Making Work Safe

Australia Deserves the Right Approach: A Business Call for Safety

'… more safety awareness in industry and commerce can only be developed by an accumulation of influences and pressures operating at many levels – that of the boardroom, the senior manager, the supervisor, the trade unions, the worker on the shop floor – and operating in a variety of ways through education, training, through the provision of better information and advice, through practical, co-operative organisation and action, through legal sanctions where necessary, through research, publicity and so on.

There is no single panacea and there are no simple short cuts. Progress in this field is rarely dramatic. But we believe that by patient and unremitting effort it is possible to raise the status, so to speak, of the subject of safety and health at work in the minds of individuals.

Source: The 'Robens Report'; *Safety and Health at Work – Report of the Committee 1970–72 under the Chairmanship of Lord Robens*, 1972, p. 2.

This statement forms the basis of the internationally accepted principles of OHS and is one to which Australian business subscribes.

'I personally surveyed the post inundation of the flooded panel, from the point of the outburst to the water's farthest extent. I measured the areas where four of my fellow mine workers were killed. I trod on the graves of four innocent men, sons, brothers and fathers, and in my mind and heart, felt the impact of the tragedy.

In every case, where I, as part of an investigative team, have been exposed to such a tragedy or accident, foremost in my mind, is what went wrong, what was the cause and how can we prevent a reoccurrence. And then, if blame and prosecution is warranted, so be it.'

Source: Justin Smith, an Australian mine surveyor and manager, 3 November 2006; accessed from the Australian Institute of Mine Surveyors Web Forum.

'If the prosecution of offences is undertaken in an arbitrary, capricious and irresponsible fashion, the laws themselves are brought into disrepute for reasons that are obvious.

I would, advisedly, characterise what has happened in these proceedings as constituting more than prosecution, and amounting to persecution of the defendants … I regard the conduct of the prosecutor as being, in all the circumstances, unacceptable and as having compromised the processes of this Court.'

Justice Marks in an OHS prosecution appeal judgment, 2006. Newcastle Wallsend Coal Company Pty Limited and Ors v. Inspector McMartin [2006] NSWIRComm 339 at 755 to 758.

Justin Smith typifies the feelings of business people toward work safety. Work safety is deeply personal and real. Justice Marks speaks for himself, but his words echo the grave concerns of the Australian business community on work safety laws and processes. This paper explores those business concerns.

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Summary

Australia has a work safety problem:

- The design and administration of work safety laws is creating OHS confusion because of inconsistency and conflict within and between laws and administration.
- The focused OHS business cultures and practices required to achieve good OHS outcomes are being frustrated by the confused legal and administrative environment.
- Australia is not seeing the level of improvement in OHS outcomes that should and can be achieved.

Business wants this situation fixed. Business aspires to zero deaths and injuries in workplaces.

The solutions are available:

- All OHS laws and the way in which they are administered should hold everyone involved in work responsible and liable for what they reasonably and practically control.

These OHS principles, known as the Robens principles (see Appendix 1) and applied the world over, should be applied consistently in all Australian jurisdictions.

Within such a framework:

- The most positive OHS cultures and practices have the best chance of flourishing.

And consequently:

- Deaths and injuries at work have the best chance of being eliminated.

Overview of an OHS problem

Up until the later part of the twentieth century, it could legitimately be said that the approach to health and safety in the workplace was often excessively flippant. This was identified in official inquiries – for example, the Robens Inquiry in the UK in the 1970s. (Workplace injuries and deaths were far too often accepted as a ‘consequence of doing business’.

This attitude has, thankfully, changed. Now the elimination of workplace injuries and deaths is taken as a ‘whole-of-community’ objective requiring government leadership and full community participation.

At the core of community OHS participation is business. The practical reality of work is that the people who own, manage, influence, are employed in, engaged with, or supply to business, are the people who most directly affect OHS outcomes.

The contention of this paper is that many Australian government OHS laws and administrative practices hinder, rather than assist, business to target and achieve practical, real and continuing improvements in work safety outcomes.

Further, much of the debate in Australia over the design and administration of OHS laws seeks to ‘deal out’ the business view. There is a view in some quarters that businesses structured as corporations cannot be trusted because the people who own and/or operate them act only from a profit motive without the normal care and concern that marks human relationships more generally. This is a dangerously narrow view which ignores the fact that businesses are comprised of people who share human values, including the need to protect one another from harm. In addition, without the active participation of all businesses, including corporations, in policy design and implementation, OHS laws lack the vital, practical elements so intrinsic to high-quality OHS results.

Moreover, in the context of work safety, ‘business’ does not simply mean commercial activity undertaken by corporations. People work in charitable organisations, churches, unions, the public sector, partnerships, trusts and many other group activities. Occupational health and safety is important in all types of organisations. The business perspective on OHS presented in this paper aims to embrace all forms of work organisation because the issues are common and vital to all.

The fact is that business is the most important voice in the OHS debate because OHS outcomes are so dependent upon business behaviour taken in its broadest context.

Barriers to maximising health and safety

The problems with OHS in Australia have many manifestations, but can be categorised as follows:

- OHS legislation across Australia is unnecessarily complex and confusing. Different jurisdictions apply widely different, even conflicting, levels of responsibilities.
- OHS regulations often lack clarity and frequently conflict with the legislation to which they are subordinate.
- The administration of OHS laws and regulations by statutory authorities is frequently inconsistent, confused and contradictory – both within and between jurisdictions.

Yet, there are clear OHS principles, accepted internationally and to which Australia is a signatory, which should guide all design and administration of Australian OHS laws (see Appendix 1).

The principles are captured in the following simple formulation:

- Everyone who is involved in work is held responsible for what they ‘practically and reasonably control’.

People in business support, defend and want strong adherence to these OHS principles. In legislation, these are identified under ‘duties of care’ obligations. They are known internationally as the ‘Robens’ principles. (See Appendix 3 for an explanation of duties of care.)

These principles are, however, repeatedly breached within many Australian OHS laws and regulations and their administration. How and where these are breached will be detailed below, but the practical appearance of the breaches produces the following general observations.

There is a lack of national consistency

- Taken collectively, the policies of the various Australian jurisdictions are frequently inconsistent, lack clarity and focus, and are impractical. In particular, there is no consistent set of core OHS principles agreed or applied across jurisdictions.
- Regulatory practice differs between jurisdictions and within inspectorates.
- Different jurisdictions produce quite dissimilar outcomes for the same work safety incident.
- Different and complex OHS laws in different states create distractions and uncertainty, and hamper the capacity of people in business to maximise work safety.
- Substantial differences occur across Australia in terms of onus of proof, defence and prosecution.
- Customary processes and safeguards of the criminal justice system are not applied consistently across jurisdictions to all people subject to prosecution.

Lack of clarity in relation to ‘duty of care’

- There is no consistent legal definition of ‘duty of care’ in OHS legislation, leading to confusion about what are the legal obligations. That is to say, OHS duty of care obligations are not always based on what people reasonably and practically control in the workplace as required under international obligations.

- OHS duty of care obligations are not applied consistently to all those involved in workplaces.

Prosecution of corporations and individuals

- In some jurisdictions, individuals are denied normal criminal justice rights, – including the presumption of innocence, access to normal criminal courts, the right to a trial by jury and the full and normal rights of appeal.
- Individuals can be convicted for safety incidents outside their control.
- Criminal prosecution processes are not always seen as fair, impartial and untainted by politics and external interference.
- Responsibilities and liabilities do not apply equally to all forms of organisation.
- Presumption of guilt applies to specific classes of persons, and requires such persons to disprove their guilt.
- The type of legal ownership of a business can determine criminality.
- Fines and sanctions are dependent on the legal status of an individual.
- Aggressive prosecutions can focus on retribution for OHS incidents, regardless of fault.
- Prosecution of multiple and concurrent duty holders for a single incident occurs, even where some parties have not had control.

Perception that corporate profits come before safety

- Underpinning the approach of some jurisdictions to OHS policies and practices is an assumption that corporations, and the people who organise and run them, are focused solely on making profit and are devoid of the normal human values of care and concern for others. Such an assumption leads to laws which mete out harsh treatment to managers – irrespective of the facts – in order to achieve prosecutions. This is done in the belief that managers will not focus on work safety without such harsh treatment. It assumes that individuals who in normal life operate within a shared ethical framework are stripped of their humanity and moral values when assuming the role of a manager.

Role and quality of regulators

Like business managers, regulators and inspectors often operate in a confused and inconsistent legislative environment. This:

- Inhibits the capacity of inspectors to mentor, coach, provide advice and share information with business.
- Limits the capacity of inspectorates to influence cultural and behavioural change.
- Deflects attention from achieving practical improvements to OHS systems.

Influence of unions

- Unions and other non-government bodies assume that they have equivalent authority to government officials.
- Union ‘bounty hunter’ power to prosecute and receive a proportion of the fines imposed for breaches of OHS law distorts justice
- Unions often seek to (and sometimes do) achieve high measures of control and authority over OHS management processes inside businesses without the associated responsibility and liability.
- The right of unions to enter workplaces is often used as a tool to pursue industrial objectives rather than a mechanism to improve safety.

- There is increasing distrust in the wider community when justice is seen to be denied in the prosecutorial process.

Lack of shared information

- There is insufficient sharing of information on safety matters and safety incidents within and between regulators, industries and businesses, and lessons that could have been learned have been lost.

Practical implications: The dangers of being a plumber

What are the practical implications of this situation? A real-life example of an unsatisfactory OHS conviction demonstrates the concerns.

Somewhere in Sydney is a plumber. He is a criminal. But he is a special sort of criminal because he was found guilty under New South Wales' occupational health and safety laws. He was denied trial before a jury, is prevented from exercising the full and normal rights of appeal and was denied the presumption of innocence. He is special because he has been denied all the customary criminal justice processes expected in a civilised society.

He was found to be a criminal following the scalding of an elderly woman at a nursing home. While she was taking a bath, a temperature control valve in a hot water system failed. The plumber who maintained the valve was found guilty and fined. OHS laws involve criminal convictions. Yet the court accepted that the plumber was particularly diligent in his maintenance regime, being fully aware of the risk that attached to failure. The plumber had strictly followed the manufacturer's maintenance guidelines. The scalding occurred because of a malfunction in the internal workings of the valve that could have only been found beforehand by microscopic inspection of the internal, sealed parts of the valve.[1]

Was this plumber 'at fault'? On the evidence, he seems completely innocent. Yet he was convicted.

What are the behavioural consequences of this conviction? The plumber was convicted of a crime because he worked in a jurisdiction (New South Wales) where OHS law is directed towards achieving the conviction of managers/owners regardless of fault. This is done in order to instil fear into managers to 'ensure' safety.

Does this conviction produce an improved safety result? As this paper argues, the answer is: 'no'. Although a conviction was secured, a message has now been sent to all NSW plumbers that convictions will be imposed regardless of how diligently a plumber conducts his or her work.

As a result:

- All NSW plumbers aware of this case need to be wary of accepting any work maintaining hot water systems in NSW nursing homes.
- If they do accept such work, they need to increase the charge rate for doing so dramatically because of the huge and unpredictable personal risk they now carry.
- Plumbers who undertake such maintenance work need to create liability avoidance procedures because normal justice has been suspended in NSW. Such procedures could, for example, involve written declarations that maintenance is not guaranteed and that nursing home owners must employ expert inspectors to recheck the plumber's work.
- Plumbers could insist on new water valves at every maintenance.

