Unions back new proposals to increase the maximum fines for companies and directors who cause death or injury to workers, but believe the fines need to be even higher if they are to act as an effective deterrent and are concerned that bad employers will still find it easy to escape prosecution.

The first report of the National Review of OHS Laws has made 75 recommendations to the Federal and State Governments on harmonising the laws that cover health and safety at work.

Fines for recklessness or gross negligence and serious harm including death will jump to $3 million for companies and to $600,000 for individuals such as directors.

The recommended maximum jail sentence for individuals will be 5 years, which is higher than that applying in most states but a drop in standards for the ACT where there is a 7 year maximum.

ACTU Assistant Secretary Geoff Fary said, “We are pleased that the Panel Report has recognised that breaches of OH&S laws are criminal rather than civil matters. These recommendations are a step in the right direction, but need to go much further to protect working people by tightening up the rules on employers’ duty of care to their workforce.

“There is a real need to address the carnage that is taking place in workplaces by increasing fines and tightening up employers’ duty of care, but we are concerned that in NSW and QLD injured workers and their families will lose out because they already have laws that squarely put the onus of proof on employers when they allegedly breach the law.”

Currently, the fines for breaking OHS laws vary between States and Territories but the maximum penalty is rarely handed down by courts.

“Unions believe that the ability to fine companies a percentage of the turnover would be a better deterrent, because even a $3 million fine is a drop in the ocean for some big corporations.

“At the moment employers can get fined more for breaching trade practices law than for being found guilty of contributing to employees being killed or maimed in their workplace.

“The courts should also be encouraged to use the maximum penalties. At the moment they don’t.

“Unions will continue to campaign for laws that put an unqualified duty of care on employers to provide a healthy and safe workplace,” said Mr Fary.

The Council of Australian Government’s (COAG) move to reform and harmonise Australia’s workplace health and safety laws was announced in April by Julia Gillard, Federal Minister for Employment and Workplace Relations. A three-person panel has conducted the review and COAG will consider the final recommendations from the panel after a second report is released by February.

Government figures show that in 2005-06, 236 Australians died from a traumatic workplace injury or disease and 139,630 Australians were compensated for a serious workplace injury or illness.
**Letters to the Editor**

If you have any safety issues to discuss, or concerns about SafetyWeek itself, please consider communicating with the editor at kjones@sia.org.au

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**Job Ads**

Please note that the job advertisements can be viewed via the SIA website:

**QUEENSLAND**
CS Energy - Health and Safety Coordinator – Kogan Creek Power Station, Chinchilla

**NORTHERN TERRITORY**
Rio Tinto - Manager Health and Safety - Energy Resources of Australia

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**New Report Signals Significant Opportunity For Harmonisation Of Australia's Occupational Health And Safety Laws**

*6 November 2008*

Statement by Mr Scott Barklamb, Director of Workplace Policy

The Australian Chamber of Commerce and Industry has welcomed the release of the first report and recommendations of the National Review Into Model Occupational Health and Safety (OHS) Laws, issued following yesterday’s meeting of Federal, State and Territory workplace relations ministers.

OHS regulation is an issue of critical importance for business. ACCI continues to seek improvements in our national framework of OHS laws that will cut red tape and unnecessary regulation, and lead to safer workplaces.

Whilst there is significant detail to be analysed across the report’s 75 separate recommendations, the review panel appears to have taken a sound approach on critical issues such as ensuring that the core safety obligation on employers is limited to doing that which is reasonably practicable, and that the prosecutor must bear the onus of proving any breach of OHS law beyond reasonable doubt.

Much detailed analysis will to be undertaken during coming weeks, and there are clear areas of potential concern for employers in the report, particularly in relation to proposals to increase various penalties, positive duties on officers and new potential obligations and duties in some areas.

The three person review panel has now commenced the second phase of the National Review Into Model Occupational Health and Safety Laws, which was commissioned by the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, in April this year, with a final report to be submitted by the end of January 2009.

ACCI notes that a second report will address a range of important issues that remain to be decided in relation to a model OHS Act. It will be important for industry to consider the two reports together once they are available in order to gain a complete picture of the review panel’s recommendations and the overall suitability of the model OHS laws proposed.

