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

NEW SOUTH WALES MINERALS COUNCIL SUPPLEMENTARY SUBMISSION – AUGUST 2008

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EXECUTIVE SUMMARY

The New South Wales Minerals Council (NSWMC) thanks the Advisory Panel for the opportunity to provide supplementary submissions on the recently released report by the Honourable Paul Stein into the NSW Occupational Health and Safety Act (Stein Report).

The National Review into the Model Occupational Health and Safety Laws (the Review) is an opportunity to establish best practice workplace health and safety legislation throughout Australia. There are particular aspects of the Stein report which do not support this objective. Of particular concern are the Report's recommendations on:

1 The appropriate test for individuals

The liability of individuals must be determined by reference to a recklessness test only. If an individual acts recklessly or is intentionally negligent, they should face the full force of the law. However, there is a clear difference between reckless acts and honest errors. This distinction must be clearly set out in the OHS legislation particularly given that if convicted, individuals face a criminal record, and worse, the real risk of imprisonment.

2 Reversal of the onus of proof for corporations

The onus of proof must be on the prosecutor to prove each and every element of the offence beyond a reasonable doubt. This is the case for all other criminal offences. There cannot be a different test for employers as compared with any other person facing a criminal charge. Reversing the onus of proof by requiring the defendant corporation to prove reasonable practicability breaches international law principles as set out in Article 14 of the International Covenant on Civil and Political Rights (which Australia ratified on 13 Aug 1980) and Article 11 of the Universal Declaration of Human Rights (which Australia adopted on 10 December 1948).

3 The role of 'control' as a means of determining liability

The employment arrangements of mine sites can be complex: for example, the presence of contractors, sub contractors and other parties operating on a single site. There are often multiple duty holders at any one site which can lead to confusion as to duties and responsibilities. There must be a clear delineation of responsibilities in OHS legislation to clarify circumstances where multiple duty holders have overlapping duties. Parties need to clearly understand what is required of them so that the exposure to risk for all parties at the workplace can be minimised. In doing so, the legislation must ensure it does not impose a duty on a party that does not have the requisite knowledge or expertise to meet it. The entity with intimate knowledge of the part of the work must be made responsible for that part of the work.

4 The role of compliance advice and guidelines

Regulators should have the power to issue compliance advice and guidelines as an additional tool to promoting health and safety at a workplace. However, compliance with such advice and guidelines must be admissible in any court proceedings. Preventing the court from hearing such evidence

effectively keeps the court in the dark about a significant part of the events leading to the incident in question. This not only misleads the court but is a miscarriage of justice.

5 Power of union representatives

NSWMC strongly believes that inspectors should be the only persons granted a right of entry, as they have the responsibility for administering OHS legislation. Any third party, including authorised representatives of an industrial organisation of employees, should not be able to access a site without the approval of the site 'owner'/operator. The right of entry must only be exercisable if such persons provide:

- Written notice of their intention to enter premises
- Written reasons for the entry
- In writing, a description of the particular risk they wish to address and the reasons why such risk cannot be adequately addressed by a health and safety representative or a health and safety committee at that worksite.

6 The right to silence

There must be a right to silence for an individual facing criminal prosecution not to answer questions if they so wish. This is a fundamental right guaranteed by Article 14(3)(g) of the International Covenant on Civil and Political Rights. The right to silence provides a safeguard against a potential miscarriage of justice. It protects persons from giving panicked, ill considered statements when they are questioned under pressure. The right to silence is afforded to persons accused of other crimes and it is incongruous that it is not provided to a person accused of having committed a breach of OHS legislation.

7 The proposal to tape interviews without the consent of the interviewee

Compulsory tape recording of interviews, in combination with the abolition of the right to silence, contravenes principles of fair process. The unfairness is exacerbated by the particular circumstances faced by the defendant of the interview process including:

- Not forewarned as to the questions they will be asked
- Compelled to reply to the questions at the time of the interview
- Not given a proper opportunity to think about their answers in a stress-free environment
- Knowing that they are facing criminal prosecution.

It is easy to see how these circumstances could lead to intimidation, confusion and panic for the witness and defendant, resulting in an admission or information provided that is unlikely to be accurate. Mandatory tape recording will result in prosecutions, and subsequent convictions, which have the real potential of being based not on the culpability of the defendant but on the inability of persons interviewed to adequately explain themselves under pressure and who were not given the opportunity to review their responses with a clear head.

8 The appropriate right of appeal

Occupational health and safety offences are criminal offences. The right of appeal must be the same as the right of appeal afforded to all other defendants accused of a crime, namely, a right of appeal to

the Court of Criminal Appeal and, where appropriate, the High Court. This appeal right must be a general and unqualified right. It cannot be a right qualified by circumstances where the defendant can prove 'miscarriage of justice'.

9 The role of 'reasonable excuse' as a defence

There must be a defence of reasonable excuse for all offences under the Act. It is unfair and unjust to punish a person who had no intention, and no knowledge, of doing anything wrong.

NSWMC also notes that the NSW Government in its submission stated that work injuries in NSW are at their lowest levels since the NSW legislative scheme commenced. The NSW Government proposition is fallacious. NSWMC urges the Advisory Panel not to conclude that this reduction in work related injuries is linked to the absolute nature of the duties, the reversal of the onus of proof, the abolition of the right to silence and any of the above other factors peculiar to NSW. In fact, a comparison of work related injuries per 1000 persons throughout the various states and territories of Australia, demonstrates that occupational incident and fatality rates in NSW are by no means exceptionally low and are at best average when compared to incident and fatality rates in other Australian states and territories which do not have OHS laws depriving accused persons of basic legal rights. For your convenience we have attached a comparison schedule to these submissions as **Schedule 1.**

Background

On 16 June 2005 the then New South Wales Minister for Commerce announced the commencement of the review of the New South Wales Occupational Health and Safety Act (**the NSW OHS Act**). The Minister invited interested parties to make submissions and take part in a constructive debate of the issues raised during the review process. The closing date for these submissions was Friday 19 August 2005. Further submissions were called for and accepted later that year.

On 2 May 2006 the Government released the Occupational Health and Safety Bill 2006 (**the NSW Draft Bill**) and invited interested parties to make submissions on the NSW Draft Bill by 18 May 2006.