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[1] Institute of Public Affairs, *The Politics of a Tragedy: The Gretley Mine Disaster and the Dangerous State of Work Safety Laws in New South Wales*, October 2006.

- Plumbers perhaps need to be cautious about sharing information. For example, if a plumber discovers a manufacturing fault in a valve while inspecting it, he or she may decide to keep quiet about it. Reporting the fault could raise the possibility of being implicated in some sort of investigation, blame, prosecution and conviction.

These outcomes are the opposite of those targeted by the regulators. When laws intentionally suspend the principles of natural justice and remove common sense from consideration, fear of injustice is created. This sort of fear damages positive OHS cultures and behaviour by:

- Causing skilled people to abandon the area of professional activity, thereby artificially creating a skills shortage.
- Inducing a culture where considerable expertise is devoted to liability avoidance. Typically this includes OHS cultures where 'paperwork trails' and legal form assume higher priority than practical outcomes.

The outcome is a shift of focus away from the practical solutions needed to resolve OHS problems.

Had this incident occurred in Victoria, however, an investigation would have followed and it is most likely that the plumber would have been found blameless, not prosecuted and certainly not convicted. He did everything a reasonable person could do over the working arrangements he controlled. The failure of the valve was totally outside of his control. He could not possibly have predicted on any reasonable grounds that the valve would fail.

In the Victorian OHS legislative environment, there is a far greater acceptance that if people do everything within their control to achieve quality OHS outcomes, then if something beyond their control does go wrong, they will not be held accountable for something they did not do. If there is a fear, it is fear of doing the wrong thing, not a fear of doing the right thing.

In Victoria, people exercising OHS responsibility can focus on good OHS practices, comfortable in the knowledge that they will be judged on what is practical, reasonable and common sense. They can trust the justice of the system.

Further, what the example of the plumber's conviction points to is a lack of harmonisation of OHS laws, regulations and enforcement strategies across the country. This is a real problem because it creates business confusion – confusion that is counterproductive to improving OHS outcomes.

The problem of lack of harmonisation: Not the whole problem, but part of the problem

Achieving harmonisation of OHS laws across Australia is important for several reasons.

There are economic benefits. For example, with consistent laws across the nation, business is more certain of what needs to be done in relation to OHS law. Where differences between states are eliminated or minimised, this creates an environment for more efficient business which creates large savings. This has particular appeal for businesses that operate nationally or across state borders. It is as important to small business as it is big business where they operate across state borders. OHS harmonisation creates better business with spin-off economic benefits for all Australians.

But economic benefits are of minor importance when compared to the improved work safety benefits. With appropriate harmonisation of OHS laws, business can become vastly more efficient at focusing on the practical things that must be done to make work safe. When businesses have to comply with different OHS laws in different states, this creates distractions and plants seeds of doubt about correct safety procedures. This increases the risk of unsafe practices. Often the difference between a safe and an unsafe practice or situation can be seemingly minor behaviour or issues. Improving safety is frequently a process of paying attention to many small details on a consistent and persistent basis. Anything that assists this attention to safety detail must help safety outcomes. Harmonisation would definitely help.

Further, it has become clear that lack of harmonisation is causing differences between the states in the practical advice they produce for business on safety procedures. Governments play an important role in bringing together scientific, engineering and managerial information to find the best technical information that can assist safety. This forms the basis of government instruction and advice to business on safety.

Where this advice differs between the states, even marginally, mixed signals are sent to business which creates confusion. The housing construction sector provides an illustrative example.

Housing construction in Victoria

There exists an OHS National Standard for Construction. It applies both to commercial and housing construction. It is essentially a statement of principles and targets that seek to reduce deaths and injuries in construction. As a national 'high-order' document, it is not prescriptive about what should occur in construction, but lays out agreed processes and principles. For example, it stipulates that construction businesses should consult with employees and sub-contractors on OHS matters, that there must be formal processes for identifying hazards and minimising them and that if hazards cannot be eliminated, to minimise risk, and that workers coming onto sites must go through safety induction processes.

Each state is supposed to adopt the standard and turn the principles into practical processes. Queensland and NSW have done so, but because both of these states have OHS Acts that apply absolute obligations to 'ensure' safety, their approach is one of high prescription for those processes. That is, they have created state-based standards which require detailed forms to be filled out at every level of construction work. Critics say that the system has emphasised a paper trail where, particularly in housing construction, a 'tick the box' approach now prevails. In other words, workers come on to sites, have standard forms, tick the boxes and do their work as they would have in the past. Approaches to safety have not necessarily improved, but the paperwork gives an appearance that improved safety is in place.

In the name of national 'harmonisation', Victoria is planning to replicate the New South Wales and Queensland standards. The housing construction sector in Victoria is highly critical of this approach. They say that the 'tick the box' approach does not improve safety but rather makes a mockery of safety procedures. Further, the Victorian *Occupational Health and Safety Act 2004* is constructed differently from the NSW and Queensland Acts, as it is based upon the Robens 'practical and reasonable control' model. Its regulations, therefore, should be consistent with the Robens principles as well. As previously outlined, the focus should be on making everyone at every level working in the industry responsible for their and other persons' safety and for implementing safe work systems. The industry call is for a more practical approach, in support of which they cite an example.

Some years ago, Victoria developed a Code of Practice for the prevention of falls in the housing construction industry. The code largely consisted of numerous pictures showing different housing construction situations involving working at different heights. The pictures showed practices that should be followed – for example, use of harnesses, etc. The code is used widely in the industry and everyone is aware of the need for compliance. People with poor literacy skills can understand both the issues and the work processes, and know that they must comply. The code is simple, accessible to everyone who works in the industry and, above all, highly practical. Victorian industry says it does not want the importation of bureaucratic appearances of 'doing something about safety', but rather want practical things done that will change attitudes and work practices in real ways that make the industry genuinely safer.[2]

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[2] For more information, see Master Builders Association, 'Submission of the Proposed Occupational Health and Safety Regulations 2007', February 2007.

What business needs and wants is harmonisation based on the Robens principles which will improve the quality of the practical information, advice and instructions that government can supply to business on safety issues. This will improve work safety.

The ‘business doesn’t care’ model

It is clear that harmonisation must be in the direction that most encourages safer work. This is where the important OHS choices need to be made. But a key concern to business is a policy push from some quarters which hold the view that ‘business doesn’t care’ about safety.

This model of OHS policy has a pervasive influence in some jurisdictions and impacts the culture of many of the public authorities charged with enforcing OHS laws.

The model takes a very narrow view of what business is. It focuses on one form of business: the corporation. It ignores other forms of business. It says that the legal duty of managers, executives and directors in corporations is only to deliver profit to shareholders. It assumes that the duty to make profit is so compelling in corporations that it blinds managers, executives and directors to their emotions, compassion, and sense of justice and responsibility to other humans. It suggests that the corporation dehumanises management and does not value its people. It further believes that the power of managers, executives and directors to control every functioning aspect of a corporation is total. It sees workers as systemically oppressed and powerless tools in the corporate structure. It deems that every workplace injury or death is the result of systemic failure, and that such failure is always management’s fault. It argues that government needs to instil the fear of harsh and oppressive retribution for managers, executives and directors, if they fail to deliver safe workplaces. It seeks an ‘eye for an eye’ as the primary OHS policy objective, demanding convictions as an example to all managers, directors and corporations.

This model has the backing of a long academic history. It is alive and significant in the current Australian OHS academic literature. Much of the OHS sociological, academic literature involves exercises in theorising about organisational dynamics inside corporations and how these dynamics can be affected by regulators. There is a general assumption underpinning this approach that the ‘business doesn’t care’ model is at play.

Exhibit 1: Academics and the ‘business doesn’t care’ model

Some examples of the way in which the ‘business doesn’t care’ model is argued and constructed as a concept by academics include the following:

The duties owed by directors in equity and under corporations legislation are not owed to third parties like employees. Directors duties are owed to the company and concerned with protecting the financial interests of its shareholders …[a]

…there is no reason to send the message that company officers can go back to their old ways and ignore the safety of employees, contractors and others in favour of increasing profits.

To say in the Objects of the OHS Act that aim of the legislation is to ‘encourage’ employees to ‘take an active role to protect themselves’ runs the risk of significantly downgrading the attention paid to safety by employers.

…the justification for reversal of onus of proof provisions in health and safety legislation has been considered by the UK Court of Appeal … in the context of a claim that such provisions were in breach of the guarantee of presumption of innocence provided by Art 6(2) of the European Convention on Human Rights…

The policy reasons which justify it [OHS] for reversal of onus of proof for employers generally justifies it to company officers.

From a criminal law perspective, they create a specific type of ‘accessorial liability’ imposing a liability for the head office committed by the company …

Sources: (a) Karen Wheelwright, 'Some care, little responsibility? Promoting Directors and managers' legal accountability for occupational health and safety in the workplace', Deakin Law Review, Vol. 10, No. 2, 2005, p. 473; (b) Neil Foster (Faculty of Business and Law, University of Newcastle), Submission to the NSW 'Stein' Review of OHS law 2007 available at: http://www.workcover.nsw.gov.au/OHS/OHSAct2000Review/default.htm; (c) Neil Foster, 'Personal Liability of Company Officers for Corporate Occupational Health and safety Breaches: Section n26 of the New South Wales *Occupational Health and Safety Act 2000*)', Australian Journal of Labour Law, 18, 2005, pp. 108 and 128.

Exhibit 2: Armed hold-ups and OHS

The obsession with prosecutions against businesses in order to instil fear of OHS laws inside corporations has led to a total suspension of criminal justice principles in the OHS realm. The example of armed hold-ups in NSW demonstrates the extent to which the 'business doesn't care' concept has been pushed and the injustices it creates.

One of the clearest demonstrations of the flawed structure of NSW's OHS laws occurs in relation to armed hold-ups, where criminals enter premises and conduct violent hold-ups.

If the criminals are caught, they are tried in criminal courts where they are accorded the presumption of innocence, guilt must be proven beyond reasonable doubt and they have full legal rights to appeal.

Yet the people subject to the hold-up face a very different situation under NSW OHS laws. The legal employer is held to be guilty simply as the result of a hold-up. Managers can be charged under the presumption of guilt features of the Act. Prosecution occurs in the NSW industrial relations courts where appeals are prohibited.

The criminals who commit the hold-ups are given greater access to justice than the victims. This is a distortion of justice of the highest order. And OHS prosecutions under such circumstance have been a regular occurrence since the Gretley case in 1996.

1) The ANZ Bank was fined $175,000 for four robberies in an eight-month period during 2002-03 at its Peakhurst branch. The Bank had guards posted as extra precautions, but the Bank had an 'absolute duty' duty under the 2000 OHS Act.

2) The ANZ Bank was fined $156,000 in 2003 for a robbery in June 2002 at the Brookvale Branch in NSW.

3) The Commonwealth Bank was fined $25,000 under the 1983 OHS Act following a 1999 armed hold-up.

4) The South Sydney Junior Rugby League was fined $195,000 after a thief took a doorman hostage and robbed the club.

5) Franklins supermarket was fined $94,500 after three workers were robbed at gunpoint in Sutherland in 2003.

Source: Institute of Public Affairs, *The Politics of a Tragedy: The Gretley Mine Disaster and the Dangerous State of Work Safety Laws in New South Wales*, October 2006

Unfortunately, the model is not confined to academe. It is pervasively influential in the design of some OHS legislation in Australia. It dominates the design and application of OHS laws in New South Wales in particular. It is rejected completely in the design of OHS laws in Victoria. (Both of these state's laws will be discussed further.)

