

General Purpose Standing Committee No. 1

# **Serious injury and death in the workplace**

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## Terms of Reference

1. That General Purpose Standing Committee No. 1 inquire into and report on serious injury and death in the workplace, and in particular:
  - (a) the operation of WorkCover's prosecution branch including the cases of
    - (i) Anthony Hampson—Gosford High School, June 2001
    - (ii) Dean McGoldrick—death while working for Advance Roofing, February 2000
  - (b) the role and performance of WorkCover in liaising with victims and families
  - (c) the method and monitoring of payment of penalties where an employer has been convicted of an offence relating to a serious accident or death
  - (d) compliance by WorkCover with its statutory requirements relating to serious injury and death in the workplace
  - (e) comparison of the operation of WorkCover in relation to the management of serious injury and death in the workplace in other jurisdictions in Australia.
2. That the Committee report by 6 May 2004.

*(Minutes of Proceedings No. 34, p 435, 19 November 2003)*

## Committee Membership

<b>Revd the Hon Fred Nile MLC</b>	Christian Democratic Party	<i>Chair</i>
<b>Hon Peter Primrose MLC</b>	Australian Labor Party	<i>Deputy Chair</i>
<b>Hon Kayee Griffin MLC</b>	Australian Labor Party	
<b>Ms Jan Burnswoods MLC</b>	Australian Labor Party	
<b>Hon Catherine Cusack MLC</b>	Liberal Party	
<b>Hon David Clarke MLC</b>	Liberal Party	
<b>Ms Lee Rhiannon MLC</b>	The Greens	

## Participating Members

<b>Hon Tony Burke MLC</b>	Australian Labor Party
<b>Hon Amanda Fazio MLC</b>	Australian Labor Party
<b>Hon Ian West MLC</b>	Australian Labor Party

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## Chairman's Foreword

This inquiry was referred to the Committee on 19 November 2003 by the Legislative Council following concerns expressed by a number of parties, notably the Construction, Forestry, Mining and Energy Union (CFMEU) about the rate of workplace injuries and fatalities in NSW, particularly in the building and construction industry. Other industries, notably the transport, agriculture and mining industries have similarly high rates of workplace injuries and fatalities.

The principal issue before the Committee during the inquiry was that of criminal responsibility for workplace deaths. A number of stakeholders argued that new manslaughter laws should be introduced in NSW to increase the responsibility of employers and corporations for ensuring the health and safety of their employees. In response, the Committee recommends in this report that as a matter of urgency, discrete and specific offences of "corporate manslaughter" and "gross negligence by a corporation causing serious injury" be provided for in the *Crimes Act 1900*.

The Committee also examined during this inquiry the role and performance of WorkCover, the lead agency with responsibility for preventing workplace injuries and fatalities and promoting safe workplaces in NSW. This report makes a number of findings and recommendations in relation to the role and performance of WorkCover.

In particular, WorkCover is the largest and most active workplace safety inspectorate in Australia, with an extensive inspectorate responsible for providing advice to employers and employees in order to prevent workplace injuries and fatalities, and for managing injuries and fatalities when they occur. Concerns were raised during the inquiry in relation to the number of WorkCover inspectors and the adequacy of their training. The Committee notes, however, that to significantly expand the inspectorate and its resources would require an increase in the current 4.1 per cent levy on employers' workers compensation premiums.

The Committee commends WorkCover for committing significant resources to health and safety education and awareness programs in the workplace. However, WorkCover fails to follow through on injury prevention measures by prosecuting employers who place their workers at excessive risk of serious injury or death, even where that risk has not resulted in a workplace accident.

WorkCover brings the most prosecutions against employers of any workplace safety inspectorate in Australia. However, the Committee has particular concerns in relation to the length of time taken to conduct a prosecution after the completion of an investigation into a serious injury or fatality, and the resulting anomaly where an employer could avoid a prosecution through non-reporting of an accident within two years.

WorkCover's procedures for liaison with the victims and families of victims of workplace accidents are currently inadequate. This was highlighted by a number of specific cases examined by the Committee during the inquiry. The Committee notes, however, that WorkCover is moving to reform its processes for liaising with the victims and families of victims of workplace accidents.

WorkCover does not have direct responsibility for the recovery of fines imposed as a result of breaches of the OH&S legislation. This responsibility rests with the State Debt Recovery Office (SDRO), although clearly WorkCover has an interest in the outcome of the SDRO's processes. The Committee commends WorkCover for moving to formalise arrangements with the State Debt Recovery Office for

monitoring the payment of fines, but believes that WorkCover should take a more proactive role in relation to “phoenix” companies – companies which deliberately go into receivership in order to avoid their legal obligations.

This report also examines specific safety issues in the construction industry, the principal industry under consideration during this inquiry. In particular, the Committee examines the impact of sub-contracting and labour hire companies on health and safety standards in the construction industry, the lack of adequate training for some workers in the industry, the failure of some workers to use safety equipment in the industry, and the controversial issue of drugs and alcohol in the workplace. The Committee also comments specifically on the safety of workers on Government premises.

I would like to thank all parties who contributed to this inquiry. In particular, I wish to note the contribution of those witnesses who had either themselves suffered an injury in the workplace, or who had lost family members to workplace accidents. Their courage in coming forward and telling the Committee of their experiences was vital to this inquiry, and reinforced for all Committee members the terrible impact that workplace injuries and fatalities have on all those involved.

I would also like to thank the officers of WorkCover for their co-operation during the inquiry and their prompt response to the Committee’s requests for information.

Finally, I want to take this opportunity to thank my fellow Committee Members and the Committee Secretariat for their work on this extensive inquiry. In particular, I would like to thank the Committee Director, Mr Steven Reynolds, for his procedural guidance, and the Committee’s research staff, Mr Stephen Frappell and Ms Rachel Simpson, for preparing this report and organising the Committee’s activities. I am also very appreciative of the work undertaken by Ms Natasha O’Connor and Ms Ashley Nguyen who provided critical administrative support during this inquiry.

Revd Hon Fred Nile MLC

**Chairman**

## Summary of Recommendations

- Recommendation 1** 18  
That as a priority WorkCover address the inadequacies in data collection and reporting identified in this report.
- Recommendation 2** 20  
That a national database on workplace injuries and fatalities be developed in accordance with the recommendations of the House of Representatives Standing Committee on Employment and Workplace Relations in its June 2003 report entitled *Back on the Job: Report into aspects of Australian workers' compensation schemes*.
- That the database record the cause of death in relation to workplace fatalities, to assist in targeting measures to improve workplace safety, and that in particular, consideration be given to improved information collection on the role of fatigue in accident and injury causation.
- Recommendation 3** 20  
That the national database on workplace injuries and fatalities be developed using nationally consistent definitions, especially as relates to employees and fatalities, and including definitions relevant to the road transport industry.
- Recommendation 4** 33  
That as a priority WorkCover undertake regular unannounced inspections of building and construction sites where the cost of the work exceeds \$250,000 to target principal contractors and any sub-contractors. That these regular unannounced inspections ensure that the principal contractor has prepared and is observing an OH&S management plan, and that any sub-contractor has prepared and is observing a written safe work method statement.
- Recommendation 5** 34  
That the Department of Commerce undertake frequent, random and unannounced audits of contractors and subcontractors on Government projects under clause 15.5 of GC21, to ensure they are continuing to meet their obligations under clauses 15.1 to 15.4 of GC21.
- Recommendation 6** 36  
That the Government review the OH&S Regulation 2001 to provide clearer definitions of the obligations of the three parties involved in a labour hire relationship: the labour hire company, the host organisation and the on-hired employee.
- Recommendation 7** 42  
That the Government investigate including in the OH&S Regulation 2001 clearer definitions of the obligations of the parties involved in an apprentice hire relationship between a Group Training Organisation, a host employer and an apprentice.
- Recommendation 8** 44  
That the Government examine the provision of additional funding to the Building Trades Group Drug and Alcohol Program, and that WorkCover examine whether it can provide any further support to the program and similar programs in other industries.

- Recommendation 9** 45  
That WorkCover conduct a study on the effects of fatigue on workplace safety in the building and construction industry and other industries, to determine whether further measures should be adopted.
- Recommendation 10** 51  
That the Government seek to amend the OH&S legislation to facilitate a greater role for WorkCover in the prevention of serious injuries and fatalities in the road transport industry in NSW.
- Recommendation 11** 52  
That WorkCover engage the active cooperation of the other agencies involved in road accident investigations (the NSW Police, the NSW Ambulance Service, the NSW Fire Brigade Service and the NSW Roads and Traffic Authority) in identifying work-related crashes, with the aim of maximising the capture of fatigue and work related road transport accidents in WorkCover data.
- Recommendation 12** 53  
That WorkCover become more involved with the NSW Roads and Traffic Authority, the TWU and employees in seeking to prevent workplace injuries in the road transport industry resulting from drug and alcohol consumption. That involvement may include developing guidelines on in drug and alcohol testing in the road transport industry.
- Recommendation 13** 61  
That NSW Health, in conjunction with WorkCover, undertake further study of the costs and benefits of introducing retractable needles across the NSW health system.
- Recommendation 14** 68  
That WorkCover introduce improved systems to incorporate feedback from Inspectors about emerging issues, and to assess current satisfaction levels of Inspectors.
- Recommendation 15** 76  
That the Government consider how best to include enforceable agreements in the compliance regime contained in the *OH&S Act 2000*, as an addition to prosecution for breaches of the *OH&S Act 2000*, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission so that in the event the offender does not comply with the agreement, a prosecution may proceed.
- Recommendation 16** 78  
That WorkCover NSW examine the possibility of splitting its inspectorate into education and prosecution branches, or other ways to minimise confusion regarding the roles of inspectors.
- Recommendation 17** 80  
That the Government continue to fund the WorkCover Assist program at least at the same level as currently funded for an additional three years beyond the current 2004 deadline.
- Recommendation 18** 86  
That WorkCover commit to prosecuting employers and co-workers alleged to have breached OH&S law and to have placed workers at excessive risk of serious injury or fatality, even where that risk has not resulted in a serious injury or fatality. That WorkCover commence these proceedings in the Industrial Relations Commission.

- Recommendation 19** 94  
That the Government take urgent steps to amend the *OH&S Act 2000* to redress the anomaly whereby an employer can effectively avoid prosecution for a breach of the Act through non-reporting of a serious incident in the workplace for two years.
- Recommendation 20** 102  
That the Premier's Department make public the report of the Intergovernmental Working Party on Public Safety when completed, and take urgent steps to finalise, through the Working Party, the responsibilities of government agencies, including WorkCover, in relation to public safety.
- Recommendation 21** 102  
That the CEOs of each Government Agency be responsible for the development and implementation of guidelines outlining the responsibility for public safety. These guidelines should be developed in full consultation with WorkCover, the Premier's Department, employers and the Labour Council of NSW.
- Recommendation 22** 105  
That WorkCover closely examine its procedures for determining whether to initiate prosecution for ways the process can be streamlined so as to reduce the length of time between an accident and commencement of prosecution. Such a review should not initiate any measures that would inhibit the likely success of prosecutions.
- Recommendation 23** 113  
That the legal panel appointed by the Minister for Commerce to advise the Government on the OH&S legal framework specifically address the suitability of a guideline judgment in relation to penalties for breach of the *OH&S Act 2000*.
- Following the advice from the legal panel, that the Minister for Commerce apply to the Attorney General for a guideline judgment under s 125 of the *OH&S Act 2000*.
- Recommendation 24** 114  
That WorkCover offer victims and/or their families the opportunity to make a victim impact statement whenever the requirements of the Part 2 of the *Crimes (Sentencing Procedure) Act 1999* are satisfied, and that such statements be tendered at the appropriate time during court proceedings for consideration by the court in sentencing the offender.
- Recommendation 25** 122  
That WorkCover report to Parliament each year the names of former directors of "phoenix" companies that have been disqualified from holding office by ASIC, when acting on information referred to it by WorkCover.
- Recommendation 26** 144  
That as a matter of urgency, discrete and specific offences of "corporate manslaughter" and "gross negligence by a corporation causing serious injury" be enacted in the *Crimes Act 1900* (NSW).
- Recommendation 27** 144  
That the Government refer to the NSW Law Reform Commission and the Panel of Review a request to examine the broader issues of corporate liability for non-workplace and workplace deaths generally, including harsher penal sentences.

- Recommendation 28** **149**  
That the Government amend the *OH&S Act 2000* to incorporate sentencing options in addition to fines, including in particular:
- incapacitation (disqualification or dissolution)
  - correction orders
  - community service orders and publicity orders.
- Recommendation 29** **149**  
That the Government adopt and give consideration to how best to implement the NSW Law Reform Commission's Report No 102 – *Sentencing Corporate Offenders*, particularly Recommendation 4.
- Recommendation 30** **150**  
That any guideline judgment that applies to offences under the *OH&S Act 2000* include a range of sentencing options to complement fines when sentencing corporate offenders, particularly where a corporation's negligence has resulted in the death of a worker.
- Recommendation 31** **154**  
That WorkCover undertake an evaluation of the UK Corporate Health and Safety Performance Index to assess its suitability as a model that could be applied in Australia to provide the public comparative information about the occupational health and safety performance of companies.
- Recommendation 32** **163**  
That WorkCover give priority to completing and implementing its protocol for liaising with the families of deceased workers. This protocol should ensure that the families and victims are considered and consulted during an investigation and possible prosecution, that families are given a single point of communication with WorkCover, and that communication should occur regularly.
- Recommendation 33** **164**  
That WorkCover include in its protocol for liaising with the families of deceased workers the requirement that family members be informed about obtaining compensation and counselling, in addition to being kept informed of the progress of the investigation.
- Recommendation 34** **165**  
That the Government amend the *OH&S Act 2000* to require WorkCover to inform the relevant insurer when it becomes aware of a serious injury or fatality.
- Recommendation 35** **166**  
That as part of its revised protocol for liaising with the families of deceased workers and injured workers incapable of acting on their own behalf, WorkCover should include a provision for identifying the insurer to non-insured family members of the worker(s).
- Recommendation 36** **166**  
That the Government amend the *Workers' Compensation Act 1987* to allow funeral expenses to be paid separately and directly by insurers in all cases, with or without a compensating discount to the lump sum payout or weekly benefit.

## Glossary

<i>1987 Act</i>	<i>Workers Compensation Act 1987</i>
<i>1998 Act</i>	<i>Workplace Injury Management and Workers Compensation Act 1998</i>
<b>ABL</b>	Australian Business Limited
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>AIG</b>	Australian Industry Group
<b>AMWU</b>	Australian Manufacturing Workers Union
<b>ASIC</b>	Australian Securities and Investment Commission
<b>ATO</b>	Australian Taxation Office
<b>CFMEU</b>	Construction, Forestry, Mining and Energy Union
<b>CHaSPI</b>	Corporate Health and Safety Performance Index (United Kingdom)
<b>CIMC</b>	Chief Industrial Magistrate's Court
<i>Crimes Act</i>	<i>Crimes Act 1900 (NSW)</i>
<b>DGA</b>	Deck Guardrail Australia Pty Ltd
<b>DPP</b>	Director of Public Prosecutions
<b>DSC</b>	Director of Daly Smith Corporation (Aust) Pty Ltd
<b>HSU</b>	Health Services Union
<b>IAG</b>	Insurance Australia Group
<b>IRC</b>	Industrial Relations Commission
<b>Labor Council</b>	NSW Labor Council
<b>Law Society</b>	Law Society of NSW
<b>MIAA</b>	Medical Industry Association of Australia
<b>MPAL</b>	Master Plumbers Apprentices Limited
<b>NECS</b>	National Electrical Communications Association
<b>NESB</b>	Non-English speaking background

<b>NOHSC</b>	National Occupational Health and Safety Commission
<b>NSWRTA</b>	NSW Road Transport Association
<b>NUW</b>	National Union of Workers
<b>OH&amp;S</b>	Occupaitonal Health and Safety
<b><i>OH&amp;S Act 1983</i></b>	<i>Occupational Health and Safety Act 1983</i> (NSW)
<b><i>OH&amp;S Act 2000</i></b>	<i>Occupational Health and Safety Act 2000</i> (NSW)
<b>“Phoenix” companies</b>	Companies which deliberately go into receivership in order to avoid their legal obligations
<b>Quinlan Inquiry</b>	Inquiry into Safety in the Long Haul Trucking Industry
<b>RTA</b>	NSW Roads and Traffic Authority
<b>SDRO</b>	State Debt Recovery Office
<b>Sharps</b>	Needlesticks and other sharp objects such as scalpels
<b>The Commission</b>	NSW Law Reform Commission
<b>TTP</b>	Time to pay
<b>TWU</b>	Transport Workers Union

# Chapter 1 Introduction

## Terms of Reference

1.1 On 19 November 2003 the Legislative Council resolved:

1. *That General Purpose Standing Committee No. 1 inquire into and report on serious injury and death in the workplace, and in particular:*
  - (a) *the operation of WorkCover's prosecution branch including the cases of*
    - (i) *Anthony Hampson—Gosford High School, June 2001*
    - (ii) *Dean McGoldrick—death while working for Advance Roofing, February 2000*
  - (b) *the role and performance of WorkCover in liaising with victims and families*
  - (c) *the method and monitoring of payment of penalties where an employer has been convicted of an offence relating to a serious accident or death*
  - (d) *compliance by WorkCover with its statutory requirements relating to serious injury and death in the workplace*
  - (e) *comparison of the operation of WorkCover in relation to the management of serious injury and death in the workplace in other jurisdictions in Australia.*
2. *That the Committee report by 6 May 2004.<sup>1</sup>*

1.2 On 6 May 2004, the Legislative Council resolved to extend the reporting date for the inquiry to 28 May 2004.

## Call for submissions

1.3 The Committee received a total of 59 submissions. Advertisements seeking submissions were placed in the major metropolitan and regional press, and the Committee also wrote to relevant individuals and organisations including the WorkCover Authority, the State Debt Recovery Office, the Director of Public Prosecutions, the NSW Labor Council, peak employer groups, insurance companies, legal professional bodies and interstate workers compensation agencies. A list of submissions is provided in Appendix 1.

1.4 During the hearing held on 16 February 2004 the Committee also received a petition tabled by Ms Kim Williams, a friend of Joel Exner, containing 4,000 signatures calling for an offence of industrial manslaughter to be established.<sup>2</sup>

<sup>1</sup> *Minutes of Proceedings* No. 34, p435, 19 November 2003.

<sup>2</sup> Evidence 16 February 2004 p7.

- 1.5 Prior to the inquiry being advertised the Committee wrote to Mrs McGoldrick, whose son Dean was mentioned in the terms of reference, and to Mr Hampson, who was also referred to in the terms of reference.

## Public hearings

- 1.6 The Committee held a total of five public hearings during this inquiry. These were held on 16 and 17 February and 1, 2 and 15 March 2004. These hearings were all held at Parliament House, with the Committee meeting the travel costs of those witnesses from outside of Sydney who were invited to give evidence. A list of witnesses is provided in Appendix 2 and transcripts of the hearing can be found on the Committee's website at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).
- 1.7 The Committee would like to thank those witnesses with personal experience of a workplace accident, as either an accident victim or a relative, for their courage in agreeing to provide evidence. The Committee would also like to thank WorkCover for its prompt response to the demands placed upon it by the Committee during a difficult inquiry. The Committee would also like to thank the CFMEU and other unions and employer groups for the assistance they provided the inquiry process, and for all of the people who participated in this inquiry by making a submission, giving evidence or attending the public hearings.

## Procedural issues

- 1.8 Following the first hearing on 16 February the Committee wrote to two employers who were adversely named by witnesses, so as to provide the opportunity to respond to the allegations made. Responses were received, one of which led to the Committee writing to a third person who was adversely named in the response. Upon receipt of the additional response, the Committee resolved to publish as submissions only those responses which were in its opinion directly relevant to the terms of reference or to earlier evidence.
- 1.9 During the hearing on 15 March 2004 WorkCover were asked questions relating to decisions by the authority to prosecute the Selinger case. In one instance the CEO, Mr Jon Blackwell, declined to answer a question on the basis of legal professional privilege subject to taking further advice.<sup>3</sup> In forwarding further questions to WorkCover, the Committee Chair again asked Mr Blackwell whether he wished to answer questions relating to decisions by the authority to prosecute the Selinger case.<sup>4</sup> In his answer Mr Blackwell again declined to answer the questions on the basis of legal professional privilege.<sup>5</sup>
- 1.10 At its deliberative meeting on 27 April 2004 the Committee resolved to again write to Mr Blackwell seeking advice on the basis on which the decision not to prosecute the case of Mr Selinger was made.<sup>6</sup> The Committee received a response from Mr Blackwell's dated 29 April 2004.