Following consideration of these submissions, WorkCover New South Wales (**WorkCover**) was asked by the Minister to prepare a review.

The review was conducted by WorkCover and resulted in the release of the *Review of the Occupational Health and Safety Act 2000 Discussion Paper, dated May 2006* (**the Review Report**).

Following release of the Review Report, the Government requested that an inquiry be conducted. The Honourable Paul Stein AM QC was engaged to conduct this inquiry (**the Stein Inquiry**).

The NSW Government called for interested parties to make submissions to the Stein Inquiry by 15 December 2006.

The Honourable Paul Stein AM QC conducted the inquiry and completed his report in April 2007 (**the Stein Report**). The NSW Government refused to release the Stein Report.

On 4 April 2008 the Federal Minister for Employment and Workplace Relations, the Honourable Julia Gillard MP, announced a National Review into model OHS legislation. The review was conducted by an Advisory Panel and resulted in the production of an Issues Paper dated May 2008. The Advisory Panel invited interested parties to make submissions regarding issues raised in that paper.

The closing date for these submissions was 11 July 2008.

The NSW Government made submissions to the Advisory Panel by 11 July 2008 and released the Stein Report on 14 July 2008. The Stein Report was annexed as **Attachment C** to the NSW Government submissions.

1. APPROPRIATE TEST FOR INDIVIDUALS AND CORPORATIONS

At present, NSW is one of only two states to impose an absolute duty on employers and certain other duty holders (controllers of work premises, designers and suppliers being some of the others). The duty is to ensure the health and safety of persons at the workplace.

The Stein Report recommends that 'so far as is reasonably practicable' be included in the statement of general duties. The Stein Report further recommends that a test of 'reasonable care' should apply to persons concerned in the management of a corporation.

Our comment:

NSWMC has long advocated that the general duty for employer corporations should include a test of reasonable practicability. This is in accordance with the International Labour Organisation Convention on Occupational Health and Safety (ILO 155) which Australia ratified on 26 March 2004.

However, the liability of individuals must be determined by reference to a recklessness test only. A test of reasonable practicability, or a test of reasonable care, if imposed on individuals, would not actively promote the reduction of exposure to risk and therefore would not actively promote the objectives of the legislation.

Supporting reasons:

Health and safety at work is a matter of the utmost importance. Justice Stein himself notes that 'every year, notwithstanding annual improvements, large number of workers suffer injury or disease from work. Every year too many workers suffer traumatic death from work or occupational disease'.

NSWMC agrees with this observation and strongly believes persons should have the right to attend a workplace where all persons concerned have taken care to make the workplace safe.

The importance of health and safety is further reinforced by the penalties imposed. For individuals, the *Occupational Health and Safety Act 2000* (NSW) (NSW OHS Act) imposes a term of imprisonment of two years, in addition to a fine, in certain circumstances. Very high fines are envisaged for corporations. Quite clearly, the legislature also had in mind that a breach of the general duty is to be considered a very serious matter.

NSWMC believes that a just and fair legislature must not allow such serious consequences of committing an offence to be visited on a person who had no intention of doing anything wrong and/or no knowledge that he or she was doing it.

Given the seriousness of the issue and the real desirability of minimising exposure to risk, the legislature needs to seriously consider whether subjecting an individual to liability (based on a test of reasonable practicability or a test of reasonable care) will assist in the enforcement of the relevant legislation. NSWMC strongly believes that whilst such a liability, imposed on an individual, may assist in raising revenue - in that it will make it easier to secure convictions- it will be actively *unhelpful* in reducing exposure to risk and will also bring the law into disrepute.

A legislature concentrated on reducing risk needs to ask itself what will assist in the enforcement of the relevant legislation. More precisely, it needs to ask itself how it can maximise the role individuals play in reducing exposure to risk.

NSWMC strongly believes that whilst punishment and retribution obviously play a part, it is the sharing of information and experiences which will play the most important role in reducing exposure to risk.

Unintended acts should be able to be revealed and discussed openly so that individuals can learn from the mistakes of others and be on the alert if similar circumstances are encountered. Individuals who encounter issues relating to health and safety will not be willing to share this information where the threat of a criminal conviction and a fine, or possibly imprisonment, hangs over their head.

Equally, intended acts should be punished to the full extent of the law.

NSWMC believes that the objectives of the model OHS legislation cannot be achieved in an environment that does not distinguish between dangerous or reckless acts and honest errors which lead to an incident at a place of work.

The clear demarcation between honest errors and reckless acts would send a definitive message that behaviour which is intended to create a risk is unacceptable but behaviour which resulted from an honest mistake will not be punished. The lessons learned can be used to the advantage of others.

With regard to a test of recklessness, NSWMC further notes that:

- Such a test was endorsed by the Robens Report (Robens Report, 1972, page 82).

- More recently, the CAMAC Report (referred to in the Stein Report at paragraph 8.29) went even further and suggested that individuals should only be penalised where it can be shown that they personally assisted or were privy to misconduct.

With regard to individuals, the Stein Report makes reference to the view of Professor Gunningham, Director of the National Research Centre for Occupational Health and Safety Regulation at the Australian National University, as expressed in the article titled '*Prosecution for Occupational Health and Safety Offences: Deterrent or Disincentive?*'.

The Stein Report alleges that, in this article, Professor Gunningham endorsed a test of gross negligence with regard to officer liability.

Contrary to the assertion in the Stein Report, Professor Gunningham expressed the view that a test of recklessness is an appropriate test for individuals.

Indeed, NSWMC notes that, in fact, with regard to the appropriate test for individuals, Professor Gunningham observed that prosecution for retributive purposes sometimes inhibits prevention. Consequently, retribution should be confined to egregious cases; otherwise it could be counter productive.

At page 386 of his article (as reproduced in the Sydney Law Review Volume 29), Professor Gunningham notes:

> So in what circumstances is retribution appropriate? Because moral and symbolic rationales underlie retribution as a justification for criminal punishment, the defendant's culpability should be a crucial consideration. For this reason, those who were ***reckless*** in their approach to the health and safety of the workforce, and whose behaviour results in serious injury or death, are appropriate targets for retribution (emphasis added).