This paper totally rejects the model as having any validity in the modern business environment. The 'business doesn't care' model ignores the commonality of human motivations operating inside all forms of business. Individual self-interest, shared goals, team leadership, personal income, career advancement, power, self-image and a need for recognition from colleagues and management are all much greater personal spurs to action than any legal duty to deliver profit to remote third parties. These other motivations operate equally in other business forms such as trusts, partnerships, unions, government or churches, for example. Equally, motivations of compassion, care for others, sense of community duty and other human values are all part of the mix of powerful human forces operating inside all business forms. All human organisations contain within them the seeds for positive and negative OHS outcomes based on the complex mix of human motivations.

The idea that, by virtue of their legal structure, corporations and the people who organise and run them are somehow without care and concern for other human beings is at odds with the reality of human organisation. The belief that there is something distinctly different in this respect that applies only within corporations (as opposed to other business forms) is a myth which has become folklore. But when the myth is taken seriously as the conceptual basis for law, it takes on features that should be of great concern to society.

This myth is held as an indisputable fact within some (but not by any means all) sections of the union movement, academia, the media, OHS bureaucracies and by some people involved in politics. Many of these people hold to this view with absolute and blinkered passion. Other people completely reject the view. Many people comprehend the line of argument associated with the 'business doesn't care' model but are perplexed by it and undecided on its truth.

Differences of view but commonality of objectives

This paper strongly disagrees with the 'business doesn't care' model, but in fairness it should be stated that there is no disagreement about the genuineness and good intent of those who promote such a view. In fact, it is not possible to find a voice in the OHS debate that is not moved by a desire to reduce deaths and injuries in Australia's workplaces. What is necessary, then, is to work through all the genuine views and to come to a nationally consistent position that gets work safety results. The Robens principles of 'practical and reasonable control' must guide that consistent position.

Changing these ideas to reflect the realities of work organisation dynamics is a difficult task. The idea that 'business' (at least in the form of the corporation) is at best uncaring, and at worst evil, has a long history. It is tied up in the notion that work is conducted in an environment of inevitable warfare between predetermined classes. This concept is deeply embedded within the psychology of many in the community. It is a dominant thought that holds together unions as significant institutions in Australia. It has long and deep academic roots and support. To many people it is taken as an indisputable 'given'. It forms a deep element within the Australian political divide. It has been institutionalised and remains alive despite the fundamental changes occurring in society and in workplace relationships.

Consequently, to find it underpinning one model of OHS law is not surprising. But even if it is a model that is impractical, leads to significant injustice under OHS prosecutions, and fails to contribute to increased work safety, to challenge it as a bedrock idea in OHS laws is to challenge significant Australian institutions. It could almost be said that these institutions are highly conservative. And to reject the OHS idea of 'business doesn't care' is to challenge some of the deepest conservative institutions in the country.

This is not a criticism of the people who make up those institutions. Rather, it is a statement of how the prevailing attitudes do not helpfully contribute to the desired practical outcomes of improved work safety.

In addition, the current inconsistency in OHS laws has not been created intentionally. It has emerged over time, with parliaments making the best decisions they believed they could within the policy frameworks that existed at various times. But as understandings have advanced, and ideas on how to improve work safety have become clearer, the environment has changed. After all, International Labour Organization ILO Convention 155 (covering OHS) was only endorsed by Australia in 2004. Given the long history to many states' OHS laws, it is not surprising that they now stand in need of reassessment.

This paper does not attribute blame for the current situation to any party. However, a failure to recognise the gravity and the extent of our OHS problems and move towards their proper resolution, even though resolving them may be difficult, is something for concern.

Business concerns: Why does business care?

There are too many deaths and injuries in Australian workplaces every year. People in business aspire to see zero deaths and zero injuries. This should be the aspiration of everyone in Australia.

The business motivation to target zero deaths and injuries is simple. The motivation is no different from anyone else's in the community. Every death is a tragedy. Every injury is a needless trauma. All should be preventable.

Exhibit 3: National totals of deaths and injuries

Year	**1998–9**	**1999–2000**	**2000–01**	**2001–02**	**2002–03**	**2003–04**	**2004–05**
Deaths	358	342	317	281	257	256	214
Injuries per 1,000 employees			18.5	17.9	17.3	17.2	16.6

Note: For sources for these figures and more detailed discussion on safety statistics, see Appendix 2.

The figures in Exhibit 3 show an ongoing tragedy of death and injury in Australian workplaces. The figures also show a steady lessening of deaths and injuries. Work in Australia is becoming progressively safer. But this is no cause for complacency. The figures can and should be much better. The national goal – to improve these figures constantly – is one to which business is committed.

To achieve this, business must have a clear, respected and prominent role in the OHS debate and policy outcomes. It's not just that business has a legitimate voice in the debate but rather that it has the key role in OHS. As discussed earlier, OHS outcomes are dependent on business operating within a supportive legal and administrative system. OHS laws, regulations and the way they are administered must be practical and enable business to achieve practical OHS outcomes. Further, business has a responsibility to ensure that it articulates its positions on OHS in clear ways. Business must robustly point out to government where government policy is interfering with or diminishing the achievement of improved OHS outcomes.

Business is experiencing significant problems in its pursuit of OHS outcomes. Some examples include:

- Impractical OHS laws combined with a denial of justice in some jurisdictions are contributing to a shortage of good managers and operators. A reduction in the quality of managers works against work safety.
- A lack of understanding by governments and the community of the role of risk management in OHS. Risk management is a structured managerial approach to improving work safety (for discussion, see the section below, 'Electrical industry: construction and risk management'). But government regulations frequently limit the application of risk management, thereby damaging OHS objectives
- The concept of absolute liability for employers that is applied in some jurisdictions is impractical under OHS. This assumes that managers have a god-like capacity to control every aspect of a business operation, including events or circumstances that are totally unpredictable and unforeseeable.
- Enforcement policies where the penalty is disproportionate to the level of fault.
- Criminal prosecutions heard in industrial courts.
- Third party-initiated prosecutions with penalties going to the prosecutor. This practice corrupts OHS objectives by turning prosecutions into money-making ventures for third parties, usually unions.

What these and other problems do is deflect business from the practical things that need to happen every day to achieve positive OHS outcomes. Any government-induced shifting of business focus is bad for work safety.

Exhibit 4: 'Adding insult to injury'

'I've always considered myself an honest man but, at the age of 62 and after 40 years in business, I'm shocked and traumatised to find myself with a criminal conviction. What's more painful is I had no control over the events for which I have been deemed guilty. What happened to me can happen to any person involved in any business in NSW – but if you work in another state it would not happen. Whether you run a one-person business or are involved in any level of management of larger businesses in NSW, you need to be afraid of the NSW occupational health and safety laws. I've run small and medium businesses in NSW all my life. I was once proud to live in this state. I operate a labour hire business and we take work safety very seriously. We have a strong safety record in difficult industries.

In 2000 we had an employee working at a company on a machine that pressed out metal caps for power poles. The machine malfunctioned, crushing four of our employee's fingers. We were shocked by the incident and co-operated fully in the investigation. We supported our employee. In the court case against me, the judge found the machine failure was totally beyond my control and impractical for me to prevent. However, I'm still criminally guilty and I fail to understand why.

…. If I don't own a machine or the property on which it sits, didn't make or design the machine nor have the capacity to direct its use or maintenance, how can I be held responsible when it fails? What sort of strange law holds me guilty for something I can't control?

…

I did nothing wrong – I'd done everything a good employer must do in following safety procedures. In NSW under these OHS laws, you are denied a trial before jury and normal rights to appeal. No other state has these laws. Other states have sensible OHS laws that hold everyone responsible for what they reasonably and practically control. I'm happy to be held responsible under those circumstances and that's why I'm looking for business opportunities outside NSW.'

Source: 'Iemma's Criminal Law Adds Insult to Injury' by Tom Smith (managing director, DSC Management), *The Daily Telegraph*, 10 January 2007, p. 23.

What are the principles of good OHS legislation and practice?

The Robens principles represent international best practice of good OHS legislation and administration.

The principles as explained under Robens hold that:

- everyone involved in work should be held responsible and liable for what they reasonably and practically control.

They provide the guiding focus for all OHS laws, regulations and practice and are the internationally accepted principles expressed in International Labour Organization Convention 155 to which Australia is a signatory. It means that everyone involved in work has shared responsibilities for work safety. It means a 'whole of community' approach to work safety. Business strongly supports these principles.

In practice this also means a layered approach to OHS as follows:

a) **OHS legislation**: In the critical 'duties of care' section, legislation must describe in general terms every type of person involved in work (for example, employer, employee, supplier, etc.) and state that each person is responsible for what they 'reasonably and practically control'.

b) **Fines, sanctions**: These liabilities should apply equally to everyone, no matter what their legal status. In other words, a manager has the same level of liability as does a shopfloor employee where they both exercise equal amounts of control.

c) **Regulations**: Regulations are subservient to legislation and should consistently reflect the Robens principles and not deviate from them.

d) **Codes of Practice**: These provide levels of detail regarding specific operational practice, for example those covering the electrical industry.

OHS regulations and codes of practice need to have a high level of consistency across Australia, need to be practical and need to be written in such a way as to support practical business operations rather than be excessively prescriptive. Excessive prescription neuters business 'control' which distorts responsibility. It is recognised that this is a fine balancing act, which is why close coordination is needed with business.

e) **Prosecution**: Where prosecution is necessary, this should occur in an open and transparent way with the accused entitled to full criminal justice rights, including prosecution in criminal courts, presumption of innocence, trial before jury and full rights to appeal. Without these legal protections, trust in OHS laws is diminished which in turn leads to negative OHS cultures.

Finally:

f) **Business practice**: Business must take on the Robens principles in their internal management processes, particularly with respect to risk management. This involves ensuring that every single person in an organisation is aware of his or her OHS responsibilities and exercises those responsibilities according to the measures of reasonable and practical control that he or she has over work activities. It means the active creation of open management systems and cultures of transparency and information exchange, where apathy or complacency about OHS does not feature.

A properly instituted OHS regime, based on Robens, would also lead to:

- The legal recognition that if a business or an individual acted in accordance with a government-created regulation or code of practice, then it was complying with the relevant OHS law.
- The legal capacity of OHS regulators to provide legally dependable advice and to act as information-gathering and exchange agents.

- High-quality education on safe work practices.
- Quality research on safe and unsafe work practices.

Such principles embedded in OHS laws and practices create the greatest opportunity for improving work safety and for constant reductions in injuries and deaths at work. If OHS and government policy and practice are consistently structured in this way across Australia, then people at work – all people – will have the responsibility to make work safe on the ground. The outcome will be better safety performance and fewer injuries.

The principles that should not be followed include:

- Creating duties of care which require people to 'ensure' work safety. That is, imposing absolute obligations which cannot be practically achieved by persons acting reasonably over what they control.
- Applying unequal measures of responsibility so that some parties have heavy responsibilities and others have light responsibilities. (For example, where employers have absolute obligations, but employees have comparatively minimal obligations.)
- Applying a presumption of guilt to classes of persons and requiring such persons to prove their innocence.
- Removing prosecutions from normal criminal courts and placing the power to make judgment in the hands of courts without a criminal law background, such as industrial relations bodies.
- Giving unions or other non-government bodies the equivalent authority of government officials such that they can impose worksite orders and conduct formal investigations and prosecutions. Unions should be prohibited from receiving proportions of fines.
- Disproportionately applying fines to different classes of defined persons in workplaces.