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<sup>3</sup> Mr Blackwell, Evidence 15 March 2004, p 24

<sup>4</sup> Correspondence from Chairman to Mr Blackwell, Chief Executive Officer, WorkCover, 22 March 2004

<sup>5</sup> WorkCover, Response to Questions on Notice from 15 March 2004

<sup>6</sup> Minutes of Proceedings No 20, 27 April 2004

- 1.11** A number of accidents referred to in this report are the subject of ongoing legal proceedings, including litigation and coronial inquiries. Any statements in this report should not be read to imply findings on issues of fact in any of these accidents.

## **This report**

- 1.12** The Committee adopted this report at a meeting on 10 May 2004. The minutes of this and other meetings held during the inquiry are presented in Appendix 6.

## **Structure of the report**

- 1.13** Chapter 2 of this report outlines the individual cases of workplace accidents raised with the Committee during the inquiry. More detailed analysis of many of these accidents and the response to them appears throughout the other chapters of this report.
- 1.14** Chapter 3 examines the statistical data available on workplace fatalities and serious injuries. Trends are examined over a period of years and the most dangerous industries are identified.
- 1.15** Chapter 4 provides a brief description of the legal and policy framework under which workplace accidents are investigated and prosecuted. In particular the requirements of the *Occupational Health and Safety Act 2000* (NSW) and the Occupational Health and Safety Regulation 2001 are examined together with the corporate structure of WorkCover.
- 1.16** Chapter 5 focuses on the building and construction industry in NSW, which was the industry that received the most comment during the inquiry. The chapter focuses on the poor safety record of the building and construction industry, and the reasons for that poor safety record.
- 1.17** Chapter 6 examines the safety records of other industries highlighted during the inquiry, including the road transport and agriculture industries, and industries covered by the National Union of Workers.
- 1.18** Chapter 7 focuses specifically on the healthcare industry, and especially concerns in relation to injuries suffered by healthcare workers from needles and other sharp objects. This was a particular issue raised by a small but distinct group of stakeholders during the inquiry.
- 1.19** Chapter 8 shifts from an examination of statistical, legislative and industry issues to focus on WorkCover's role in investigating and enforcing workplace safety in NSW. It notes the role of WorkCover's Safety Inspectorate, WorkCover's conduct of investigations, and the compliance and enforcement options available to WorkCover inspectors.
- 1.20** Chapter 9 continues to focus on WorkCover, examining the role it plays in injury prevention. Particular attention is directed to WorkCover's various advice and support services, together with concerns about WorkCover's interpretation of occupational health and safety (OH&S) law and its willingness to investigate recognised workplace hazards.
- 1.21** Chapter 10 examines in turn WorkCover's conduct of prosecutions where there has been a workplace accident. It examines the notification of accidents, WorkCover's subsequent

investigation procedures, the process by which a decision is made whether to conduct a prosecution and the time taken to commence prosecutions.

- 1.22** Chapter 11 moves in turn to examine the level and payment of fines arising from WorkCover actions, including the level of fines and their collection, the procedures for liaison between WorkCover and the State Debt Recovery Office, and the issue of “phoenix” companies.
- 1.23** Chapter 12 focuses on the controversial issue of criminal responsibility for workplace deaths, and whether new manslaughter laws should be introduced in NSW to increase the responsibility of employers and corporations for ensuring the OH&S of their employees.
- 1.24** Chapter 13 concludes with an examination of WorkCover’s procedures for liaising with the victims and the families of victims of workplace accidents, with particular reference to many of the cases outlined in Chapter 2.

## Chapter 2 The cases

### Introduction

- 2.1 Term of reference 1(a) for this inquiry required the Committee to inquire into and report on:
- the operation of WorkCover's prosecution branch including the cases of
- (i) Anthony Hampson – Gosford High School, June 2001
  - (ii) Dean McGoldrick – death while working for Advance Roofing, June 2000.
- 2.2 This chapter examines the cases of Mr Hampson and Mr McGoldrick, together with other cases brought to the attention of the Committee during the conduct of the inquiry.
- 2.3 The Committee wishes to emphasise that the purpose of summarising the cases in this chapter is simply to outline the circumstances and sequence of events in each particular case. Discussion of the actions of WorkCover, employers, unions and others as revealed by these cases is provided later in this report.
- 2.4 However, from the outset, the Committee wishes to acknowledge that every unnecessary or serious injury in the workplace is tragic for all those involved. Behind each of the cases outlined below is a great deal of sadness, anger and grief.

### Recent cases of workplace injuries and fatalities in NSW

#### Mr Anthony Hampson

- 2.5 Mr Anthony Hampson suffered serious injuries on 10 June 2001 when he fell 6 metres from the roof of the auditorium at Gosford High School in Sydney's north. His employer was Garry Denson Metal Roofing Pty Ltd. He was 39 at the time of the accident.
- 2.6 As a result of the accident, Mr Hampson suffered two broken heels, an injured right shoulder and an injured spine which was medically diagnosed as a bruised or pinched spinal cord. Mr Hampson indicated that he continues to suffer incontinence, progressive disintegration of both ankles and knees with increasing pain levels, ongoing discomfort from a bone graft from his right hip, and he walks with the aid of a walking stick.<sup>7</sup>
- 2.7 WorkCover claimed that at the time of Mr Hampson's accident, it was not notified by either Garry Denson Metal Roofing Pty Ltd or the Department of Public Works, the principal contractor on the site. As a result, WorkCover claims that its investigations branch only became aware of the accident on 29 October 2003 following contact from the Construction, Forestry, Mining and Energy Union (CFMEU).<sup>8</sup>

<sup>7</sup> Submission 27, Mr Hampson, pp1-2

<sup>8</sup> Mr Blackwell, WorkCover, Evidence, 2 March 2004, pp62-64

- 2.8** By contrast, the Committee received evidence from Mr Denson that he reported Mr Hampson's accident to WorkCover in writing two days after the accident.<sup>9</sup>
- 2.9** On 16 February 2004, WorkCover laid prosecution charges in the Chief Industrial Magistrate's Court against Garry Denson Metal Roofing Pty Ltd and against Mr Garry Denson personally. Importantly, the only charge available to prosecutors was for failure to notify WorkCover of the accident suffered by Mr Hampson, rather than for a breach of the *Occupational Health and Safety Act 2000 (OHS Act 2000)*. This is because under s 107 of the *OHS Act 2000*, charges for an offence under the Act must be instituted within two years of the offence.
- 2.10** The first return date in the Chief Industrial Magistrate's Court was Monday, 8 March 2004. The matter is still proceeding.<sup>10</sup>
- 2.11** The case of Mr Hampson is examined further in Chapters 5 and 10.

### **Mr Dean McGoldrick**

- 2.12** Mr Dean McGoldrick was killed on 1 February 2000 when he fell from the top of a 12 metre high building at a building site in George St in Sydney. Mr McGoldrick was on his 11<sup>th</sup> day of work as an apprentice roofer. His employer was Tamworth Metal Gutter Fascia Services Pty Ltd, owned by Mr John Poleviak. He was 17 at the time of his death.<sup>11</sup>
- 2.13** WorkCover conducted an investigation into Mr McGoldrick's death and forwarded a brief to the Coroner on 15 June 2000. Subsequently, the Acting Deputy State Coroner informed WorkCover that an inquest would not be conducted. As a result, on 13 December 2000, WorkCover proceeded with the serving of a summons and the laying of charges against Tamworth Metal Gutter Fascia Services Pty Ltd and Mr Poleviak in the Chief Industrial Magistrate's Court.<sup>12</sup>
- 2.14** The Chief Industrial Magistrate's Court found against Metal Gutter Fascia Services Pty Ltd and fined the company \$20,000. If the company could not pay the fine within 28 days, the co-defendant, Mr Poleviak was required to pay the fine personally. Only \$1,800 of the fine had been paid by October 2003.<sup>13</sup>
- 2.15** On 28 October 2003, the State Debt Recovery Office (SDRO) issued a court fine enforcement order against Mr Poleviak for the unpaid fine. The matter is still proceeding, pending full payment by Mrs Poleviak, who has undertaken to meet the outstanding fine through the sale of personal assets (a house).<sup>14</sup>
- 2.16** The case of Mr McGoldrick is examined further in Chapters 11 and 13.

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<sup>9</sup> Correspondence from Mr Denson to Committee Chairman, 12 March 2004.

<sup>10</sup> Mr Blackwell, WorkCover, Evidence, 2 March 2004, pp62-63

<sup>11</sup> Submission 26, Mrs McGoldrick, p1

<sup>12</sup> Mr Blackwell, WorkCover, Evidence, 2 March 2004, p60

<sup>13</sup> Submission 26, Mrs Robyn McGoldrick, p2

<sup>14</sup> Mr Blackwell, WorkCover, Evidence, 2 March 2004, p60. See also Mr Nugent, Evidence, 1 March 2004, p47

**Mr Joel Exner**

- 2.17** Mr Joel Exner was killed on 15 October 2003 when he fell several metres through a roof at the Australand Holdings Ltd site, Eastern Creek. It was Mr Exner's third day as an apprentice roofer. He was 16 at the time of his death.<sup>15</sup>
- 2.18** Mr Exner's employer was J.B. Metal Roofing Pty Ltd, once again owned by Mr Garry Denson. Australand Holdings Ltd had contracted J.B. Metal Roofing Pty Ltd and Garry Denson Metal Roofing Pty Ltd to carry out metal deck roofing work at the Australand site. J.B. Metal Roofing Pty Ltd supplied the employees for the work and Garry Denson Metal Roofing Pty Ltd supervised the work.
- 2.19** WorkCover currently has a brief before the Coroner in relation to the death of Mr Exner. The Committee understands that the WorkCover investigation file recommends prosecution of J.B. Metal Roofing Pty Ltd, together with a large number of other contractors on the site at the time of Mr Exner's death.<sup>16</sup>
- 2.20** The case of Mr Exner is examined further in Chapters 8, 12 and 13.

**Mr Geoffrey Jardine**

- 2.21** Mr Geoffrey Jardine was killed on 3 July 2002 after sustaining injuries to his head and torso at a construction site at Yarala Rd, Mt Ku-ring-gai in Sydney. The injuries were sustained when he was crushed by an excavator clearing trees at the site. He was 62 at the time of his death.
- 2.22** Mr Jardine was employed by Wilson Tree Services, owned by Mr Donald Wilson. The project and construction manager on site was Howie Herring & Forsyth Pty Ltd, appointed by Barlow Developments Pty Ltd, owner of the premises. Howie Herring & Forsyth Pty Ltd had appointed Mr Andrew Skelton as the project manager on site.<sup>17</sup>
- 2.23** WorkCover's report into the death of Mr Jardine was sent to the Coroner on 14 January 2003. The Coroner dispensed with holding an inquest on 14 April 2003. WorkCover subsequently laid prosecution charges against a range of defendants in the Industrial Relations Commission on 27 February 2004. The matter is still proceeding.
- 2.24** On a separate matter, investigation of the circumstances of Mr Jardine's death led to the allegation that Mr Jardine's signature had been forged on a Safety Management Plan for the site after his death. WorkCover has forwarded those allegations to the NSW Police for possible prosecution.<sup>18</sup>
- 2.25** The case of Mr Jardine is examined further in Chapter 13.

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<sup>15</sup> Submission 28, CFMEU, pp14-15

<sup>16</sup> Mr Blackwell, Evidence, 2 March 2004, pp66-67

<sup>17</sup> Tabled Document, WorkCover NSW, 'Summary - Recommendations – Coroner', 17 December 2002, p1

<sup>18</sup> Mr Blackwell, Evidence, 2 March 2005, p68

**Mr Gregory Rees**

- 2.26** Mr Gregory Rees was killed on 19 September 2002 when he was crushed during the demolition of No 6 Ore Bridge at the former Newcastle BHP Steelworks site at Port Waratah. Mr Rees was employed by Demtech Pty Ltd.<sup>19</sup>
- 2.27** On 29 July 2003, WorkCover sent a report on the death of Mr Rees to the Newcastle Coroner's Court. The matter was listed for mention on 19 November 2003, 18 February 2004 and 7 April 2004. The matter is still proceeding.<sup>20</sup>
- 2.28** The case of Mr Rees is examined further in Chapters 9 and 13.

**Mr Wayne Howell**

- 2.29** Mr Wayne Howell was injured on 5 May 1992 at the Pine Grove Memorial Park Ltd cemetery while he was lifting granite headstone slabs. He was 29 at the time of the accident.
- 2.30** As a result of the accident, Mr Howell indicated that he suffered two disk ruptures, which required a laminectomy, discectomy and spinal fusion, together with the insertion of plates and screws. He also has permanent nerve damage in both legs.<sup>21</sup>
- 2.31** WorkCover indicated to the Committee that Mr Howell received weekly benefits from the Workers Compensation Scheme after his accident, until he was awarded a payment under common law in late 1996. The scheme paid for Mr Howell's hospital and medical expenses.<sup>22</sup>
- 2.32** The Committee is aware that Mr Howell is currently undertaking further workers compensation proceedings against Stringvale Pty Ltd (Pinegrove Memorial Park Ltd) and the respondent's insurer QBE Workers Compensation NSW Ltd pursuant to sections 66 and 67 of the *Workers Compensation Act 1987*. This claim is based on the nature and conditions of Mr Howell's employment between July 1987 and 5 May 1992.
- 2.33** The case of Mr Howell is examined further in Chapters 10 and 13.

**Mr David Selinger**

- 2.34** Mr David Selinger was a member of the public killed on 15 July 2001 at Fox Studios in Sydney. He was killed when temporary chain mesh fencing panels erected for the Sydney Fringe Festival fell on him during a severe wind storm.
- 2.35** WorkCover sent a brief on the accident to the Coroner on 21 September 2001. On 24 February 2003, the Coroner concluded her inquest and published her findings. They included several recommendations directed to the Police, the State Emergency Board, the management

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<sup>19</sup> Submission 13, Mr & Mrs Denis and Sharon Rees, p1

<sup>20</sup> Mr Blackwell, Evidence, 2 March 2004, p70

<sup>21</sup> Mr Howell, Evidence, 17 February 2004, pp49-51

<sup>22</sup> Tabled Document, WorkCover NSW, 'Summary - Recommendations - Coroner', 17 December 2002, covering letter

of Fox Studios and the Department of Fair Trading. No recommendations were made in relation to WorkCover.

- 2.36** Following an investigation of the circumstances of Mr Selinger's death, WorkCover decided not to proceed with a prosecution on the basis that it was more a public safety issue.<sup>23</sup>
- 2.37** The case of Mr Selinger is examined further in Chapter 10.

### **Mrs Lola Welch**

- 2.38** Mrs Lola Welch was killed on 30 June 2001 when she was struck by the trailer of a truck at a construction site on Mona Vale Road in St Ives in Sydney. The construction was being undertaken by C.J & S.J O'Keefe Building Pty Ltd, directed by Mr Christopher O'Keefe. The accident occurred out the front of the site.
- 2.39** WorkCover undertook preliminary investigations on 3 July 2001, but initially left the investigation to the NSW Police on the basis that the accident occurred outside the workplace and was a road safety issue. Subsequently, however, WorkCover undertook an investigation following representations from Mr Alan Welch, the husband of Mrs Welch, who indicated that the accident had in fact occurred on the footpath outside the construction site while part of the vehicle was still on the site.
- 2.40** Prosecution action was initiated by WorkCover on 12 June 2003 in the Industrial Relations Commission against C.J & S.J O'Keefe Building Pty Ltd and Mr Christopher O'Keefe. The matter has been set down for 7 June 2004.<sup>24</sup>
- 2.41** The case of Mrs Welch is examined further in Chapters 10 and 13.

### **Ms Chun Lin**

- 2.42** Ms Chun Lin was killed on 19 April 2000 when she was struck by a truck and received fatal crushing injuries on the campus of the University of NSW.
- 2.43** WorkCover initially left investigation of the accident to the NSW Police, on the basis that the incident was not work related and was in fact a motor vehicle accident. The NSW Police subsequently provided a brief to the Coroner.
- 2.44** In February 2004, the Director of Public Prosecutions (DPP) advised WorkCover that it would not be taking any actions in regard to the accident. WorkCover is now reviewing the case to determine whether it should launch an action of its own.<sup>25</sup>
- 2.45** The case of Ms Lin is examined further in Chapter 10.

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<sup>23</sup> Mr Blackwell, Evidence, 2 March 2004, p72. See also Ms Grant, Evidence, 2 March 2004, p72

<sup>24</sup> Mr Watson and Mr Blackwell, Evidence, 2 March 2004, p75

<sup>25</sup> Mr Blackwell, Evidence, 2 March 2004, p77

**Mr Michael Boland**

- 2.46** Mr Michael Boland was killed on 26 February 2003 when he was electrocuted at a siding at the Rail Depot at Wilson Parade, Heathcote. His employer was Whyco Crane Service Pty Ltd and the principal contractor was Rail Infrastructure Corporation. He was 32 at the time of his death, with a wife and three young children.<sup>26</sup>
- 2.47** The case of Mr Boland is examined further in Chapter 13.

**Mr Steve Likar**

- 2.48** The Committee received three submissions from Mr Steve Likar, who was injured on 8 November 1996 in a scaffolding accident in Rose Bay.<sup>27</sup> These submissions were received when the Committee was well advanced in its consideration of evidence, and unfortunately the Committee was not able to investigate Mr Likar's case in greater detail.
- 2.49** The submissions have, however, been made public in accordance with the wishes of Mr Likar. The Committee also provided WorkCover with a copy of Mr Likar's submissions for a response.

**Conclusion**

- 2.50** The Committee and secretariat staff wish to express their sympathy and regret to all those who have suffered loss as a result of workplace accidents. We thank all those who had the courage to come before this inquiry and talk of their experiences in the hope that they can help reduce the incidence of workplace accidents in the future.
- 2.51** In the next two chapters, the statistical, legislative and policy background to these cases is examined.

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<sup>26</sup> Submission 45, Ms Karen Boland, p1

<sup>27</sup> Submissions 53, 53a and 53b, Mr Likar

## Chapter 3 Data on workplace injury and fatalities in NSW by industry

### Introduction

- 3.1 During the conduct of the inquiry, the Committee's attention was drawn to a number of industries, notably the construction and transport and storage industries, which have very high rates of occupational injury and death.
- 3.2 This chapter examines data on workplace injuries and fatalities in NSW by industry, largely based on data in WorkCover's *Statistical Bulletin 2000-01*. In particular, the chapter examines:
- workplace injuries in NSW by industry from 1993/94 to 2000/01
  - workplace fatalities in NSW by industry from 1987/88 to 2000/01
  - more recent data on workplace fatalities in NSW
  - the accuracy of available data on workplace injuries and deaths.
- 3.3 The Committee notes that the data from the *Statistical Bulletin 2000-01* is the latest publicly available data on workplace injuries by industry. WorkCover provided the Committee with more recent data on workplace fatalities from the *Compendium of Workers' Compensation Statistics Australia 2001-02*,<sup>28</sup> together with additional unpublished provisional data. However, WorkCover advised the Committee that it is yet to update the *Statistical Bulletin 2000-01*.
- 3.4 The Committee is very disappointed at WorkCover's failure to publish more recent data except in relation to workplace fatalities in NSW, as discussed later in this chapter.

### Workplace injuries in NSW by industry from 1993/94 to 2000/01

- 3.5 WorkCover's *Statistical Bulletin 2000-01* defines a workplace injury as an accident that occurs at the workplace, either during work or during a work break, where the worker's activity is under the control of an employer. Also included are injuries that occur while the employee is working at a location other than their normal workplace or base of operations.<sup>29</sup>
- 3.6 Data from the *Statistical Bulletin 2000-01* indicates that the incidence of workplace injuries in NSW decreased from 19.0 per 1,000 wage and salary earners in 1993/94 to 15.1 per 1,000 wage and salary earners in 2001/02, after peaking at a rate of 19.4 per 1,000 wage and salary earners in 1996/97. This is shown in Figure 3.1 below.

