifies that:

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

- as broad a coverage as possible, to ensure that the duties of care deal with emerging and future hazards and risks and changes to work and work arrangements;
- clarity of expression, to ensure certainty in the identification of the duty holders and that they can understand the obligations placed on them; and
- the interpretation and application of the duties of care consistent with the protection of health and safety.⁴²

The Panel recommended that the model Act should contain a set of principles to guide duty holders, regulators and the courts in the interpretation of the duties of care, and that, inter alia, the principles should include the following:⁴³

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

Further, the principles of risk management should be identified in the part of the Model Act setting out the fundamental principles applicable to the model Act.⁴⁴

Of interest is use of the words ‘reduce’ and ‘reduction’ in the Panel’s statement of principles. Substituting the words ‘minimise’ and ‘minimisation’ would to indicate the extent to which duty holders should strive to address hazards and risks.⁴⁵ Hopefully this

⁴¹ Ibid, xiii.

⁴² Ibid, 18.

⁴³ Ibid, Recommendation 2.

⁴⁴ Ibid, Recommendation 9.

⁴⁵ I address this issue further in the section below on ‘reasonably practicable’.

will be rectified by the WRMC or Safe Work Australia when they address the recommendations in the First Report.

Much of the First Report addresses the general duty provisions. Following on from the analysis of the changing organisation of work in Chapter 2, one of the Panel's overarching recommendations is that the duty of care provisions in the model Act 'together impose duties on all persons who by their conduct may cause, or contribute in a specified way, to risks to the health and safety of any person from the conduct of a business or undertaking.'⁴⁶ Another is that the duties of care are to be 'focused on the undertaking of work and activities that contribute to its being done, and are not limited to the workplace'.⁴⁷

These two recommendations are operationalised by arguably the most important proposals in the First Report: that the model Act impose a 'primary' general duty upon a 'person conducting a business or an undertaking' and owed to 'workers' broadly defined and 'others'; and that beneath this primary duty sits a series of specific classes of duty holders with more detailed duties which 'flesh out' the primary duty of care, without excluding or limiting the primary duty. The primary and specific duties are all qualified by the 'reasonable practicability' of measures to eliminate or reduce⁴⁸ hazards and risks, and reasonable practicability is to be included in each duty of care, with the onus of proving reasonable practicability in a prosecution being on the prosecutor. Workers and corporate officers are not subject to the primary duty of care, but have other specific duties imposed upon them, which are qualified by reasonable care and due diligence respectively.⁴⁹ The Panel recommends that the model Act include key principles to be found in the current OHS statutes: that the general duties are non-delegable; that a person can have more than one duty; that more than one person can concurrently owe the same duty; that no duty restricts another; and that each duty holder must comply with an applicable duty to the required standard (reasonably practicable, reasonable care or due diligence) even though another duty holder may have the same duty.⁵⁰ The Panel recommends that 'each duty holder must consult, and co-operate and co-ordinate

⁴⁶ *First Report*, above n 32, Recommendation 3.

⁴⁷ *Ibid*, Recommendation 3.

⁴⁸ See again the criticism of this word instead of the word 'minimise', above.

⁴⁹ *First Report*, above n 32, chapters 8 and 9.

⁵⁰ *Ibid*, Recommendations 2(a), (b), (c) and (d).

activities with all persons having a duty in relation to the same matter.⁵¹ The Panel also specifies that the model Act will contain a provision to the effect that: '(e) Each duty holder must comply with an applicable duty to the extent to which the duty holder has control over relevant matters, or would have control if not for an agreement or arrangement purporting to limit or remove that control.'⁵² It is not clear exactly what this means, but hopefully it means that duty holders cannot contract out of their OHS obligations. Certainly the drafters of the model OHS should make it clear that this is the intended meaning of the provision.

The primary duty

The Panel is to be strongly commended for its recommendation that the primary general duty in the model Act be owed by a 'person conducting a business or an undertaking',⁵³ but should not be owed by workers and officers to the extent that they were not conducting a business or undertaking in their own right.⁵⁴ This recommendation builds on the general duty on persons conducting a business or undertaking in section 28 of the *Queensland Workplace Health and Safety Act 1995* (similar provisions are to be found in the new *Work Safety Act 2008* (ACT) and the new *Workplace Health and Safety Act 2007* (NT)), but goes further to recommend that this duty be an overarching or umbrella duty, purporting to impose OHS obligations on all persons who are in a position to eliminate or control all work-related hazards and risks. As noted later in this article, this primary duty will be supplemented by specific duty holders having particular duties, and by regulations, codes of practice and guidance material.

The Panel considered that the current approach of imposing the duty upon an employer and upon a self-employed person 'is too limited, as it maintains the link to the employment relationship as a determinant of the duty of care' and 'the changing nature of work arrangements and relationships make this link no longer sufficient to protect all persons engaged in work activities.'⁵⁵ The Panel noted that there may be circumstances where a person with active control or influence over the way work is conducted might be neither an employer nor a self-employed person.⁵⁶ Further, the person carrying out the

⁵¹ Ibid, Recommendation 2(f).

⁵² Ibid, Recommendation 2(e).

⁵³ Ibid, Recommendation 13.

⁵⁴ Ibid, Recommendations 10, 11, 12 and 13.

⁵⁵ Ibid, 46.

⁵⁶ Ibid, 46.

work might be doing so under the effective direction or influence of a person who is not a person engaging them under a contract of employment: for example, the worker may be a contractor, or may be share farming or share fishing.⁵⁷ The Panel recommended that the primary duty holder's obligations should not be limited to the employment relationship⁵⁸ and went further to argue that those obligations should not be limited to any particular relationships.⁵⁹

While the Panel will define 'conduct of a business or undertaking' in the Second Report, it indicated that the primary duty of care should clearly provide that it applies to any person conducting a business or undertaking whether as (a) an employer; (b) a self-employed person; or (c) the Crown in any capacity; and (d) a person in any other capacity, and whether or not the business or undertaking is conducted for gain or reward.⁶⁰ It indicated that its preference was to define 'business' along the lines of the definition in the *Workplace Health and Safety Act 1995* (Qld) section 28(3) and *Workplace Health and Safety Act 2007* (NT), section 4. Section 28(3) of the Queensland Act provides that the general duty imposed on a person who conducts a business or undertaking applies --

- (a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and
- (b) whether or not the business or undertaking is conducted for gain or reward; and
- (c) whether or not a person works on a voluntary basis.