Exhibit 5: Drugs and alcohol at work: lessons from an education program

There are many positive stories about how work safety has been dramatically improved. Here is one.

It was not so long ago that work in the Australian shipping industry had a strong drinking culture. All freight carriers had drinking bars. Alcohol was sold to crew at discounted tariff-free prices. It was quite normal for crew to arrive on a ship drunk, for crew members to be intoxicated while on duty, for alcohol-related violence to break-out between crew members and for significant drink-related injuries and even deaths to occur on ships.

Once drinking was accepted and tolerated as part of the job. But community attitudes changed and the maritime industry realised that it had to change as well. But the problem was that the drink culture was embedded as a 'right' within the industry. And it wasn't just the commercial sector. The Australian Navy had also long operated under a 'drinking at sea' culture.

In the mid-1990s, the maritime sector of the oil and gas industry committed to fixing the problem.

However, it was realised that bad cultures cannot be changed by dictating policy from on top. Work cultures are only changed when workers themselves are committed to the change. A coalition of like-minded industry people formed a plan. The coalition included managers, union officials, industry association staff, employees and government officials. They devised and implemented a no-alcohol-and-drug-at-work education programme, established alcohol and drug support and rehabilitation programmes, came to agreement on new no-alcohol-and-drug industrial agreements and so on.

The plan swung into full gear in 1995 after consultation with all stakeholders. The Australian Maritime Safety Authority produced a Code of Conduct for the sector which included mandated maximum blood alcohol levels. The industry reports a huge success. Ships are now formally alcohol- and drug-free zones. Random alcohol and drug testing is standard practice. People detected with alcohol or drugs in their system are removed from ships. The programme applies across all staff with no exclusions. Even shore-based white collar staff are randomly alcohol and drug tested.

The result has been a massive change in the culture of Australian shipping. Work safety has improved massively. Work-related injuries and deaths have dropped dramatically.

What's important to note about the campaign and change in policy is that it did not occur within an environment of recrimination and blame. Workers were not blamed for the culture and neither were the bosses. There was a common acceptance that the problem was a joint problem of 'people' and their attitudes and lifestyles. It was recognised that everyone had a responsibility to address the problems. Government had a role to play in setting legal standards. Managers had a responsibility to design and implement the systems to fix the problem. And 'managers' in this context included union officials who were as much involved in the management processes as were the formally employed managers. Everyone accepted responsibility for the situation and the solutions, including employees. There was no compromising on the targets that had to be set and achieved. There was no playing politics with the issue.

They succeeded. It is an ideal case study of the application of the Robens principles, that is, that everyone in the work situation is responsible for what they practically and reasonably control.

Source: Peter Barrow, General Manager of Human Resources, Farstad Shipping Pty Ltd presentation to the Australian Mines and Metals Association 2007 Annual Conference, Perth, March 2007.

State of play: Perverse outcomes from poor and inconsistent legislation and practice

Business is concerned about distortions in the application of the Robens principles (‘practical and reasonable control’) in Australian jurisdictions. This is creating significant confusion for business. It creates injustices, and damages the objective of continually improving work safety. This paper discussed earlier the issue of the convicted plumber. Many other examples exist, including the following.

Electrical Industry: Construction and risk management

The use of electricity on construction sites is an area of extreme hazard. Wet areas pose constant risks; movement of heavy machinery, equipment and materials creates permanent risk of electric cords being damaged, and so on. Electrocution is a permanent high risk. The electrical industry has a strict code of practice covering these risks. The OHS regulations in New South Wales, as with all states, require the application of mandated codes of practice covering such things as when and how electricity is switched off and turned back on again, the identification and isolation of work areas where electrical power may be on and the prevention of non-authorised persons entering those areas, tagging of power cords and their inspection and maintenance, and so on. The mandated codes are strongly supported by the electrical and construction industries and are reinforced in company operational systems and practices.

Nevertheless, the regulations became somewhat farcical and impractical when they were applied in a wider context. Some years ago, cord tagging in New South Wales became compulsory for all electrical equipment in workplaces in the state. This meant that even domestic-type microwave ovens and fridges that were used in office tea rooms, and computers and printers in offices had to undergo yearly inspection and tagging. It was not common sense and added unnecessarily to costs and time. The regulation was eventually changed, in part probably because the state public service experienced a huge escalation in cost and time relating to inspection of office and other electrical equipment. This is but one example of where a perfectly sensible OHS regulation in one area is applied with nonsensical consequences in another completely different area without any consideration of the different risk profiles. This frustrates all business (including the government sector) and shifts focus away from more serious OHS issues to things that are comparatively trivial.

This example also demonstrates the need for what is known as ‘risk management’. Risk management is a formalised management process of OHS risk control which focuses management priorities on the highest areas of likely OHS risk. It involves statistical analysis of the probabilities of possible OHS events. Management systems are developed accordingly where risk situations are identified and priorities for action can be developed. It is a common, standard process in OHS management, particularly for medium and large businesses and all businesses in areas of higher risk activity.

Mandated SafeWork Method Statements are part of the risk management strategies which the electrical industry supports.

In the electrical industry for construction in New South Wales, there is a requirement under the OHS regulations for risk management systems to be used – it is mandated. This includes required actions (as described earlier) for isolation of areas where electrical work is occurring and so on. Because the regulations involve the legal requirement to apply risk management processes, it is natural for electrical companies and electricians to use the regulations as an industry ‘bible’. Common sense would suggest that if all the procedures were followed under the electrical regulations and someone was still electrocuted, then an electrical company or plumber would not be prosecuted under the OHS Act. Lessons would be learnt from the electrocution in terms of the existing procedures, and the regulations would presumably be changed or expanded to prevent a reoccurrence of such an incident. If the regulations were breached, however, prosecution would presumably proceed.

But New South Wales has a particular problem. The duties of care within its OHS Act do not hold everyone responsible for what they reasonably and practically control (the Robens principles). If an OHS incident occurs, guilt automatically applies under the 'must ensure' requirements of the Act and convictions inevitably follow. But the regulations under the Act are written with a presumption of 'reasonable and practical control'. The regulations require electrical businesses to undertake prescribed practical approaches to electrical work. However, even if all the regulations have been complied with, an electrical business or individual electrician will still be prosecuted. In this respect, the New South Wales *Occupational Health and Safety Act 2000* and the regulations under it are in direct conflict. To comply with the regulations does not create compliance with the Act. In effect, in that state's electrical industry, the only way to 'ensure' safety in the electrical industry is never to turn electricity on. If electricity is to be turned on, it is impossible to 'ensure' safety as required under the Act. The electrical industry association has been quite public in stating the problem.[3]

New South Wales Coal Industry

Similar problems exist in the New South Wales coal industry. The industry has a Coal Mines OHS Act and regulations that are subservient to the generic OHS Act. The Coal Mines OHS Act is highly prescriptive about how coal operations should be conducted. The regulations are strongly supported in the industry and coal companies have internal management systems that reflect, enforce and strengthen the regulations. The regulations sensibly stipulate that machinery used in mines must have power cut-out mechanisms. These operate so that if a power malfunction occurs in a machine, power is automatically cut. They operate similarly to power cut-out switches in domestic houses. But the legal situation is that even if all machines are correctly fitted with power cut-out, and these are correctly maintained and serviced, then if a failure of the cut-out occurs and an injury results, the company will be prosecuted and convicted because the NSW OHS Act requires that the employer 'must ensure' safety. This effectively means that coal companies must have knowledge and capacity beyond any human technical knowledge if they are to comply with the Act.

A national OHS plan

Fortunately, these problems are not unrecognised. Australians do have governments which, at the highest of political levels, have recognised that OHS laws are different across the states. They understand that this hampers the capacity of business to maximise work safety. They have committed themselves to creating consistency for the purposes of improving work safety.

Governments have an agreement on a process to create consistency, but unfortunately not an agreement on what should be the consistent principles of OHS laws. This failure to reach agreement on the core OHS principles has significantly stalemated the reform process. What is more, there does not appear to be a focused discussion, planned or ongoing, about the differences on core principles. Such a discussion is urgently needed.

Understanding the process

In 2005, Australia's state and territory governments and the Commonwealth signed a formal national plan in which they agreed to improve national work safety outcomes by the year 2012. The target is for fewer deaths and injuries at work. A key to that plan is achieving national harmonisation in OHS laws.

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[3] For more information, refer to the Submission to the 2007 Stein Review of NSW OHS Laws by the National Electrical and Communications Association.

Exhibit 6: The National OHS Strategy 2002–2012

The National OHS Strategy 2002–2012 was adopted by the Workplace Relations Ministers Council in May 2002 and formalised as Decision 5.6 of the Council of Australian Governments' (COAG) on 10 February 2006.

The two key targets to be achieved between June 2002 and June 2012 are:

- a 20 per cent reduction in workplace fatalities; and
- a 40 per cent reduction in workplace injuries.

Source: The strategy is available at http://www.ascc.gov.au/ascc/HealthSafety/OHS

A peak union group, the Australian Council of Trade Unions, and a peak industry group, the Australian Chamber of Commerce and Industry, are formal partners in the plan. Implementation of the plan is coordinated by a dedicated public sector work safety body, the Australian Safety and Compensation Council (ASCC). ASCC reports to the joint governments and industry/union partners.

In targeting national OHS harmony, the plan takes a layered policy approach.

Top layer of policy: identifying the 'duty of care' in OHS acts

Each government in Australia has its own OHS Act. The most important thing each piece of legislation does is identify who (of all those involved in workplaces) has a 'duty of care' and what that duty is. All legislation applies duties of care to employers, for example. All other aspects of OHS legislation, regulation and administration follow from these duties of care.

Middle layers: regulations/codes of practice

OHS regulations take the duties of care and describe in more practical ways how those duties must be met. These can also be expressed in 'standards' or 'codes of practice' covering specific work issues. Eight national standards already exist. The noise standard, for example, specifies the maximum exposure to noise (measured in decibels) that can occur in any work situation. If noise exceeds the level/s, OHS law has been broken and people can be prosecuted. Each government decides if and how it applies the national standards in its specific legislation and codes. This has resulted in important differences between jurisdictions in many areas.

Lower layer: guidance material

This is material mostly produced by the states-based workers' compensation authorities and gives advice and guidance to businesses and workers on safe work practices. It is often more specific in nature – describing, for example, safe lifting procedures. The guidelines are meant to be helpful, but are not legally binding. If a guideline is breached, it doesn't mean that an OHS prosecution will occur. Prosecution authorities will look at a broad range of workplace behaviours, consider these within the applicable duty of care and make prosecution decisions based on these factors.

This approach is consistent with the approach called for in this paper.

The stalemate: Big-picture problem – duties of care

Unfortunately there is wide divergence within OHS legislation about the key area of duties of care. Governments have recognised that significant divergence exists, but no discernible discussion or consensus seems forthcoming to fix the problem; that is, no-one can agree on a nationally consistent legal description of the duties of care.

This is at the core of the current legal OHS problem. This problem is becoming acute. While the nation's governments cannot agree on the nature of OHS duties of care, the focused approach that

business must take to safety is compromised. This lack of agreement on duties of care has created significant confusion within the ranks of business about what is legal and what is not legal. This is manifest at every executive, management and worker level in business. The confusion is compounded where a business operates in more than one state. In many instances, this creates an unresolved 'crisis' for business confronted by complexities in the law.