<sup>28</sup> National Occupational Health and Safety Commission, *Compendium of Workers' Compensation Statistics Australia, 2001-02*, December 2003

<sup>29</sup> WorkCover, *Statistical Bulletin 2000-01*, p25

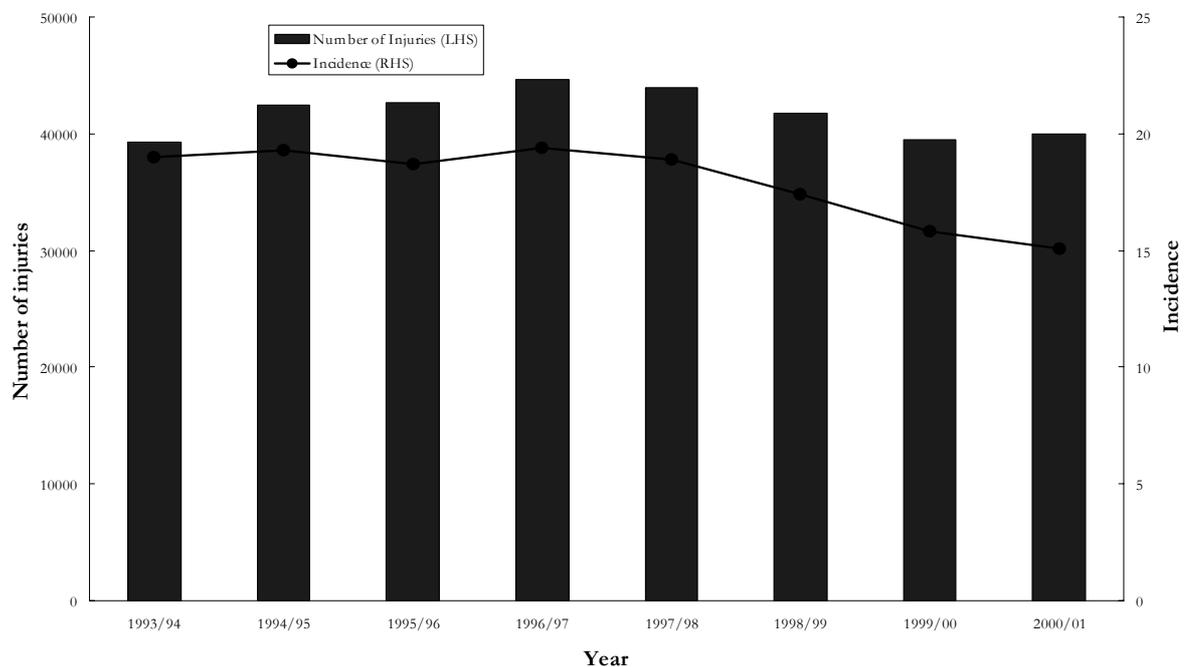
**Figure 3.1** Workplace injuries in NSW – 1993/94 to 2000/01

Year	Number	Incidence*
1993/94	39,309	19.0
1994/95	42,505	19.3
1995/96	42,648	18.7
1996/97	44,654	19.4
1997/98	43,982	18.9
1998/99	41,739	17.4
1999/00	39,531	15.8
2000/01	39,995	15.1

\* Incidence is the number of injuries per 1,000 wage and salary earners

Source: WorkCover, Statistical Bulletin 2000-01, appendix e

**3.7** Figure 3.2 shows graphically the overall decline in the incidence of injuries in NSW from 1993/94 to 2000/01.

**Figure 3.2** Number of injuries in NSW – 1993/94 to 2000/01

**3.8** In 2001, the industries with the highest incidence of workplace injury were mining (45.4 injuries per 1,000 wage and salary earners), construction (31.4), agriculture, forestry and fishing (28.9) and transport and storage (26.9). These rates compare to the rate across all industries of 15.1 per 1,000 wage and salary earners. This is shown in Figure 3.3 below.

**Figure 3.3** Injuries in NSW in 2000/01 by industry (highest 10 sub-divisions)

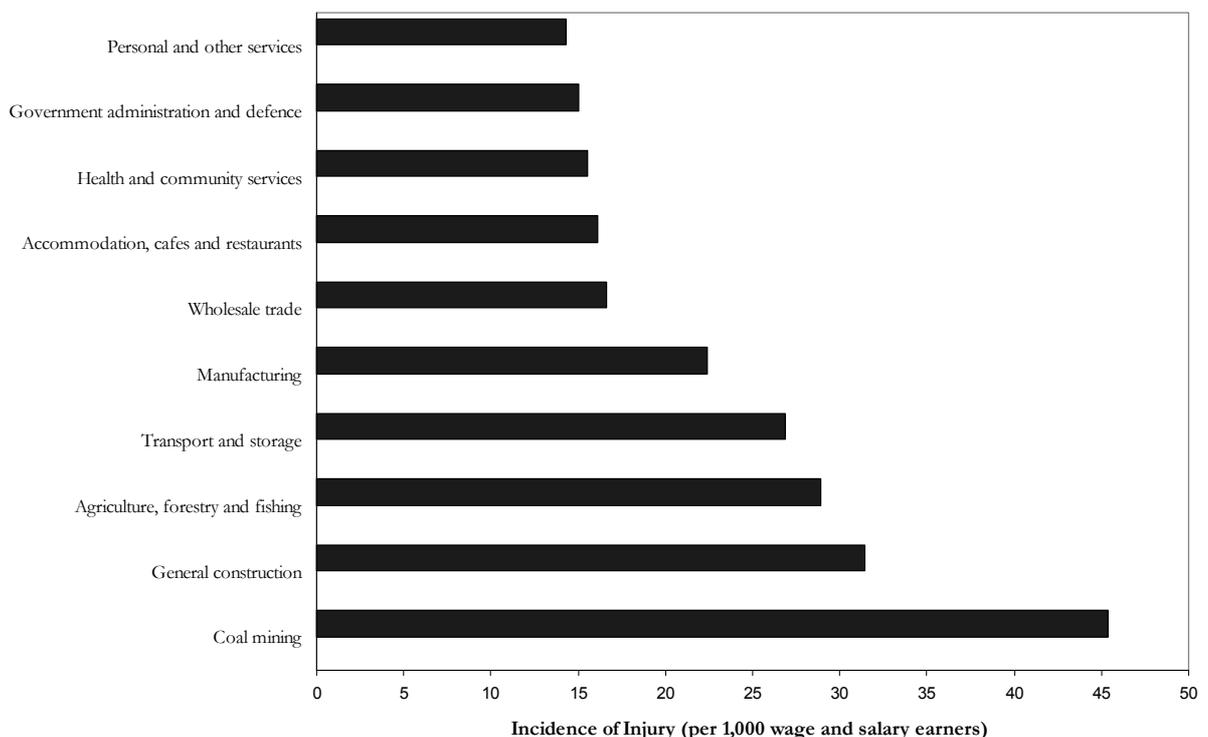
Industry	Number	Incidence*
Coal mining	616	45.4
Construction	4,972	31.4
Agriculture, forestry and fishing	1,672	28.9
Transport and storage	3,405	26.9
Manufacturing	7,445	22.4
Wholesale trade	2,412	16.6
Accommodation, cafes and restaurants	2,539	16.1
Health and community services	4,209	15.5
Government administration and defence	1,103	15.0
Personal and other services	1,400	14.3
Total	39,995	15.1

\* Incidence is the number of injuries per 1,000 wage and salary earners

Source: WorkCover, *Statistical Bulletin 2000-01*, appendix e

**3.9** The Committee notes that coal mining accidents do not come under WorkCover's responsibilities and so are not discussed in this report.

**3.10** Figure 3.4 shows graphically the incidence of injuries in NSW in 2000/01 by industry (highest 10 sub-divisions).

**Figure 3.4** Incidence of injuries in NSW in 2000/01 by industry (highest 10 sub-divisions)

**3.11** In summary, the above data indicates an overall decline in the incidence of workplace injuries in NSW up until 2001/02. However, certain industries remain particularly dangerous to work in. Notable amongst those are the building and construction industry, the mining industry, rural industries and the transport and storage industry.

### **Workplace fatalities in NSW by industry from 1987/88 to 2000/01**

**3.12** WorkCover's *Statistical Bulletin 2000-01* defines a workplace fatality as a compensated fatality under the workers compensation system. Significantly, however, the Committee notes that not all work-related fatalities result in a claim for compensation, for example:

- fatalities to self-employed people
- if the person was covered by the Scheme but the funeral expenses were not claimed
- if there were no dependents to pay the death benefits to
- fatalities related to Commonwealth employees
- fatalities occurring due to dust diseases (with the exception of coal mines).<sup>30</sup>

**3.13** The Committee notes that different jurisdictions in Australia use different definitions of a workplace fatality, making it impossible to compare the rate of workplace fatalities in different jurisdictions.

**3.14** Between 1987/88 and 2000/01, the *Statistical Bulletin 2000-01* indicates that there was an overall decline in the rate of incidence of fatalities in NSW. The rate peaked at 12.2 fatalities per 100,000 employees at risk in 1988/89, falling to a low of 5.2 fatalities per 100,000 employees at risk in 2000/01. This is shown in Figure 3.5 below.

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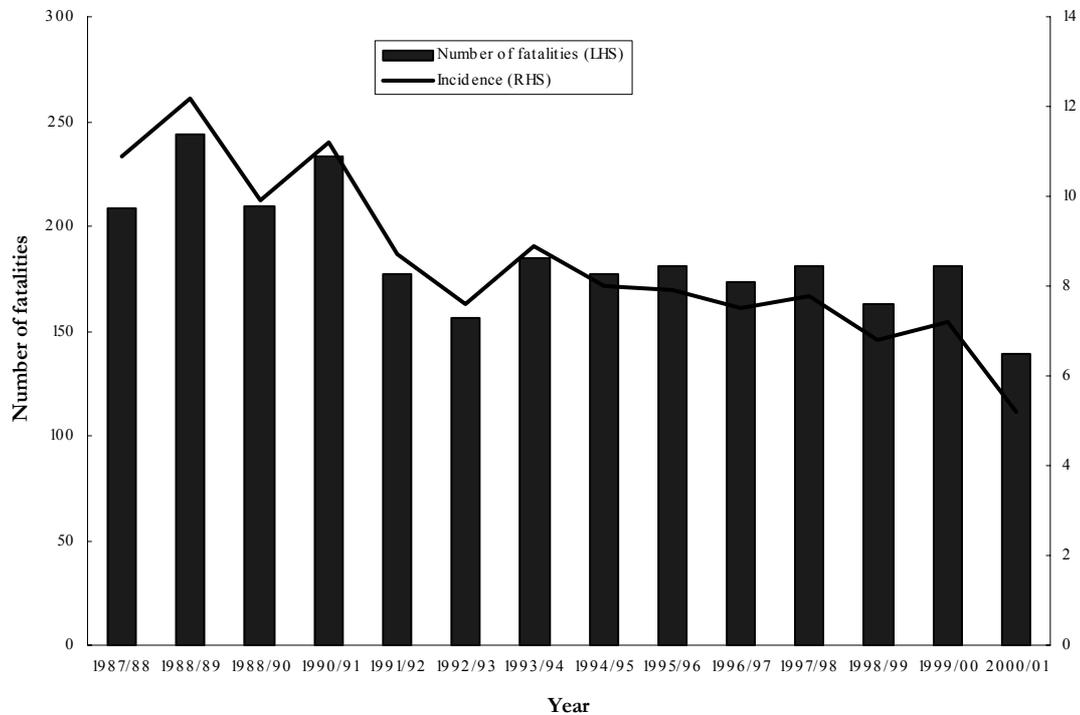
<sup>30</sup> WorkCover, *Statistical Bulletin 2000-01*, p19

**Figure 3.5** Fatalities in NSW – 1987/88 to 2000/01

Year	Number	Incidence*
1987/88	209	10.9
1988/89	244	12.2
1989/90	210	9.9
1990/91	233	11.2
1991/92	177	8.7
1992/93	156	7.6
1993/94	185	8.9
1994/95	177	8.0
1995/96	181	7.9
1996/97	173	7.5
1997/98	181	7.8
1998/99	163	6.8
1999/00	181	7.2
2000/01	139	5.2
Total	2,609	Na

\* Incidence is the number of fatalities per 100,000 employees at risk  
Source: WorkCover, Statistical Bulletin 2000-01, p19

**3.15** Figure 3.6 shows graphically the decline in the incidence of fatalities in NSW from 1987/88 to 2000/01.

**Figure 3.6** Fatalities in NSW – 1987/88 to 2000/01

**3.16** Looking specifically at data by industry, over the period 1991/92 to 2000/01, there were 609 workplace fatalities reported in NSW. The breakdown of these fatalities by industry is given in Figure 3.7 below.

**Figure 3.7** Fatalities in NSW – 1991/92 to 2000/01 by industry (highest 10 sub-divisions)

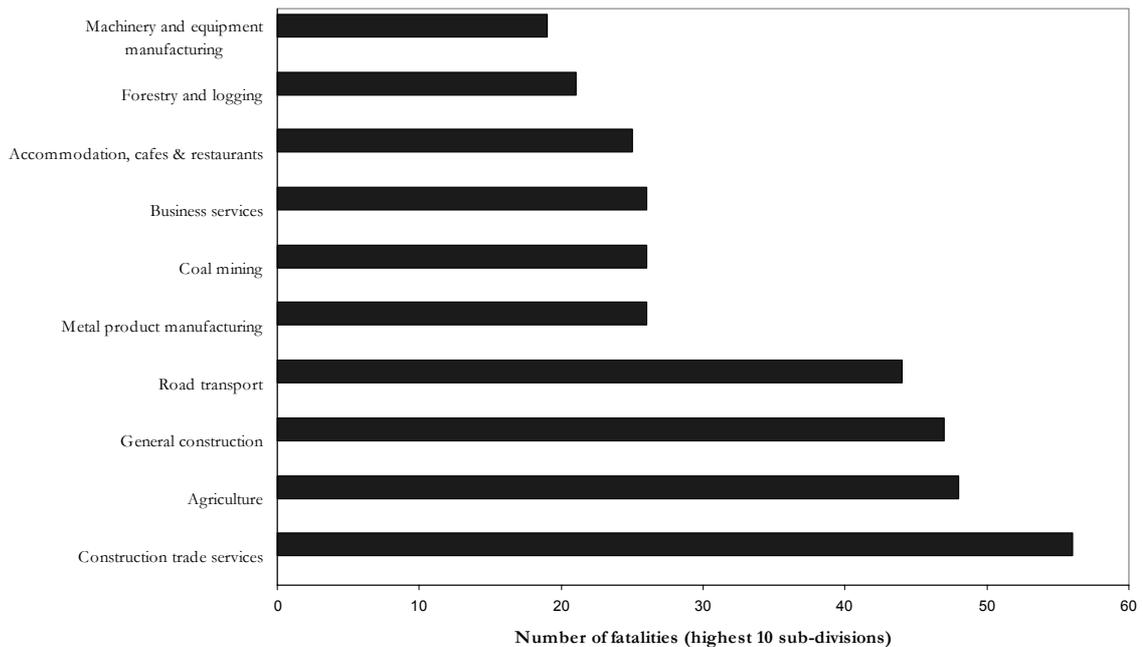
Industry	Number
Construction trade services	56
Agriculture	48
General construction	47
Road transport	44
Metal product manufacturing	26
Coal mining	26
Business services	26
Accommodation, cafes & restaurants	25
Forestry and logging	21
Machinery and equipment manufacturing	19
Other	271
Total	609

Source: WorkCover, Statistical Bulletin 2000-01, p22

**3.17** As shown in Figure 3.7, construction, agriculture and road transport recorded the highest number of fatalities in NSW over the period 1991/92 to 2000/01.

**3.18** Figure 3.8 shows graphically the incidence of fatalities in NSW from 1991/92 to 2000/01 by industry (highest 10 sub-divisions).

**Figure 3.8** Fatalities in NSW – 1991/92 to 2000/01 by industry (highest 10 sub-divisions)



**3.19** In summary, as with the previous examination of workplace injuries in NSW, the above data indicates an overall decline in the incidence of workplace fatalities in NSW up until 2001/02. Once again, however, certain industries remain particularly dangerous to work in. Notable amongst those are the building and construction industry, rural industries and the transport and storage industry.

### More recent data on workplace fatalities in NSW

**3.20** While the evidence presented above from WorkCover's *Statistical Bulletin 2000-01* indicates a significant decline in the numbers of occupational fatalities in NSW workplaces up until 2000/01, the Committee notes that in 2001/02 there was a worrying increase in the rate of workplace fatalities in NSW.

**3.21** Data from the *Compendium of Workers' Compensation Statistics Australia 2001-02*<sup>31</sup> indicates that the total number of fatalities in NSW rose from the previously cited 139 in 2000/01 to 177 in 2001/02.

**3.22** The Committee recognises that provisional data<sup>32</sup> for 2002/03 indicates a subsequent fall again in fatalities in NSW in 2002/03 to 138, a drop of over 20% from the 177 of 2000/01.<sup>33</sup>

<sup>31</sup> National Occupational Health and Safety Commission, *Compendium of Workers' Compensation Statistics Australia, 2001-02*, December 2003

- 3.23** Nevertheless, the Committee notes that concern about a possible jump in workplace deaths in NSW in 2001/02 was one of the factors leading to the setting up of this inquiry.
- 3.24** As indicated previously in this chapter, the Committee is very disappointed at WorkCover's failure to publish more up-to-date OH&S data, except in relation to workplace fatalities in NSW. The Committee believes that WorkCover should address this urgently.

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### **Recommendation 1**

That as a priority WorkCover address the inadequacies in data collection and reporting identified in this report.

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## **The accuracy of available data on workplace injuries and fatalities**

- 3.25** As indicated above, WorkCover's *Statistical Bulletin 2000-01* indicates an overall decline in workplace injuries and fatalities in NSW in recent years (allowing for a possible increase in fatalities in NSW in 2001-02). However, the Committee is aware of concerns that the data, which is based on workers compensation claims, may significantly understate the problem.
- 3.26** In its written submission, the NSW Labor Council (Labor Council) noted that in NSW, workers compensation claims data is collected by the insurance companies and provided to WorkCover on a monthly basis. However, the Labor Council argued that there are a number of problems with the data:
- there is an unquantifiable level of non-reporting of workers' compensation claims. For example, the Labor Council cited employees in the film industry who have suffered injuries to fingers (including fingers being cut off) which are not reflected in WorkCover's data
  - even when workers compensation claims are reported, the data often contain a number of errors through the provision by insurers of incomplete or incorrect information in the coded fields
  - WorkCover collects data on OH&S accidents and workers compensation claims on separate databases, which are not integrated.<sup>34</sup>
- 3.27** The Committee notes that these issues were raised in its 2002 report entitled *NSW Workers Compensation Scheme: Third Interim Report*.<sup>35</sup>
- 3.28** The Labor Council also cited the findings of the House of Representatives Standing Committee on Employment and Workplace Relations in its June 2003 report entitled *Back on*

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<sup>32</sup> This data is currently still being validated.

<sup>33</sup> Submission 29A, WorkCover, p9. See also correspondence from Mr Blackwell, CEO, WorkCover to Committee Chairman, 22 April 2004.

<sup>34</sup> Submission 52, Labor Council, pp44-45

<sup>35</sup> General Purpose Standing Committee No 1, Report 18, *NSW Workers Compensation Scheme: Third Interim Report*, April 2002.