Section 4 of the Northern Territory Act defines 'business' as '(a) an industrial or commercial undertaking or activity (whether carried on for profit or on a not-for-profit basis); or (b) an undertaking or activity of government or local government'.

The primary duty is to be owed to 'workers' very broadly defined, and to others. While the Panel will address the definition of 'worker' in the Second Report, it indicated⁶¹ that its preferred approach will be based on the definition of 'worker' in the Northern Territory Act (section 4),⁶² which includes 'any person who works in a person's business or undertaking' as an employee, apprentice, contractor or sub-contractor (or their employee), employee of a labour hire company, volunteer or in any other capacity'.

⁵⁷ Ibid, 47. See the other examples at the bottom of page 47.

⁵⁸ Ibid, Recommendation 11.

⁵⁹ Ibid, 48.

⁶⁰ Ibid, Recommendation 12.

⁶¹ Ibid, Recommendation 16.

⁶² See also the definition in section 9 of the *Work Safety Act 2008* (ACT).

The Panel recommended that the primary duty of care should not be limited to the workplace (in contrast to section 8(2) and 9 of the *Occupational Health and Safety Act 2000* (NSW)), but ‘should apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking.’⁶³ To avoid the limitation or exclusion of the primary duty of care, the Panel recommended that the Model Act ‘specifically provide that the duty should apply without limitation’, and in particular should not be limited or restricted by the specific duties.⁶⁴

The Panel illustrated how the primary duty could be drawn together in a model clause, as follows:⁶⁵

1. A person conducting a business or undertaking (other than in the capacity of a worker or officer) must ensure so far as is reasonably practicable that workers engaged in work as part of the business or undertaking, and any other persons, are not exposed to a risk to their health and safety from the conduct of the business or undertaking.
2. Without limiting sub-section (1), a person conducting a business or undertaking must so far as is reasonably practicable ensure:
 - (a) the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health and safety of any person;
 - (b) the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances;
 - (c) each workplace under the control and management of the business operator is maintained in a condition that is safe and without risks to health;
 - (d) the provision of adequate welfare facilities;
 - (e) the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their health and safety from the conduct of the business or undertaking ...’
-
4. In this section [provide definitions of worker, business or undertaking etc].
5. For the avoidance of doubt, the duties and obligations imposed by this section apply without limitation notwithstanding anything provided elsewhere in the Act.

Sub-section (3) provides for the extension of the primary duty of care to circumstances where the primary duty holder, ‘a person who conducts a business or undertaking’,

⁶³ *First Report*, above n 32, Recommendation 17. For a good example, see *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268.

⁶⁴ *First Report*, above n 32, Recommendation 18.

⁶⁵ *Ibid*, 59 and Recommendation 21.

provides accommodation to workers in remote locations to enable the worker to undertake the work.⁶⁶

The expression in sub-section (1) of the model clause ‘are not exposed to a risk to their health and safety’ has been interpreted very broadly by the courts. The best known example is the English case of *R v Board of Trustees of the Science Museum* [1993] ICR 876, where the Court of Appeal stated that the ordinary meaning of ‘the word “risks” conveys the idea of a possibility of danger, ... The word “exposed” simply makes it clear that the section is concerned with persons potentially affected by the risks.’ In other words, for a contravention of the primary duty to occur the person owed the duty does not actually have to suffer injury or ill-health, but rather need only be exposed to a significant risk of injury or ill-health.

Sub-section (2) in the model clause expressly provides that it does not limit subsection (1), and places the particular duties on any person conducting a business or undertaking.⁶⁷ It is largely a cut and paste of the specific obligations to be found under the employer’s general duty in the current OHS statutes.⁶⁸ Presumably these specific obligations will be supplemented somewhere in the model Act with a provision requiring the primary duty holder to ‘consult, and co-operate and co-ordinate activities with all persons having a duty in relation to the same matter.’⁶⁹

There are serious concerns with the old fashioned nature of recommendations 19 and 20 leading to subsections (2) and (3) above. Because the provisions in sub-section (2) are drawn from the current employer’s general duties to employees, and the provisions in sub-section (3) from the employer’s duty in Western Australia, they outline obligations that are framed for the employment relationship, and not for other work relationships or for other types of relationship, and which are less clearly the primary issues that should be emphasised in other situations – for example, where the protection of members of the public is of concern. In other words, they highlight plant, substances, workplace conditions, accommodation and first aid at the expense of other types of risk (which, of course, are generically covered by sub-section (1)) and fail to address core processes in a systematic (but not systems) approach to managing OHS. This is, arguably, a retrograde

⁶⁶ Ibid, Recommendation 20.

⁶⁷ Ibid, 57. It deals with a particular situation that has been highlighted by experience in remote areas in Western Australia.

⁶⁸ Ibid, Recommendation 19 and see p 57.

⁶⁹ Ibid, Recommendation 2(f). These issues will be addressed in the Second Report.

step and misses an ideal opportunity to reinforce in duty holders' minds the notion that there are proactive steps they should take to pursue positive OHS outcomes which include appointment of competent persons, consultation with workers, searching for and eliminating or minimising risks, developing and implementing safe systems of work, providing instruction and training, monitoring injuries and adverse health effects, reporting and investigating incidents and taking preventive action, arranging and providing first aid, emergency response and documenting action taken. These are core activities in any proactive approach to OHS and are uncontroversial, except perhaps the requirement to engage OHS expertise.

My understanding from communications with the National OHS Review Panel is that in the First Report the Panel has addressed the duties of care as outcomes to be achieved. Process matters which support the duties of care will be addressed in the Second Report. The Panel considers that these are fundamental to the duties of care, but are not part of the duty 'of care'. These matters will include consultation, issue resolution, employment or engagement of OHS advice, and may include risk management requirements.