Further, at page 388, under the heading '***Conclusion'*** Professor Gunningham notes:

> ….As we have seen, vengeful prosecution against those who neither intended harm nor were reckless in their behaviour (epitomised in the Gretley decision) is widely perceived to be unjust, and this has caused the law to lose its legitimacy in the eyes of the duty holder. It has also generated a defensiveness on the part of duty holders that results in an unwillingness to examine the root causes of accidents and incidents for fear of being prosecuted.

Bearing in mind that a breach of the general duty carries with it a risk of imprisonment in certain circumstances, it is relevant to note that the NSW Legislation Review Committee at page 8 of its June 2006 Discussion Paper entitled 'Strict and Absolute Liability' observed that:

> The right to liberty is a fundamental right (see for example ICCPR Article 9) that should only be abrogated if there are compelling public interest reasons for doing so. It is clear that depriving a person of liberty where they have been found guilty beyond reasonable doubt of certain serious crimes can be justifiable. However, imprisoning a person for an offence that they did not intend to commit is not and it violates this most fundamental human right.

Conclusion

A test of 'reasonable practicability' or 'reasonable care' for individuals may be appropriate in civil matters but is not appropriate in criminal matters where, if convicted, individuals face the social stigma of a criminal record and its consequences, and where there is a real risk of imprisonment.

2. REVERSAL OF THE ONUS OF PROOF SUGGESTED IN THE STEIN REPORT

In recommending that the statement of general duties incorporate a concept of reasonable practicability, the Stein Report recommends that it should be up to the defendant to prove what was reasonably practicable on the balance of probabilities. In support of this proposition, the Stein Report suggests there is nothing inherently unfair in the reversal of the onus of proof.

Interestingly though, with regard to individuals concerned in management, the Stein Report acknowledges the importance of ensuring the prosecutor retains the onus of proof with regard to every element of the alleged offence.

Our comment:

NSWMC strongly opposes the concept that the defendant should bear the onus of proving reasonable practicability. Offences under OHS legislation in NSW are criminal offences. NSWMC believes they should remain criminal offences in the model OHS legislation. As with all criminal offences, the onus must be on the prosecutor to prove all elements of the offence, beyond a reasonable doubt. This must be the case for the prosecution of both employers and individuals concerned in the management.

Supporting reasons:

The recommendation that the defendant bear the onus of proving reasonable practicability breaches international law. The reversal of the onus of proof breaches Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 11 of the *Universal Declaration of Human Rights* (UDHR).

Further, it is a well accepted position in Australia that the prosecutor bears the onus of proof in criminal matters. In *Woolmington v DPP*[1] the Court referred to it as the "golden thread" throughout the web of English criminal law.

On a practical level, NSWMC believes that general duties in the model OHS legislation should provide enough guidance for employers to know what is expected of them and how they might comply with the provisions. Regulators have a duty to ensure that they make clear how the law is to be complied with. Including a notion of reasonable practicability in the offence offers a greater degree of transparency in that it places the onus on the regulator to transparently state what is required in order to comply with a law.

To suggest that a defendant should bear the onus of proving what is reasonably practicable is to suggest that it is for the duty holder to identify what is required in order to comply with the law. This lack of clarity in the health and safety arena can only compromise health and safety standards.

Comments on the Stein Report

[1] [1935] AC 462 (at pages 481-482)

At paragraph 7.10, the Stein Report asserts that 'quite frequently the onus of proving defences peculiarly within the knowledge of the defendant is placed upon that party on the civil standard of proof'.

With regard to this issue NSWMC notes that:

- This is indeed the case in some circumstances (see, for example, the defence of insanity). However, the onus on the accused is in relation to proving a *defence.* It is not in relation to disproving an *element of the offence*.

- The Stein Report notes that the onus of proving a defence can shift where the particular fact in issue is 'peculiarly within the knowledge of the defendant'. Reasonable practicability in maintaining a safe workplace is not a matter which is peculiarly within the knowledge of the defendant.

In support of the proposition that there is nothing inherently wrong with a reversal of the onus, the Stein Report cites three cases:

- *Davies v Health & Safety Executive* [2002] EWCA Crim 2949;

- *He Kaw Teh v R* (1985) 157 CLR 523; and

- *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

***Davies v Health & Safety Executive* [2002] EWCA Crim 2949**

In *Davies v Health & Safety Executive* (*Davies v HSE*) the Court had to consider whether the reversal of the onus of proof contained in section 40 of the *Health and Safety at Work Act 1974* was compatible with the presumption of innocence guaranteed by Article 6(2) of the *European Convention on Human Rights.*

NSWMC notes that, in finding that it was compatible (and therefore sanctioning the reverse onus) the Court took into consideration circumstances which are quite different to the circumstances applicable in present day NSW. Namely:

- The extent of the inspectors' powers under the English legislation – the Court noted that under the legislative regime inspectors were not specifically given the power of forced entry, and more importantly, did not have the power to search for and seize documents. The Court concluded that, in the circumstances, the regulator was reliant to a large extent on what information the defendant chose to provide.

  This is in stark contrast to the situation in NSW where inspectors have extremely wide-ranging powers, including the power to use reasonable force to enter premises (section 54), the power to carry out searches when on premises and inspect things (section 59), the power to dismantle, take and keep things (section 60), the power to seize or require documents or other things, and the power to require answers to questions (section 59).

- The nature of the offences created by that legislation - the Court noted that legislation for the promotion of health and safety could not properly be seen as 'truly criminal' and pointed out that, with regard to these cases, 'many may be relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy'.

  In contrast to this, the offences established under health and safety legislation in Australia are by no means trivial. They carry serious penalties and real social disgrace and infamy, as well as significant repercussions for both individual and corporations. NSWMC rejects the notion that although offences under the health and safety legislation are criminal offences, they should somehow be perceived as being something less than criminal.

- The available punishment - lastly and importantly, the Court noted that, under the legislation, there was no risk of imprisonment for any of the offences created by the section under which the defendant was charged. In relation to this issue the Court stated that whether or not defendants can be imprisoned is 'undoubtedly an important factor in deciding whether Parliament has struck the right balance in this legislation'.[2]

  More specifically, in relation to the onus of proof the Court noted that a consideration instrumental in its decision was the fact that a defendant in cases where the reverse burden of proof applies does not face imprisonment.