Source: ACCI

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**Psychological injury – the hidden workplace scourge**

*20 October 2008*

The hidden scourge affecting almost a third of Queensland workers is psychological injury from aggressive or abusive customers and managers as well as stress from overwork, conflict and shift work.

A recent poll of 1000 Queenslanders show 29% of the public are more concerned about psychological injury than physical injury from manual lifting (13%), repetitive work (12%), slips and/or falls (12%) or chemicals (8%).

Queensland Council of Unions (QCU) Secretary Ron Monaghan said the independent public poll supported the experience of the Workers’ Compensation Information Service (WCIS) – a telephone hotline based at the QCU.

"The poll results are a timely reminder during Safe Work Australia Week that many workers are suffering in silence," Mr Monaghan said. "More than a third of callers to our workers’ compensation hotline report stress at work from abuse and bullying to overwork and relentless shift work.

Source: QCU
These serious concerns have a deep impact on the working and private life of workers, not to mention productivity in the workplace.

More than a third (37%) of 1,400 callers to the WCIS reported psychological pressures likely to lead to injury.

Mr Monaghan said what made the tragedy worse was that it is largely hidden with official records showing only 2.5% of claims processed by insurers (WorkCover and self insurers) related to psychological injury.

"People still think an injury has to be physical to be claimed even though psychological injury can have a far more devastating impact than a broken ankle," he said. "The problem is not just with workers reluctant to claim – the reality is the law makes it hard to prove work is the cause of psychological injury rendering successful claims less likely than for broken bones."

"People know the law is stacked against them and they are often the least capable of digging in for what can be a long drawn out battle required to prove a claim. The result is thousands of workers suffer in silence, work and home lives are shattered and company productivity collapses."

The public poll showed women were more likely to suffer as a result of aggressive or abusive clients - 12% compared to 8% for men.

The QCU recommends the following tips for people concerned about work-related psychological injury:

- talk to your doctor;
- talk to your workplace health and safety or union rep;
- find out what WH&S policies are in your workplace and if they are followed; and
- talk to your workmates about how WH&S procedures could be improved in your workplace.

Source: QCU

Physical inactivity costing the Australian economy $13.8 billion a year

New Medibank Private-commissioned research has found that physical inactivity is costing the Australian economy $13.8 billion a year.

The research, conducted in conjunction with KPMG-Econtech and launched as part of Walktober, builds on Medibank's 2007 research which examined the healthcare costs of physical inactivity. This latest study captures the healthcare costs, economy wide productivity costs, and the mortality costs of individuals passing away prematurely as a result of physical inactivity.

Craig Bosworth, Medibank Private Industry Affairs Manager, believes that the findings further demonstrate the importance of being active and the burden that a lack of physical activity can have on the Australian economy as a whole.

"Most Australians are aware of the benefits of physical activity but this latest round of Medibank research has revealed some alarming effects of physical inactivity," Mr Bosworth said. "An estimated 16,179 people die prematurely each year due to conditions and diseases attributable to physical inactivity and that is frightening. And whilst the majority of these are from the older population there is also a large number of people dying under 74 years of age due to physical inactivity, particularly in the male population.

"This mortality cost is often overlooked, but is an important element in considering not only the social but also financial costs of physical inactivity due to a decline in the size of the labour force."
Continued from page 3

The modelling approach used in the research also looked at the increased number of medical conditions as a result of physical inactivity and the ensuing medical costs of Coronary Heart Disease, stroke, Type 2 diabetes, breast and colon cancer, depression, and falls. The direct health cost of falls alone (attributable to physical inactivity) was found to be $503 million/year.

“Like other health risk factors, physical inactivity can have an adverse effect on organisations as well as individuals. Specifically, physical inactivity can impact on employee productivity by causing increased absenteeism and presenteeism, which impose direct economic costs on employers.

“The Medibank research has found that productivity loss due to physical inactivity equates to 1.8 working days per worker per year,” Mr Bosworth said.

Ian Kett, Co-ordinator of the Walktober campaign, welcomed the Medibank research.

“This important research highlights the need for concerted and immediate action across the nation to create an active culture,” said Ian Kett, “Walking is the simplest and most accessible form of physical activity and is fundamental to public health. If we can create a nation of walkers we will address many of the issues raised in the report.”