Regulations, codes of practice and guidance material are also different across the states, sometimes radically so. Further, state regulations in other areas can sometimes directly contradict OHS regulations. To comply with one regulation potentially means to break another. Look at these examples.

Queensland coal mines drug policies

Queensland coal mines are governed by a specific Coal Mines Act. The Queensland *Workplace Health and Safety Act 1995* also applies. Fitness for duty principles under the OHS Act requires an alcohol- and drug-free environment. Coal mine company policies also require this. But under the Coal Mines Act, if a company is to implement a drug-free policy (including, for example, mandatory random drug testing), the company must not only consult with all employees but must have approval from a majority of employees. To date, there is no known case of a coal mine that has failed to obtain employee agreement. But the Coal Mines Act clearly creates the circumstance which could put a mining company and its managers in a dangerous situation with regard to their OHS obligations. If a majority of employees did not agree to a drug free policy, a company and its managers would either have to breach the Mines Act to enforce the OHS Act or breach the OHS Act to comply with the Mines Act. It is a situation that should not be tolerated by government and is, in effect, a failure of government to exercise its responsibilities to ensure that the legislative circumstances for achieving safety are not compromised.

Truck modifications

Sometimes good OHS procedures can conflict with seemingly unrelated regulations. In one instance a truck was delivering live cattle to an abattoir. The standard design of cattle transport trucks requires that, when the cattle are loaded and unloaded, the truck driver must climb a ladder on the truck to reach a leaver to open and close the cage gate/s. On one occasion an experienced truck driver climbed onto the ladder, slipped, fell and suffered serious injury. The trucking company was fined and convicted under OHS laws. The trucking company then did everything possible to modify the design of the truck ladders on its entire fleet to make them safer. But unfortunately every modification resulted in breaches of New South Wales Road Transport Authority design regulations.

It is clear that if safety is to be improved and injuries and deaths prevented, not only must business take firm action, but government in all areas must be capable of taking quick action to rectify problems. It's not good enough to blame such problems on bureaucracy or other such issues. The same expectations for safety that apply to business must also apply to every aspect of government regulation.[4]

Cross-border problems

It is perhaps surprising that the New South Wales Department of Infrastructure has dual responsibility for enforcement of OHS in construction as well as the workers' compensation authority. It is a requirement in the construction sector in both Victoria and NSW that if apprentices are employed, they must be supervised at all times. The border towns of Albury and Wodonga effectively make for one larger city area. It is common for housing builders from each side of the border to have jobs across the border. The NSW Department of Infrastructure has been known to

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[4] WorkCover Authority of New South Wales (Inspector Stephen Jones v Whites Stock Transport Pty Ltd [2006] NSWIRComm381).

apply $1,500 on-the-spot fines to Victorian house builders working in NSW who have left apprentices alone when the builder, for example, left the site to buy lunch.

Victorian builders have been surprised by this because in Victoria it is only WorkSafe inspectors who have the power to issues notices and fines, and normally Victorian inspectors take an educative approach in the first instance, will issue warnings, and then issue fines after a repeated breach.

In this instance the issue is not whether or not on-the-spot fines should be issued. Rather, the example is a demonstration of different OHS compliance cultures between NSW and Victoria. Victorian WorkSafe seeks to work with people, to educate at first instance and to prosecute if necessary. The Victorian approach is likely to create industry-wide support for their regulations, and foster cultures of peer pressure amongst builders to comply because WorkSafe is more likely to be seen as reasonable.

In New South Wales, OHS enforcement is aggressive. It punishes at first instance. Its culture is based on harsh retribution and creation of fear of the law. This is likely to create cultures amongst builders of non-support and loathing of inspectors. It is likely to result in builders, particularly small builders, being reluctant to share information, as well as making them wary of consulting with and seeking advice from inspectors. This is not good for safety. It creates a 'them-and-us' mentality rather than one of cooperation aimed at shared goals.

In many cases, regulatory conflict can usually be fixed by resolving engineering and scientific issues as to what might be safe or unsafe. Some strong progress towards consistency is apparent in some areas, but is non-existent in others. However, comprehensive full progress is hampered not only by the stalemate over duties of care which flows through to regulations, but also, as we have just seen, by the way in which Acts are administered and the differing cultures of the safety inspectors in different jurisdictions.

This paper has focused on the top layer of OHS policy – it is directed, in particular, to displaying and resolving the fundamental differences on the duties of care described under the various OHS Acts. This should not, however, be interpreted as a devaluation of the other layers of OHS policy, which are also important. But progress on the lower layers is difficult without resolution of the problems with the duties of care.

What should be done? Preferred model and the way forward

To achieve a full community focus on OHS issues, the inconsistency in duties of care must be resolved. If this can be achieved, it would be a major step forward to improving work safety. It would make the resolution of a large number of unresolved, 'lower order' practical issues significantly easier and faster. This would assist more speedy delivery of nationally agreed practical safety advice and instructions to business. Business would be able to respond more quickly to improve safety 'on the ground'.

The Robens 'practical and reasonable control' model is the preferred model.

This model is not obsessed with the corporation, or ideas of corporate managers being singularly fixated on profit to the exclusion of work safety. Instead, it takes a much broader and practical approach, recognising that unsafe practices, injuries and deaths happen in all work organisation types. It accepts that many factors come into play, including management system inadequacies, human failure, machinery problems and so on. It accepts that some OHS incidents are beyond human control and are genuine accidents. Fault has to be proven not assumed. But it does not take a genuine accident as an excuse for indifference. Rather, it takes them as a cause to investigate, discover problems, identify solutions and apply and share new knowledge. The aim is to learn how to prevent OHS incidents.

As discussed in this paper, this model was most clearly articulated in the UK in the 1970s in the 'Robens' report into OHS (see Appendix 1). The Robens OHS model quickly became accepted as the international benchmark for OHS laws and remains so today. More than 35 years after its

publication, Robens remains the model most likely to improve work safety outcomes on a consistent basis.

In essence, this model holds that everyone at work must be held responsible and liable for work safety according to what they 'reasonably and practically control'. This model is widely accepted because it fits with the practical realities of how work is organised. It encourages all people at work – managers, executives, employees, contractors, suppliers, site designers and so on – to focus personally on what they can do to maximise safety. Safe work systems are part of this focus and are the responsibility of managers and executives. Prosecutions will and do occur under this model when people fail to act reasonably over what they practically control, and this includes the people responsible for safe work systems.

Australia ratified ILO Convention 155 (C155) in 2004, thereby undertaking an international obligation. The Commonwealth's own OHS laws comply with C155. In 2004, Victoria strongly embraced the Robens principles (and C155) in their OHS laws. NSW, by contrast, distorts the Robens principles. (This distortion is discussed below.)

This position paper strongly endorses and promotes this model. It is the right approach because it fits the practical realities of work. Consequently, it is the best route to achieving continuing improvements in work safety and reductions in injuries and deaths.

Despite the clear advantages of the Robens approach, it appears that OHS criminal law within Australia is pulling in two fundamentally opposite directions, leading to considerable inconsistency.

The NSW model ('business doesn't care') is obsessed with the need to instil fear of conviction in the minds of managers in the belief that this is how government can ensure work safety. To secure convictions, OHS criminal law has been stripped of its normal judicial protections. Further, prosecution processes are being driven by an obsessive quest for conviction, regardless of fault.

The Victorian model (the Robens 'practical and reasonable control' principle) conducts prosecutions where clear fault is proven. But, in addition, Victorian OHS law has been tightened so that businesses are given a clearer understanding of what is legal and what is not legal. Further, there is an emphasis on practical things that will improve safety.

The other states and territories occupy places on the spectrum between New South Wales and Victoria (a comparison is provided in Appendix 4). When the Victorian and NSW models are compared (and if the variants in the other states are also considered), then what clearly emerges is that inconsistency in Australian OHS laws is substantial. The inconsistency starts at the very peak design feature of Australia's OHS laws (the duties of care in OHS legislation) and cascades down through the systems.

What is needed is a consistent, nationally focused approach to creating high-level harmonisation of OHS laws, regulations and practice in every jurisdiction, with the Robens 'practical and reasonable control' model being the policy-guiding benchmark. This requires cooperative leadership at every level of government in Australia. It needs the active involvement of unions, OHS academics and public servants charged with OHS administration and enforcement. Most importantly, business must play a key and active role to ensure practical delivery of outcomes.

Conclusion

What business needs and wants is a practical, commonsense approach to fixing OHS problems. Business, in all its forms, must take the lead in reducing workplace deaths and injuries in Australia, with a constant ambition of securing zero deaths and injuries.

Within businesses this must involve a 'whole of workforce' approach to safety. Every individual must be involved and must accept and take responsibility for their actions. Management must set up the safety systems, constantly review them, ensure training, provide practical backup and have active and responsive engagement with all staff at every level.

And business also needs government to do its job. Legislative frameworks for OHS responsibility must be clear, consistent and apply responsibilities and liabilities to every person involved in work. No-one must be outside the responsibility loop. Liabilities must be applied with equity across the community and to all persons, no matter what their legal status. Within prosecution processes, justice must be applied and be seen to be applied.

OHS regulations must be consistent with the legislative frameworks under which they operate. Codes of practice must emphasise the practical behaviours required. Government requirements which only create the appearance of good safety outcomes through paperwork compliance, for example, are no substitute for real workplace behavioural change. The cultures of OHS inspectorates must be open, engaging, educative and orientated to exchange and dissemination of practical information that will aid safety. When they must prosecute, this should occur within a clear comprehension of the practical realities and behaviours of parties involved. Where flagrant breaches of safety have occurred, convictions should be sought and achieved.

There must be a central guiding principle to achieve these ends. This paper has argued strongly that the ‘practical and reasonable control’ (Robens and C155) model of OHS laws provides the guiding principles. It is the international benchmark to which Australia has committed itself.

The reason for supporting the ‘practical and reasonable control’ model is that it has the best chance of assisting business to improve work safety while ensuring that an enforcement and penalty regime captures those people who ignore and breach safe work practices.

This paper strongly rejects the model which is most firmly in place in New South Wales and applied in some other states (with variations) and which sees business as uncaring and in need of an aggressive, justice-denied, fear-driven, prosecutorial approach to ensure work safety behaviours. The duplicity, inequity and injustice of this approach is demonstrated in the fact that prosecutions are aggressively focused on corporations and executives in corporations, to the exclusion of all others. It is an approach disconnected from the practical truths of how all business operates. It is unlikely to produce the cultural changes at work that are required if safety is to be constantly improved. It will create resentment, injustices and responsibility-avoidance behaviours. This is bad for safety.

Australia is fortunate that all governments have recognised the need to improve the national approach to work safety regimes. Harmonisation of all jurisdictional laws is required, based upon the Robens ‘practical and reasonable control’ model. However, in the current environment, it is doubtful that harmonisation across the nation will proceed with the vigour, agreement and clear focus that is required. The principal reason for this is the lack of agreement about the crucial question of duties of care.

This paper says that the ‘practical and reasonable control’ – that is, the Robens/C155 principles – should form the key wording of all duties of care statements in all OHS legislation. This is the basis of the Victorian 2004 OHS Act.

But achieving continuous declines in workplace injuries and deaths is a never-ending ‘work in progress’. All other required elements discussed in this paper need to fall into place and constantly improve. It is a total community exercise that requires clarity, not only about the end target (zero deaths and injuries) but also about how to get there.