  NSWMC notes that pursuant to the current NSW OHS Act, defendants can be imprisoned. In these circumstances, it is crucial to ensure that the onus of proof remains on the prosecutor to establish all elements of the offence beyond a reasonable doubt.

In conclusion, the basis for allowing the reversal of the onus of proof in *Davies v HSE* cannot be of any relevance to the NSW position.

It is important to note that the current legislative regime in NSW is entirely inconsistent with the position in *Davies v HSE*. This is acknowledged by the Stein Report where it recommends the removal of imprisonment from the NSW OHS Act. However this recommendation ignores the real issue - the fundamental difference between the NSW position and the UK position is the availability of information to inspectors and their ability to compel the provision of information.

For these reasons the case cannot assist the NSW legislature and, more importantly, cannot assist the Federal legislature in deciding on an appropriate onus of proof in the model OHS legislation.

***He Kaw Teh v R* (1985) 157 CLR 523**

At paragraph 7.10, the Stein Report notes:

> the High Court in *He Kaw Teh v R* (1985) 157 CLR 523 (*He Kaw Teh*) at 595 (Dawson J) stated that such a reversal of onus has been accepted as a valid and necessary part of laws dealing with industrial safety.

NSWMC notes that, when considered in the context of the rest of the quote, it is clear that Dawson J's comments in *He Kaw Teh v R* (He Kaw Teh) refer to whether and when offences should be regarded as absolute liability offences and whether and when they should require intent. His comments do not sanction a reversal of the onus of proof.

In fact, the High Court in *He Kaw Teh* acknowledged that the rule that the prosecution must prove the guilt of the accused and the accused is not bound to establish his innocence is a 'governing principle…which applies generally in the criminal law'.[3]

The comments of the High Court do not, in any way, amount to a High Court sanction of a reversal of the onus where the matter involves industrial health and safety.

***Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249**

At paragraph 7.30 the Stein Report asserts that placing the onus of proving reasonable practicability on the prosecution beyond reasonable doubt will impose a burden on the prosecution which it will often be difficult to surmount. This, the Stein Report goes on to explain, is because 'much of the material and knowledge of what is or is not reasonably practicable in the circumstances will reside with the defendant'.

At paragraph 7.31 the Stein Report cites *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 (***Chugg** v Pacific Dunlop*) in support of this assertion.

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[2] *Davies v Health & Safety Executive* [2002] EWCA Crim 2949 at paragraph 19.
[3] *He Kaw Teh v R* (1985) 157 CLR 523 at 593 (Dawson J).

Knowledge

The Stein Report refers to section 7A(2) of the NSW Draft Bill and notes that it proposes defining reasonable practicability in a number of ways which, the Stein Report asserts, can only be known by the defendant – thereby justifying a reversal of the onus.

Interestingly, the High Court in *Chugg v Pacific Dunlop* considered provisions very similar to the current proposed provisions defining reasonable practicability. In dealing with the argument that reasonably practicable measures are peculiarly within the knowledge of the defendant, the High Court in fact found that the informant (the regulator) will have the resources of government available to them and would not be expected to be in a position of disadvantage, *vis-à-vis* the employer, as regards what was and was not practicable in terms of maintaining a safe and healthy working environment. Indeed, the responsible Minister or an inspector may well have *more* general information and more ready access to expert advice than an accused employer.[4] They will have superior, or at least wider, knowledge than an employer on matters which will bear on the question of practicability (see Dawson, Toohey and Gaudron JJ, at page 260).

Matters of cost and suitability

At 7.31, the Stein Report suggests that *Chugg v Pacific Dunlop* supports a reversal of the onus of proof as the Court there noted that 'matters of cost and suitability of ways of mitigating a hazard lay particularly within the knowledge of defendants'.

At page 260 their Honours Dawson, Toohey and Gaudron JJ dealt with the argument raised by the informant that matters bearing on cost and the suitability of ways of removing or mitigating the hazard or risk are matters upon which an employer may be expected to have knowledge not available to an informant.

Contrary to the assertion made in the Stein Report however, a reading of the judgment in context reveals that, after considering relevant case law, the Court concluded that cost and suitability are but aspects of the overall question of practicability. The High Court noted that whilst it may be reasonably supposed that an employer will have superior knowledge of matters peculiar to his or her workplace, including cost and suitability of various suggested means of removing a hazard or risk, an inspector will have wider knowledge of other matters which bear on the question of practicability.

Further, in some cases, the *inference* that an employer failed to provide 'so far as reasonably practicable' a safe and healthy workplace will arise from the identification of some method which would remove or mitigate a perceptible risk or hazard and, in such cases, that *inference* might well be further strengthened by the failure of an employer to call evidence as to matters, such as cost and suitability, which are peculiarly within his knowledge.

In conclusion, contrary to the assertion in the Stein Report, *Chugg v Pacific Dunlop* is in fact authority for the proposition that it is inappropriate to reverse the onus of proof, even where some matters, such as cost and suitability of ways of mitigating a hazard, lie particularly within the knowledge of the defendant.

Lastly, the High Court in *Chugg v Pacific Dunlop* examined the practical outcome of reversing the onus and noted that the obligation imposed by the duty was a general obligation.

Consequently, if the onus is on an informant, the issue is confined by the means which the informant claims were practicable in the circumstances. If the onus is on a defendant, the issue, if confined at all, is confined only by the 'means of making the place safer which the ingenuity of counsel can suggest in the course of cross-examination'.[5]

[4] (*Chugg v Pacific Dunlop* per Deane J at page 254)
[5] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at paragraph 24.

A reversal of the onus would entail the additional burden of anticipating and negating the practicability of every possible means of avoiding or mitigating a risk or accident that might be raised in the course of cross examination.

A defendant would have to be granted an adjournment every time the prosecutor raised a possible step the defendant could have taken. Such an adjournment being required to allow the defendant to go away and gather information as to why that particular step wasn't taken (such as, for example, evidence as to costs of taking that step or other issues affecting practicability).