The National Physical Activity guidelines (NPA guidelines) for Australians recommend 30 minutes of moderate-intensity physical activity on most days of the week as the minimum requirement for good health. To be considered ‘physically active’ the National Physical Activity guidelines recommend an accumulation of at least 150 minutes of moderate-intensity physical activity over at least five sessions in a week. Any individual that does not meet this level of exercise is considered to be physically inactive.

Hearing Loss Claims

Under the Workers Rehabilitation and Compensation Act 1986 (“the Act”), if a worker has suffered noise-induced hearing loss as a result of employment, he or she is potentially entitled to be compensated by way of a lump sum for binaural hearing loss.

A threshold is applicable. Lumpsum compensation willonly be paid if the worker’s binaural hearing loss is at least 5 per cent.

Importantly, under the Act, for a person who has resigned or retired and suffers from noise-induced hearing loss and who brings a claim within two years of the date of resignation or retirement, it is presumed that the noise-induced hearing loss is caused by employment.

That presumption is lost if a claim is brought outside of the two-year limit. In other words, there is no presumption that noise-induced hearing loss is caused by employment if a claim is commenced after two years from the date of resignation or retirement. In those circumstances, it becomes necessary to prove the casual connection between employment and the noise-induced hearing loss.

The entitlement is particularly relevant to police officers, many of whom suffer noise-induced hearing loss owing to employment, either because of the use of firearms - without any or any adequate protection - or due to policing pubs and places of entertainment where loud music is often played.

In summary, many police officers have an entitlement to be compensated by way of a lump sum under the Act for noise-induced hearing loss caused by employment. But many officers do not realize that, if they resign or retire their employment without bringing a claim, a presumption that the noise-induced hearing loss is work-related is lost after a period of two years from the date of resignation or retirement.

If you have suffered noise-induced hearing loss that is likely to be caused or to have been contributed to by employment, whether or not you have resigned or retired, you should seek advice, because you may have a claim and an entitlement to a lump sum of money for your disability.
Safe Work Award Winners Lead By Example

Industrial Relations Minister, Paul Caica, has called on all South Australian employers and employees to follow the lead on workplace safety set by the winners of this year’s Safe Work Awards’, announced tonight.

“The Award winners send a positive message and example to South Australians of the kind of innovation, dedication and cooperation needed to keep our workplaces safe,” the Minister said.

The Awards capped off four weeks of workplace safety presentations around the State, which were all strongly attended.

Mr. Caica says the Safe Work event and the Awards both prove that the business sector is fast recognising that safety at work is a valuable investment.

“At Monday’s Adelaide launch, an official from leading resources company, Santos, told us how entering the Safe Work Awards and subjecting itself to the judging process has made it a better company for the experience,” the Minister said.

“At a CEO’s forum later that day, we then heard an investment analyst from AMP Capital explain that there is a clear and identifiable link between good OHS management and strong overall financial performance.

“Safe Work Month and the Safe Work Awards are both an integral part of this government’s commitment to meeting the target, set in its Strategic Plan, regarding greater safety at work,” Mr. Caica said.

Best Workplace Health and Safety Management System – ETSA Utilities

ETSA Utilities’ complete commitment to workplace safety is highlighted by its safety vision of a workplace free of accidents and injuries. This has seen a reduction in claims and injury costs over the last five years. ETSA Utilities’ safety philosophy and management system have also been adopted by several other major organisations, including ASC Pty Ltd and Yalumba Wines.

Best Solution to an Identified Workplace Health and Safety Issue – Toll Autologistics ‘Flatpack Vehicle Transporter’

Toll Autologistics – Vehicles Division has developed an innovative vehicle transporting system that not only improves employee safety, but also eliminates damage to vehicles sustained during transport. The remote-controlled hydraulic system removes the need for operators to work at height, and markedly reduces slip, trip and strain injuries.


The Association was instrumental in commissioning the ‘It’s Not a Board Game’ DVD and Manual Set. It gives new and existing industry employees the means to demonstrate their competence as plasterers, including those with limited English. In doing so, it has helped drive an industry-wide safety culture change.

Public Sector Leadership Award for Injury Prevention and Management – The Repatriation General Hospital

The Repat was recognised for its reduction in the number and severity of workplace injuries over the last decade. Initiatives, including an onsite physiotherapy treatment service, have helped deliver above-average return to work and rehabilitation outcomes for hospital employees.