The above discussion begs the question as to whether there should be a specific duty owed by a person conducting a business or an undertaking to workers, which includes the matters outlined in the second half of the previous paragraph. An alternative approach would be to use regulations, codes of practice and guidance material to provide this detail. Recommendation 22 specifies that 'the primary duty of care should be supported by codes of practice or guidance material to explain the scope of its operation and what is needed to comply with the duty.' Presumably this recommendation should also include regulations, as the text which supports it refers to the use of regulations as well as codes of practice and guidance material.

The First Report notes that in some industries regulations or statutes unrelated to the general OHS statute impose OHS obligations on business operators in that industry.⁷⁰ The most notable examples are in the mining industry, the road transport industry, and also in relation to clothing outworkers. The First Report considers that these sorts of detailed obligations are not appropriate for inclusion in the model Act and should be

⁷⁰ Ibid, 60.

addressed in regulations, codes and guidance material. The issue of whether there should be industry specific legislation will be considered in the Second Report.

I would argue that the model OHS Act include, in the part of the Act dealing with the primary duty of care, examples of the type of work arrangements that the duty address – all kinds of labour hire arrangements, franchise arrangements, contracting and sub-contracting, share farming and fishing, and so on. One option is for these examples to be provided in Second Report when the Panel addresses definitions.⁷¹ Further, the first round of new regulations, codes and guidance material made under the model OHS Act should also clearly outline how the primary duty applies to these various working arrangements.

The specific classes of duty holders

As noted at the beginning of this paper, the modern Australian OHS statutes impose general duties on a variety of parties other than the employer and self-employed persons. The First Report recasts these general duties as specific duties which further clarify the primary general duty in relation to specific classes of duty holders, namely:⁷²

- those in the management and control of the workplace and adjacent areas, fixtures, fittings or plant;
- the so-called ‘upstream duty holders’, such as designers, manufacturers, suppliers and importers of plant, substances and structures, as well as builders, erectors and installers of structures; and
- OHS service providers.

The First Report proposes a specific duty on those who have, to any extent,⁷³ management and control⁷⁴ of the workplace,⁷⁵ fixtures, fittings or plant within it to

⁷¹ Note that there are specific references to labour hire and franchising at p 50 of the *First Report*.

⁷² *First Report*, above n 32, 61.

⁷³ *Ibid*, Recommendation 25

⁷⁴ This will be defined in the Second Report.

⁷⁵ The Panel recommends that, for this specific duty, domestic premises be excluded from the definition of a workplace unless specifically included by a regulation: *First Report*, above n 32, Recommendation 28.

ensure, so far as is reasonably practicable,⁷⁶ that the workplace, the means of entering and existing the workplace, and any fixtures, fittings and plant within it are safe and without risks to health and safety⁷⁷ of any person at the workplace or any adjacent areas.⁷⁸

All of the current Australian OHS statutes impose a duty on upstream duty holders, but the provisions vary in their coverage and the nature of the duty. The National OHS Review Panel has proposed that the model OHS Act provide for separate duties of care to be owed by ‘specific class of persons undertaking activities’ in relation to plant, substances or structures intended for use at work.⁷⁹ The specific classes of persons are designers of plant, substances and structures; manufacturers of plant, substances and structures; builders, erectors and installers of structures; suppliers⁸⁰ and importers of plant, substances and structures.⁸¹ The Report also recommends that the duties should cover the life cycle of activities to be undertaken in relation to the plant, substance or structure.⁸² The duties would ‘ensure that the health and safety of those contributing to the use of, using, otherwise dealing with or affected by the use of plant, structures or substances is not put at risk’ from the particular activities of construction, erection, installation, building, commissioning, inspection, storage, transport, operating, assembling, cleaning, maintenance or repair, decommissioning, disposal, dismantling and recycling.⁸³ The duty is owed to those persons using or otherwise dealing with, or whose health and safety might otherwise be affected by the use of the plant, substance or structure.⁸⁴ It is also recommended that the specific duties include broad requirements for hazard identification, risk assessment and control; appropriate testing and examination to identify any hazards and risks; the provision of information to the person to whom the plant, structure or substance is provided about the hazards, risks and risk control measures; and the ongoing provision of any additional information as it becomes available.⁸⁵

⁷⁶ Ibid, Recommendation 27.

⁷⁷ Ibid, Recommendation 23.

⁷⁸ Ibid, Recommendation 26.

⁷⁹ Ibid, Recommendation 29.

⁸⁰ ‘Supply’ will be defined in the Second Report, but the Panel recommends that passive financiers (persons who technically own plant, structures or substances for which they are providing finance) be excluded from the definition of ‘supply’: Ibid, Recommendation 36.

⁸¹ Ibid, Recommendation 30.

⁸² Ibid, 70-72.

⁸³ Ibid, Recommendation 31.

⁸⁴ Ibid, Recommendation 33.

⁸⁵ Ibid, Recommendation 34.

These recommendations can be cautiously supported as they emphasise the role of upstream duty holders and a life cycle approach, although the Report does not make it clear how differentiated the duties would be. For example, would there be a separate duty for each function and type of item? That would mean 15 different duties. The Report notes concern about the complexity of expressing duties separately in this way,⁸⁶ but does not make it clear how the specific duties would be drafted. While the Report appears to suggest separate duties but may simply be intending a separate duty from the principal duty of persons conducting a business or undertaking.⁸⁷

Recommendation 32 attempts to deal with the thorny issue of unintended use or misuse, proposing that consideration should be given to any reasonably foreseeable activity undertaken for the purpose for which the item was intended to be used. This proposal is an attempt to balance potential duty holder concerns that they should not have to consider all possible ways persons may misuse their items, with the position that duty holders should not simply be able to declare that their item must be used safely. It is not clear that this recommendation would resolve the uncertainty about unintended use. For example, in the *Arbor Products*⁸⁸ case the supplier of a wood chipper claimed the plant was not used for the purpose for which it was intended. It had been used to mulch different types of materials, not wood. The Full Bench, on appeal, found that the statutory duty required that plant was supplied in a safe condition, in the sense that its safety was ensured,⁸⁹ and that the qualification of proper usage was intended to limit liability where the plant was safe but became unsafe because of misuse.⁹⁰ An approach that emphasises identification of reasonably foreseeable hazards, and eliminating or minimising risks so far as reasonably practicable would overcome these problems. Further, the definitions in the Second Report might address the issue of the definition of ‘purpose’, and in particular, the breadth or detail of the definition of that word.