NSWMC also notes that, in deciding whether a prosecution is warranted in the circumstances, the prosecutor will necessarily have to consider what, if any, reasonably practicable steps should have been taken. A fair prosecutor, bound as he or she would be by prosecutorial guidelines, will not commence a prosecution merely because an incident has occurred. A prosecution will be commenced if there has been some moral or legal culpability justifying a prosecution in the circumstances. There is no reason why the prosecutor should not be in a position to indicate what reasonably practicable steps it had in mind when it decided that a prosecution was warranted in the circumstances.

We acknowledge that the inclusion of 'reasonably practicable' in the offence as opposed to being a part of the defence, as recommended by the Stein Report, gives the element of reasonable practicability increased significance. However, the inclusion of 'reasonably practicable' as an element of the offence will not change the current situation in NSW in practice, if the defendant has the onus of proof in relation to it.

For all the above reasons, NSWMC strongly urges the Advisory Panel to disregard any suggestion that the Stein Report recommendation to reverse the onus of proof should be implemented in any model OHS legislation.

Practical issues with a split onus

As stated above, the Stein Report acknowledges that the onus of proof must remain on the prosecutor at all times in prosecutions of individuals concerned in the management of a corporation.

NSWMC notes that there are complex and diverse practical difficulties surrounding simultaneously requiring an employer defendant to prove on the balance of probabilities that all reasonably practicable measures were taken, and requiring the prosecution to prove beyond a reasonable doubt that an individual concerned in the management did not take reasonable care, as advocated by the Stein Report.

One likely problem is that employer and individual prosecutions will not be able to be heard together as an individual may be compelled to give evidence as to his or her knowledge and actions in order to attempt to satisfy the company's burden of proof, and may consequently disadvantage him or herself in the defence of his or her own prosecution.

Other problems arise from the fact that courts will have to deal with essentially the same issue/s in the context of different burdens of proof. This may cause a perception of bias in a context where it is of the utmost importance that justice be done and be seen to be done. To do otherwise may erode public confidence in the legislation.

To avoid the possibility of bias, real or perceived, different judges may have to hear company and individual prosecutions in relation to the same incident, thereby significantly increasing the costs of hearings, significantly reducing available court time and significantly reducing or delaying access to justice.

Last, but not least, in the case where the employer is an individual rather than a company, it creates the anomalous situation whereby there will be two different standards and burdens of proof relating to individuals, depending on whether the defendant is an employer or an individual concerned in the management of a corporation.

Conclusion

It is for all of the above reasons that NSWMC argues that the onus must be on the prosecutor to prove all elements of the offence beyond a reasonable doubt in relation to the prosecution of both employers and individuals concerned in the management. This would eliminate the significant administrative complexities and difficulties outlined above, and provide clarity in relation to the standard to which all matters are to be decided. Importantly, it would also ensure that the process remains just and fair.

3. THE ROLE OF CONTROL AS A MEANS OF DETERMINING LIABILITY

The Stein Report rejects the view that there should be a delineation of responsibilities in circumstances where multiple duty holders have overlapping duties. The Report states that the recommendation for control to be listed as a factor in determining what is reasonably practicable will make it clear that duty holders' obligations are limited by the extent to which they exercise control.

Our comment:

NSWMC believes that delineation of responsibilities must be included in the legislation to clarify circumstances where multiple duty holders have overlapping duties.

Supporting reasons:

The fact is that where there are multiple duty holders, there will often be a blurring of the lines and confusion as to who has control, where and when. A prime example of this is *WorkCover Authority of New South Wales (Inspector Mansell) v Ove Arup Pty Ltd* [2006] NSWIRComm 240. In that matter a joint venture was specifically formed to tender for work from the State Rail Authority of New South Wales (**SRA**). Parties to the joint venture agreed that one party would provide project management and engineering expertise (Ove Arup), another party would provide architectural design management expertise and yet another party would provide construction management expertise. During the course of the work, a gas supply line, previously cut and capped by an employee of AGL Gas Networks Ltd, exploded. During the hearing it became obvious that the parties were confused as to who had responsibility for health and safety at various stages of the project. Ove Arup argued that contractually it was only responsible for coordinating joint venture activities relating to personnel, costs, allocation of resources and whether the contracts were running to schedule. Ove Arup's defence was that it did not have control of the work involving the gas supply line and that its liability was limited to its area of expertise. The Court rejected Ove Arup's defence and held that all joint venture parties (including Ove Arup) were responsible for health and safety in regards to all parts of the work including the gas pipeline.

The case illustrates that:

- Confusion regarding who has control can only decrease health and safety (as any one party may not take the requisite precautions on the assumption that another party will be taking care of the issue)

- Allocating health and safety responsibilities outside a party's area of expertise will only result in that party not appreciating that something may be a risk to health and safety.

Conclusion

NSWMC strongly believes health and safety will be enhanced if the model OHS legislation clearly delineates responsibilities in circumstances where multiple duty holders have overlapping duties. More importantly, NSWMC believes health and safety would be enhanced if the entity with intimate knowledge of the part of the work is made responsible for that part of the work.

The legislation should not be about maximising the entities which can be fined in order to gain a financial windfall. It should be about ensuring that the parties clearly understand what is required of them so that the exposure to risk can be minimised. In doing so, the legislation must ensure it does not set a defendant up to fail by imposing a duty the defendant does not have the requisite knowledge or expertise to meet. Confusion amongst duty holders can only result in a negative health and safety outcome.

4. THE ROLE OF COMPLIANCE ADVICE

The Stein Report recommends that the NSW OHS Act be amended to insert new provisions allowing for compliance advice by WorkCover inspectors. However, the Stein Report recommends such compliance advice should not be admissible in any court proceedings.

The Stein Report also recommends new provisions which permit WorkCover to issue guidelines. However, the Stein Report also recommends that these guidelines should not be admissible in evidence in any proceedings for an offence against the legislation or the Regulations.

Our comment:

NSWMC agrees that provisions should be included in any model OHS legislation allowing the regulator to issue guidelines and advice, but also is of the clear view that these guidelines and advice must be admissible in court.