*the Job: Report into aspects of Australian workers' compensation schemes.* The House of Representatives Committee found that:

Currently there is little consistency in the format or the data collected, which makes interstate comparisons difficult. Better data about actual claims experience would enable a proper analysis of the instances that give rise to claims. It is extremely difficult to establish meaningful national benchmarks, to identify performance standards or to monitor emerging trends on a national basis, although the National Data Set for Compensation-based Statistics is a positive step in this direction. Improved data recording would also enable industry trends in terms of health and safety and workers' compensation management to be tracked.<sup>36</sup>

**3.29** To address this issue, the House of Representatives Standing Committee on Employment and Workplace Relations recommended that the Commonwealth Government:

- examine the need to extend the National Data Set for Compensation-based Statistics, to provide nationally relevant workers compensation data that assists meaningful interjurisdictional comparisons for policy analysis and contributes to the development of a national framework
- further investigate the implications and appropriateness of a national database on workers compensation claims which identifies injured workers, employers, service providers and insurance companies
- further investigate the implications and appropriateness of additional data matching capacity between Commonwealth agencies and the State and Territory workers' compensation authorities.<sup>37</sup>

**3.30** In its written submission, the Labor Council requested that this Committee also recommend the urgent development of a national data base on workplace injuries and fatalities in line with the conclusions and recommendations of the House of Representatives Standing Committee on Employment and Workplace Relations. The Labor Council submitted that the National Occupational Health and Safety Commission would be best placed to oversee and implement such a national database.<sup>38</sup>

**3.31** The Committee endorses this position.

<sup>36</sup> House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the Job: Report into aspects of Australian workers' compensation schemes*, June 2003, executive summary, pxxiv

<sup>37</sup> House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the Job: Report into aspects of Australian workers' compensation schemes*, June 2003, executive summary, pxxv

<sup>38</sup> Submission 52, Labor Council, pp46-37

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**Recommendation 2**

That a national database on workplace injuries and fatalities be developed in accordance with the recommendations of the House of Representatives Standing Committee on Employment and Workplace Relations in its June 2003 report entitled *Back on the Job: Report into aspects of Australian workers' compensation schemes*.

That the database record the cause of death in relation to workplace fatalities, to assist in targeting measures to improve workplace safety, and that in particular, consideration be given to improved information collection on the role of fatigue in accident and injury causation.

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**Definition of workplace injury and death**

- 3.32** The House of Representatives Standing Committee on Employment and Workplace Relations also cited the need for nationally agreed definitions on matters relating to OH&S. The House of Representatives Committee stated:

There is also a need to develop an agreed position on a number of definitions, particularly that of employee, as there are a number of 'workers' not covered by a workers' compensation scheme, who may not have taken out an alternative forms of insurance.<sup>39</sup>

- 3.33** The Committee agrees with this position, and recommends the adoption of national consistent definitions, especially nationally consistent definitions of employees and fatalities.
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**Recommendation 3**

That the national database on workplace injuries and fatalities be developed using nationally consistent definitions, especially as relates to employees and fatalities, and including definitions relevant to the road transport industry.

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<sup>39</sup> House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the Job: Report into aspects of Australian workers' compensation schemes*, June 2003, executive summary, pxxix

## Chapter 4 NSW OH&S legislation and WorkCover

### Introduction

- 4.1 This chapter provides information on the occupational health and safety (OH&S) legislation in NSW and the role of WorkCover. It examines:
- the objectives of the *Occupational Health and Safety Act 2000 (OH&S Act 2000)* and the Occupational Health and Safety Regulation 2001 (OH&S Regulation 2001)
  - the OH&S obligations of employers, workers and other parties
  - WorkCover's statutory OH&S role
  - WorkCover's corporate structure.

### The objectives of the *OH&S Act 2000* and the OH&S Regulation 2001

- 4.2 OH&S law in NSW is determined by the *OH&S Act 2000* and the OH&S Regulation 2001.
- 4.3 The *OH&S Act 2000* and the OH&S Regulation 2001 are designed to secure the health, safety and welfare of persons at work by placing certain duties on those people who have varying degrees of control over the workplace.
- 4.4 The specific objectives of the *OH&S Act 2000* are set out in section 3 of the Act:
- to secure and promote the health, safety and welfare of people at work
  - to protect people at a place of work against risks to health or safety arising out of the activities of persons at work
  - to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs
  - to provide for consultation and co-operation between employers and employees in achieving the objects of the Act
  - to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled
  - to develop and promote community awareness of OHS issues
  - to provide a legislative framework that allows for progressively higher standards of OH&S to take account of changes in technology and work practices
  - to protect people (whether or not at a place of work) against risks to health and safety arising from the use of plant that affects public safety.
- 4.5 The OHS Regulation 2001 supports the *OH&S Act 2000*. It sets out the requirements for workplaces to put in place systems to identify, assess, control and/or eliminate health or safety

risks. It also details how the duty to consult with employees about health and safety can be met.

4.6 The OHS Regulation 2001 also provides specified control measures for particular hazards and industry activities, including:

- controls in relation to fall prevention, asbestos, working spaces, noise management, atmosphere, working at heights, electricity in the workplace, working in confined spaces and manual handling
- controls in relation to the design, manufacture, importation and sale of certain plant<sup>40</sup>
- controls in relation to hazardous processes and substances
- controls in relation to construction work.<sup>41</sup>

## **The OH&S obligations of employers, workers and other parties**

4.7 The general obligations under the *OH&S Act 2000* for employers, workers and other parties are set out in sections 8, 9, 10, 11 and 20 of the Act.<sup>42</sup>

### **Employers**

4.8 Section 8(1) of the *OH&S Act 2000* requires an employer to ensure the health, safety and welfare at work of all his or her employees.

4.9 Section 8(2) of the Act creates an obligation on an employer to ensure that people other than employees of the employer (ie the general public) are not exposed to risks to their health and safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

### **Self-employed persons**

4.10 Section 9 of the *OH&S Act 2000* creates an obligation on a self-employed person to ensure that people, other than the employees of the person, are not exposed to risks to their health or safety from the conduct of the person's undertaking at the person's place of work.

### **Employees**

4.11 Section 20 of the *OH&S Act 2000* requires employees, while at work, to take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.

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<sup>40</sup> Meaning any machinery, equipment or appliance

<sup>41</sup> Submission 29, WorkCover, pp6-7

<sup>42</sup> See Submission 29, WorkCover, pp7-8

### Other parties

- 4.12** Section 10 of the *OH&S Act 2000* imposes a duty on persons who have, to any extent, control of non-residential premises used as a place of work (or control of any plant or substance provided for use of persons at work) to ensure that the premises, plant or substance is safe and without risks to health.
- 4.13** Section 11 of the *OH&S Act 2000* requires a person who designs, manufactures or supplies any plant or substance for use by people at work to:
- ensure that the plant or substance is safe and without risks to health when properly used
  - provide, or arrange for the provision of, adequate information about the plant or substance to the persons to whom it is supplied to ensure its safe use.

### Directors and managers of corporations

- 4.14** Section 26 of the *OH&S Act 2000* makes certain directors or managers of corporations liable when that corporation is found to have contravened the Act. Directors and managers can avoid liability under s 26 if they can prove either:
- they were not in a position to influence the conduct of the corporation in relation to the relevant contravention of the Act; or
  - they used all due diligence to prevent the relevant contravention by the corporation.

### Offences and penalties for breach of obligations

- 4.15** The offence for failing, through act or omission, to fulfil the duties in ss 8, 9, 10 and 11 is contained in s 12 of the *OH&S Act 2000*. The maximum penalty for breach of section 12 is \$825,000 for a corporation (being a previous offender) and \$82,500 or 2 years imprisonment for an individual (being a previous offender). Maximum penalties for first offences are \$550,000 for a corporation and \$55,000 for an individual.
- 4.16** The maximum penalty for an employer who breaches s 20 of the *OH&S Act 2000* is \$3,300 for a first offence and \$4,950 for a previous offender.

### WorkCover's statutory OH&S role

- 4.17** The OH&S legislative framework administered by WorkCover includes the *OH&S Act 2000*, the OH&S Regulation 2001 and the *Dangerous Goods Act 1975* and the regulations made thereunder.<sup>43</sup>
- 4.18** Section 22 of the *Workplace Injury Management and Workers Compensation Act 1998 (1998 Act)* sets out the following general functions of WorkCover:

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<sup>43</sup> The Committee examined the OH&S legislative framework in its 2002 report entitled *NSW Workers Compensation Scheme: Third Interim Report*

- to be responsible for ensuring compliance with workers compensation legislation and OH&S legislation
- to be responsible for the day-to-day operational matters relating to the schemes to which any such legislation relates
- to monitor and report to the Minister on the operation and effectiveness of workers compensation legislation and the OH&S legislation, and on the performance of the schemes to which that legislation relates
- to undertake such consultation as it thinks fit in connection with current or proposed legislation relating to any such scheme as it thinks fit
- to monitor and review key indicators of financial viability and other aspects of any such schemes
- to report and make recommendations to the Minister on such matters as the Minister requests or the Authority considers appropriate.<sup>44</sup>

**4.19** Section 23 of the *1998 Act* sets out the following specific functions of WorkCover:

- to initiate and encourage research to identify efficient and effective strategies for the prevention and management of occupational injury and for the rehabilitation of injured workers
- to ensure the availability of high quality education and training in such prevention, management and rehabilitation
- to develop equitable and effective programs to identify areas of unnecessarily high costs in or for schemes to which the workers compensation legislation or the OH&S legislation relates
- to foster a co-operative relationship between management and labour in relation to the health, safety and welfare of persons at work
- to develop programs to meet the special needs of target groups
- to facilitate and promote the establishment and operation of OH&S committees and OHS representatives or other agreed arrangements for consultation at places of work
- to investigate workplace accidents
- to monitor the operation of requirements and arrangements imposed or made by or under the workers compensation legislation or OH&S legislation and to commence and conduct prosecutions for offences in connection with any such requirements and arrangements
- to collect, analyse and publish data and statistics, as the Authority considers appropriate
- to provide advisory services to workers, employers, insurers and the general community (including information in languages other than English)

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<sup>44</sup> Submission 29, WorkCover, p 2

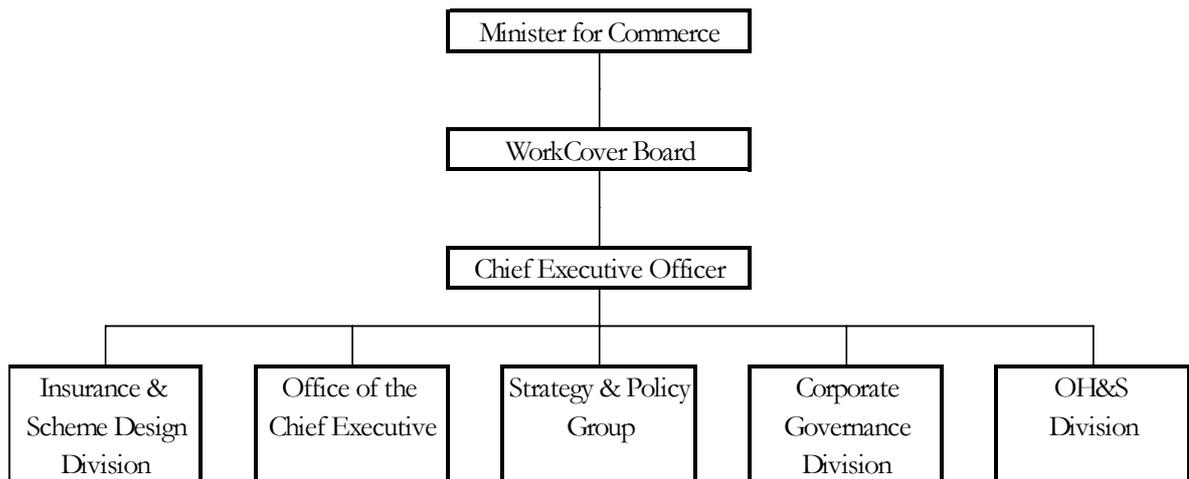
- to provide funds for or in relation to measures for the prevention or minimisation of occupational injuries or diseases and in relation to OH&S education.<sup>45</sup>

## WorkCover's corporate structure

**4.20** WorkCover is a statutory corporation constituted under s 14 of the *1998 Act*. It is predominantly funded through a levy on workers compensation premiums. As such, industry bears the direct cost of WorkCover's OH&S services and inspections and management of the workers compensation system.<sup>46</sup>

**4.21** WorkCover is currently divided into three Divisions – the OH&S Division, the Insurance and Scheme Design Division and the Corporate Governance Division – together with the office of the Chief Executive Officer and the Strategy and Policy Group. This is shown in Figure 4.1 below.

**Figure 4.1** Corporate Structure of WorkCover



Source: Submission 29, WorkCover, p 3

**4.22** Of particular relevance to this inquiry, WorkCover's Safety Inspectorate is located within the OH&S Division of WorkCover, and WorkCover's Legal Group is located within the Corporate Governance Division. Within the Legal Group, the Criminal Law Practice branch is responsible for conducting prosecutions for breaches of the OH&S legislation. These areas are examined in greater detail later in this report.

<sup>45</sup> Submission 29, WorkCover, p6

<sup>46</sup> Submission 29, WorkCover, p2



## Chapter 5 The building and construction industry

### Introduction

- 5.1 As indicated in Chapter 3, the building and construction industry is a high-risk industry, with high levels of workplace fatalities and injuries.
- 5.2 This chapter examines in greater detail:
- the industry's poor safety record
  - factors contributing to the industry's poor safety record.

### The industry's poor safety record

#### Fatalities

- 5.3 As indicated in Chapter 3, the building and construction industry has a very high rate of fatalities compared to other industries. Data from WorkCover's *Statistical Bulletin 2000-01*<sup>47</sup> indicates that there were 56 fatalities in construction trade services and 47 fatalities in general construction in the four years between 1987/88 and 2000/01.
- 5.4 In its written submission, the Construction, Forestry, Mining and Energy Union (CFMEU) noted that over the nine-year period 1991/92 to 1999/00, the highest number of fatalities by industry was recorded in the construction trade services and general construction industries, with the major hazards being:
- hit by moving objects
  - hit by falling objects
  - falls from height
  - contact with electricity.
- 5.5 The Committee notes that the cases of Mr Dean McGoldrick, Mr Joel Exner, Mr Geoffrey Jardine, Mr Gregory Rees, Mr David Selinger, Mrs Lola Welch, Ms Chun Lin and Mr Michael Boland all fall within these categories.
- 5.6 Following the hearing on 2 March 2003, the Committee requested from WorkCover information on the fatality rate in the building and construction industry amongst young employees aged under 25 for 2002-03. In response, WorkCover indicated that there were three fatalities of young people under 25 in 2000/01, five in 2001/02 and four in 2002/03.<sup>48</sup>

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<sup>47</sup> Latest available data.

<sup>48</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p29

- 5.7 The Committee also notes that WorkCover's publication 'Protecting Young Workers from Workplace Hazards' indicates that in 1998/99, nine young workers aged between 15 and 25 were killed in NSW.<sup>49</sup>

### **Injuries**

- 5.8 In its written submission, the CFMEU highlighted a 1998 WorkCover report entitled *Analysis of Claims in the Construction Industry* which found that over the period 1991/92 to 1996/97, 10% of all workers compensation claims for injury and disease came from workers in the building and construction industry. This represents a much greater risk of employment injury than to the average worker in NSW. The major hazards faced by workers in the building and construction industry were sprains, strains, muscle injuries, fractures, dislocations and other such injuries predominantly suffered in the upper limbs and trunk.<sup>50</sup>
- 5.9 The Committee also notes the data from WorkCover's *Statistical Bulletin 2000-01* on injuries in the construction industry in 2000/01. The bulletin indicated that of the 4,972 compensatable injuries in the construction industry in 2000/01:
- 1,748 resulted in permanent disability
  - 400 resulted in six months or more off work
  - 2,818 resulted in less than six months off work.<sup>51</sup>
- 5.10 Again following the hearing on 2 March 2003, the Committee requested from WorkCover information on the injury rate in the building and construction industry amongst young employees aged under 25 in 2002-03. In response, WorkCover indicated that there were 636 permanent total or permanent disabilities of young people under 25 across the three years.<sup>52</sup>
- 5.11 The Committee also notes that WorkCover's publication 'Protecting Young Workers from Workplace Hazards' indicates that in 1998/99, more than 1,000 young workers suffered a permanent disability; and over 8,400 were injured at work, a rate of 23 each day.<sup>53</sup>

### **Occupational disease**

- 5.12 The Committee notes that slow onset occupational diseases received very little comment during the conduct of the inquiry, the focus being on traumatic single incident accidents occasioning serious injury or death.
- 5.13 However, in its written submission, the Workers Health Centre at Lidcombe<sup>54</sup> noted that workers in the construction industry have the longest periods of absence from work due to

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<sup>49</sup> WorkCover, 'Protecting Young Workers from Workplace Hazards', p3

<sup>50</sup> WorkCover, *Analysis of Claims in the Construction Industry*, 1998 cited in Submission 29, CFMEU, p3

<sup>51</sup> WorkCover, *Statistical Bulletin 2000-01*, appendix e

<sup>52</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p31

<sup>53</sup> WorkCover, 'Protecting Young Workers from Workplace Hazards', p3

<sup>54</sup> The Workers Health Centre at Lidcombe is an independent, not for profit enterprise which has been assisting workers through its OH&S service for the past 28 years.

occupational diseases of workers in any industry. While there is little research available in Australia, the Workers Health Centre noted international evidence that construction workers suffer high incidence of noise-related hearing loss, mesothelioma, lead poisoning, musculo-skeletal injury and dermatitis.<sup>55</sup>

## Factors contributing to the industry's poor safety record

**5.14** In its written submission, the CFMEU cited in detail the findings in *Safety Building New South Wales*, a report published in 2001 by the Occupational Health and Safety Best Practice Initiative Unit of WorkCover. In the forward to the report, Professor Dennis Else pointed to an improving OH&S outcome in the building and construction industry, but also the continuing need for further improvement:

This report details significant improvements in the way OHS is being managed in the industry and the development of a valuable set of OHS management tools in relation to hazard management, contractor management, OHS training, safe design and performance measurement. In particular, the evaluation shows that the initiatives have produced greater commonality in the expectation of sub-contractors and helped reduce the time wasted by them on documenting safe work practices in a myriad of different formats for different principal contractors.

This report also shows, however, that some major gaps remain in the way the construction industry is managing OHS. Documented safe work practices often do not translate to actual safe work practices in the workplace. It would appear that this is an area in which performance measures should be targeted to ensure that we have lead indicators to show that our actual safe work practices are improving on the ground.<sup>56</sup>

**5.15** Further, at page seven, the report found:

Notwithstanding the achievement in improved OHS management and performance in the period 1996-2001, the NSW construction industry must maintain a priority focus on OHS reform. The rate of fatalities, injury and disease in the industry, with its resultant human suffering and economic and social costs, still remain unacceptably high.<sup>57</sup>

**5.16** At the same time, the Committee notes the evidence of Mr Pattison of Australian Business Limited that:

It would be my experience with our constituency that employers are mindful of their obligations; that they take the steps they believe they can take.<sup>58</sup>

**5.17** The Committee considers below the following issues which were highlighted during the conduct of the inquiry in relation to safety in the construction and building industry:

- the impact of commercial pressures on OH&S standards

<sup>55</sup> Submission 25, Workers Health Centre, p9

<sup>56</sup> WorkCover, *Safety Building New South Wales*, 2001 cited in submission 28, CFMEU, p5

<sup>57</sup> WorkCover, *Safety Building New South Wales*, 2001 cited in submission 28, CFMEU, p5

<sup>58</sup> Mr Pattison, Evidence, 2 March 2004, p3

- the impact of sub-contracting on OH&S standards;
- the impact of labour hire companies on OH&S standards;
- the lack of adequate training for workers in risk assessments and safety fundamentals
- the failure of some workers to use safety equipment
- the employment of young workers in the building and construction industry
- employees working under the influence of drugs and alcohol;
- cross-border issues
- the impact of long hours of work on OH&S standards.

### **The impact of commercial pressures on OH&S standards**

**5.18** During the conduct of the inquiry, a number of parties argued that commercial pressures in the building and construction industry are leading to a lowering of OH&S standards.