A surprising recommendation in the First Report is the specific duty placed on people or organisations who provide information, advice or OHS services to workplaces, on the basis that these people, by providing such services, ‘materially influence health and safety

⁸⁶ Ibid, 69-70.

⁸⁷ Ibid, 70.

⁸⁸ *WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Ltd* [2001] NSWIRComm 50.

⁸⁹ Ibid, para 43.

⁹⁰ Ibid, para 43.

by directing or influencing things done or provided for health and safety.⁹¹ The Panel recommends that the model Act should place ‘a duty of care’ on any person providing OHS advice, services or products⁹² that are relied upon by other duty holders to comply with their obligations under the model Act.⁹³ The Panel was influenced by a similar provision in the Tasmanian OHS legislation.⁹⁴ The duty should require the service provider to ensure so far as is reasonably practicable that no person at work is exposed to risks to their health or safety from the provision of services.⁹⁵

The First Report includes this duty on OHS service providers but does not make any recommendation for inclusion of OHS support in the proposed duty of a person conducting a business or undertaking. It is difficult to see how duty holders can take the necessary steps to comply with the complex OHS duties outlined above if they do not ensure that they have employed or engaged personnel with expertise in OHS. While some duty holders will do this voluntarily, it is difficult to see why such a crucial aspect of a general duty – to engage personnel with the requisite OHS expertise – is not included in the specific aspects of the general duty anywhere in the First Report. A consequence is that the obligations of a duty holder fall below the current requirements in the Victorian *Occupational Health and Safety Act 2004*, section 22(2)(b) and in the New South Wales *Occupational Health and Safety Regulation 2001*, regulation 16. The Panel intend to make recommendations for provision of OHS support or services in their Second Report. Provision for OHS support is essential to ensure organisations have OHS knowledge and capability.

Further, there is cause for serious concern with the First Report’s recommendation that there be a duty on the providers of OHS services. The proposed duty is premised on the assumption that providers of OHS services materially influence health or safety by directing or influencing things done or provided for health or safety. Providers of OHS

⁹¹ *First Report*, above n 32, 76.

⁹² What are relevant ‘services’ and who the relevant ‘service providers’ are will be defined in the Second Report. The Panel suggested, however, that the definition of ‘service providers’ might include a health and safety organisation, consultants providing advice or intellectual property, training providers, lawyers, occupational hygienists or others undertaking environmental or biological testing or analysis; or any person or entity claiming an expertise in OHS and providing a service to a business or undertaking: *Ibid*, 77.

⁹³ *Ibid*, Recommendation 37.

⁹⁴ *Workplace Health and Safety Act 1995* (Tas), s.14B.

⁹⁵ *First Report*, above n 32, Recommendation 39.

services do so either as employees of, typically, larger organisations with sufficient resources or as independent contractors. Either way, they are not in a position to *direct* or *ensure* OHS outcomes which are determined by officers of an organisation, unless they are actually appointed in a senior and influential management position. It is disproportionate to impose a duty on OHS service providers to *ensure health and safety*, even if qualified by reasonable practicability. An appropriate level of responsibility is to require OHS service providers to take *reasonable care* to ensure persons are not adversely affected by their conduct or omissions. The *Victorian Code of Ethics and Minimum Service Standards for Professional Members of OHS Associations* (developed by OHS professional associations collaborating with WorkSafe Victoria) is an appropriate approach emphasising that the responsibility of OHS service providers is to act and work responsibly, competently and honestly, and giving priority to OHS over sectional or private interests.⁹⁶ It is likely that the definitions in the Second Report will make it clear that the specific duties, including this duty, do not apply to workers and officers, in the same way as they are excluded from the primary duty. Thus, an employee providing OHS advice as an employee within a business that is engaged to do so would not be caught by that duty of care.

Reasonably practicable

As noted earlier in this article, all of the duties discussed so far in this section are to be qualified by reasonable practicability. The Panel recommends that this expression be defined in the model Act,⁹⁷ in a way ‘which allows a duty holder to understand what is required to meet the standard.’⁹⁸ In particular, the First Report makes the important point that the definition should specify that the duty holder must not just have regard to, but also weigh up the various elements of the calculus.⁹⁹ The Panel outlined an example definition as follows:

⁹⁶ *Victorian Code of Ethics and Minimum Service Standards for Professional Members of OHS Associations*, 1st ed, Health and Safety Professionals Alliance, Melbourne, 2008, 4.

⁹⁷ *First Report*, above n 32, Recommendation 5.

⁹⁸ *Ibid*, Recommendation 6.

⁹⁹ *Ibid*, 34. See in particular, the example of the wording provided by the Panel on pages 34-35.

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

- a) the likelihood of the hazard or risk eventuating;
- b) the degree of harm that may result if the hazard or risk eventuated;
- c) what the duty holder knows, or a person in their position ought reasonably to know, about:
 - (i) the hazard, the potential harm and the risk;
 - (ii) ways of eliminating or reducing the hazard, the harm or the risk;
- d) the availability and suitability of ways to eliminate or reduce the hazard, the harm and the risk; and
- e) the costs associated with the available ways of eliminating or reducing the hazard, the harm or the risk, including whether the cost is grossly disproportionate to the degree of harm and the risk.