Employer of the Year – Eldercare

Eldercare, a major provider of aged care and retirement living, met the judging criteria...
Sydney Safety Conference

Opinion - Kevin Jones
Over the next few editions of SafetyWeek, there will be summaries of conference papers that were presented at the Safety Show in Sydney at the end of October 2008.

The Safety Institute had me cover the three-day conference hosted by the NSW Division and supported by WorkCover NSW. I wasn’t sure what to expect of the conference or the venue, the Sydney Showgrounds, which is part of where the Olympics were held.

The last time I had attended an OHS conference in Sydney was for one of the FutureSafes almost a decade ago and that was at Darling Harbour.

The Sydney Conference had around 300 delegates and is a conference that satisfies a niche market but draws from an influential selection of industries.

Several of the speakers had an audience that was miniscule compared to the impact of the topic that was being discussed.

For instance, two lawyers from Corrs Chambers Westgarth spoke on Rail Safety. They described in detail how rail safety management has undergone a revolution in New South Wales that was generated by disasters and mismanagement.

This revolution in legislation and corporate culture has occurred in around 6 years. The lessons for regulators and corporate officers were obvious.

The audience was five people.

The largest crowd in a single venue was for the hypothetical hosted by Adam Spencer and with a panel of prominent OHS people from the whole political spectrum. The discussion was lively, funny and educational.

This session showed that high-profile speakers presented in a dynamic fashion will draw a crowd.

International speakers are a feature of Australian OHS conferences and they tend to be a bit unpredictable. I was not impressed by Larry Wilson, a Canadian who spoke of behavioural-
• A failure to provide adequate lighting in the depot.

Industrial Magistrate Richard Hardy noted how a lapse in the company’s training obligations and safety management practices had tragic results:

“An unfortunate fact was that Mr. Crompton was not effectively inducted or shown how to change a tyre because the person who usually did such an induction was not present on the day that Mr. Crompton was present for instruction.”

Magistrate Hardy fined the company $50,000 originally but discounted the penalty by 10% (to $45,000) given the company’s guilty plea, cooperation with SafeWork SA, contrition and improvement in its safety systems.

The Magistrate also ordered the maximum payment allowable under law of $20,000 to Mr. Crompton’s family for “injury, loss or damage” resulting from the offence.

“Nothing must ever be left to fall through the cracks when it comes to safety training,” says Michele Patterson, Executive Director of SafeWork SA.

“In this case, a seemingly minor matter of a missed induction appointment combined with a string of other factors to cost a man his life and devastated his family.”

Source: SafeWorkSA

Brisbane company developing new safety product for mines

6 November 2008

Brisbane company QMW Industries has been awarded $250,000 from the State Government’s Business and Industry Transformation Incentives (BITI) scheme to develop and export an innovative safety product to protect workers on mine sites.

Industry Minister Desley Boyle announced the funding today.

“The BITI scheme supports projects that promote the transformation of priority industries and drive Queensland towards an internationally competitive, sustainable and knowledge-intensive future,” Ms Boyle said.

Minister Boyle said the BITI grant would enable QMW Industries to become a world class manufacturing supplier for the mining and resource industry.

“This is a Queensland-owned company that has established itself as a market leader for safety overfit frames, structures, canopies and cabins for use in the construction, earthmoving, mining and maintenance industries,” she said.

“QMW will develop a new safety overfit frame prototype that will assist in minimising the effect of accidents on mine sites. This new product will create a Queensland supply chain allowing the company and its partners to meet the needs of the global mining industry.”

QMW Industries owner Jeff Samuels said the State Government funding would also help his company to establish a world class testing laboratory to develop the new prototype.

“We have a very experienced R&D team with a proven track record in the design, development, manufacture and installation of these safety overfit frames,” he said.

“The new prototype will act like a cage protecting the driver/operator in the event of an accident which may cause the cabin to be crushed.

“It will also protect driver/operators from falling objects.”

Ms Boyle said the State Government was pleased to support an innovative company like QMW Industries.

“This is a great opportunity to create significant export opportunities for the company and its supply chain partners,” she said.
BITI focuses on the big picture and the impact of a project on an industry and region as a whole.

“Small to medium enterprises operating in Queensland’s priority sectors can apply for between $30,000 and $250,000 for projects that have the potential to significantly expand their business, their industry and their region.”