**5.19** For example, in its written submission, the CFMEU noted that in order to win a contract, contractors will tender for a job at the lowest possible price. As a result, they are under commercial pressure to maintain profit margins by disregarding or cutting corners in OH&S. In this regard, the union noted in its written submission the finding from the report on *Safety Building New South Wales* that:

Financial incentives and bonuses which encourage projects to finish ahead of schedule result in compromise when it comes to safety.<sup>59</sup>

**5.20** Mr Ferguson from the CFMEU elaborated further on this issue during the hearing on 17 February 2004:

I want to say, the majority of building contractors do the right thing. The majority of them, but there is extreme competition in the industry and unless WorkCover starts hitting the ones that don't comply, we have the good contractors put out of business by the people who cheat to get the contracts because their prices are cheaper.<sup>60</sup>

**5.21** The Committee also notes the findings in the *Final Report of the Royal Commission into the Building and Construction Industry*, released in 2002. The report concluded:

The occupational health and safety performance of the building and construction industry is unacceptable. The powerful competitive forces in the industry too often work against occupational health and safety. The industry strives to complete projects on budget and on time. Too often safety is neglected. There must be cultural and behavioural change. That can come about by harnessing the competitive forces in the industry to work for occupational health and safety.<sup>61</sup>

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<sup>59</sup> WorkCover, *Safety Building New South Wales*, 2001 cited in submission 28, CFMEU, p6

<sup>60</sup> Mr Ferguson, Evidence, 17 February 2004, p36

<sup>61</sup> *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 6, 'Reform – Occupational Health and Safety, 2002, p7

### The impact of sub-contracting on OH&S standards

- 5.22** In its written submission, the Workers Health Centre noted that the dozen or so major contractors who dominate the Australian construction industry are now mainly large-scale project managers with very few of their own employees on site. Most aspects of a building project are now contracted to smaller sub-contractors who are largely responsible for purchase of materials and the provision of labour.<sup>62</sup>
- 5.23** A number of parties argued that sub-contracting in the building and construction industry has had a detrimental impact on OH&S standards in the building and construction industry. For example, in his evidence on 17 February 2004, Mr Ferguson indicated:
- ... the killings are taking place not by the principal contractors that get the government contracts, they're often squeaky clean with well paid employees, with all sorts of personal equipment and safety training but the mass of the workforce aren't employed by the principal contractor, they are engaged by subcontract companies who then, often unbeknown to the builder, let alone the government department, sublet work to another contractor, who sublets work to another contractor, to a labour hire agency – you've often got illegal immigrants working on sites unbeknown to anyone on the site.<sup>63</sup>
- 5.24** Similarly, in his written submission, Mr Sullivan from Bayline Holdings Pty Ltd, a company in the building and construction industry, nominated the advent of specialist sub-contractors, and the 'quicker we get the work done, the more we make' attitude, as one of the principal reasons for the poor safety record of the building and construction industry.<sup>64</sup>
- 5.25** The Workers Health Centre at Lidcombe also observed in its written submission:
- The characteristics of the construction industry, particularly the high proportion of subcontractors and a transient workforce, add to the difficulties in integrating OHS into broader construction project management. Usually, there could be up to four tiers of responsibility at large construction sites. The increasing number of subcontractors are, however, small operators who neither have a management structure or the resources to address OHS at the different sites they work in.<sup>65</sup>
- 5.26** The Workers Health Centre further noted a recent report by the National Occupational Health and Safety Commission (NOHSC)<sup>66</sup> which identified some common problems faced by different industries in managing contractor/subcontractor OH&S compliance. These include lack of appropriate OH&S controls, poor awareness of OH&S, particularly among smaller contractors, and inconsistencies that lead to high rates of non-compliance with OH&S legislation. Moreover, the NOHSC found that some of the common risk factors identified

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<sup>62</sup> Submission 25, Workers Health Centre, p11

<sup>63</sup> Mr Ferguson, Evidence, 17 February 2004, p44

<sup>64</sup> Submission 40, Bayline Holdings Pty Ltd, p2

<sup>65</sup> Submission 25, Workers Health Centre, p10

<sup>66</sup> Mayhew.C, M.Quinlan, L.Bennett, 'The Effects of Subcontracting/Outsourcing on OHS', Industrial Relations Research Centre Monograph, University of NSW, 1996.

with the construction industry can make contract workers more susceptible to accidents such as the need to save time, tight schedules and lack of caution.<sup>67</sup>

**5.27** The Committee notes that under clause 226 of the OH&S Regulation 2001, principal contractors on construction sites where the cost of the work exceeds \$250,000 or the work is demolition work, asbestos removal work or high risk construction work are required to prepare an OH&S management plan. In turn, in managing the relationship between contractors and sub-contractors, clause 227 of the OH&S Regulation 2001 states in part:

(2) A principal contractor for the construction work must ensure that each sub-contractor, before commencing work at a place or work, provides the principal contractor with a written safe work method statement for the work to be carried out by the sub-contractor.

(3) A principal contractor must ensure that:

(a) a sub-contractor is directed to comply with:

(i) the safe work method statement that the sub-contractor has provided, and

(ii) the requirements of the Act and this Regulation, and

(b) the activities of the sub-contractor are monitored to the extent necessary to determine whether the sub-contractor is complying with:

(i) the safe work method statement that the sub-contractor has provided, and

(ii) the requirements of the Act and this Regulation, and

(c) if the sub-contractor is not so complying, the sub-contractor is directed to take action immediately to comply with the safe work method statement or the requirements of the Act and this regulation, or both, ...

**5.28** However, in his written submission, Mr Stokes from Deck Guardrail Australia Pty Ltd (DGA) argued that there is considerable confusion between building contractors and sub-contractors as to responsibility for ensuring safety on work sites.<sup>68</sup>

**5.29** To address this issue, the Committee believes it is appropriate that WorkCover undertake regular unannounced inspections of building and construction sites in NSW to ensure both principal contractors and sub-contractors are observing their legislative obligations under clause 227 of the OH&S Regulation 2001. Principal contractors and sub-contractors should be able to provide to WorkCover inspectors on the spot with a satisfactory OH&S management plan or written safe work method statement as applicable.

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<sup>67</sup> Submission 25, Workers Health Centre, p11

<sup>68</sup> DGA is a private firm which has developed various roof edge protection systems which stop workers from falling from buildings. Submission 15, DGA, p10

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## Recommendation 4

That as a priority WorkCover undertake regular unannounced inspections of building and construction sites where the cost of the work exceeds \$250,000 to target principal contractors and any sub-contractors. That these regular unannounced inspections ensure that the principal contractor has prepared and is observing an OH&S management plan, and that any sub-contractor has prepared and is observing a written safe work method statement.

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### *State Government contractual work*

- 5.30** The Committee notes that particular concerns were raised during the inquiry in relation to sub-contracting work undertaken on State Government owned sites. In his evidence to the Committee on 17 February 2004, Mr Ferguson specifically highlighted the case of Mr Hampson, and the failure of the Department of Public Works, the principal contractor at Gosford High School, to inform WorkCover of the accident suffered by Mr Hampson:

I will go back to the issue of Gosford High School. I do expect better performance from government than the private sector. I think the community at large expects that. The government high school, no notification from the principal or the Public Works Department from WorkCover. I'd like to know why not.<sup>69</sup>

- 5.31** The Committee also notes the death of Mr Boland while working for a sub-contractor to the Rail Infrastructure Corporation.
- 5.32** The Committee is particularly concerned by this issue, and believes that Government agencies have a responsibility to ensure the safety of workers on Government premises. In this regard, the Committee notes the findings of the Royal Commission into the Building and Construction Industry, which recommended that the Commonwealth Government insist on the application of safe design principles on all projects for which it (including its departments or agencies) is the direct client, or in relation to which it provides or contributes to funds or other projects.<sup>70</sup>
- 5.33** The Committee notes the Government's *GC21 Contract* and its companion *GC21 Subcontract*, developed by the Construction Agency Coordination Committee.<sup>71</sup> *GC21* contains the general conditions of contract as they relate to principal contractors and subcontractors. Relevantly, clause 15 referring to OH&S states:

#### **Occupational health and safety management**

The Contractor must be committed to creating a safe working environment and to continuous improvement in occupational health and safety.

1. The Contractor is principal contractors and responsible for and must comply with the requirements of the Contract for occupational health

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<sup>69</sup> Mr Ferguson, Evidence, 17 February 2004, p33

<sup>70</sup> *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 6, 'Reform – Occupational Health and Safety, 2003, p65

<sup>71</sup> See <http://www.construction.nsw.gov.au/index.html>

and safety, subject to the express provisions of the Occupational Health and Safety Act 2000 and the Occupational Health & Safety Regulation 2001. This includes, without limitation, compliance with the NSW Government “OHS&R Management Systems Guidelines”.

2. Unless specified otherwise in *Contract Information* item 15, the Principal hereby appoints the Contractor as principal contractor for the Works and authorises the Contractor to exercise such authority of the Principal as is necessary to enable the Contractor to discharge the responsibilities imposed on a principal contractor by the Occupational Health & Safety Regulation 2001.
3. Where applicable, as indicated in *Contract Information* item 16A, at least 14 days before starting *Design* and construction the Contractor must document, submit and implement an occupational health and safety management plan which complies with the Occupational Health & Safety Regulation 2001 and the NSW Government “OHS&R Management Systems Guidelines”.
4. The Contractor must systematically manage its occupational health and safety management processes in accordance with the systems, plans, standards and codes specified in the Contract.
5. The Contractor must demonstrate to the Principal, whenever requested, that it has met and is meeting at all times its obligations under clauses 15.1 to 15.4.

**5.34** The same requirements are placed upon subcontractors. The Committee is concerned that despite these requirements, contractors and subcontractors on Government sites may not be applying safe OH&S principles. The Committee therefore recommends that the Department of Commerce undertake random audits of contractors and subcontractors on Government projects under clause 15.5 of GC21.

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### **Recommendation 5**

That the Department of Commerce undertake frequent, random and unannounced audits of contractors and subcontractors on Government projects under clause 15.5 of GC21, to ensure they are continuing to meet their obligations under clauses 15.1 to 15.4 of GC21.

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### **The impact of labour hire companies on OH&S standards**

**5.35** The impact of labour hire companies on OH&S standards in the building and construction industry was another issue of particular concern raised during the inquiry.

**5.36** In evidence on 17 March 2004, Ms Hughes, Industrial Research Officer with the National Union of Workers, argued that employers contracting their labour supply to labour hire companies have very little incentive to maintain OH&S standards. This is because host employers can minimise the number of workers compensation claims in their workplace, and hence their workers compensation premiums, by simply employing staff through an

employment agency. If there is an accident at work, it is the labour hire agency, and not the host employer, that is legally responsible for notifying the insurer.<sup>72</sup>

- 5.37** The Committee was also informed by the evidence of Mr Goodsell from the Australian Industry Group (AIG) during the hearing on 2 March 2004. Mr Goodsell highlighted considerable uncertainty between labour hire companies and contractors in relation to responsibility for safety:

Labour hire has certainly created a shift in the structure of some industries. I do not think it has led to a lowering of standards in the sense of the expectations of people in the workplace about what safety measures should be implemented. There are some ambiguities from time to time about responsibilities. That is one of the reasons we suggested to WorkCover a specific program to address labour hire. It is not so much that people do not accept that a standard must be upheld, there are genuine issues about where the responsibility lies for meeting the obligation that no-one disagrees exists.<sup>73</sup>

- 5.38** The Committee notes that in August 2003, WorkCover released a discussion paper entitled *Review of Premiums and Implementation of Grouping*, the purpose of which was to seek comments on the method of calculating workers compensation premiums, with a view to introducing a revised method from the 2004/05 policy year.

- 5.39** In relation to labour hire companies, the discussion paper specifically raised the possibility of introducing industry classes specifically for labour hire companies, incorporating a higher workers compensation premium rating for those companies. The paper noted:

Labour hire companies are currently eligible for ‘multi-tariff’ policies, under which the wages of hired or placed employees are allocated to the industry class most closely associated with the activities the employees undertake. There are concerns that this approach:

- is contrary to the approach of industry classifications used for all other employers
- may be subject to manipulation by labour hire employees in order to minimise or avoid premiums
- may involve complex record keeping where labour hire companies employ workers in a wide range of activities attracting different industry premium rates
- does not take into account differences in the claims experience and claims costs of labour hire employers, compared to general employers in the industry classification.

Preliminary analysis by WorkCover’s actuaries indicates that, overall, labour hire employers do have higher claim costs than non-labour hire employers.<sup>74</sup>

<sup>72</sup> Ms Hughes, Evidence, 17 February 2004, p77

<sup>73</sup> Mr Goodsell, Evidence, 22 March 2004, p14

<sup>74</sup> WorkCover, *Review of Premiums and Implementation of Grouping*, Discussion Paper, August 2003, p11

**5.40** In response to this proposal, the Committee notes that it received a written submission from Mr Smith, Managing Director of Daly Smith Corporation (Aust) Pty Ltd, trading as DSC Personnel (DSC). DSC has been in the contract labour business for the last 23 years. In his submission, Mr Smith argued that:

... WorkCover are particularly attacking the contract labour industry including the attempt to introduce a special (high) workers' comp premium for contract labour companies to lift the cost of contract labour to discourage employers from using contract labour instead of long term union labour.<sup>75</sup>

**5.41** The Committee is not in a position to comment on WorkCover's review of workers compensation premiums. However, in relation to the OH&S of labour hire workers more generally, the Committee notes the recommendation of the Labor Council in its written submission that there needs to be clearer definitions of the obligations of the three parties involved in a labour hire relationship: the on-hired employee service provider (the labour hire company), the host organisation and the on-hired employee. Clearer definitions may assist the respective parties in taking greater responsibility for workers OH&S.<sup>76</sup>

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### **Recommendation 6**

That the Government review the OH&S Regulation 2001 to provide clearer definitions of the obligations of the three parties involved in a labour hire relationship: the labour hire company, the host organisation and the on-hired employee.

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### **The lack of adequate training for workers in risk assessments and safety fundamentals**

**5.42** In his written submission, Mr Sullivan argued that another major cause of poor safety standards in the building and construction industry is the lack of adequate training for workers in risk assessment and safety fundamentals.

**5.43** Under WorkCover's *Code of Practice for OHS Induction Training for Construction Work*, all workers and self-employed people involved in construction work are required to undertake construction induction training, which includes general work activity and site induction training, supervised by a WorkCover accredited trainer. Following that, workers are issued with 'Green Cards'.

**5.44** However, Mr Sullivan submitted that there is a lack of formal training in various aspects of the building and construction industry, particularly in relation to safety, which means that most lessons are learnt "on the job", often from other workers perpetuating unsafe practices. Mr Sullivan stated:

The lack of any, or limited formal training or even competency based "on site" assessments is a major contributor to the lack of safety awareness and procedures.<sup>77</sup>

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<sup>75</sup> Submission 5, Mr Smith, p1

<sup>76</sup> Submission 52, Labor Council, p66

<sup>77</sup> Submission 40, Bayline Holdings Pty Ltd, p2

- 5.45 Similar concerns were raised by a number of witnesses appearing before the Committee including Mr Hampson,<sup>78</sup> Mrs McGoldrick<sup>79</sup> and Ms Baxter.<sup>80</sup> As stated by Mr Hampson in his written submission:

At no time during this employment was I given any induction, information, training or supervision to do my job safely. I had stated clearly to my employer that I was not experienced in working on roofs and this did concern me. Despite my lack of training, experience and supervision Gary Denson put me upon the roof on my first day at work.<sup>81</sup>

- 5.46 In relation to the specific case of Mr Hampson, the Committee notes that Mr Denson, Mr Hampson's employer, disputed Mr Hampson's claim that he never received any training:

He, and all my employees were given induction training on each job, ongoing safety information and training and were supervised on every job.<sup>82</sup>

### ***Workers from non-English speaking backgrounds***

- 5.47 The Committee heard evidence that the problems in relation to safety training in the building and construction industry are compounded further when workers are from non-English speaking backgrounds (NESB).

- 5.48 Mr Ferguson presented the following evidence to the Committee during the hearing on 17 February 2004:

... I want to say to you there is thousands of workers from a non-English speaking background in the building industry. Very large sections of those workers speak no English whatsoever. They are desperate for employment. Not keen on employment, they're desperate. They've got no other option but to work in unsafe situations. I know of many cases where workers are injured. They're not reported to WorkCover. They use Medicare rather than worker's compensation.

I'll give you one example of a worker injured at a St Leonards building site. He was taken off the site in an ambulance. I actually looked at the first aid report and it said "a visitor to the building site" – this is a worker we're talking about – "a visitor to the building site was injured from an unfamiliar ladder." This is a worker on the site injured because their safety wasn't in order. Taken by an ambulance to the local hospital. Then the worker is confronted with all the bills in the world from the ambulance and medical treatment. He was unlawful. He was from South Korea. The boss simply said "Get out of the country before they get ya to make you pay all the bills and put you in gaol."

He contacted the union through a church group in the Korean community. We assisted him getting justice before he was deported. A lot of unlawful workers in the building industry. They don't speak English, they don't report accidents, let alone

<sup>78</sup> Submission 27, Mr Hampson, p1

<sup>79</sup> Submission 26, Mrs McGoldrick, p1

<sup>80</sup> Submission 34, Ms Baxter, p1

<sup>81</sup> Submission 27, Mr Hampson, p1

<sup>82</sup> Correspondence from Mr Denson to Committee Chairman, 12 March 2004.

casual workers. If you're a casual in the building industry, you don't complain about worker's compensation or put in a claim because you don't get the phone call the next night, because you don't have any security, you don't have any permanency and you simply cop it, keep working or go on Medicare and do the best you can.<sup>83</sup>

**5.49** Mr Keenan, OH&S Manager, Baseline Pty Ltd also raised the issue of workers from NESBs in both his written submission and his evidence to the Committee on 16 February 2004. Mr Keenan previously worked as an organiser and NSW OH&S Coordinator for the CFMEU.

**5.50** In his written submission, Mr Keenan noted that while working as an organiser and NSW OH&S Coordinator for the CFMEU, he found that workers from NESBs lacked an understanding of even basic OH&S principles, and that contractors employing workers from NESBs failed to ensure they were trained and supervised to ensure a safe working environment. As stated by Mr Keenan in his submission:

The very culture of NESBs is not to complain or report for fear of the sack. These people are exploited by unsafe bosses who continually fail to provide a safe workplace.<sup>84</sup>

**5.51** Mr Keenan also raised the issue of Green Cards. On becoming OH&S Manager at Baseline Pty Ltd, Mr Keenan indicated that:

One of the first areas of concern I identified as a safety problem was the number of NESB workers who had been given a "Green Card" by a WorkCover Accredited Trainer, and had no basic knowledge of English or OHS. These classes did not have an interpreter present. Simple safety issues like First Aid and Evacuations were not known to them.<sup>85</sup>

### **The failure of some workers to use safety equipment**

**5.52** As indicated in Chapter 4, s 20 of the *OH&S Act 2000* places on employees the following duty in the workplace:

(2) An employee must, while at work, co-operate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that is imposed in the interests of health, safety and welfare on the employer or any other person.

**5.53** However, during the inquiry, a number of parties cited evidence of the failure of workers in the building and construction industry to use of safety equipment, notably harnesses, even when such equipment was provided.

**5.54** For example, the Committee notes the following abstract from an article published by Christine Zupanc entitled 'Issues Relating to the Wearing of Fall-Arrest Harnesses in the Construction Industry', as provided to the Committee by the Ergonomic Society:

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<sup>83</sup> Mr Ferguson, Evidence, 17 February 2004, p36

<sup>84</sup> Submission 35, Mr Keenan, p2

<sup>85</sup> Submission 35, Mr Keenan, p3

Work-related falls continue to be one of the leading causes of fatalities in the Australian construction industry, and the failure to use fall protection equipment, such as fall-arrest harnesses and arresting devices, has been found to be a contributing factor. In an attempt to gain an understanding of the issues surrounding the use of fall-arrest harness systems by construction workers a study involving semi-structured interviews of 15 male construction workers was carried out at three construction sites. The majority of interviewees commented that there was discomfort in wearing a fall-arrest harness; that there were a number of problems when anchored via an arresting device, and that using a fall-arrest system reduced productivity. Most of the interviews considered that they needed safety precautions against falls, and they expressed the view that workers' attitudes towards safety depended critically upon the supervisors' attitude towards safety.<sup>86</sup>

- 5.55** The Committee also notes the anecdotal evidence of Mr Hampson during the hearing on 16 February 2004 that harnesses are sometimes worn in the building and construction industry, but not hooked up.<sup>87</sup>
- 5.56** Mr Goodsell also raised this issue from an employer's perspective during the hearing on 2 March 2004. Mr Goodsell indicated that considerable uncertainty exists for employers whether they can dismiss employees who do not follow OH&S guidelines:

It is age-old problem and an enormous frustration to companies that some employees engage in civil disobedience. If they find things uncomfortable or inconvenient to wear, they will not do so. There is also the alpha-male effect with younger males, who do not think they need protective equipment because they are tough. The problem is that the law provides that the employer must work his way through those issues. At the end of the day, the Act contains some protections—employees are supposed to use protective clothing if it is provided and must not misuse it. However, the only sanction available is disciplinary action, and companies are increasingly resorting to that. It is not easy, because it does not always fit into the co-operative culture companies are trying to develop with employees.<sup>88</sup>

- 5.57** Mr Goodsell in turn noted that companies have dismissed workers for failing to use safety equipment, but have subsequently lost unfair dismissal cases as a result.<sup>89</sup>

### **The employment of young workers in the building and construction industry**

- 5.58** The Committee notes that Mr Exner and Mr McGoldrick, two of the cases drawn to the Committee's attention during the inquiry, both died at a very young age.
- 5.59** WorkCover's publication 'Protecting Young Workers from Workplace Hazards' stresses the importance of protecting young workers from workplace hazards. It states:

<sup>86</sup> Zupanc.C, 'Issues Relating to the Wearing of Fall-Arrest Harnesses in the Construction Industry', *Ergonomics Australia*, Vol 17, No 3, September 2003, p18, cited in Submission 44, The Ergonomics Society of Australia

<sup>87</sup> Mr Hampson, Evidence, 16 February 2004, p9

<sup>88</sup> Goodsell, Evidence, 2 March 2004, pp14-15

<sup>89</sup> Goodsell, Evidence, 2 March 2004, p15

Employers must pay special attention to the needs of young workers because they lack experience and may not be familiar with workplace practices.