The Panel also recommended that the meaning and application of the standard of reasonably practicable should be explained in a code of practice or guidance material.¹⁰⁰

This ‘example definition’ is based upon, and improves, the best definition of ‘reasonably practicable’ in the current OHS statutes, namely section 20 of the *Occupational Health and Safety Act* 2004 (Vic). This definition can be further improved when considered in the Second Report, in at least three aspects.¹⁰¹ First, while it uses the term ‘costs’ in paragraph (e) (rather than ‘cost’ in section 20 of the Victorian Act) and is not meant to be read narrowly, the reference to ‘cost’ later in the clause should be phrased so that it refers not only to monetary costs, but to other costs as well.

Second, the clause should emphasise that measures are only not reasonably practicable if the time, trouble and cost involved in their introduction are grossly disproportionate to the risk.¹⁰² The definition should be revised to reflect the principle that costs, time and trouble are quarantined and only taken into account in determining whether the measures are disproportionate. This approach would recognise that where the risk is low and there

¹⁰⁰ Ibid, Recommendation 7. The Panel gave as an example of guidance material the excellent publication, WorkSafe Victoria, *How WorkSafe Applies the Law in Relation to Reasonably Practicable*, WorkSafe Position, Edition No. 1, WorkSafe Victoria, Melbourne, 2007

¹⁰¹ This and the following two paragraphs have benefited significantly from an exchange with the National OHS Review Panel.

¹⁰² See Asquith LJ in *Edwards v National Coal Board* [1949] 1 KB 704 at 712.

are a range of possible controls, each minimising the likelihood or degree of harm to the same extent, the duty holder may choose the least costly option. This principle could also be emphasised in the definition of reasonably practicable.

Third, there is a very strong argument that the expression should be eliminate or *minimise* risks to emphasise the need to achieve the lowest possible risk. It is true that the Australian OHS Acts and regulations around Australia use both the terms ‘reduce’ (for example, in the definition of ‘reasonably practicable’ in section 20 of the Victorian OHS Act, and see also regulation 3.1 in the *Occupational Safety and Health Regulations* 1996 in Western Australia) and ‘minimise’ (see, for example, section 27A of the *Workplace Health and Safety Act* 1995 (Qld) and section 55 of the *Workplace Health and Safety Act* 2007 (NT)). It may also be that the qualifier of ‘so far as is reasonably practicable’ effectively results in ‘reduce’ and ‘minimise’ meaning the same thing. Even so, the drafters of the National OHS Act would be well advised to use the expression ‘minimise’ to make the matter clear.

The Panel recommended that the concept of control not be included in the definition of reasonable practicability¹⁰³ because ‘control is an inherent element in determining what can reasonably be done in the circumstances. Making express reference to control in the definition of reasonably practicable may lead to a focus on that issue, ahead of other factors noted in the definition.’¹⁰⁴

The Panel also addressed the issue of whether reasonably practicable should explicitly refer to risk management principles. Both the reasonably practicable and risk management principles appear to require duty holders to identify and weigh up risks and possible control measures, but it is far from clear from a simple reading of the OHS statutes exactly what the relationship between these two processes is. This apparent disjunction between reasonably practicable and risk management principles reflects the distinct origins of each. The reasonably practicable calculus emerged as a crucial qualification to the general duty provisions in Anglo-Australian OHS legislation which emerged from the 1970s in response to the Robens Report, while the central place of risk management principles in OHS regulation emerged in the next wave of the OHS

¹⁰³ *First Report*, above n 32, Recommendation 8.

¹⁰⁴ *Ibid*, 36.

regulatory debate beginning in the 1980s – and these risk management principles were placed in the regulations and codes of practice made under the OHS Acts.¹⁰⁵ It should be noted at this point that the cases interpreting the employer’s general duty indicate that the employer should not just be responding to demonstrated risks but should have a system of searching for and identifying all possible risks, and instituting reasonable and appropriate measures.¹⁰⁶

The Panel recommended that the principles of risk management should be identified in the part of the model Act setting out the fundamental principles, but that risk management should not expressly be required to be applied as part of the qualifier reasonably practicable, or to comply with the duties of care.¹⁰⁷ The Panel explained that it considered that:

The definition of reasonably practicable should be simple and easy to understand, setting out principles rather than processes. Reasonably practicable should be a standard to be met, rather than a process. If it is appropriate for risk management process requirements to be included in the model Act, they can be provided in separate provisions as specific obligations. This is consistent with the principles in our terms of reference.¹⁰⁸

Whether risk management principles should be further recognised and reinforced in the model OHS Act, and whether or not there should be specific requirements for risk management will be addressed in the Second Report.

If risk management is not expressly required to comply with the general duties of care, or to determine what preventive action is reasonably practicable, duty holders will be left in the curious position of being required by *case law* to assess the risks without this being explicitly required by the model Act. Further, the First Report seems to take different approaches to the risk management requirement. As noted above, it proposes that risk management should be included in fundamental principles to support interpretation and implementation and not as part of reasonably practicable, and then proposes that the upstream duties should include risk management. There is no justification for these different approaches. If risk management is not integrated in all of the duties, replacing reasonably practicable, then it should be dealt with consistently in fundamental principles that apply to all duties. Different approaches simply cause confusion and there is no basis

¹⁰⁵ Bluff, E, and Johnstone, R, ‘The relationship between “reasonably practicable” and risk management regulation’ (2005) 18 *Australian Journal of Labour Law* 197.

¹⁰⁶ *Ibid*, 212-219.

¹⁰⁷ *First Report*, above n 32, Recommendation 9.

¹⁰⁸ *Ibid*, 36.

for expecting that upstream duty holders will be any better at risk assessment than other duty holders.

Duties of officers

A corporation is an artificial entity, and can only operate through its human agents – including its corporate officers and workers. The Australian OHS statutes currently make provision for corporate officer liability for contraventions by the corporation of the statutory OHS obligations, but there are at least four different models for doing this.¹⁰⁹ For example, section 26 of the *Occupational Health and Safety Act 2000* (NSW) provides that:

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each individual director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or manager satisfies the court that:
 - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
 - (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

A second approach to corporate officer liability is found in section 55 (1) of the *Occupational Safety and Health Act 1984* (WA) (see also section 37 of the *Health and Safety etc at Work Act 1974* (UK)) which provides that:

Where an offence against the Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any wilful neglect on the part of any director, manager, secretary or officer of the body corporate, that person is also guilty of that offence.