The next round of BITI closes on 13 March 2009. For more information on BITI, visit www.industry.qld.gov.au/incentives

Mine health and safety boosted by testing revamp 4 November 2008

The State Government is improving its testing systems to ensure only the best and most qualified people are overseeing health and safety in the state’s mines, Mines and Energy Minister Geoff Wilson said today.

Mr Wilson said the state’s Board of Examiners was being revamped to ensure Queensland maintained its record safety levels in a booming mining industry.

“Queensland has one of the safest mining industries in the world, both in terms of its safety record and safety legislation,” Mr Wilson said.

“But we cannot become complacent, so we are continually striving to look at the way we do things and see where things may be improved.”

Mr Wilson said the eight-member Board of Examiners was responsible for ensuring only qualified and competent people held statutory positions managing safety and health at mines.

“There have been a number of changes made to the way the board operates,” Mr Wilson said.

“These include new senior appointments to the board plus streamlined administrative processes to deliver more flexible, and efficient arrangements for applicants to safety positions.

Mr Wilson said another main change would help applicants prepare for the written law examination on Queensland’s mining safety and health legislation.

“In the past, applicants were provided with a practice examination before they sat the written test.

“We are revising and restructuring both written and practice examinations so that as well as providing a score for the completed examination, the result will also reveal any areas of topic strength or weakness.”

A new automated workflow and document tracking system will also help processing of applications and produce speedier outcomes for applicants.

Mr Wilson said the commitment to mining health and safety must not waver.

“The Queensland mining industry workforce has grown by 55 percent in recent years, to now total more than 33,000 workers. With such growing numbers, we must continue to strongly enforce mine safety on the ground - mine by mine, employer by employer, worker by worker.”

For more information, visit www.dme.qld.gov.au/mines/board_examiners.cfm

Treadmill safety alert 6 November 2008

The Australian Competition and Consumer Commission today issued a new Safety Alert on treadmills, aimed at helping treadmill users prevent injuries to children.

The Safety Alert follows a recent report by the New South Wales Product Safety
Committee that found there was an urgent need to alert and educate users of treadmills about the hazards treadmills present to children.

The Safety Alert notes that over the past three years, more than 100 serious accidents associated with treadmills have occurred in Australian homes.

“Most serious injuries occur when children try to touch or climb on a treadmill while it is being used,” ACCC Deputy Chair, Mr Peter Kell, said. “The best way to prevent injury is to use your fitness machine in an area that is not accessible to a young child.

“Serious friction burns can occur extremely quickly when small hands or fingers become trapped against moving parts - by the time the treadmill user can react, it’s too late!”

The Safety Alert, which will be available in hard copy or from the ACCC’s website, www.accc.gov.au, warns treadmill users to always keep young children away from fitness machines. It supplements other safety alert brochures published by the ACCC on goods which have proven dangerous to vulnerable members of the community, such as children and the elderly.

“The ACCC is working with State and Territory consumer protection agencies to publicise the dangers of treadmills to small children.

“It is also consulting industry and other stakeholders on a proposal to introduce mandatory warning labels on treadmills,” Mr Kell said.

“The ACCC is developing a Regulation Impact Statement for a new mandatory safety standard which will require treadmills to carry a warning label alerting users to potential hazards.”

Federal Consumer Affairs Minister, Mr Chris Bowen, has also issued a consumer warning under section 65B of the Trade Practices Act 1974.

Construction jargon may put new, Hispanic workers at risk

WEST LAFAYETTE, Ind. - Specialized language used in the safety training for construction workers may not be understood by those new to the job or Hispanic workers, possibly putting them in danger, according to two Purdue University pilot studies.

Bryan Hubbard, assistant professor of building construction management, and James McGlothlin, associate professor of health sciences, teamed to lead the studies. Findings will be presented Oct. 21-23 at the National Occupational Injury Research Symposium in Pittsburgh.

“Safety trainers must cover a lot of material in a short amount of time and, therefore, use a lot of jargon and acronyms,” Hubbard said. “These terms are familiar to them and those in the industry, but our study found that this lingo isn’t understood by everyone on the construction site. Important information is covered in this training, and not understanding any part of it puts workers at risk.”