Employers must provide them with information and training about work hazards and safe work practices that give consideration to their age and experience.<sup>90</sup>

**5.60** However, during the inquiry, the Committee received a written submission and took evidence from Karen Iles, the Apprenticeship Officer with the CFMEU, who highlighted the ongoing vulnerability of apprentices in the building and construction industry to injury. Ms Iles is responsible for working with apprentices in the construction industry to educate them about OH&S and their rights at work.<sup>91</sup> Ms Iles noted that:

- Apprentices are often in their first job after leaving school at an age of 15-18, and have little understanding of their rights in the workplace nor the obligations of employers. As a result, apprentices and other new entrants to the workforce often have an expectation of being looked after by their employers, and look up to their employers as “parent figures”.<sup>92</sup>
- While apprentices receive substantial training at TAFE, many apprentices do not receive sufficient on the job training from tradespersons, or may be trained in bad habits. In addition, while TAFE training is generally comprehensive, it is delivered over a three-year period, meaning that apprentices in their first year may not have had training in the performance of a particular job.<sup>93</sup>
- The building and construction industry has a culture which means that apprentices are given the “lousy jobs” that other workers do not want to do. In addition, there is also a “macho” culture on site, which may involve “initiation” and harassment of apprentices. The desire of young apprentices to fit into this workplace culture often makes them vulnerable when placed in unsafe work situations.<sup>94</sup>
- Within the building and construction industry, there is an attitude of contempt towards WorkCover. WorkCover is seen as an agency to be avoided rather than as a means of assisting workers and improving OH&S. In particular, Ms Iles argued that in relation to the deaths of Dean McGoldrick, Joel Exner and Peter Cruickshanks,<sup>95</sup> the poor response of WorkCover to those high profile fatalities has permeated the industry, and has contributed to employers’ sense that they are able to successfully dodge WorkCover and their responsibilities to provide a safe workplace.<sup>96</sup>

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<sup>90</sup> WorkCover, ‘Protecting Young Workers from Workplace Hazards’, p3

<sup>91</sup> Submission 28A, Karen Iles, p1

<sup>92</sup> Submission 28A, Karen Iles, p1

<sup>93</sup> Submission 28A, Karen Iles, pp1-2

<sup>94</sup> Submission 28A, Karen Iles, p2

<sup>95</sup> Mr Peter Cruickshank was an apprentice painter who was electrocuted in 2001. There has been no prosecution arising from his death.

<sup>96</sup> Submission 28A, Karen Iles, p3

**5.61** Ms Iles reiterated these concerns in her evidence on 15 March 2004. Ms Iles stated:

Apprentices and young workers are vulnerable to injury in the workplace. The National Occupational Health and Safety Commission found that one-third of all workplace injuries and accidents happen to young and inexperienced workers. Apprentices and young workers deserve particular attention with employer, government and non-government assistance in the area of workplace safety. Apprentices are often young workers. Often the apprenticeship is their first job after leaving school at the ages of 15 to 18 years, and we saw that with the death of Joel Exner, which I think has been raised at this inquiry. They have little or no understanding of their rights in the workplace, nor the obligations of employers. This is true for matters pertaining to their wages, employment conditions, roles of different government and non-government organisations in the workplace, and occupational health and safety. This makes apprentices and other young workers particularly vulnerable in the workplace.<sup>97</sup>

**5.62** Chapter 9 later in this report discusses a range of initiatives being undertaken by WorkCover in an attempt to target the OH&S of young workers and apprentices.

#### ***Group Training Organisations***

**5.63** The Committee notes that it received a written submission of the Master Plumbers Association of NSW in relation to apprentices employed by the Master Plumbers Apprentices Limited (MPAL).

**5.64** The MPAL is a nationally registered Group Training Organisation with over 230 apprentice plumbers in training, making it the largest group training company for plumbing apprentices in Australia. It conducts a program of 21 four-hour seminars for apprentices on the Master Plumbers Safety and Consultation System for the Plumbing industry, which was partially funded through WorkCover Assist.

**5.65** However, in its written submission, the Master Plumbers Association of NSW raised concerns in relation to the continuance of the MPAL. Currently, under the *OH&S Act 2000*, if an apprentice under MPAL is injured at a worksite while under the direct supervision of a host employer, WorkCover is legally obliged to prosecute MPAL, and not the host employer. The Master Plumbers Association of NSW submitted that:

... WorkCover NSW should prosecute the host, subject to the Group Training Company being able to establish, beyond reasonable doubt, that they had undertaken all necessary and relevant checking of the safety system under which the apprentice works with the host employer.

**5.66** The Committee accepts this evidence, and believes that the Government should investigate including in the OH&S Regulation 2001 clearer definitions of the obligations of the parties involved in a apprentice hire relationship between a host employer and a Group Training Organisation.

<sup>97</sup> Ms Iles, Evidence, 15 March 2004, p43

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**Recommendation 7**

That the Government investigate including in the OH&S Regulation 2001 clearer definitions of the obligations of the parties involved in an apprentice hire relationship between a Group Training Organisation, a host employer and an apprentice.

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**Employees working under the influence of drugs and alcohol**

- 5.67** The Committee notes the evidence of Mr Goodsell from AIG during the hearing on 2 March 2004 in relation to the issue of drugs and alcohol in the workplace. Mr Goodsell indicated that the 2003 NSW Summit on Alcohol Abuse at Parliament House agreed that alcohol is a factor in between 5 and 10 per cent of workplace injuries in NSW. Similarly, Mr Goodsell indicated that whereas drug use was not previously regarded as an issue in the workplace, perhaps because society is less able intuitively to comprehend the nature of that problem, drugs are also increasingly recognised as a factor in workplace injuries.<sup>98</sup>
- 5.68** Given the significance of the problem posed by drugs and alcohol in the workplace, Mr Goodsell noted that unions are in dispute over the issue of compulsory drug and alcohol testing in the workplace:
- The status of drug and alcohol testing, almost every time it is raised, is disputed by unions, and there is a brawl about that issue. The people are on sides different to those they are on in this debate. The unions are saying, "Oh, no, we don't have to go that far," whereas employers are saying, "We understand the legal obligation is that we do go that far." So we have a reversal of positions when it comes to that.<sup>99</sup>
- 5.69** As a possible model to addressing the issue of drugs and alcohol in the workplace, the Committee notes the evidence of Mr Russell from AIG during the hearing on 2 March 2004 that the mining industry had developed a tripartite approach to drug and alcohol testing supported by employers, unions and the Government in its various regulatory forms.<sup>100</sup>
- 5.70** The Committee also notes that it received a written submission from Mr Sharp, the NSW Project Co-ordinator of the Building Trades Group Drug and Alcohol Program, and the Executive Officer of the Construction Industry Drug and Alcohol Foundation.
- 5.71** In his submission, Mr Sharp indicated that there is an acknowledged alcohol problem in the building and construction industry, with data indicating that over one in four (27%) of workers in the building industry drink at a high or moderate risk level, compared with an average across all industries of around 18%. Similarly, workers in the construction and mining industries have the highest reported level of hangovers (4.9% of all workers), twice the average for all industries.

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<sup>98</sup> Mr Goodsell, Evidence, 2 March 2004, pp15-16

<sup>99</sup> Mr Goodsell, Evidence, 2 March 2004, p13

<sup>100</sup> Mr Russell, Evidence, 2 March 2004, p18

- 5.72** In recognition of this problem, the Drug and Alcohol Committee of the Building Trades Group of Unions developed in 1989 the Building Trades Group Drug and Alcohol Program. The program promotes awareness and workplace safety through a broad range of drug and alcohol awareness, education and training activities. Since its inception, the program has provided:
- 860 on site awareness sessions (40 minutes duration, including a screening of the video “Not at Work, Mate”) to 72,000 construction workers
  - 170 drug and alcohol safety in the workplace training sessions (2 hours duration) to 1,750 safety committee members
  - 1,230 drug and alcohol safety in the workplace training sessions (2 hours duration) to 14,000 construction industry apprentices in TAFE colleges.
- 5.73** Mr Sharp indicated his belief that ongoing provision of these services had resulted in the Building Trades Group Drug and Alcohol Program being well accepted by all stakeholders – the workers, the employers and the unions – in the industry. In 2003, the program was chosen by the United Nations as one of 15 demonstration projects to be promoted internationally to practitioners and policy makers as a best practice model.<sup>101</sup>
- 5.74** The Committee also notes that the Building Trades Group Drug and Alcohol Program established in 1994 a registered charity called The Construction Industry Drug and Alcohol Foundation (the Foundation), which is a non-profit organisation that aims to raise funds to provide adequate, effective and readily accessible drug and alcohol treatment services and support to construction industry members and their families.
- 5.75** In June 2000, the Foundation opened Foundation House, a treatment centre specifically designed to meet the needs of construction industry members and their families. The House was funded solely by the Foundation over its first two years of operation, and has been co-funded by the NSW Department of Health since then. Over the period from July 2002 to June 2003, Foundation House has provided the following services:
- the House received 622 telephone inquiries regarding available services from individuals and other agencies representing clients seeking help
  - the House admitted 121 clients to the residential program with 90 clients (74%) completing the 28-day program. Of those 90 completing the residential program, 38 clients (42%) were referred to Halfway Houses or other support accommodation
  - the House provided outpatient counselling to 83 clients. The number of sessions per client ranged from one to seven, with an average of three sessions per client
  - 750 clients attended weekly relapse prevention groups, with an average attendance of 16.<sup>102</sup>
- 5.76** The Committee is aware of the significant value of the Building Trades Group Drug and Alcohol Program and the Foundation. Nevertheless, the continuing high presence of drugs

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<sup>101</sup> Submission 56, Mr Sharp, pp2-3

<sup>102</sup> Submission 56, Mr Sharp, pp4-5

and alcohol in the workplace in the building and construction industry highlights the extent of the problem.

- 5.77 The Committee believes that there may be value in further broadening the Building Trades Group Drug and Alcohol Program through the involvement of WorkCover, and possibly the provision of additional funding by the Government.

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### Recommendation 8

That the Government examine the provision of additional funding to the Building Trades Group Drug and Alcohol Program, and that WorkCover examine whether it can provide any further support to the program and similar programs in other industries.

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### Cross-border issues

- 5.78 During the hearing on 17 February 2004, the Committee raised with WorkCover representatives the degree of cooperation between WorkCover and its sister agencies in other states, especially in relation to information about people who might have been convicted of unsafe work practices in other jurisdictions. The Committee specifically noted border areas such as the Tweed Heads area and Albury/Wodonga, where people regularly live in one state and work in another.
- 5.79 In response, Mr Grant from WorkCover indicated that there is no formal information sharing between WorkCover and its sister agencies, because each jurisdiction has its own legislation, which might mean that a person found culpable in one jurisdiction might not have been found culpable in another. Mr Blackwell also cited possible concerns about privacy.<sup>103</sup> However, in relation to border areas, Mr Watson from WorkCover commented:

If I could just comment about our interactions with our brother and sister jurisdictions either side of the Queensland and Victorian borders. We have run both in the Queensland border and on the Victorian border, joint activities with inspectorates from Queensland and Victoria respectively were we have had inspectors from New South Wales and inspectors from, for example, Victoria, working together in the construction industry in those border areas who deal with exactly the nature of the companies that operate on both sides of the border, so there is an understanding, a shared understanding about the provisions of legislation in both States and the requirements that are in New South Wales are similar to those requirements in Victoria, so that particular employers actually deliver safe places of work in those border town areas.

...

So we do have that interaction in the field with the inspectorates, as well as with the heads of jurisdictions, we meet formally across Australia with all jurisdictions at least three times a year and we discuss issues related to how enforcement and how compliance activities can be carried out to deal with issues that emerge.<sup>104</sup>

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<sup>103</sup> Ms Watson and Mr Blackwell, Evidence, 17 February 2003, p24

<sup>104</sup> Mr Watson, Evidence, 17 February 2004, p24

### **The impact of hours of work on OH&S standards**

- 5.80** In its written submission, the CFMEU argued that hours of work are another key issue in compromising safety in the building and construction industry. The CFMEU noted that workers are required to work six, and sometimes seven, days each week, during which it is not uncommon for employees to do in excess of 60 or 70 hours. In turn, the CFMEU submitted that the more fatigued a worker is, the more likely it is an accident will happen.<sup>105</sup>
- 5.81** The CFMEU also noted in its written submission in this regard the finding from the report on *Safety Building New South Wales* that
- Pressure to finish projects also means workers are required to put in an excessive number of hours which further exacerbates the risk of accident and injury.<sup>106</sup>
- 5.82** The Committee recognises that excessive hours may be a problem in the building and construction industry, although the Committee did not receive sufficient evidence during the inquiry to make a finding on this issue. The Committee does, however, believe that hours of work in the building and construction industry and other industries should be the subject of further study by WorkCover, to determine the effect that fatigue has on workplace safety.

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### **Recommendation 9**

That WorkCover conduct a study on the effects of fatigue on workplace safety in the building and construction industry and other industries, to determine whether further measures should be adopted.

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<sup>105</sup> Submission 28, CFMEU, pp6-7

<sup>106</sup> Submission 28, CFMEU, p6



## Chapter 6 Other industries

### Introduction

- 6.1** The Committee notes that while the majority of industry specific evidence it received during the inquiry related to the building and construction industry, it also received evidence in relation to the other industries. This chapter examines the following industries:
- the road transport industry
  - industries covered by the National Union of Workers
  - the agriculture industry.
- 6.2** The following chapter examines the specific safety issue injuries from needles and other sharp objects in the NSW healthcare industry.

### The road transport industry

#### The safety record of the road transport industry

- 6.3** During the inquiry, the Committee received evidence from two parties in relation to the road transport industry:
- Mr Keith McGucken, Occupational Health and Safety Officer with the Transport Workers Union (TWU)
  - Mr Hugh McMaster from the NSW Road Transport Association (NSWRTA).<sup>107</sup> The NSWRTA also made a written submission to the inquiry.
- 6.4** These parties expressed very different views to the Committee on the safety record of the road transport industry in NSW.
- 6.5** In his evidence to the Committee on 17 February 2004, Mr McGucken argued that the road transport industry in NSW has a very poor safety record, citing figures from the NSW Roads and Traffic Authority (RTA) that between 1998 and 2002, there were 958 transport workers killed on the road in NSW.<sup>108</sup>
- 6.6** However, in its written submission, the NSWRTA cited data from the Australian Transport Safety Bureau indicating that the proportion of fatalities on the road in NSW involving an articulated truck fell as a percentage of national fatalities from 47% to 36% over the period from 1981-83 to 1999-2001. This is shown in Figure 6.1 below.

<sup>107</sup> The NSWRTA is a state registered employer association with over 550 members. It is the largest road transport employer organisation in NSW.

<sup>108</sup> Mr McGucken, Evidence, 17 February 2004, pp63-64

**Figure 6.1** Fatalities on the road in NSW involving articulated trucks – 1981/83 to 1999/01

Year	Fatal Accidents	Fatalities	Fatalities as a % of accidents in Australia involving articulated trucks
1981/83	111	136	47
1984/86	96	118	45
1987/89	93	123	39
1990/92	71	85	41
1993/95	54	66	33
1996/98	55	66	36
1999/01	57	69	36

Source: Australian Transport Safety Bureau

- 6.7** The Committee notes the discrepancy in figures cited by Mr McGucken and the NSWRTA in relation to the safety record of the road transport industry. Accordingly, the Committee reiterates Recommendation 3 of this report for the development of a national database on workplace injuries and fatalities using nationally consistent definitions. That database should specifically record injuries and fatalities in the road transport industry using nationally agreed definitions.
- 6.8** Given the differing evidence on the safety record of the NSW road transport industry, the Committee was informed by the findings in the Inquiry into Safety in the Long Haul Trucking Industry, the so-called Quinlan Inquiry, released in 2001. The report found evidence of a major safety problem in the long haul trucking industry:
- in 1999, 189 Australians died in crashes involving articulated trucks (or about one tenth of all road fatalities that year), with 51 of these being truck drivers. In absolute terms, up until 1999 there was no trend improvement in either the number of fatalities (truck driver or other road user) or the number of fatal crashes involving articulated trucks after 1991. By way of contrast, since 1991 there has been an improvement in the total number of fatal all-vehicle crashes and fatalities
  - as the most populous state and as the hub of interstate transport on the eastern seaboard, NSW recorded the largest number of deaths (64 including 13 truck drivers) in 1999. Again, there was no trend improvement after 1991 (with the possibility of an upward trend since 1995). The number of crashes (all categories of seriousness) involving articulated trucks on NSW roads has increased from 948 in 1991 to 1,520 in 1999 (no comparable figures are available for Australia).<sup>109</sup>
- 6.9** The Quinlan Inquiry report also noted other indicators of serious health and safety issues association with long haul trucking. In particular, the report noted that workers' compensation claims data seriously understates the extent of work-related injury and disease in the road transport industry due to reporting/claim problems and the fact that most owner/drivers do not take out workers' compensation cover (and a not insubstantial number have no insurance

<sup>109</sup> Prof M.Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, 2001, executive summary, p2

cover whatsoever). The inquiry also received submissions that some small fleet operators actively discourage workers' compensation claims (urging them to use Medicare etc).<sup>110</sup>

### **The role of WorkCover in investigating accidents in the road transport industry**

**6.10** During the inquiry, there was also significant disagreement between the NSWRTA and the TWU whether accidents involving trucks should be investigated by WorkCover.

**6.11** In the hearing on 17 February 2004, Mr McGucken argued that many employees in the trucking industry are being forced to work 80, 90 or even 100 hours per week. As such, Mr McGucken argued that the employers, the clients, the consigners and receivers who place such unrealistic demands on truck drivers should be subject to investigation and prosecution by WorkCover where it can be shown that they contribute to unsafe work practices. Mr McGucken also observed:

Quite clearly under New South Wales legislation a truck is deemed to be a place of work. WorkCover being the regulator, the safety regulator of work places is very, very reluctant to get involved.<sup>111</sup>

**6.12** In this regard, the Committee cites the evidence of Mr Perkins, who noted that Chapter 1, Clause 3 – Definitions of the OH&S Regulation 2001 makes it clear that a vehicle is a place of work. Mr Perkins cited the following definitions from the regulation (Mr Perkin's emphasis):

- **Employee** means **an individual who works** under a contract of employment or apprenticeship
- **Place of work** means **premises where persons work**
- **Premises** includes any place, and in particular includes ... any **vehicle**, vessel, or aircraft ...<sup>112</sup>

**6.13** By contrast, in its written submission, the NSWRTA argued that the cabin of a truck should not be treated as a place of work in the context of OH&S laws. The Association argued that a place of work relates to fixed locations such as buildings, and not a place such as a truck cabin where workers or employees do not have sufficient control over the safety of that environment.

**6.14** Accordingly, the NSWRTA submitted that road accidents involving truck drivers and other industry employees are quite properly treated in the same way as other road accidents, with primary responsibility for investigations resting with the NSW Police and the RTA. The NSWRTA submitted that such agencies have the skills and resources to deal with road accidents. In addition, road accidents involving trucks often involve other private road users, who are clearly outside the responsibility of WorkCover.