The principal claim of this paper is that a pathway for change can unfold in which, across the nation, OHS laws can be made consistent if based on the key principles of ‘practical and reasonable control’. If this can be achieved, business in concert with government and the community can get on with the job of achieving ever-safer work.

Appendix 1: International best practice: the Robens model

The modern principles of OHS safety were first created in the United Kindgom in 1972 following a formal inquiry into OHS practices by the UK Parliament. The inquiry was chaired by Lord Robens and the principles are generally referred to as the 'Robens principles'. These principles have since become the central focus for OHS laws, regulations and practices globally.

The International Labour Organisation drew on and adopted the Robens principles when establishing an international labour Convention (C155) on OHS practice in 1981 and reinforced this again through ILO Protocol 155 in 2002. In 2004, Australia become a signatory to C155, accepting an international obligation to apply these principles to OHS laws and practices.[5]

It must be noted that in some Australian jurisdictions these international obligations are breached because of the design of OHS laws and that in other jurisdictions the obligations are distorted because of the way in which OHS laws are implemented and administered.

In practice, Robens sought to address the apathy towards work safety which was apparent at all levels through the community and in businesses at the time. The report made a clear statement which, some 35 years, later still stands as a guiding OHS beacon.

> '… more safety awareness in industry and commerce can only be developed by an accumulation of influences and pressures operating at many levels – that of the boardroom, the senior manager, the supervisor, the trade unions, the worker on the shop floor – and operating in a variety of ways through education, training, through the provision of better information and advice, through practical, co-operative organisation and action, through legal sanctions where necessary, through research, publicity and so on. There is no single panacea and there are no simple short cuts. Progress in this field is rarely dramatic. But we believe that by patient and unremitting effort it is possible to raise the status, so to speak of the subject of safety and health at work in the minds of individuals.'[6]

Robens addressed the problem of OHS apathy by establishing a simple principle. The report held that every individual involved in work should be held responsible and liable for what they practically and reasonably controlled.

'Practical Reasonable Control' has become the international benchmark for OHS laws.

Article 16 of ILO Convention 155 states:

> (1) Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.[7]

A note on Robens

As is the case in Australia, major OHS reviews have occurred elsewhere in the world as a result of significant OHS incidents. The Robens inquiry followed a devastating loss of life in a colliery incident. The colliery was owned by the National Coal Board, a UK Government instrumentality.

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[5] For a discussion of Australia's international obligations under C155, see Australian Chamber of Commerce and Industry, *Modern Workplace: Safer Workplace – An Australian Industry Blueprint for Improving Occupational Health and Safety 2005–2015*, April 2005, p. 51.

[6] Robens, op. cit.

[7] Convention 155 and Protocol 155 are available from the ILO website www.ilo.org.

Lord Robens was chairman of the Board and later headed up the UK inquiry into OHS referred to here.

> At 9.15 am on October 21, 1966, a colliery waste tip from Merthyr Vale Colliery slid down Merthyr Mountain and into the mining village of Aberfan. It engulfed Pantglas Junior School, smothering to death 109 children in their classrooms, and five of their teachers. They had just returned there from school assembly, at which they had sung All Things Bright and Beautiful. The total death toll was 144 humans (116 children and 28 adults) and a small number of farm animals.

The Wilson Government immediately appointed a Tribunal of Inquiry which reported in August 1967 (Davies 1967). It was unsparing. Blame for the disaster rests upon the National Coal Board.

The Tribunal was appalled by the behaviour of the National Coal Board and some of its employees, both before and after the disaster: '[T]he Aberfan disaster is a terrifying tale of bungling ineptitude by many men charged with tasks for which they were totally unfitted, of failure to heed clear warnings, and of total lack of direction from above'. Colliery engineers at all levels concentrated only on conditions underground. In one of its most memorable phrases, the report described them as 'like moles being asked about the habits of birds.8

[8] I. McLean & M. Johnes, *Corporatism and Regulator Failure: Government Response to the Aberfan Disaste*r, the United Kindgom Economic and Social Research Council. Available at: http://www.nuffield.ox.ac.uk/politics/aberfan/esrc.html

Appendix 2: Understanding workplace injuries and deaths statistics

The collection of Australian statistics on the incidence of deaths and injuries has only been occurring in a consistent manner for a comparatively short period of time. National statistics collection only started around the mid-1980s with the formation of a national coordination body, the National Occupational Health and Safety Commission. Initially, statistics were collected from coroners' reports, but from the late 1990s figures from each jurisdiction's workers' compensation authorities became the preferred method. For a variety of reasons relating to data collection differences, caution should be taken in drawing direct comparisons between statistics from coroners' reports and those from workers' compensation authorities. However, even allowing for the difficulties in statistical comparisons, the following information gives some helpful indication of trend lines.

From coroners' reports:

During the four-year period 1989–1992, 2,389 persons died nationally while working or commuting to/from work. The average number of deaths per year – 597 – was made up of:

- 305 while working;
- 135 from road accidents while working;
- 157 while commuting to or from work.

If commuting deaths are excluded, work deaths averaged 440 per year.[9]

From workers' compensation authorities

Exhibit 6: National totals of deaths and injuries

Year	**1998–9**	**1999–2000**	**2000–01**	**2001–02**	**2002–03**	**2003–04**	**2004–05**
Deaths	358	342	317	281	257	256	214
Injuries per 1,000 employees			18.5	17.9	17.3	17.2	16.6

Sources: Australian Safety and Compensation Council, Compendium of Workers Compensation Statistics Australia 2002 to 2003, January 2006; and Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report: Comparison of Occupational Health and Safety and Workers' Compensation Schemes in Australia and New Zealand*, Eighth Edition, September 2006.

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[9] National Occupational Health and Safety Commission (now the Australian Safety and Compensation Council), *Work-related traumatic fatalities in Australia, 1989 to 1992,* Summary Report, December 1998.

Workers' compensation authorities usually include some traffic accident deaths in work-related deaths statistics. One study indicates that traffic accidents account for 30 per cent of recorded workplace deaths.[10]

Some collation of coroners' and workers' compensation data

The statistics collected from workers' compensation authorities do not record injuries and deaths for people not in the workers' compensation schemes – for example, the self-employed. For instance, in 2005, the Australian Safety and Compensation Council published an estimate of work-related deaths for the period 2003–04 using OHS authorities and national coroners' information adjusted for duplication.

The estimate indicated 332 deaths in 2003–04 made up as follows:

- 226 deaths while working for an income.
- 89 deaths while commuting to or from work.
- 10 deaths of bystanders.
- 5 deaths of volunteer workers.
- 2 of unknown work activity.

Work-related diseases

Great confusion is also caused when disease-related work deaths are included. These figures can be highly variable depending on the statistical methodology used and the difficulty of attributing death from a particular disease to a work situation. Estimates range from 1,800 to 7,000 per year and can include diseases such as mesothelioma (asbestos related), skin cancer, heart disease, strokes and so on. These estimates have been based on statistical probability of disease-related deaths drawn from USA studies looking at the likelihood of disease-related deaths in some USA industries. These statistical probabilities have been applied to Australia, which helps explain the wide variance in estimates. It appears that no direct gathering of such statistical data has occurred in Australia.

International comparisons

Obtaining reliable international comparisons is difficult. Even though Australia has one of the best statistics-gathering processes in the world, other countries often use different criteria. This means that considerable adjustments are needed to be able to achieve like-for-like comparisons. For example, some countries may exclude vehicle-related injuries and deaths, thereby producing an appearance of lower injuries and deaths, while many other countries do not even gather data.

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[10] Workplace Relations Ministers' Council, Comparative Performance Monitoring Report: Comparison of Occupational Health and Safety and Workers' Compensation Schemes in Australia and New Zealand, Eighth Edition, September 2006.

Appendix 3: Understanding the 'Duties of Care' and OHS as Criminal Law

Understanding the duty of care 'problem'

To understand why there is major divergence in OHS legislation about duties of care, it is necessary to understand the concepts with which policy-makers must deal when designing OHS laws.

By definition, work safety (OHS) problems only occur when people are engaged in 'work'. If an injury occurs to someone when they are driving a car in their private time, it's a road law issue, or an insurance issue, not an OHS issue. If someone scalds himself when cooking at home, it's a home safety problem, not an OHS problem. Injuries under OHS laws are confined to 'work'.

Most frequently, work is a co-operative effort by many people to achieve shared goals. Work mostly involves payment, but it can be voluntary. There's always some form of human organisation involved in work.

When policy-makers try to define OHS duties of care, they must think about the nature of organisations that organise work and how duties of care apply inside these organisations. It makes sense that if OHS laws are to be effective, policy-makers must write the duty of care descriptions to cover all forms of legal work structures and all categories of people who operate within them.

The list of possible legal structures that need to be embraced is wide and includes:

- Corporations owned by one person with one employee (perhaps the same person.)
- Corporations with thousands of employees and shareholders.
- Trusts, individuals, partnerships, public service corporations, public services non-corporations, local councils, unions, not-for-profit incorporated charitable bodies, and so on.

Each one of these forms of organisation can have massively different management arrangements, both between and within each structure. Further, the way people behave and interact in each structure varies in endlessly complex ways, whatever the legal structure. Both the formal structures of business and the informal human dynamics in the workplace affect work safety outcomes.

Understanding the clash of the two models applied to the duty of care

It is at this point that OHS law in Australia splits into two distinct models based upon significantly divergent concepts of business organisation. It is this split which is a primary cause of the inconsistency in national OHS laws about the duty of care descriptions. It is the failure to confront, debate and resolve this split which is a primary cause of the current national impasse on moving towards harmonised and safer OHS laws.

The two models have been discussed in the main body of this paper.

- The first is the Robens 'reasonable and practical control' model.
- The second is the 'business doesn't care' model.

The two models inevitably cannot and do not work in tandem. They are wholly incompatible one with the other.

How these two models interact with criminal law

Breaches of OHS law sit within the criminal law system. They do not sit within civil law because civil law has as one if its key objectives the award of compensation (usually money) for an aggrieved or injured party. In Australia, workers' compensation schemes undertake the function of compensation by providing monetary and other support for persons injured at work.

OHS criminal law is, however, quite different from normal criminal law for several reasons. First, normal criminal law only applies where damage or injury has occurred. Breaches of OHS law can occur even if injury or death has not occurred. This is because OHS law aims to prevent injury or death. Work situations that have the potential for injury or death are considered with seriousness and those found responsible can be prosecuted. Second, to breach normal criminal law someone must have intended to cause injury or death. But OHS law can be breached even if someone had no intention to cause death or injury.

Exhibit 7: Criminal law and OHS

This discussion from the Occupational Health and Safety Act (OHSA) Review, ('The Maxwell Report') gives a good description of criminality under OHS law.

- As envisaged by Robens, the general duty provisions 'enunciate the basic and overriding responsibilities of employers and employees'. The concepts which those provisions embody – such as safe systems of work – were essentially imported from the common law of negligence.
- The law of negligence is concerned with civil remedies for loss and damage. It is compensatory in nature.
- OHSA is a quite different creature. Breach of an OHSA duty is a criminal offence. It gives rise to no civil remedy.
- A prosecution for a breach of an OHSA duty is also quite unlike a typical criminal prosecution. First, the offence is committed whether or not harm was caused. Though prosecution typically follows workplace accidents, the dutyholders are not charged with 'conduct causing death or serious injury'. Nor is the seriousness of the breach of duty measured by the seriousness of the consequences (if any) of the breach.
- Secondly, proof of a breach of an OHSA duty does not depend upon proof of a relevant knowledge or intent (mens rea). And there are no statutory defences under OHSA.
- In short, the Act imposes what lawyers describe as an absolute obligation to comply with duties, subject always to considerations of 'practicability'.
- It follows from the nature of OHSA offences that no question of manslaughter can arise under OHSA. Manslaughter is a concept known only to the criminal law, as are the offences of negligently or recklessly causing serious injury.