Hubbard and McGlothlin’s studies looked at terms used in the 10-hour safety training by the Occupational Safety and Health Administration that all construction workers are required to complete. The training involves topics such as how to safely work around construction sites. Words used in the training and in the Purdue study included PTO, which stands for power takeoff, a rotating driveshaft used to provide power to an attachment or separate machine; bird caging, which is when a wire rope frays; and lockout-tagout, a way to ensure electricity does not flow in a circuit.

The first study looked at construction safety training issues for employees new to construction. Hubbard and his team undertook the study to examine the causes behind the high number of work-related deaths and injuries in the construction industry,
which previous studies have indicated are more likely to occur at the beginning of a construction worker’s career.

To evaluate the effectiveness of the OSHA training, Hubbard and his team conducted three surveys with student interns in the construction industry: one before the OSHA training, one after the training and before working on the construction site for their first internship, and one after working at their first internship. The study was conducted in the summer of 2007.

The results indicated that although the training is successful in helping to bring awareness of safety issues on the construction site, many of the interns, who were mostly construction engineering management students at Purdue, didn’t understand a large amount of the terminology and acronyms presented during the training. For instance, during the training, students indicated that they were unfamiliar with terms such as PTO; MSDS, an acronym for material safety data sheet, which provides information and procedures for handling or working with various substances; and lanyard, a cord used to hook a safety harness to a stable point. Hubbard said before proceeding with work on the construction site, safety instructors ensured that students understood the meanings of unfamiliar words.

The second study, led by McGlothlin, was a continuation of the first study, looking specifically at Hispanic construction workers, who have a high number of fatal accidents on construction sites. The survey looked at workers’ perceptions of construction safety, their levels of safety training and their familiarity with construction terms. The survey was conducted in Louisiana in the summer and fall of 2007 among workers who were helping to rebuild after 2005’s Hurricane Katrina.

This study examined the understanding of the same list of words in the Purdue student study and found that even fewer in this population understood the terms. Less than 20 percent of Hispanic workers understood any of the terms used in OSHA training, and some terms were understood by only 3 percent.

Hubbard and McGlothlin said a possible solution includes the use of visuals during training, including creating books where nearly every construction-specific word is accompanied by a picture. “We shouldn’t eliminate the acronyms and jargon from the training because these are terms workers will need to know, but what we can do is associate visual elements with these words so they are familiar with the terms and what they mean,” McGlothlin said.

Collaborating with Hubbard and McGlothlin on the new construction worker study were Purdue engineering graduate students Irene Mena and Adythia Soendjojo. Collaborating on the Hispanic worker study were Mena from Purdue, and Fereydoun Aghazadeh, Jackoby Bertot, Jose Huerta and Laura Player from Louisiana State University.

Source: Purdue University
The National OHS Review Panel ‘National Review into Model Occupational Health and Safety Laws First Report’ (the Report) was tabled at the Workplace Relations’ Ministers Council meeting yesterday.

The Report contains the findings and recommendations for what the National OHS Review Panel considers to be the optimal content of a model OHS Act in the following key areas:

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

Duties of Care

The Report recommends that there be a primary (general) duty of care imposed on any person who conducts a business or undertaking (whether as an employer, self-employed person, principal contractor or otherwise) for the health and safety of:

- ‘workers’ within an expanded definition that is not limited to a contract of employment or deeming through direct engagement by contracting, referring instead to a broader ‘person who works in a business or undertaking’; and
- others who may be put at risk to their health and safety by the conduct of the business or undertaking.

This recasting of the duty is intended to cover new working relationships beyond the traditional employer/employee relationship, circumventing the need to refer to the employment relationship.

The classes of persons singled out by the Report to be subject of duties of care under a model OHS Act include:

- those with management or control of workplace areas;
- designers of plant, substances and structures;
- manufacturers of plant, substances and structures;
- builders, erectors and installers of structures;
- suppliers and importers of plant, substances and structures;
- OHS service providers;
- officers;
- workers; and
- other persons at the workplace.

The Report recommends that there be a statement of principles clearly stated in the OHS Model Act so that they are clearly understood. In this approach, the Report takes a leaf from the current Victorian OHS legislation.

Reasonable Practicability

In relation to reasonable practicability, the Report recommends that a defined ‘reasonably practicable’ be built into the offence in the model OHS Act which reflects the current approach taken in all jurisdictions except New South Wales and Queensland. This will be welcomed by the business community in New South Wales and Queensland who have called for a shift of the burden of proof to prosecutors for some time.