The *Occupational Health and Safety Act 2004* (Vic) provides, in section 144, that the corporate officer will be liable if the corporate employer's contravention 'is attributable to an officer of the body corporate failing to take reasonable care' to prevent the contravention.

The Review Panel has rejected each of these models, which rely on attributed liability rather than imposing a positive duty on corporate officers, breach of which will result in an offence by the officer. Instead the panel has recommended the approach set out in the Victorian Maxwell Report of 2003, namely that the model Act should place a 'positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care of that entity under the model

¹⁰⁹ See Johnstone, R. and Wilson, T, 'OHS liability, corporate officers and corporate groups' (2006) 22(3) *The Journal of Occupational Health and Safety- Australia and New Zealand* 219-225.

Act.¹¹⁰ Note that the standard here is not reasonable practicability, but rather due diligence, which is a standard ‘well known by those who would be sufficiently directing and influencing the decisions of the company’.¹¹¹ The Panel noted that corporate officers will be defined in the Second Report, but ‘should be those persons who act for, influence or make decisions for the management of the relevant company.’¹¹² The officer’s liability provision should apply to officers of a corporation, an unincorporated association, a partnership and equivalent persons representing the Crown.¹¹³ The Panel should ensure that the definition of corporate officers in the Second Report is broad enough to include ‘shadow directors’, so that responsibility for contraventions by corporations of the general duties in the model Act can be sheeted home to entities such as holding companies and franchisors.¹¹⁴

Duties of workers and others

As noted above, the Panel has recommended a very wide definition of worker. The First Report recommends that workers should have a duty of care to themselves and to any other person whose health and safety may be affected by the worker’s conduct or omissions at work.¹¹⁵ The standard is not reasonable practicability, but rather one of reasonable care ‘being the standard applied for negligence under the criminal law’.¹¹⁶ This duty will also require workers to co-operate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act.¹¹⁷ The First Report also recommends that there should be a similar duty on other persons present at the workplace; for example, visitors.¹¹⁸

The Nature of OHS Offences

¹¹⁰ *First Report*, above n 32, recommendation 40. The Panel’s fall back position was a provision similar to section 144 and 145 of the Victorian OHS Act.

¹¹¹ *Ibid*, 82.

¹¹² *Ibid*, Recommendation 41.

¹¹³ *Ibid*, Recommendation 42.

¹¹⁴ See Johnstone, R and Wilson, T, ‘Take me to your employer: The organisational reach of occupational health and safety regulation’ (2006) 19 *Australian Journal of Labour Law* 59, especially pp 64-67 and 76-80.

¹¹⁵ *First Report*, above n 32, Recommendations 45 and 46.

¹¹⁶ *Ibid*, Recommendation 47.

¹¹⁷ *Ibid*, Recommendation 46.

¹¹⁸ *Ibid*, Recommendation 49.

Part 3 of the First Report discusses the nature and structure of offences relating to the duties of care. This Part begins with two very important recommendations. The first is that to emphasise the seriousness of contraventions of the general duties, and ‘to strengthen their deterrent value, breaches of the duties of care should only be criminal offences, with the prosecution bearing the criminal standard of proof for all elements of the offence.’¹¹⁹ The Panel will address the issue of whether civil sanctions are suitable for other obligations in the model Act in the Second Report. The second very important recommendation recognises the inchoate nature of OHS offences. As the Review Panel notes, a ‘duty holder’s failure to provide and maintain a safe system of work, even where no harm has occurred, may result in extreme levels of risk and merit the strongest possible sanctions.’¹²⁰ Thus the Panel recommends that ‘penalties should be clearly related to non-compliance with a duty, the culpability of the offender and the level of the risk, not merely the actual consequences of the breach.’¹²¹

The First Report recommends that offences for contraventions of the duty of care should continue to be absolute offences, and be clearly expressed as such, qualified by reasonable practicability (or due diligence or reasonable care) as discussed above.¹²² One of the most controversial issues faced by the Review Panel was whether the onus of proving reasonable practicability should be borne by the prosecutor (as is the position in all of the Australian OHS statutes apart from New South Wales and Queensland), or by the duty holder once the prosecutor had proved the other elements of the general duty offence (the position in New South Wales, Queensland and in the *Health and Safety at Work Act 1974* (UK)). The latter position had been supported by the Industry Commission in its 1995 report, *Work, Health and Safety*, a position justified by the argument that:

It is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.¹²³

After considering all the arguments, the Review Panel decided that the prosecution should bear the onus of proving beyond reasonable doubt all elements of the general

¹¹⁹ Ibid, Recommendation 50.

¹²⁰ Ibid, 95.

¹²¹ Ibid, Recommendation 51.

¹²² Ibid, Recommendation 52

¹²³ Industry Commission, above n 11, Vol I, 55.

duty offence. It observed that the submissions and recent OHS reviews were vehemently divided on this issue.¹²⁴ Factors which appeared to support the Panel's conclusion included the fundamental principle in the criminal justice system that the prosecutor bear the onus of proving all of the elements of the offence; and that the High Court in *Chugg v Pacific Dunlop Limited* (1990) CLR 249 held that the onus of proving reasonable practicability lay with the prosecutor because OHS inspectors will in all likelihood 'have superior, or at least wider knowledge than an employer on some of the matters which, in a good number of cases, will bear upon the question of practicability'¹²⁵ and that in many cases the identification of a hazard or risk 'may, as a matter of common sense, also constitute identification of a means of removing that risk, thereby giving rise to a strong inference that an employer failed to provide 'so far as is practicable' a safe workplace.'¹²⁶ The Panel also remarked that it had 'not been helped in analysing this matter by the apparent lack of substantive evidence about the effect of a reverse onus on OHS outcomes.'¹²⁷ It also observed that 'the instances in which a reverse onus is provided for do not usually involve heavy penalties or imprisonment'¹²⁸ - and as we shall see below, the Panel has made such recommendations.