<sup>110</sup> Prof M.Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, 2001, executive summary, p3

<sup>111</sup> Mr McGucken, Evidence, 17 February 2004, p63

<sup>112</sup> Submission 49, Mr Perkins, pp7-8

- 6.15** During the hearing on 15 March 2004, the Committee raised with Mr McMaster from the NSWRTA the position expressed by Mr McGucken. In response, Mr McMaster commented:

We certainly agree that WorkCover has a role. We said so in our original submission. We said that the police and the Roads and Traffic Authority should be the primary agencies because of their role in terms of the development and application of road transport law. ... but they do recognise that there are circumstances when WorkCover justifiably has the right and duty to investigate where there are concerns that say the driver has been driving excessive hours or there are other factors that in the minds of those responsible may have compromised that driver's ability to do his or her job in a safe and responsible manner.

As far as the cabin being the workplace, it is certainly our view that it is a place where work is carried out. The difficulty we find is that, as I said in my opening remarks, it is not possible for an employer to have any control over what goes on in the cabin of a truck while the driver is doing his or her job on the road or over the working environment surrounding the truck at a particular point in time. So a great deal of care must be taken in considering the implications of calling a road or the cabin of a truck a workplace.<sup>113</sup>

- 6.16** Once again, the Committee was informed on this issue by the findings of the Quinlan Inquiry. In particular, in relation to Mr McGucken's concerns about excessive hours and unrealistic demands being placed on truck operators, the report found that:

... current commercial arrangements between an array of parties to the transport of freight, including load owners/clients and receivers, consignors and brokers, freight forwarders, large and small fleets as well as owner/drivers have a significant influence on safety.<sup>114</sup>

- 6.17** In addressing this issue, the Quinlan Inquiry report noted, amongst a large number of other regulatory issues, that:

The NSW Occupational Health and Safety Act covers the road transport industry and contains arguably the most effective remedies for dealing with very serious offences by operators, consignors or clients. However, no real effort has been made by the responsible agency, WorkCover, to investigate or prosecute such offences even though this has support not only from the RTA but the union, industry associations, insurers and other parties. As this Inquiry has shown, there is evidence of a depressingly large number of cases where there are indications of corporate criminality warranting serious investigation. It should be noted that OHS agencies in other jurisdictions like Victoria are becoming more active in undertaking prosecutions in the trucking industry.<sup>115</sup>

- 6.18** The Quinlan Inquiry report subsequently indicated that WorkCover in NSW has preferred to take a subsidiary role to the NSW Police, the RTA and the Environmental Protection

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<sup>113</sup> Mr McMaster, Evidence, 15 March 2004, p17

<sup>114</sup> Prof M.Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, 2001, executive summary, p5

<sup>115</sup> Prof M.Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, 2001, executive summary, p8

Authority in relation to safety in the long haul road transport industry. However, the report found that:

... there are compelling reasons why OHS legislation must be brought into play in the industry if a reasonably rapid change in safety performance is to be achieved. Put simply, the OHS Act contains general duties applying to a range of parties, an array of penalties more likely to have real deterrent value, and a proven record of successful implementation.... In Victoria, these options are now being actively explored (further, the Victorian Road Transport Association has worked to bring coroners into the loop). By getting a more balanced mix of road transport and OHS legislation and greater cooperation amongst the agencies a number of the serious limits with the current approach can be addressed.<sup>116</sup>

- 6.19** The Committee is concerned that the road transport industry has a very poor OH&S record, as indicated in Chapter 3. Accordingly, the Committee endorses the greater use of the OH&S legislation in the prevention of serious injuries and fatalities in the road transport industry in NSW.

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### Recommendation 10

That the Government seek to amend the OH&S legislation to facilitate a greater role for WorkCover in the prevention of serious injuries and fatalities in the road transport industry in NSW.

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- 6.20** In this regard, the Committee notes that in November 2003, the NSW Police, WorkCover, the RTA and the Department of Environment and Conservation released the *Interagency Guidelines for the Prevention and Investigation of Long Haul Heavy Vehicle Trucking Incidents*. The guidelines indicate that the Government, in seeking to improve the safety environment in the road transport industry, would undertake a number of measures, including:

Amendment of the occupational health and safety (OH&S) legislation to cover contractor truck drivers while they are on the road. This will allow, for example, investigation by WorkCover if it appears unrealistic and dangerous delivery timetables contributed to an accident involving a long haul truck;<sup>117</sup>

- 6.21** The Committee welcomes the Government's commitment to amending the OH&S legislation to facilitate the greater involvement of WorkCover in reducing accidents in the road transport industry, and believes that WorkCover should work more closely with other agencies involved in road accident investigation, including the NSW Police, the NSW Ambulance Service, the NSW Fire Brigade Service and the NSW Roads and Traffic Authority.

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<sup>116</sup> Prof M.Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, 2001, executive summary, p12

<sup>117</sup> NSW Police, Roads and Traffic Authority, WorkCover Authority and Department of Environment and Conservation, *Interagency Guidelines for the Prevention and Investigation of Long Haul Heavy Vehicle Trucking Incidents*, November 2003, p4

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**Recommendation 11**

That WorkCover engage the active cooperation of the other agencies involved in road accident investigations (the NSW Police, the NSW Ambulance Service, the NSW Fire Brigade Service and the NSW Roads and Traffic Authority) in identifying work-related crashes, with the aim of maximising the capture of fatigue and work related road transport accidents in WorkCover data.

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**Drug and alcohol testing in the road transport industry**

- 6.22** In its written submission, the NSWRTA noted that in 1999, drugs and alcohol were the principal factor in 10.8% of all fatal crashes involving at least one heavy vehicle of greater than 4.5t GVM.<sup>118</sup>
- 6.23** During the public hearing on 15 March 2004, the Committee placed on notice with Mr McMaster the issue of drug and alcohol use in the road transport industry, and whether companies that are members of the association undertake drug and alcohol testing of drivers before they commence a trip.
- 6.24** In his response provided on 7 April 2004, Mr McMaster indicated that only a minority of companies conduct drug and alcohol tests/inspections. Mr McMaster suggested that an employer would need to consider a number of factors when evaluating the consequences of conducting such tests, including:
- whether privacy concerns have been addressed
  - the reaction of the TWU
  - whether the proposed regime involves random selection, targeted selection or everybody at a site or in a company
  - whether participation is compulsory or voluntary
  - the types of tests/inspections that are conducted
  - the circumstances under which the tests/inspections would be conducted
  - the consultative processes with employees
  - whether education/training needs to be conducted beforehand
  - how to ensure the process is non-discriminatory
  - the outcomes of a test/inspection, and how that may vary according to the seriousness of the problem, whether it is a repetition of a previous problem or a one-off problem, and other variables.<sup>119</sup>

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<sup>118</sup> Gross vehicle mass

<sup>119</sup> Mr McMaster, Response to Questions on Notice, 7 April 2004, p2

- 6.25** The Committee believes that the issue of drug and alcohol use in the road transport industry is one area where WorkCover could become much more involved with employers, the NSWRTA, the TWU and employees in seeking to prevent workplace injuries. That involvement may include developing guidelines on drug and alcohol testing in the road transport industry.

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### Recommendation 12

That WorkCover become more involved with the NSW Roads and Traffic Authority, the TWU and employees in seeking to prevent workplace injuries in the road transport industry resulting from drug and alcohol consumption. That involvement may include developing guidelines on in drug and alcohol testing in the road transport industry.

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## Industries covered by the National Union of Workers

- 6.26** The Committee received a written submission from the NUW, which represents workers in the industries of warehousing and distribution, food manufacturing, pet food manufacturing, milling, the rubber industry, commercial travellers and sales representatives. The Committee also took evidence from Ms Alisha Hughes representing the NUW during the hearing on 17 February 2004.
- 6.27** In its submission, the NUW indicated that the main causes of injuries and fatalities in the workplaces of NUW members are manual handling, forklift trucks and the simple failure of companies to comply with relevant legislation by identifying hazards and conducting risk assessments:
- in relation to manual handling, the NUW noted that one of the main problems is the inclusion of time limits on manual handling tasks. The NUW submitted that such practices encourage and reward employees for not following correct manual handling procedures and other safety procedures, and accordingly should be outlawed<sup>120</sup>
  - in relation to forklift trucks, the NUW noted that in the last few years, the union has lost two members to forklift truck accidents. One member lost his life when he was pinned by a forklift truck, and another lost his life when he fell from the top of a high reach truck. The union indicated that it is expecting both companies involved to be prosecuted, although at the time, WorkCover was still collecting and reviewing information on the two cases<sup>121</sup>
  - in relation to compliance by companies with the relevant OH&S legislation, the NUW noted the example of an adhesive and abrasive manufacturing company at Lidcombe with approximately 80 employees that had not undertaken any hazard identification or hazard reduction in accordance with its obligations under the *OH&S Act 2000* and *OH&S Regulation 2001*. In addition, the NUW noted the case of a grocery distributor which was issued with a number of penalty notices by WorkCover,

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<sup>120</sup> Submission 47, NUW, pp2-3

<sup>121</sup> Submission 47, NUW, p3. See also Ms Hughes, Evidence, 17 February 2004, pp68-69

but fought those notices through their lawyer on the basis of technicalities, as a result of which the penalty notices were withdrawn.<sup>122</sup>

**6.28** The Committee also notes that the NUW raised the issue of labour hire companies in industries covered by the union. The NUW indicated there is a growing number of workers in industries covered by the union employed through labour hire companies, including up to 90% of casual workers. Echoing concerns raised in relation to labour hire companies in the construction industry, the Union submitted that

... there is not as much commitment to proper induction and safety training for labour hire workers – by both the host employer and the employment agency.<sup>123</sup>

**6.29** The Committee was not in a position to explore these issues further within the timeframe of the inquiry. However, the Committee believe that they warrant further strategic attention by WorkCover.

## **The agriculture industry**

**6.30** As indicated in Chapter 3, the agriculture industry has a very high rate of injuries and fatalities, with the additional likelihood that a significant proportion of accidents go unreported.

**6.31** Following the hearing on 2 March 2004, the Committee placed on notice with WorkCover a question on the success of WorkCover in reducing the high rate of injuries and fatalities in the agriculture industry. In its response, WorkCover indicated that it has been involved in a number of initiatives to assist rural and agricultural employees to improve workplace health and safety:

- since 1994, WorkCover has promoted, in conjunction with the National Farmers Federation, NSW Farmers Association and the wider agricultural community, the Managing Farm Safety course that helps farmers to increase productivity and reduce workplace injury
- since 1999, WorkCover has promoted the Farm Safety Starter Kit, which incorporates a 15 minute farm safety check and induction checklist, backed up by an associated television advertisement campaign
- in 2000, WorkCover began the 4 year Roll Over Protective Structure rebate scheme for tractors, which has seen more than 9690 structures fitted to tractors
- since 2001, WorkCover has promoted the Future Farmers Program, in which OHS training modules are incorporated into the curriculum of high school agriculture courses
- since 2001, WorkCover has conducted information sessions across rural NSW including information about the need to consult with employees to identify and manage potential hazards and risk in the workplace.

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<sup>122</sup> Submission 47, NUW, pp3-4. See also Ms Hughes, Evidence, 17 February 2004, p70

<sup>123</sup> Submission 47, NUW, p4

**6.32** In addition to these initiatives, WorkCover also funds:

- the Shear Safety Program, which helps woolgrowers and shearers improve their working conditions via a worm device rebate, a dollar-for-dollar shed improvement initiative, and information and assistance seminars
- the Rural Safety Hotline, which enables rural employers, workers and others to access information relating to safety initiatives
- rural field days and small business information sessions.

**6.33** As a result of these initiatives, WorkCover noted that preliminary data for 2003/04 indicates that from 1 July 2003 to 31 March 2004, there have been two fatalities in the agriculture, forestry and fisheries industry. In the corresponding period during 2002/03 there were 12 fatalities in the industry.<sup>124</sup>

**6.34** Data on fatalities in the agriculture, forestry and fisheries industry in NSW from 2000/01 to 2003/04 is shown in Figure 6.2 below.

**Figure 6.2** Fatalities on the agriculture, forestry and fisheries industry in NSW – 2000/01 to 2003/04

Industry	2000/01	2001/02	2002/03*	2003/04#
Agriculture, forestry and fisheries	17	17	16	2

\* 2002/03 data is preliminary and has yet to be validated

# Data is preliminary and refers only to 1 July 2003 to 31 March 2004

Source:: Correspondence from Mr Blackwell, CEO, WorkCover to Committee Chairman, 22 April 2004.

**6.35** The Committee commends WorkCover for its contribution to the decline in fatalities in the agriculture, forestry and fisheries industry in 2003/04, and agrees with WorkCover's assessment that a cooperative tripartite approach amongst employers, employees and unions to workplace safety can significantly improve OH&S outcomes.

**6.36** The Committee notes, however, that aggregated reporting on sectors can obscure underlying trends in specific industries, and that injury prevention policies are usually directed towards industries not sectors which may make it difficult to monitor the success of individual policies. WorkCover publishes in its *Statistical Bulletin* separate injury and fatality data disaggregated by occupation. For example, for the agriculture, forestry and fisheries industry, WorkCover published separate data for agriculture; services to agriculture, hunting and trapping; forestry and logging; and commercial fishing. The Committee endorses this approach to reporting the incidence of injury and death in individual industries.

<sup>124</sup> Correspondence from Mr Blackwell, CEO, WorkCover to Committee Chairman, 22 April 2004.



## Chapter 7 The healthcare industry and “sharps”

### Introduction

- 7.1 During the inquiry, a number of parties raised with the Committee the issue of injuries from needlesticks and other sharp objects such as scalpels (“sharps”) in the NSW healthcare industry, and the risk that such injuries can lead to the transmission of potentially fatal diseases.
- 7.2 This chapter examines the following issues:
- the threat posed by “sharps” in the NSW healthcare industry
  - available data on sharp object injuries in the NSW healthcare industry
  - means of reducing sharp object injuries in the NSW healthcare industry
  - sharp object injuries in the NSW Police Service.

### The threat posed by “sharps” in the NSW healthcare industry

- 7.3 The Committee notes that needlestick or other sharp object injuries pose a threat to the health of nursing and other medical staff in the NSW healthcare industry.
- 7.4 In their written submissions, both the Medical Industry Association of Australia<sup>125</sup> (MIAA) and the NSW Nurses’ Association<sup>126</sup> noted that nurses and other healthcare workers who use “sharps” are at risk of injuries that can lead to them contracting serious or fatal blood borne infections, including Hepatitis B, Hepatitis C and HIV.<sup>127</sup> The MIAA cited studies indicating that:
- sharp object injuries can lead to the transmission of at least 20 different pathogens
  - the risk of transmission of an infection from a sharp object injury where there is contamination is 1 in 3 for Hepatitis B, 1 in 30 for Hepatitis C and 1 in 300 for HIV.<sup>128</sup>
- 7.5 The Committee notes the evidence from Ms Butrej from the NSW Nurses’ Association in the hearing on 1 March 2004 that nurses are not necessarily aware when they are treating patients who suffer from HIV or other diseases, and cannot take additional precautions accordingly.<sup>129</sup>

<sup>125</sup> The MIAA is the peak industry association representing the medical device and diagnostic industry. Members of the association supply 85% of all non-pharmaceutical medical products to hospitals, medical professionals and patients in Australia.

<sup>126</sup> The NSW Nurses’ Association represents approximately 48,000 nurses across NSW.

<sup>127</sup> Submission 50, NSW Nurses’ Association, p4.

<sup>128</sup> Submission 17, MIAA, p35

<sup>129</sup> Ms Butrej, OH&S Coordinator, NSW Nurses’ Association, Evidence, 1 March 2004, pp27-28

- 7.6** The MIAA also argued in its written submission that even where a healthcare worker is injured by a “sharp” but infection does not occur, the lengthy diagnostic procedure undertaken to ascertain that a serious disease has not been contracted involves a great deal of emotional trauma for the victim, and indeed for their partner.<sup>130</sup>
- 7.7** Furthermore, Ms Butrej indicated that sharp object injuries entail significant additional costs such as the carrying out of tests, the provision of prophylaxis drugs to try to prevent infection if the source was positive, time off work and the provision of counselling services.<sup>131</sup>

### **Available data on sharp object injuries in the NSW healthcare industry**

- 7.8** A number of parties to the inquiry presented data indicative of the rate of needlestick or other sharp object injuries to nursing and other medical staff in the healthcare industry in NSW.
- 7.9** In its written submission, the MIAA cited the following indicators of the rate of sharp object injuries in the healthcare industry in NSW:
- data from the Annual Surveillance Report (1999) of the National Centre in HIV Epidemiology and Clinical Research indicates that in 1998 (the last year for which authoritative statistics are available), it is estimated that at least 13,000 nurses and other healthcare workers in Australian hospitals suffered a sharp object injury
  - figures published in the October 2003 Australian HIV Surveillance Report indicate that there were 12 cases of HIV infection in the health care setting up to 30 June 2003. This figure includes 6 cases of occupationally acquired HIV infection and 4 cases of HIV transmission in surgical rooms
  - a study completed in 2003 by the Centre for Healthcare-Related Infection Surveillance and Prevention in Brisbane examined 18 Queensland hospitals, and found that more than 1200 hospital staff had suffered needlestick injuries or been splashed with body fluids in the past 18 months.<sup>132</sup>
- 7.10** Furthermore, the MIAA raised the possibility that nursing and other medical staff may under report sharp object injuries by up to 60%. This is despite the legal requirement under the OH&S Regulation 2001 for nurses and other medical staff to report such injuries.<sup>133</sup>
- 7.11** In addition to the above data, in the hearing on 1 March 2004, Mr Street from the MIAA cited statistics indicating conservatively that one in nine nurses in NSW will suffer a needlestick injury each year, although anecdotal evidence suggests that many nurses are too busy, embarrassed or scared to report their injuries.<sup>134</sup>
- 7.12** In turn, Associate Professor Mary-Louise McLaws, Director of the NSW Hospital Infection Epidemiology and Surveillance Unit at UNSW, cited in her written submission a study which

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<sup>130</sup> Submission 17, MIAA, p 8,35-36. See also Mr Street, Evidence, 1 March 2004, p34

<sup>131</sup> Ms Butrej, Evidence, 1 March 2004, p34

<sup>132</sup> Submission 17, MIAA, pp8-9

<sup>133</sup> Submission 17, MIAA, p9

<sup>134</sup> Mr Street, Evidence, 1 March 2004, p24

she conducted in association with Associate Professor Whitby which reported that in one Australian hospital alone:

- 1836 injuries were sustained over a ten-year period with a needle previously used on a patient, thus required pathology investigation to ascertain whether a blood borne disease was transmitted to the injured health care worker
- 66% of the 1836 injuries involved a nurse
- nearly 7% of the 1836 injuries involved hollow-bore needles that exposed the health care worker to blood containing either hepatitis B,C or HIV infections.<sup>135</sup>

**7.13** In response to this issue, the Committee notes the evidence of Dr Stewart, the NSW Chief Health Officer, that in January 2004, WorkCover gazetted an exemption for NSW Health relating to the reporting of health care workers occupational exposures under clause 341(h) of the OH&S Regulation 2001. At the same time, NSW Health established a system for reporting, recording and following-up incidents of occupational exposure to blood-borne diseases, and is to provide WorkCover with aggregated occupational exposure data by health care facility twice each year.<sup>136</sup>

**7.14** Dr Stewart subsequently tabled with the Committee the first report on infection rates in NSW hospitals for January – June 2003, developed by the independent Australian Council on Healthcare Standards (ACHS).

**7.15** Ms Stewart, Assistant Director, AIDS and Infectious Diseases Unit, NSW Health also tabled with the Committee a study which found that the rate of occupational exposures to blood or body fluids in health care workers declined from around 29 exposures per 100 daily-occupied beds in 1995 to approximately 22 in 1997.<sup>137</sup>

## Means of reducing sharp object injuries in the NSW healthcare industry

### The use of safety-engineered medical devices

**7.16** In their written submission, both the MIAA and Health Services Union (HSU) highlighted that employers in the healthcare sector have a legal responsibility, as stated in Clauses 11 and 12 of the OH&S Regulation 2001, to eliminate the hazard of needlestick and other sharp object injuries, or if that is not 'reasonably practicable', to control the risk.<sup>138</sup>

**7.17** Clause 11 of the OH&S Regulation 2001 states in part:

- (1) Subject to subclause (2), an employer must eliminate any reasonably foreseeable risk to the health or safety of:

<sup>135</sup> Submission 20, Assoc Prof McLaws, p1

<sup>136</sup> Dr Stewart, Evidence, 1 March 2004, p51

<sup>137</sup> MacDonald M & G.Ryan, 'Monitoring Occupational Exposure to Blood-Borne Viruses in Health Care Workers in Australia', *Victorian Infectious Diseases Bulletin*, Volume 2, Issue 3 August 1999

<sup>138</sup> Submission 17, MIAA, pp22-24. See also Submission 19, Health Services Union, p1

- (a) any employee of the employer, or
  - (b) any other person legally at the employer's place of work,
- or both that arises from the conduct of the employer's undertaking

- (2) If it is not reasonably practicable to eliminate the risk, the employer must control the risk.