The Report takes the sensible view that defining reasonably practicable will provide guidance to duty holders in achieving legislative compliance, noting that case law is not easily accessible to duty holders. The definition is modelled on the definition in the...
current Victoria Occupational Health and Safety Act 2004 however, provides greater clarity around the need to weigh up the various elements for doing what is reasonably practicable including:

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

The authors are not supportive of the inclusion of the element of ‘control’ in the definition of ‘reasonably practicable’ and take the view that the definition should set out principles rather than processes. Arguably, failing to provide processes means that duty holders will still struggle to understand what it is they need to do to fulfill the duty.

The Report also suggests different qualifiers for officers, workers and other persons. In relation to officers of corporations, the recommendation is that there be a duty on officers to exercise due diligence to ensure compliance by their company, adopting an approach which is similar to that in the current Victorian legislation. The recommended casting of the officer duty is incident-focused rather than system focused and as such is reactive.

The business community will welcome the fact that the onus of proving a failure to meet the standard of due diligence will be on the prosecution under the Report’s suggested approach. The prosecution will bear the onus of proof beyond reasonable doubt on all elements of an offence. In light of the recommendations about the onus of proof in relation to reasonable practicability, there would be no defences under the model OHS Act.

The duty of ‘workers’ under the model OHS Act largely reflects the current duty which is placed on ‘employees’ throughout the jurisdictions. That is, taking reasonable care for their own health and safety and reasonable care that their acts and omissions do not adversely affect the health or safety of others.

**Offences**

The offences under the recommendations for the model OHS Act would be strictly criminal with the prosecution bearing the criminal standard of proof for all elements of the offence.

The Report suggests the adoption of a three-tiered approach to offences.

The Report adopts the Victorian approach of making category one offences indictable and other offences dealt with summarily. Indictable offences would be heard by a Judge and Jury (as occurs in Victoria). Indictable offences represent a departure from the position in most Australian jurisdictions.

The Report’s recommended three-tiered approach to offences can be summarised as follows: [refer Table 1]

As the table above demonstrates, maximum penalties would significantly increase if the approach recommended by the Report were adopted. Maximum penalties for the most serious OHS offences would rise to 3 million dollars for corporations; $600,000 for
Table 1

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Summary/Indictable</th>
<th>Maximum Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1</td>
<td>Most serious cases – Breach of the primary (general) duty involving recklessness or gross negligence and serious harm (fatality or serious injury) to a person or a risk of such harm.</td>
<td>Indictable</td>
<td>Corporation = $3 million Individual = $600,000 Imprisonment - up to five years</td>
</tr>
<tr>
<td>Category 2</td>
<td>Breach of the primary (general) duty where serious harm or the risk of it without the element of recklessness or negligence.</td>
<td>Summary</td>
<td>Corporation = $1.5 million Individual = $500,000</td>
</tr>
<tr>
<td>Category 3</td>
<td>Breach of the duty that does not involve serious harm or the risk of serious harm.</td>
<td>Summary</td>
<td>Corporation = $500,000 Individual = $100,000</td>
</tr>
</tbody>
</table>

individuals and imprisonment for up to five years under the suggested approach. This would make OHS penalties comparable with penalties for breaches of environmental legislation in Australia. In light of the higher penalties, there are no further penalties recommended for repeat offenders.

The Report takes the view that the model OHS Act should provide a system of appeals against a finding of guilt in a prosecution with appeals ultimately to the High Court of Australia. Such an appeal process will be welcomed.

Concluding Thoughts

On the whole, the methodology adopted in the Report represents picking the preferable provision from existing legislation rather than approaching the challenge of what a model OHS Act should look like with a blank canvass. If there is a jurisdiction which the recommended model most closely resembles, it is clearly Victoria. The report was officially endorsed by COAG members. However, it remains to be seen whether it will in fact be adopted.

The National OHS Review Panel's second report is due to be provided to the Workplace Relations Ministers at the end of January 2009.

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NEXT WEEK: “When Good Times Turn Bad: The Interaction Between OHS Policies, Grievance Procedure and Contracts of Employment” by Cameron Hannebery, and Kathryn Bion

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