A third important recommendation in the First Report is Recommendation 55:

- There should be three categories of offences for each type of duty of care
- a) Category 1 for the most serious breaches, where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent;
 - b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness or gross negligence; and
 - c) Category 3 for a breach of the duty without the aggravating factors present in the first two categories.
- with maximum penalties that:
- d) relate to the seriousness of the breach in terms of risk and the offender's culpability;
 - e) strengthen the deterrent effect of the offences; and
 - f) allow the courts to impose more meaningful penalties, where that is appropriate.

This means that in Category 1 offences, the prosecutor has the onus of proving that the duty holder was reckless or grossly negligent, rather than that the duty holder failed to

¹²⁴ *First Report*, above n 32, 117.

¹²⁵ *Chugg v Pacific Dunlop Limited* (1990) CLR 249, per Dawson, Toohey and Gaudron JJ at para 17.

¹²⁶ *Ibid* at para 18.

¹²⁷ *First Report*, above n 32, 117.

¹²⁸ *Ibid*, 118.

take reasonably practicable measures to remove or reduce the risks, and that there was a high level of risk of serious harm.

Offences in Category 1 are to be indictable offences (triable summarily where the court decides that it is appropriate and the parties agree),¹²⁹ and the other offences should be dealt with summarily.¹³⁰

One matter not addressed in the First Report is the relationship between the primary duty of care and the more specific duties.¹³¹ Clearly, the specific classes of duty holders will also owe the primary duty of care (and both types of duties are qualified by reasonable practicability), so that parties owing the specific duties must also comply with the approach required in the primary duty. Earlier in this article, I noted that to avoid the limitation or exclusion of the primary duty of care, the Panel recommended that the Model Act ‘specifically provide that the duty should apply without limitation’, and in particular should not be limited or restricted by the specific duties.¹³² This means that there can be no suggestion that compliance with the provisions of a specific duty will be deemed by the courts to be compliance with the primary duty.

Consequently, it is clear that a breach of a ‘specific duty’ will also constitute a breach of the ‘primary duty’, but that there will be circumstances in which there is a contravention of the primary duty where there is not an applicable specific duty.

Where a specific duty applies, it is likely that it will be easier to prove a breach of that specific duty than a contravention of the primary duty. Thus an OHS regulator would be likely to prosecute the breach of the specific duty where it applies, with the primary duty called on only where the specific duty cannot be used.

¹²⁹ Ibid, Recommendation 54

¹³⁰ Ibid, Recommendation 53

¹³¹ I have been greatly assisted in the following paragraphs by an exchange with the members of the Panel. It is possible that this issue will be further examined in the Second Report when enforcement policies and other matters are considered.

¹³² *First Report*, above n 32, Recommendation 18.

It is common in the practice of OHS prosecutors for charges under different provisions to be pleaded as alternatives.¹³³ Where the primary and a specific duty apply, that practice appears appropriate.

The current OHS statutes, like the proposed Model OHS Act, provide for a person to be subject to a number of duties in relation to the same circumstances and for contraventions to be alleged and offences found in relation to them all. For example, a person may be guilty of contraventions of the duty of an employer to employees, the duty of the employer to non-employees, and the duty of a person with management or control of the workplace. The general principle in these cases appears to be that where two heads of liability arise out of the same fact situation, the issue is to be dealt with at the point of sentencing.¹³⁴

The First Report also recommended that the model Act ensure that more than one breach of a duty of care provision could be alleged in a single paragraph of an information or count of an indictment in relation to duties of care, thereby avoiding the application of the rule against duplicity to charges for contraventions of the general duties.¹³⁵

Penalties

The First Report has recommended very high maximum penalties.¹³⁶ Category 1 offences attract a maximum fine of \$3,000,000 for corporations, and \$600,000 for individuals contravening the primary and specific duties; \$600,000 for corporate officers; and \$300,000 for workers. Further, the First Report recommends that the model Act provide for imprisonment for individuals for up to five years for category 1 offences.¹³⁷

¹³³ See Johnstone, R, *Occupational Health and Safety, Courts and Crime*, Federation Press, Sydney, 96-103, 159-169.

¹³⁴ *Director of Public Prosecutions Reference No 1 of 1992* (1992) 2 VR 405, discussed in Johnstone, R, *Occupational Health and Safety Law and Policy*, Thompson, Sydney, 2004 at 269-70 and Creighton, B and Rozen, P, *Occupational Health and Safety Law in Victoria*, 3 ed, Federation Press, Sydney, 114.

¹³⁵ *First Report*, above n 32, 128 and Recommendation 69.

¹³⁶ *Ibid*, Recommendations 57 and 58, and Tables 11, 12 and 13. The principle of double jeopardy would not apply in this situation.

¹³⁷ *Ibid*, Recommendation 59.

Category 2 offences attract a maximum fine of \$1,500,000 for corporations, and \$300,000 for individuals contravening the primary and specific duties; \$300,000 for corporate officers; and \$150,000 for workers

Category 3 offences attract a maximum fine of \$500,000 for corporations, and \$100,000 for individuals contravening the primary and specific duties; \$100,000 for corporate officers; and \$50,000 for workers.

The Panel noted that the Australian OHS statutes took a variety of approaches to offences for contraventions of the OHS statutes leading to workplace fatalities.¹³⁸ The Panel astutely recognised the dilemma posed by understandable public demands for serious punishments to be imposed upon duty holders responsible for contraventions of the inchoate duties in the model OHS Act which resulted in a workplace fatality.

Our approach in dealing with non-compliance with duties of care has been to ensure that the statutory responses are consistent with the graduated enforcement of the duties. We are concerned that the natural abhorrence felt towards work-related deaths should not lead to an inappropriate response. The seriousness of offences and sanctions should relate to the culpability of the offender and not solely to the outcome of non-compliance. Otherwise, egregious, systematic failures to eliminate or control hazards or risks might not be adequately addressed.

Even so, where non-compliance with duties of care involve a high degree of negligence or recklessness and results or could result in a work-related death or other grievous harm to a person to whom a duty is owed, we consider that it is appropriately placed at the highest end of the scale of offences.¹³⁹

In other words, these instances would be dealt with as Category 1 offences, and subject to the high penalties for such offences.