Source: C. Maxwell, Occupational Health and Safety Act Review, State of Victoria, March 2004, Chapter 32.

As a consequence, OHS criminality is significantly and importantly different from normal criminality, a difference which is generally only understood by OHS legal practitioners. But for someone to be tagged a 'criminal' in the community is a grave matter. It carries with it a significant stigma, let alone any associated punishment. Consequently, it is a tag that should only be applied to people with great care and full availability to judicial safeguards. If criminal prosecution processes are to have integrity and thus generate community confidence, they must be seen in the community to be fair, impartial and not tainted by politics or external interference. Where the slightest suggestion of this can be verified, community confidence in the criminal system will be eroded, to the community's detriment.

This is the current situation in New South Wales, where the structure of OHS criminal law has stripped the prosecution process of the key judicial safeguards necessary for community confidence in the law. These include the presumption of innocence, the right to a trial before jury, access to normal criminal courts and full rights to appeal. Further, NSW OHS prosecution processes have been the subject of significant suggestions (supported by evidence) of partiality and lack of integrity. These suggestions arise from unanswered questions about failures to

prosecute, inconsistency in prosecutions and questions concerning undue influence from outside parties. Serious criticism has emanated from the judiciary and independent reports.

Further, the standards for the duties of care are not consistent between and within the states. The same applies to levels of fines imposed for OHS breaches. This is demonstrated in the tables (below) showing different standards applied to employees and employers (as individuals).

When each of these issues is looked at in the light of legal judgments, the differences become more substantial. Each of the concepts and related specific wordings in each legal jurisdiction have highly specific and often technical legal meaning. Each jurisdiction has built up a body of legal judgments in which fine legal interpretations of specific terminologies must be settled before judgments can be made. Understanding not only each state's laws, but also the pattern and picture across Australia, requires high levels of specialised legal knowledge that only a small number of Australian lawyers possess. For the layperson or for anyone running any size or type of business, access to this understanding is impractical if not impossible. To the layperson it amounts to a blur of confusing policy and regulation. Yet it is laypeople who must make OHS decisions every day and it is they who are held responsible if OHS incidents or injuries occur.

The outcome is that the situation is very complex. It works against OHS operational clarity. It is bad for work safety.

Exhibit 8: Wording of Duty of Care descriptions, Australian jurisdictions

	Wording of duty of care for employer	Wording of duty of care for employee	Observations on level of consistency within each jurisdiction
New South Wales	'An employer must ensure the health, safety and welfare at work of all the employees…'	'… employee must, while at work, take reasonable care for the health and safety of people …'	Stark differences exist. Employer has total obligation to safety. Employee has to take reasonable care.
Victoria	'An employer must, so far as is reasonably practicable, provide and maintain …a working environment that is safe.'	'… an employee must take reasonable care for his or her own health and safety' (and) 'take reasonable care for the health and safety of persons …'	Duties of care are similar.
Queensland	'An employer has an obligation to ensure the workplace health and safety …'	'A worker…has the following obligations…to comply with the instructions …by the employer…'	Stark differences exist. Employer has total obligation to safety. Employee only has obligation to do as told.
Tasmania	'An employer must … ensure so far as is reasonably practicable … safe from injury and risk to health …'	'… an employee must … take reasonable care for the employee's own health …' (and) 'comply with any direction …'	Duties of care are similar.
Australian Capital Territory	'An employer shall take all reasonably, practicable steps to protect the health and safety …'	'An employee shall … take all reasonably practicable steps … to ensure … the health and safety …'	Duties of care are similar.
South Australia	'An employer must … ensure so far as is reasonably practicable that the employee … is safe from injury …'	'An employee must take reasonable care to protect the employee's own health …' (and) '… reasonable care to avoid adversely affecting …any other person…'	Duties of care are similar.
Western Australia	'An employer shall, as far as is practicable, provide and maintain a working environment …are not exposed to hazards …'	'An employee shall take reasonable care … to ensure his or her own safety …' (and) '… avoid adversely affecting the safety …'	Duties of care are similar.

	Wording of duty of care for employer	**Wording of duty of care for employee**	**Observations on level of consistency within each jurisdiction**
Northern Territory	'A employer shall, so far as is practicable…provide and maintain a working environment that is safe …'	'A worker shall …take appropriate care of his or her own health and safety …' (and) '… as far as practicable, follow all reasonable directions …'	Duties of care are similar.
Commonwealth	'An employer must take all reasonably practicable steps to protect the health and safety …'	'An employee must … take all reasonably practicable steps …'	Duties of care are similar.
Observations on consistency – or lack of consistency – between jurisdictions	Significant differences between Queensland and New South Wales on the one hand and the other jurisdictions on the other. Marginal differences between the other jurisdictions.	General consistency between jurisdictions except for Queensland.	

Source: see sources listed for Exhibit 9.

Exhibit 9: Fines for OHS Breaches, Australian jurisdictions

	Maximum fines applied to employers (as 'natural' persons, ie individuals)	**Max fines applied to employees**	**Observations on level of consistency within each jurisdiction**
New South Wales	$82,500	$4,950	Employers have significantly disproportionate penalties compared with employees.
Victoria	$193,374	$193,374	Penalties are identical.
Queensland	$150,000	Not clear if fines apply	Unclear.
Tasmania	$50,000	$10,000	Employers have disproportionate penalties compared with employees.
Australian Capital Territory	100 penalty units.	100 penalty units.	Penalties are identical.
South Australia	$100,000	$10,000	Employers have significantly disproportionate penalties compared with employees.
Western Australia	$100,000	$25,000	Employers have significantly disproportionate penalties compared with employees.
Northern Territory	$25,000	$5,000	Employers have disproportionate penalties compared with employees.
Commonwealth	$242,000	$9,900	Employers have massively disproportionate penalties compared with employees.
Observations on level of consistency between jurisdictions	Substantial differences seem to apply.	Substantial differences seem to apply.	

Sources: OHS legislation in the states and territories: see Workplace Health and Safety Act 1995 (Queensland); *Occupational Safety and Health Act 1984* (Western Australia); *Workplace Health and Safety Act 1995* (Tasmania); *Occupational Health, Safety and Welfare Act 1996* (South Australia); *Work Health Act* (Northern Territory); *Occupational Health and Safety Act 1989* (Australian Capital Territory); *Occupational Health and Safety Act 2004* (Victoria); *Occupational Health and Safety Act 2000* (New South Wales); and *Occupational Health and Safety (Commonwealth Employment) Act 1991.*

Appendix 4: Recent Australian History of OHS law and Some Interstate Comparisons

Most governments in Australia have reviewed their OHS laws over the last decade.

Typically, the major impetus for review has been the need for a political response to major OHS events. In Victoria, the explosion at the Esso gas plant in Gippsland in 1998 directly resulted in a five-year process of OHS change. In NSW, the trigger was the Gretley mine disaster in 1996 and that has been reinforced by the Hardies asbestosis situation. Currently, Tasmania is experiencing political pressure on OHS following the Beaconsfield mine disaster of 2006. Most other states and territories have reviewed their laws, though not on the scale conducted in NSW and Victoria. However, similar high-profile events in other states (should they ever occur) would likely trigger major reviews.

On each occasion, Australian unions have been at the forefront of political pressure for change. This is both a natural and expected response. Most union pressure has combined with academic justifications grounded in the 'business doesn't care' model of OHS to push for an anti-corporation (NSW) approach to OHS legislation. Where major OHS disasters have happened, the public relations debate that has followed has generally limited the ability of business to argue its case for OHS law based on the 'reasonable and practical control' model.

The following summary of events helps to explain the situation.

Major OHS events by state

Victoria

OHS changes in Victoria gained great impetus following the Longford gas explosion in 1998. The explosion at Victoria's gas production facility destroyed a large section of the plant and cut off gas supplies to Victoria for some two weeks. Two workers were killed and eight others injured. The explosion turned into a public relations disaster for Esso, who were confronted by an aggressive union campaign against them and several judicial rulings criticising the company over its procedures before the explosion and the handling of legal proceedings afterwards. Esso was fined millions of dollars over the explosion and ordered to pay millions more in compensation. The Longford event and associated campaigning created a political environment for change to the Victorian OHS Act.

In 1998 there was a change of government and a new ALP government came to power, partly on a platform to address OHS issues. In the government's first attempt at change, it introduced an 'Industrial Manslaughter Bill' which had the following features:

- Corporations could be declared guilty of criminal OHS offences.
- Designated managers could be jailed for the criminal offences of their corporations. Even non-Australian resident CEOs of corporations could be jailed.
- This new form of criminality was not to be applied to state government entities, individuals, partnerships, or organisations where volunteers were engaged.

If passed, the Bill would have created new forms of criminal OHS offences targeting only corporations. Different legal classes of persons would have had widely different OHS liabilities. The Bill was confronted by large-scale and united business opposition and was defeated in the Victorian Upper House which, at the time, was controlled by the Opposition.

At the following state election in 2002 the ALP was returned to government and gained control of the Upper House. Significantly, however, the government did not attempt to reintroduce the Industrial Manslaughter Bill, but instead conducted an inquiry into OHS law. The resulting Maxwell Report is perhaps one of the best available discussions of the principles of OHS law, its design and the practical problems confronting it.

This paper highly recommends the Maxwell Report as one of the soundest discussions available on OHS law.

The Victorian legislation that resulted has the following features:

- Everyone in the work situation has an equal measure of statutory responsibility and liability based on what each person practically and reasonably controls (in other words, very much like Robens). Fines and sanctions allocated are precisely the same no matter what legal status a person has – an employee, manager, independent contractor or other.
- Responsibilities and liabilities apply equally to all forms of organisation, whether they are corporations, trusts, individuals or partnerships, not-for-profit operations or government bodies.
- The Workcover authority is able to give advice to businesses on what OHS practices should be followed. This includes the development of codes of practice.

The Australian Capital Territory

Despite the failure of the Victorian Industrial Manslaughter Bill, the ACT decided to proceed in a similar direction in 2002. It maintained an exclusive focus on OHS liability for corporations, and only corporations, but made modifications in the light of the public reaction against the Victorian Bill.

The ACT Act:

- Applies OHS criminality against a corporation, but has so watered down the provisions for jailing executives that jailing is perhaps unlikely.
- Does not apply to ACT government-owned entities, Commonwealth departments, or trusts, partnerships or individuals.

The main potential effect of the ACT Act is that it enables a process of court-ordered public humiliation of corporations through mandated media advertising in which guilt has to be admitted, as well as other shaming measures.

The Commonwealth was sufficiently concerned by the impact of the ACT Act on the Commonwealth's own entities that it passed a Commonwealth law exempting Commonwealth-owned corporations from the provisions of the ACT Crimes (Industrial Manslaughter) Amendment Act 2002. An absurd situation now exists in the ACT where two corporations can undertake identical activity in Canberra, have identical OHS incidents, yet one will face criminal manslaughter prosecution and the other won't. The difference arises not from the rights or wrongs of a situation or management or other behaviour. Rather, it is purely the legal ownership of the corporation that determines criminality or not. This is a major example of how OHS law in Australia has become alarmingly inconsistent.