Supporting reasons:

The recommendation that such compliance advice or guidelines not be admissible in any proceedings is hard to comprehend. The Stein Report states that compliance advice 'is a tool to help duty holders understand how to implement their obligations'.[6] Guidelines serve the same purpose. In the circumstances, it is hard to see why such advice and guidelines cannot be taken into consideration by a court in determining whether the defendant's actions were reasonable.

By not allowing the advice of inspectors and compliance or non-compliance with that advice to be admitted as evidence, or any evidence of guidelines issued to be equally received into evidence, the court will effectively have been kept in the dark about a significant part of the events leading to the particular incident and, in that sense, misled as to the circumstances surrounding the incident itself. This will effectively result in a miscarriage of justice as the court will have reached a decision without having all of the relevant facts before it.

The Stein Report also makes recommendations regarding codes of practice. At present the NSW OHS Act provides for industry codes of practice. The Act provides that the purpose of these codes of practice is to provide practical guidance to employers and others who have duties under the legislation.

Under the present NSW OHS Act, relevant codes may be admitted into proceedings in respect of any matter which the prosecution must prove and a person's failure to follow a code is evidence of the matter to be established.

In the circumstances, it is only fair that where a defendant has followed a code of practice, it be made clear in the legislation that the defendant is entitled to have the court consider this information also.

Conclusion

NSWMC strongly believes that the prosecution should be able to adduce evidence where advice was given but not complied with and the defendant should be able to adduce evidence where advice was given and complied with. To do otherwise may lead to a miscarriage of justice.

Further, compliance with an inspector's advice should be a defence to a prosecution pursuant to the model OHS legislation.

The same logic applies to any guidelines and codes of practice. The model OHS legislation should not permit a court to be misled by a failure to be able to present all relevant matters for its consideration.

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[6] Stein Report, paragraph 10.11.

5. POWERS OF UNION REPRESENTATIVES

Power to prosecute

The Stein Report recommends that unions should retain the power to prosecute currently afforded to them under the NSW OHS Act.

Our comment:

NSWMC believes that unions or any other sectional interest group must not be able to commence prosecutions. Unions, by their very nature, represent the interests of one group of employees, not the entire community. Conversely, prosecutors must represent the interests of the entire community, not private or factional interests.

Supporting reasons:

Health and safety prosecutions involve criminal charges which may ultimately result in criminal convictions. The consequences for all participants are by no means trivial and range from the social stigma of a criminal conviction to the real risk of imprisonment.

It is imperative that the public retain its confidence that the judicial system does not expose duty holders to unwarranted prosecutions, instigated by third parties which are not accountable to the public for the proper exercise of the prosecutorial power.

Any bias or any perception of bias must be eliminated.

A prosecutor plays an important role in the public's confidence in the judicial system. A prosecutor is an administrator of justice whose principal role is to assist the court to arrive at the truth. They must be independent and not representative of sectional or group interests.

The possibility that a prosecution may be perceived as arising out of some ulterior motive must be negated. This is difficult to do when the prosecutor is a third party, representing factional interests, who will receive a moiety if the prosecution is successful.

Unlike the moiety awarded to a regulator, the moiety to unions does not go into public revenue coffers to benefit the entire community.

Further, union prosecutors are not subjected to any rules or regulations governing their behaviour. State prosecutors have compliance and enforcement policies and model litigant guidelines which impose a high standard of integrity in prosecutorial conduct. These standards do not apply to unions.

On a more practical level, a regulator will have available to it a number of enforcement options. Ideally, a regulator will exercise its discretion in deciding which enforcement option is appropriate in the circumstances of the particular incident at hand.

There is a real risk that union prosecutions will undermine these enforcement options as unions may commence a prosecution where the regulator has already used or intended to use enforcement options other than prosecution.

Conclusion

Allowing unions the power to prosecute has the potential to undermine public confidence in the system and/or to undermine alternative enforcement options.

Power to enter premises to discuss OHS matters

The Stein Report recommends the introduction of a power for authorised representatives of an industrial organisation of employees to enter workplaces to discuss occupational health and safety matters.

Our comment:

NSWMC strongly believes that inspectors should be the only persons granted a right of entry, as they have the responsibility for administering OHS legislation. Any third party, including authorised representatives of an industrial organisation of employees, should not be able to access a site without the approval of the site 'owner'/operator.

If such persons are granted a right of entry then this right of entry should only be exercisable if such persons provide:

- Written notice of their intention to enter premises
- Written reasons for the entry
- In writing, a description of the particular risk they wish to address and the reasons why such risk cannot be adequately addressed by a health and safety representatives (HSR) or a health and safety committees (HSC) at that worksite.

Such a process would guarantee that the power to enter premises is not abused whilst, at the same time, also ensuring that no misunderstandings can arise between employers and authorised employee representatives.

Supporting reasons:

Under the present NSW OHS Act, if an authorised employee representative forms the view that there is imminent danger, it is open to them to contact a certified inspector. This inspector will then have the right to enter the premises based on a reasonable belief that persons are being placed at risk of injury.

In light of the extensive and detailed consultation provisions in the NSW OHS Act, there is no basis for allowing an authorised representative of an industrial organisation of employees to enter a worksite to discuss matters pertaining to health and safety.

With regard to the model OHS legislation, as submitted previously, NSWMC believes the model OHS legislation should include a requirement for consultation. It should provide for HSRs and HSCs with well defined roles. If this submission is accepted, there will equally be no need for the model OHS legislation to allow authorised representatives of an industrial organisation to enter workplaces.

6. THE RIGHT TO SILENCE

The Stein Report recommends that an inspector should have the power to compel an interviewee to answer questions.

Our comment:

NSWMC believes that the model OHS legislation must not infringe the right to silence by requiring persons to give oral evidence or answer questions.

NSWMC made extensive submissions on this issue to the Stein Inquiry. The issues raised in those submissions have not been mentioned in the Stein Report. Consequently, NSWMC considers it appropriate to repeat them here.

Supporting reasons:

The right to silence of an individual facing criminal prosecution, is guaranteed by Article 14(3)(g) of the ICCPR. It is generally recognised that the right to silence provides a safeguard against potential miscarriages of justice.