The First Report examined the issue of whether these monetary and custodial penalties should be supplemented with non-monetary penalties and concluded that, even ‘though there was limited information available that demonstrates the long term effects on OHS ... of alternative sentencing options’, the ‘possible weaknesses of particular sentencing options may be reduced or eliminated by the judicious combining of several orders.’¹⁴⁰ Accordingly, the Panel recommended¹⁴¹ that the model Act should provide the following sentencing options in addition to fines and custodial orders:

¹³⁸ Ibid, 100-103.

¹³⁹ Ibid, 103. See also Recommendation 56.

¹⁴⁰ Ibid, 113.

¹⁴¹ Ibid, Recommendation 61.

- a) adverse publicity orders;
- b) remedial orders;
- c) corporate probation
- d) community service orders
- e) injunctions
- f) training orders; and
- g) compensation orders.

The Panel considered that since it was recommending significant increases in maximum penalties, and was also proposing a greater range of sentencing options, there was plenty of scope for a sentencing court to impose substantial fines that take account of prior convictions where to do so is appropriate,¹⁴² and the model Act did not need to provide for a further penalty for a repeat offender.¹⁴³

One of the curious aspects of the current Australian OHS statutes is that, apart from the maximum penalties specified in the Acts, very little guidance is provided to the sentencing court. Such guidance will be even more important once the model Act is adopted by each Australian jurisdiction, to ensure that the courts impose consistent penalties across jurisdictions. Guidance is also assist courts apply a mix of monetary, non-monetary and custodial penalties. The First Report recommended that ‘subject to wider criminal justice policy considerations’, the model Act should provide for the ‘promulgation of sentencing guidelines or, where there are applicable sentencing guidelines, they should be reviewed for national consistency and compatibility with the OHS regulatory regime.’¹⁴⁴ In my view, such guidelines should not involve a grid, or the adaptation of more general guidelines. Rather the guidelines should provide courts with guidance as to appropriate mitigating and aggravating factors in sentencing, and guidance as to when and how to apply non-monetary penalties.

The remaining recommendations in the First Report included that

- there should be a system of appeals against a finding of guilt, and that the final appeal in each State and Territory should be to a court from which a further

¹⁴² Ibid, 111.

¹⁴³ Ibid, Recommendation 60.

¹⁴⁴ Ibid, Recommendations 68.

appeal can lie to the High Court; but with no such appeals no appeals from acquittals.¹⁴⁵

- o Crown immunity should not be provided for in the model Act.¹⁴⁶
- o the limitation period for initiating prosecutions should be two years from the occurrence of the offence or from the offence coming to regulator's notice; or one year from a finding in a coronial inquiry that an offence occurred.¹⁴⁷
- o the model Act should provide for or facilitate the presentation of victim impact statements to courts hearing category 1 and category 2 cases.¹⁴⁸
- o the model Act should 'enshrine the rule against double jeopardy by providing that no person is liable to be punished twice for the same offence under the Act or for events arising out of and related to that offence.'¹⁴⁹

4. Conclusion

With three notable exceptions, the recommendations of the First Report National Review into Model Occupational Health and Safety Laws are quite conservative, in the sense that they fall well within the scope of the existing Australian OHS statutes. This is far from surprising. A range of factors have subjected the National OHS Review process to a strong gravitational pull towards drawing out the best of the provisions from the status quo in the various Australian OHS statutes. These factors include the Review's Terms of Reference (requiring the Review Panel to identify areas of best practice, common practice and inconsistency and to make recommendations); the types of issues raised in the issues paper (which largely reflected the concerns of regulators, employers and their associations, and trade unions); the tenor of the submissions (most were based on current Australian provisions, and argued for the best of the current provisions in the Australian OHS statutes, with the submissions of regulators generally favouring their own provisions), and the relative political strengths of New South Wales and Victoria. A further factor could be the Review Panel's apparent preference for the reports of reviews of the various Australian OHS regulatory systems Findings and proposals in the academic literature on OHS regulation are very rarely discussed in the Report. A perusal

¹⁴⁵ Ibid, Recommendations 63 and 64.

¹⁴⁶ Ibid, Recommendations 65.

¹⁴⁷ Ibid, Recommendations 66.

¹⁴⁸ Ibid, Recommendations 67.

¹⁴⁹ Ibid, Recommendation 70.

of the references in the First Report reveals that very few academic articles or books are cited.

Even one of the great innovations of the First Report – the primary general duty on persons conducting a business or undertaking – is drawn from the key Queensland general duty provision (which has been echoed in the new statutes in the two Territories), although as noted above the Review Panel has elevated the duty to an overarching primary duty, and broadened the definition of workers. One reason that the Panel may have been willing to make this significant proposal was the emphasis in its Terms of Reference on taking into account the changing nature of work and employment arrangements.

A second major innovation is the duty imposed upon corporate officers. Even though the recommended provision is not currently to be found in an Australian OHS statute, it is drawn from a recommendation in the Victorian Maxwell Report. While many will argue that this recommendation could weaken the enforcement provisions of the model Act, by recommending a positive duty on officers of due diligence, by making this recommendation the Panel has done much to legitimate the First Report in the eyes of employers.

Indeed, this change to the corporate officers provisions, and the other recommendations are likely to lead to suggestions, particularly from New South Wales and Queensland commentators, that enforcement would be weakened – that the onus of proving reasonable practicability should be placed upon the prosecutor in a prosecution of the general duties – have been countered by the recommendations that have caught most commentators by surprise: the three categories of offences and the very high financial penalties. Will the increased general and specific deterrence from these higher penalties outweigh the possible weakening of the prosecution provisions of the enforcement provisions brought by the changes to the corporate officer provisions and the provisions governing the onus of proving reasonably practicable?

Evaluations of the Review Panel's recommendations are, however, difficult to make in the absence of recommendations on the issues still to be addressed in the Second Report

– particularly the provisions in relation to worker representation, consultation, participation and enforcement.