New South Wales

Since at least 1983, NSW has had OHS laws that applied a presumption of guilt against employers. However, because the presumption of guilt had not been applied in an aggressive prosecutorial manner, the practical impact of the NSW Act was fairly similar to that in other states. That is, the way in which the law was administered applied the principles of 'reasonable and practical control' even if the specific wording of the Act distorted those principles. But, in 1996, the Gretley coal mining disaster changed the situation.

NSW not aggressive about prosecutions until 2000

Evidence of a non-aggressive approach to prosecutions in NSW is sourced from NSW departmental correspondence.

- The view of the Chief Inspector (of Mines) had been '… that it was more important to fix the underlying causes to accidents by adopting a 'no blame' approach and utilising contemporary investigation techniques…. This approach leads to cooperation from all parties in the development of safe working systems'.[a]

Prosecutions would only occur in cases of clear-cut negligence.

- There was a view in the Department of Minerals Resources that, 'Like any workplace, no coal mine is entirely free from risk'.[b]

The DMR was of the view that many situations in coal mines imposed such limitations that it was not reasonably practicable to ensure safety and the Department could not exercise reasonable control. This was a recurring theme in DMR documents and was informally put in writing to the Crown Solicitor's Office and WorkCover justifying why the DMR should not be prosecuted.

Sources: (a) Court of Coal Mines Regulations Inquiry into fatalities at Gretley colliery, Statement by Terrence Abbott, 12 May 1997; (b) Comments on Draft Statement of Facts by the Department of Minerals Resources, Conference notes, Krstic & Anderson, 19 January 2000.

Gretley was an underground coal mine in the Hunter Valley in NSW. In November 1996, miners dug into a 100-year-old disused, water-filled mine adjacent to Gretley. The resulting underground flood tragically took the lives of four men. The tragedy happened because the company was using faulty mine maps supplied by the state government mines department. There had been worse mines disasters involving greater loss of life in NSW before Gretley. But Gretley acted as the trigger for political pressure to instigate aggressive prosecution.

For the first time, the full force of the 1983 OHS Act was applied in the prosecution of the mining company and mine managers. The prosecution was launched in 2000, with convictions recorded in 2004. The company's appeal to the Full Bench of the NSW IRC was rejected in November 2006.

Several things have happened in NSW since the Gretley disaster in 1996:

The NSW ALP government introduced a new OHS Act in 2000. The main features of the Act are:

- Presumption of guilt applies against the legal employer.
- Employees do not suffer the presumption of guilt. Essentially, an employee's primary statutory liability is to comply with the instructions of employers.
- OHS prosecutions are conducted in the Industrial Relations Commission of NSW. There are no appeals beyond the IRC and no trial before jury. The normal provisions of criminal justice do not apply, even though criminal convictions are recorded.
- Unions have the power to prosecute and have used it. They can and do receive half of the fines imposed. A convicted business can also be ordered to pay the union's legal fees.

Further, in 2005, the NSW Government introduced a Deaths Bill (the Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005). This was designed to enable the jailing of employers in the event of a death or serious injury at a workplace. The Bill was confronted by substantial opposition from the NSW business sector and was withdrawn by the government. Shortly thereafter, however, the government amended and reintroduced it under the same name. This was opposed by many, but not all, in the business community. In fact, some industry groups supported the Bill.

The 2005 OHS Deaths Act has the following features:

- Imprisonment can occur in the event of a serious injury or death.
- Prosecution occurs in the normal courts with normal rights of appeal allowed.

In some respects it was an important first shift from the general thrust of OHS law in NSW.

But the difficult political process of achieving passage of the OHS Deaths Act demonstrated to the NSW ALP government that it had a political problem with its OHS laws. What was really driving this political problem, however, was the aggressive nature of NSW OHS prosecutions in NSW since Gretley.

With one-third of the Australian workforce, NSW conducted 63.4 per cent of all OHS prosecutions in the period 1989–99 to 2002–03. Because of the presumption of guilt, some 96 per cent of NSW prosecutions resulted in conviction in 2002–03.[11]

Since 2000, significant numbers of prosecutions and convictions have taken place which involved people who had no practical control over the OHS incident that led to their prosecution. The knowledge of these prosecutions has spread throughout the NSW business community and, as knowledge spreads, there has been a growing fear of the NSW OHS laws. For any business of any size in NSW it is only a matter of time, and luck, before managers, executives and directors face prosecution for incidents where they did not exercise control. In fact, a number of high-profile, national businesses are currently confronted with OHS prosecutions in NSW. It cannot be quantified, but it is fair to assume that this is adversely affecting the NSW economy as businesses view investment in NSW as carrying an unacceptably high, unfair and unjust risk of OHS conviction for their personnel. The legislation has also had the effect of shifting the focus of OHS management from the prevention of injuries to the mitigation of legal risk.

In mid-2005, the government conducted an inquiry into its OHS laws. For the first time, every single submission from business groups called for fundamental change to the 2000 Act. Universally, business called for removal of the presumption of guilt and for application of the notion of practical and reasonable control as the basis for OHS laws. This signalled the collapse of the union/business/government consensus on the issue in NSW.

In early 2006, the government announced proposed changes to the 2000 OHS Act which would have gone some distance to removing the presumption of guilt. But this time it was faced with enormous opposition from the union movement, its core support base. In October 2006, it withdrew its proposed changes and announced yet another inquiry (the Stein Review) into OHS laws, to report in April 2007, shortly after the March NSW state election.

In August 2006, an independent report was released that looked at the Gretley prosecution processes and found substantial irregularities, in particular over the failure to prosecute a government department and a union-owned labour hire company. Both the department and the labour hire company were directly involved in Gretley. The report looked at prosecutions after Gretley and expressed grave concerns about the system of justice in NSW as it applied to OHS.[12]

Since the Gretley convictions, the company that subsequently purchased the mine sought to appeal the decision in the NSW Industrial Relations Court. If the appeal had been successful, it could have opened up avenues for improved justice under NSW's OHS laws. But the appeal against the conviction of the company was dismissed in November 2006, by a verdict of two to one. However, the dissenting judge made a series of scathing comments about the behaviour of

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[11] 'Safer Workplaces: A New Partnership', combined employer group submission to the NSW OHS Act Review, 2005, p. 2, available from Australian Business Limited.

[12] IPA Work Reform Unit, op. cit.

the prosecutor, effectively calling for his dismissal and the removal of the NSW WorkCover Authorities' prosecutorial powers.

A more complete picture including other states/territories

The other states and territories have not had the same significant triggers for changing their OHS laws in the last five years that have been evident in NSW, Victoria and the ACT. It would appear, however, that Tasmania is in the early stages of such a process. It is difficult at this stage to predict the direction in which political pressures will push Tasmanian OHS law.

This paper has shown an overall picture of the state of OHS laws across Australia. The foregoing discussion on the changes in the ACT, Victoria and NSW provides an important part of the picture. The other states have had laws that have remained somewhat unchanged in terms of core design since the 1980s and 1990s, although some modifications have occurred. They were all created after the Robens report and after ILO Convention 155 came into existence, but well before Australia became a signatory to C155. Consequently, the internationally accepted principles of OHS law are reflected in the states' laws in an inconsistent manner. This can best be understood by doing a comparative case study of just one area of OHS law – namely, how the laws apply personal liability against corporate executives and managers under duties of care.

The ACT's OHS Act, for example, does not make officers personally liable, but the ACT's Industrial Manslaughter legislation transfers responsibility for corporate criminality to officers in a watered-down way.[13]

The Queensland OHS Act of 1995 is similar to the NSW Act. It applies liability to corporate officers once corporate liability has been determined, but with better defences than those available in NSW.[14] The Queensland Act requires that a corporation 'must ensure' safety. This is similar to NSW and creates a presumption of guilt.[15] However, the defences available in Queensland are considerably more reasonable than those in NSW, enabling a higher level of justice to apply.

The Tasmanian Act of 1995 is also similar to NSW, but is narrower because it only applies liability to directors of corporations and designated 'responsible officers' and not to other mangers and executives.

The South Australian OHS Act of 1986 applies individual liability only to designated 'responsible officers' and does not generally capture all managers, executives and directors. However South Australia introduced a Bill to Parliament in 2006 which expands the OHS liability of a corporation to corporate officers, employees and agents. It also creates a jailing offence for 'natural persons' (individuals) who knowingly or recklessly endanger health or safety.

The Western Australian OHS Act of 1984 makes it an offence for an officer to 'connive' to commit an offence under the Act or to engage in 'wilful neglect'. The Northern Territory follows a similar approach under its 1986 Act. Both of these Acts are closer to the idea of general criminal law. They apply liability to individual officers only where there is a measure of 'intent' on the part of the officers. This is quite different from NSW and Queensland where no measure of intent is required to impose liability upon corporate officers.

The old Victorian Act of 1985 was similar to the WA and NT Acts. But the 2004 Victorian Act shifted away from 'connivance' or 'wilful neglect' and now imposes liability on corporate officers for 'failing to take reasonable care'. This is significant because it demonstrates just how important the

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[13] Neil Foster, 'Personal Liability of Company officers for Corporate Occupational Health and Safety Breaches: Section n26 of the *Occupational Health and Safety Act 2000* (NSW), Australian Journal of Labour Law, 18, 2005.
[14] ibid.
[15] Wheelwright, op. cit.

shift in the Victorian 2004 Act has been in its direct application of the Robens 'control' model to OHS. In addition, the Victorian Act does not apply individual liability only to corporate officers. It applies identical personal liability to employees, suppliers, independent contractors and so on, using exactly the same wording as is used for corporate officers.

The Commonwealth's OHS legislation does not make officers personally liable.[16] But personal liability continues to apply under normal criminal law if someone is injured or killed. This requires proof of intent to injure and so on (mens rea), and the presumption of innocence and the right to trial before a jury.

When the same issue of duty of care is looked at from another perspective – that is, in terms of onus of proof, defence and prosecution – differences across Australia are substantial.[17] In NSW, Tasmania and Queensland, the accused suffer a presumption of guilt and must prove their innocence. In South Australia, the prosecution must identify a 'causal link' and the accused must demonstrate 'reasonable steps' in his or her defence. South Australia seems to have 'a bit both ways' seemingly giving weight both to a presumption of innocence and a presumption of guilt. A Victorian prosecutor must prove lack of reasonable care (in other words, there is a presumption of innocence) and in Western Australia and the Northern Territory the prosecutor must prove 'connivance' or 'neglect' (also involving a presumption of innocence).[18] Further, the Victorian Act is substantially different from those in NSW and Queensland because the onus is on the prosecution to demonstrate 'beyond reasonable doubt' that there was a failure to 'take reasonable care'.[19] The NSW Act of 2000 imposes a presumption of guilt against a corporation which leads immediately to a presumption of guilt against a corporate officer.[20] The accused must prove their innocence.

Observation: To the layperson, much of this is highly confusing. There appears to be considerable 'splitting of legal hairs' between jurisdictions as to when people are liable under OHS law and when they are not liable. This confusion is real. All people operating in business need to have clarity about their legal liability if they are to be able to make clear and effective decisions. This confusion, created by the differences between the states needs to be resolved to assist people in business to get on with the important task of improving safety.

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[16] Foster, op. cit.
[17] ibid.
[18] ibid.
[19] Wheelwright, op. cit.
[20] ibid.