NSWMC notes that in the majority of circumstances our criminal justice system recognises, as one of its fundamental pillars, the right of an individual not to speak to the police if they so wish. It is well accepted that the rule has protected innocent persons from making ill considered statements in

response to questioning. The rule has also protected persons from giving panicked, factually incorrect answers in response to aggressive questioning.

Pursuant to the NSW OHS Act, an accused person cannot refuse to answer questions put by an inspector, even if the answers may tend to incriminate them. In circumstances where an accused person is not forewarned as to the questions he or she will be asked, is forced to reply to the questions at the time of the interview, and is not given a proper opportunity to think about their answers in a stress-free environment, it is understandable that the accused person will feel forced into making potentially ill considered or factually incorrect statements.

If the individual claims privilege at the time of providing the answers, a statement made in these circumstances is potentially not admissible at the hearing of any resulting criminal charge against the individual. However, the statement will be taken into consideration by a legal officer in determining whether to prosecute the person in the first place. Also, the statement may be used against other persons charged in relation to the same incident.

Conclusion

All persons must be provided with an opportunity to consider questions put by inspectors and to reserve or waive their right to silence. The right to silence should not be abrogated in legislation, unless such abrogation is justified by, and in proportion to, an object in the public interest.

NSWMC does not believe that the public interest in bringing to justice an individual who has breached health and safety law is more important, or greater than, the public interest in bringing a murderer or child molester to justice. Consequently, NSWMC believes it does not make sense to preserve the right to silence for persons accused of murder or child molestation, yet abrogate the right for persons accused of having committed a breach of OHS legislation. NSWMC suggests that the preservation of the right with regard to other criminal matters is a recognition of the fact that to do otherwise would be to found a prosecution and possible conviction on the inability of a person to explain themselves under pressure. The abrogation of the right to silence is not a method of obtaining reliable information.

NSWMC also believes that, given this important reason for its existence, the right to silence should only be abrogated if the information that an individual is required to give could not reasonably be obtained by any other lawful means. There is no reason why the information an inspector seeks to obtain by questioning a director or manager cannot be obtained by other means. It is not sufficient justification for abrogation of the right to silence to state that an inspector will be *inconvenienced* if a person's right to silence is invoked.

For all of the above reasons, the right to silence must be recognised in the model OHS legislation.

7. THE PROPOSAL TO TAPE INTERVIEWS WITHOUT THE CONSENT OF THE INTERVIEWEE

The Stein Report recommends the introduction of powers allowing compulsory taping of interviews.

Our comment:

NSWMC believes that there should be no compulsory tape recording of interviews. Compulsory tape recording, in combination with the abolition of the right to silence in the current NSW OHS Act, contravenes principles of fair process.

NSWMC made extensive submissions on this issue to the Stein Inquiry. The issues raised in those submissions have not been mentioned in the Stein Report. Consequently, NSWMC considers it appropriate to repeat them here.

Supporting reasons:

There must be no compulsory tape recording of interviews regardless of whether the tape recording occurs at formal interviews, at the inspector's office, or at informal interviews at an incident site.

The NSW OHS Act abolishes the right to silence of individuals. Consequently, inspectors can compel defendants to answer questions. Such persons do not have the right to refuse to answer these questions, even if they feel that by giving the answers, they may potentially incriminate themselves.

As already stated with respect to the right to silence, it is not difficult to see how a defendant who is:

- not forewarned as to the questions they will be asked;
- forced to reply to the questions at the time of the interview;
- not given a proper opportunity to think about their answers in a stress-free environment; and
- knowing that they are facing criminal prosecution,

can easily be confused, albeit unintentionally, into making ill considered or factually incorrect statements.

Neither defendants nor witnesses are given the benefit of seeing the questions prior to these being asked by the inspector. Both witnesses and defendants can easily be intimidated by the interview process. Such a process can create an atmosphere of oppression, panic and confusion that is likely to render the answers given unreliable.

If answers are tape recorded, a witness will not have the opportunity of checking those answers and, if need be, clarifying what he or she said so that the answers more adequately reflect the truth of the matter rather than the state of confusion and panic of the witness at the time of giving the answers.

Throughout the history of our legal system we have recognised that an admission or information provided, in circumstances where it is unlikely to be accurate, should not be accepted, as it will not advance the interests of justice to do so. Consequently, by allowing mandatory tape recording, Parliament will be sanctioning prosecutions, and subsequent convictions, which have the real potential of being based not on the culpability of the defendant but rather on the fact that persons interviewed were not able to adequately explain themselves under pressure at the time of the interview and were not given the opportunity to review their responses with a clear head, before the responses are received.

It is noted that the police in NSW have a power to tape record the questions and answers of individuals. However, it should also be noted that this power can only be exercised when the individual *agrees* to take part in such an interview. In such a *voluntary* interview the individual is not under the same pressure as they would be were they involved in a compelled, electronically recorded interview, and the individual is therefore less likely to be overborne by confusion and pressure. In such a state of mind, the interviewee will be better placed to adequately explain themselves when answering questions. It is further noted that police do not tape record witness statements.

Conclusion

NSWMC strongly urges the Advisory Panel to refuse any suggestion that the model OHS legislation should provide for the compulsory tape recording of mandatory interviews.

8. THE APPROPRIATE RIGHT OF APPEAL

The Stein Report recommends that there be an avenue of appeal to the Court of Criminal Appeal from the Full Bench of the Industrial Court for dissatisfied defendants. The Stein Report recommends that this right of appeal be limited to circumstances where a miscarriage of justice has occurred.

Our comment:

There must be a right of appeal to the Court of Criminal Appeal and, with special leave, to the High Court of Australia. This right of appeal must be the same right of appeal afforded to all other defendants accused of a crime.

Supporting reasons:

The right of appeal should be in alignment with other criminal matters. That is, a right of appeal to the Court of Criminal Appeal and a right of appeal, with special leave, to the High Court of Australia.

Occupational health and safety offences are criminal offences. There is no reason why defendants should not be granted the same rights as defendants charged with any other criminal offence. The right of appeal must be a general right, and not a right qualified by circumstances where the defendant must prove a 'miscarriage of justice'.

Conclusion

There is a real risk of undermining community confidence in the administration of justice where the legislation specifically impedes overview by a higher court, particularly where such overview is thought desirable and even necessary for other criminal offences.

The impediment may have particularly grave consequences in the case of individual defendants who should be entitled to the same rights and privileges, preserved in criminal procedure, which apply to all criminal proceedings.

Further, the same public interest considerations and oversight that apply to appeals by the prosecution in the general criminal law, should also apply in OHS legislation. By this we mean that the current situation in NSW, where the prosecution has a right of appeal on acquittal, should be specifically rejected in any model OHS legislation.

10. THE ROLE OF 'REASONABLE EXCUSE' AS A DEFENCE

The Stein Report recommends that a number of current offences under the NSW OHS Act not be qualified by a defence of reasonable excuse. The offences are the following:

- Tampering or attempting to tamper with a thing to which an inspector has restricted access, without an inspector's approval (section 71(3) of the NSW OHS Act)
- Failing to notify WorkCover of an incident (section 86 of the NSW OHS Act)
- Destroying, damaging or removing a notice required to be exhibited (section 102 of the NSW OHS Act)
- Obstructing, hindering or impeding an authorised official in the exercise of their functions or intimidating or threatening or attempting to intimidate any authorised official in the exercise of their function (section 136 of the NSW OHS Act)

Our comment:

No substantive reasons are provided in the Stein Report justifying the recommendations.

With regard to the section 71(3) offence, the Stein Report notes that 'reasonable excuse' appears in the wording of section 71(6). According to the Stein Report, this appears to indicate that at the time the provisions were enacted, the offence in section 71(3) was considered more serious and therefore not subject to the qualification of reasonable excuse.

With regard to the section 86 offence, despite finding that there may be some legitimate circumstances where a person has a reason for failing to notify WorkCover of an incident, the Stein Report concludes that, as the duty is such an important duty, a failure to notify should remain an absolute duty not qualified by the defence of reasonable excuse.

With regard to the offence of destroying, damaging or removing a notice required to be exhibited (section 102 of the NSW OHS Act), the Stein Report cites the seriousness of the offence as a reason to disallow a defence of reasonable excuse.

With regard to the offence of obstructing, hindering or impeding an authorised official in the exercise of their functions or intimidate or threaten or attempt to intimidate any authorised official in the exercise of their function (section 136), the Stein Report acknowledges that it may be possible to commit an offence under this section where there is some misunderstanding regarding the person's authority. In spite of this the Stein Report concludes that no reasonable excuse defence should apply.

NSWMC strongly disagrees with the conclusions reached in the Stein Report and urges the Advisory Panel to disregard the recommendations in any consideration of appropriate model OHS legislation.

Supporting reasons:

A just and fair legislature must not allow the consequences of committing offences so serious to be visited on a person who had no intention of doing anything wrong and no knowledge that he or she was doing anything in fact wrong.

In *He Kaw Teh*, the Court noted that there is no reason for penalising a person who did not intend his or her actions, and to do so would be tantamount to imposing a liability merely in order to find a luckless victim. The Court noted the futility of punishing a person who did not intend their actions. The Court also noted that, as a matter of fairness, an accused should not be punished where there was in fact a reasonable excuse for the action, where such reasonable excuse may not necessarily be apparent on the face of the action.

Conclusion

For these reasons, NSWMC strongly believes that 'reasonable excuse' should provide a defence to offences such as these, if they are to be included in any model OHS legislation.

Schedule 1 – Statistics of Occupational Incidents and Fatalities across Australian Jurisdictions

The NSW Government, at page five of their submission in relation to the National Review into Model Occupational Health and Safety Laws, asserts the following:

> The NSW Government has a strong record of protecting workers and promoting workplace safety.

Occupational incident and fatality rates in NSW are by no means exceptional, and are at best average, in comparison with incident and fatality rates in all Australian states and territories. See Tables 1 to 3 below in relation to Australia generally and Tables 4 to 5 in relation to the mining industry, in this regard. This is the case despite the absolute nature of the general duties, the expansive and wide-ranging powers of inspectors, and the abrogation of the right to silence.

Table 1[7]

State or territory	Working for income fatalities by state/territory - 2004-2005
New South Wales	77
Queensland	58
Victoria	54
Western Australia	30
South Australia	13
Tasmania	9
Northern Territory	6
Australian Capital Territory	2
Australia – Total	249

[7] Australian Safety and Compensation Council - Work-Related Traumatic Injury Fatalities, Australia 2004-05, April 2008, page 9.

Table 2[8]

State or territory	Frequency rates of serious* injury and disease claims by jurisdiction - 2005-2006 (claims per million hours worked)
Tasmania	11.5
South Australia	11.2
Queensland	11.0
New South Wales	10.1
Australian Capital Territory	9.5
Northern Territory	8.8
Western Australia	8.0
Victoria	7.9

* includes all accepted workers' compensation claims involving temporary incapacity of one or more weeks plus all claims for fatality and permanent incapacity.

Table 3[9]

State or territory	Incident rate of bystander fatalities by state/territory - 2004-2005 (deaths per 100,000 population)
Tasmania	1.2
South Australia	0.5
New South Wales	0.4
Victoria	0.2
Western Australia	0.2
Queensland	0.2
Australian Capital Territory	0.0
Northern Territory	0.0
Australia – Total	0.2

[8] Workplace Relations Ministers Council - Comparative Performance Monitoring Report - February 2008 (Ninth Report), page 6.
[9] Australian Safety and Compensation Council - Work-Related Traumatic Injury Fatalities, Australia 2004-05, April 2008 at page 16.

Table 4[10]

State or territory	Lost time injury frequency rate (number of lost time injuries per million hours worked) by state 2005-2006 – Mining industry only
New South Wales	12
Tasmania	7
Victoria	6
South Australia	5
Western Australia	4
Queensland	4
Northern Territory	3
Australia – Total	5

Table 5[11]

State or territory	Fatal injury frequency rate by State - average from 1996-2006 – Mining industry only
New South Wales	0.12
Tasmania	0.11
South Australia	0.08
Western Australia	0.06
Queensland	0.06
Victoria	0.03
Northern Territory	0.02
Australia – Total	0.07

[10] Minerals Council of Australia – Safety Performance Report of the Australian Minerals Industry – 2005-2006, page 26.
[11] Ibid at page 13.