**7.18** Given this legal requirement on employers to eliminate or minimise the 'reasonably foreseeable risk' of injuries, the MIAA recommended in its submission the introduction of commercially available safety engineered devices which would effectively eliminate the majority of sharp object injuries in the NSW healthcare industry, and in turn, the risk of transmission of blood-borne diseases.<sup>139</sup>

**7.19** In this regard, Mr Street and Ms Martland noted in evidence on 1 March 2004 that members of the MIAA manufacture a wide range of such safety-engineered medical devices such as retractable needles, protected scalpel blades, needle-free intravenous access products and IV cannulas with safety protection.<sup>140</sup>

**7.20** Similarly, in its written submission, the NSW Nurses' Association made a recommendation that the OH&S Regulation 2001 be amended so that the requirement to provide safe equipment clearly includes equipment designed to eliminate or reduce the risk of injuries from sharp medical instruments and devices.<sup>141</sup>

### ***Retractable needles***

**7.21** The Committee notes that the use of retractable needlesticks, as opposed to other engineered safety devices, was examined in detail during the conduct of the inquiry.

**7.22** In the hearing on 1 March 2004, Ms Martland advocated that the OH&S Regulation 2001 be amended to mandate the introduction of safety-engineered medical devices into hospitals, at least in certain circumstances, on the basis that it would be effective in reducing sharp object injuries. Ms Martland further noted that only around 25% to 30% of needles in hospitals are used for skin injections, and that it would only be these needles that would have to be substituted with retractable needlesticks. The remaining needles are used for procedures such as drawing up liquids which do not touch peoples' skins, and hence are "clean" needles.<sup>142</sup>

**7.23** Associate Professor McLaws also advocated that the most effective means of reducing the daily threat posed specifically by needlestick injuries would be the introduction to NSW hospitals of self-retracting needles.<sup>143</sup> Ms Butrej also supported mandating the use of retractable needles during the hearing on 1 March 2004.<sup>144</sup>

<sup>139</sup> Submission 17, MIAA, p22

<sup>140</sup> Mr Street, Evidence, 1 March 2004, p24. Ms Martland, Member of the Health Care Safety Special Interest Group, MIAA, Evidence, 1 March 2004, p25

<sup>141</sup> Submission 50, NSW Nurses' Association, p5

<sup>142</sup> Ms Martland, Evidence, 1 March 2004, pp26, 28

<sup>143</sup> Submission 20, Assoc Prof McLaws, p2

<sup>144</sup> Ms Butrej, Evidence, 1 March 2004, p35

- 7.24** In response to this issue, the Committee again notes the evidence of Dr Stewart, the NSW Chief Health Officer, and Ms Stewart from NSW Health. They indicated that retractable needles have been available on state contract to area health services since 2000, but suggested that cost may possibly be a factor in their low take-up by the area health services. Ms Stewart noted that a conventional three-millimetre syringe costs 8.4 cents, compared to 47 cents for a two-part safety syringe (or 79 cents if it is bought assembled).<sup>145</sup>
- 7.25** At the same time, Dr Stewart noted that over the past 20 years, procedures for dealing with needlesticks and other sharps have changed dramatically to reduce accidents. Whereas once it was common to resheath needles, today it is a requirement that needles be placed in provided yellow containers. Similarly, Ms Stewart noted that since 1992, nurses and surgical staff have been restricted from using their hands to open a wound while sharps are being used in a body cavity.<sup>146</sup>
- 7.26** Accordingly, Dr Stewart did not support mandating the use of retractable needles at the current time:
- Retractable technology is a question that we have to keep constantly under review. It may well be that at some stage when the prices go down to a greater degree than they are now and there is widespread acceptance of the product—because there are also issues around does the product work properly—is it possible to use it, given there have been other experiences over the years; many times when hospitals have tried to introduce different needles and so on there is resistance from health care workers.<sup>147</sup>
- 7.27** In response to this issue, the Committee does not believe that any healthcare worker should be exposed to potentially life threatening diseases where there are effective means of preventing such exposure. However, the Committee also recognises that there are many competing demands on the health budget and that mandatory introduction of retractable needles would have significant budgetary implications.
- 7.28** To date, the Committee understands that the introduction of retractable needles has been an ad-hoc process throughout the NSW healthcare industry, with little available research or data on the costs and benefits of introducing such technology, and little or no guidance from NSW Health. Accordingly, the Committee recommends that NSW Health, in conjunction with WorkCover, redress this situation and undertake further study of the costs and benefits of introducing retractable needles in the NSW health system.

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### Recommendation 13

That NSW Health, in conjunction with WorkCover, undertake further study of the costs and benefits of introducing retractable needles across the NSW health system.

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<sup>145</sup> Ms Stewart, Evidence, 1 March 2004, p52

<sup>146</sup> Dr Stewart and Ms Stewart, Evidence, 1 March 2004, p53

<sup>147</sup> Dr Stewart, Evidence, 1 March 2004, p57

**7.29** The Committee notes in this regard that Campbelltown Hospital has commenced a trial of retractable needles in four clinical units – emergency department, psychiatry, ambulance care and a general ward area.<sup>148</sup> The Committee considers that NSW Health could conduct further research into the costs and benefits of retractable needles using this trial as a starting point.

### **Prosecution of needlestick and other sharps object injuries by WorkCover**

**7.30** The Committee notes that a number of parties to the inquiry raised in their written submissions the issue of whether needlestick or other sharp object injuries to nursing and other medical staff in the healthcare industry in NSW should be prosecuted by WorkCover:

- the NSW Nurses' Association indicated that to date, there have been no prosecutions by WorkCover of sharp object injuries in the healthcare industry in NSW, and recommended that WorkCover initiate a program of strategic prosecutions relating to the risk of transmission of infections blood-borne diseases from sharp object injuries<sup>149</sup>
- the HSU submitted that needlestick injuries are clearly a 'reasonably foreseeable hazard', given their high incidence in the workplace, but that there are few if any actions brought by WorkCover seeking to enforce employers' obligations in this area<sup>150</sup>
- the MIAA noted that WorkCover inspectors investigate very few sharp objects injuries in the health care system, and recommended that WorkCover demonstrate the importance of employers being proactive in response to needlestick and other sharp object injuries by prosecuting for risk alone, and not merely reacting to a death or serious injury.<sup>151</sup>

**7.31** To address its concerns on this issue, the MIAA recommended that WorkCover reduce the required length of time off work to initiate a WorkCover investigation from 7 days to 2 days.<sup>152</sup> The MIAA also advocated the WorkCover adopt a compliance programme targeting workers in the health care sector.<sup>153</sup>

**7.32** In the absence of such measures, the MIAA suggested that the apparent failure of WorkCover to investigate the real and very serious risk to healthcare workers of occupational exposure to blood-borne pathogens means that there is no incentive for employers to adopt sustainable hazard elimination strategies in the NSW healthcare system.<sup>154</sup>

**7.33** In response to this issue, the Committee notes that sharp injuries can potentially lead to life threatening diseases, but that the available data does not document significant deaths in the

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<sup>148</sup> Correspondence from Dr Stewart, Chief Health Officer, to Chairman, 11 March 2004

<sup>149</sup> Submission 50, NSW Nurses' Association, p5

<sup>150</sup> Submission 19, Health Services Union, p1

<sup>151</sup> Submission 17, MIAA, p19

<sup>152</sup> Submission 17, MIAA, p18

<sup>153</sup> Submission 17, MIAA, p17

<sup>154</sup> Submission 17, MIAA, p26

workplace. Nevertheless, the Committee believes that it is important that employers in the healthcare industry and WorkCover work to ensure a safe workplace for healthcare workers.

### **Sharp object injuries in the NSW Police Service**

- 7.34** In its written submission, the Police Association of NSW argued that needlestick injuries are a significant risk in the working environment of NSW Police Officers. In particular, the Association submitted that NSW Police are frequently exposed to the risk of contracting blood-borne viruses such as Hepatitis B, Hepatitis C and HIV from dealing with injecting drug users.
- 7.35** In response to this issue, the Police Association of NSW argued that police should be provided with appropriate personal equipment, engineering controls and disinfectants, together with ongoing education and training on protective practices and responding to occupational exposures.
- 7.36** In turn, should police officers potentially be exposed to blood-borne viruses, the Association emphasised that the NSW Police Service must accept responsibility for the cost of serological tests and prophylaxis medication, together with the provision of counselling services.<sup>155</sup>

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<sup>155</sup> Submission 31, Police Association of NSW, pp1-2



## Chapter 8 WorkCover's framework for investigations and enforcement

### Introduction

8.1 This chapter investigates WorkCover framework for conducting investigations and enforcement, with particular reference to:

- WorkCover's Safety Inspectorate
- WorkCover's random and targeted investigations
- WorkCover's compliance and enforcement options
- WorkCover inspectors' dual education and enforcement functions.

### WorkCover's Safety Inspectorate

8.2 WorkCover's Safety Inspectorate is located within the OH&S Division of WorkCover. It is the largest and most active workplace inspectorate in Australia, with a total of 301 inspector positions spread throughout the state in 25 metropolitan, regional and rural locations.<sup>156</sup>

8.3 That said, the Committee notes the evidence of Mr Blackwell on 17 February 2004 that WorkCover's 301 inspectors are responsible for approximately 400,000 workplaces across the state.<sup>157</sup>

8.4 The structure of the Safety Inspectorate reflects the geography and profile of NSW industry. It is made up of two country teams, seven industry teams and a compliance co-ordination team. The ten teams are multi-disciplinary, and include inspectors, technical specialists, project officers and client liaison officers.

8.5 For example, the construction and utilities industry team comprises a state co-ordinator, three team co-ordinators, three principal inspectors, one regional inspector and thirty-five inspectors.<sup>158</sup> In 2002/03, the team responded to approximately 2,500 complaints and conducted approximately 200 investigations.<sup>159</sup>

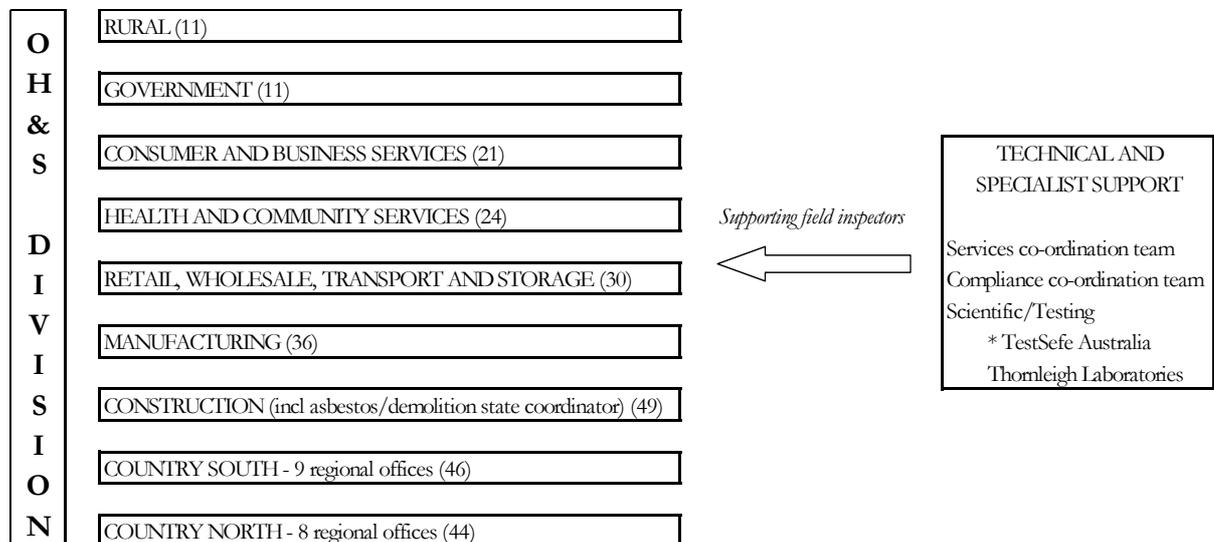
8.6 During the hearing on 17 February 2004, the Committee requested from WorkCover an organisational chart of the Safety Inspectorate by industry. In response, WorkCover provided the organisational chart reproduced below in Figure 8.1.

<sup>156</sup> WorkCover, Response to Question on Notice from 17 February 2004, p13

<sup>157</sup> Mr Blackwell, Evidence, 17 February 2004, p16

<sup>158</sup> Submission 29A, WorkCover, p9

<sup>159</sup> WorkCover, Response to Question on Notice from 17 February 2004, p13

**Figure 8.1** Organisation of WorkCover's Safety Inspectorate

Source: WorkCover, Response to Question on Notice on Tuesday, 17 February 2004.

**8.7** WorkCover also indicated in its response to questions on notice from 17 February 2004 that during the course of a typical week, inspectors in the Safety Inspectorate could expect to:

- investigate workplace incidents and breaches of legislation
- respond to OH&S complaints from workers, unions, OH&S committees and the public
- give advice and information on the development and improvement of systems to eliminate or reduce the risk of injury or illness
- conduct compliance inspections relating to known workplace or industry hazards
- target hazards in industry sectors as part of specific injury prevention projects and campaigns
- participate in after hours and weekend emergency response rosters.<sup>160</sup>

**8.8** The size of WorkCover's safety inspectorate raised some comment during the inquiry. In its written submission, the NSW Labor Council (Labor Council) recognised that WorkCover NSW has 'probably one of the best resourced inspectorates in Australia and even on a global scale.' Nevertheless, the Labor Council recommended that the size of the inspectorate be increased, and that inspectors have access to additional support from ergonomists, occupational hygienists and other support services.<sup>161</sup>

**8.9** The Committee also raised with Mr Ferguson from the Construction, Forestry, Mining and Energy Union (CFMEU) the size of the WorkCover inspectorate, and whether it needs to be expanded. In response, Mr Ferguson did not put a number on the size of the Safety Inspectorate to perform its role, but indicated that:

<sup>160</sup> WorkCover, Response to Question on Notice from 17 February 2004, p3

<sup>161</sup> Submission 52, Labor Council, pp25-26

I think that whatever resources are required should be made available to bring to an end the fatalities and bloodshed in the workplace.<sup>162</sup>

- 8.10** Finally, the Committee also notes the following evidence of Mr Watson from WorkCover during the hearing on 2 March 2004:

It is important to get a sense of how we are funded. WorkCover is funded from a 4.1 per cent levy on employers' workers compensation premiums. If we increase the size of the inspectorate, the levy needs to be increased.<sup>163</sup>

### **The training of WorkCover inspectors**

- 8.11** In its written submission, WorkCover indicated that its inspectors have experience in a range of trades and professions. As a representative sample, participants in the two most recent recruitment programs for inspectors run by WorkCover had tertiary qualifications and professional skills in building construction, engineering, medical biotechnology, policing and forensic investigations, health sciences and mechanics.<sup>164</sup>

- 8.12** Inspectors currently undertake an 18-month Inspector Induction Program, which includes theoretical studies and field-based training under the supervision of an experienced inspector. After successfully completing the program, new inspectors are eligible to receive the national recognised Diploma of Government (Workplace Inspections).<sup>165</sup>

- 8.13** The Committee notes, however, that in evidence on 17 February 2004, Ms Yaager from the NSW Labor Council expressed the following concern:

We have said that the training of inspectors in the collection of evidence needs to be reviewed and ... highlighted the need for training in forensic and other sorts of areas to really help the inspectors thoroughly complete their investigation and do a proper job so that we can have everything that we need for a prosecution.<sup>166</sup>

- 8.14** Similarly, in evidence on 17 February 2004, Ms Buchtman, appearing on behalf of the CFMEU, indicated:

I have encountered some problems on these larger sites with what I consider a lack of understanding of the OH&S laws regarding construction from a small number of inspectors. We certainly get inspectors out there who are fighting to understand the OH&S legislation themselves.<sup>167</sup>

- 8.15** The Committee also notes concerns expressed by Mr Terry Perkins, a former WorkCover inspector of 27 years' experience, that some WorkCover inspectors lack the skills, knowledge

<sup>162</sup> Mr Ferguson, Evidence, 17 February 2004, p46

<sup>163</sup> Mr Watson, Evidence, 2 March 2004, p47

<sup>164</sup> Submission 29, WorkCover, p9

<sup>165</sup> Submission 29, WorkCover, p9

<sup>166</sup> Ms Yaager, Evidence, 17 February 2004, p62

<sup>167</sup> Ms Buchtman, Evidence, 17 February 2004, p37

and experience to conduct their work, and that he specifically was not given the necessary training.<sup>168</sup>

**8.16** The Committee raised the evidence of Mr Perkins with WorkCover representatives during the hearing on 17 February 2004. In response, Mr Watson indicated:

... I am aware that he made the claim that he had not been appropriately trained to carry out the work that he had been asked to do. Terry had extensive experience as an inspector. He commenced his employment as a specialist in plant but later in his career he moved into more general field activities based at that time at our Toronto office and I am aware that he made that claim repeatedly. He was provided with one on one training to up-skill him in the areas he believed he needed to be up-skilled where he felt that he didn't have adequate basis for carrying out the duties of an inspector.<sup>169</sup>

**8.17** In response, Mr Perkins in turn indicated in his written submission that following the introduction of the first enterprise bargaining agreement at WorkCover 12 years ago, all inspectors were reclassified as "General Inspectors" and required to undertake Performance Development Reviews (PDR) to assess their need for additional training. However, Mr Perkins indicated that to his knowledge, not one inspector had received the training to address the requirements identified and documented in the PDR process. Mr Perkins attributed this to a failure of management.<sup>170</sup>

**8.18** This matter was again raised with Mr Watson during the hearing on 15 March 2004, and later responses were also received from Mr Perkins<sup>171</sup> and Mr Watson.<sup>172</sup> The Committee acknowledges that there is an ongoing difference of opinion between the Mr Perkins and Mr Watson as to the adequacy of the training Mr Perkins received from WorkCover.

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### **Recommendation 14**

That WorkCover introduce improved systems to incorporate feedback from Inspectors about emerging issues, and to assess current satisfaction levels of Inspectors.

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### **Partnership with the NSW Community**

**8.19** Evidence given during the inquiry highlighted opposing views between WorkCover and industry about the effectiveness of WorkCover in managing issues related to death and serious injury, and in the broader context, about WorkCover's ability to achieve the outcomes of its mandate.

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<sup>168</sup> Cited in submission 15, Mr and Mrs Denis and Sharon Rees, appendix C

<sup>169</sup> Mr Watson, Evidence, 17 February 2004, p28

<sup>170</sup> Submission 49, Mr Perkins, p4

<sup>171</sup> Submission 49A, Mr Perkins.

<sup>172</sup> Correspondence from Mr Watson to Committee Chairman, 30 April 2004.

- 8.20** WorkCover's website declares that WorkCover's primary objective is to work in partnership with the NSW community to achieve safe workplaces, effective return to work and security for injured workers.
- 8.21** However, some witnesses stated that in fact WorkCover does not engage in meaningful consultation with the community, and is not able to proactively meet industry's needs.<sup>173</sup>
- 8.22** Relatives of victims stated clear expectations of communication that they require from the regulator, when confronted with a workplace tragedy.
- 8.23** The CFMEU, NSW Bar Association and NSW Nurses' Association in their submissions articulate their expectation for WorkCover to provide assistance and advice for their membership.
- 8.24** The Committee believes that WorkCover's senior ranks needs to contain a breadth of industry experience.
- 8.25** Although several witnesses praised the work of individuals within WorkCover, many felt that front-line staff were constrained by a lack of management foresight, and a focus on reactive (rather than preventative) strategies. These comments were particularly aimed at the Occupational Health and Safety Division of WorkCover, which administer the work of the Inspectorate.<sup>174</sup>
- 8.26** Mr Watson stated that the position of a WorkCover inspector is highly sought after. Despite the attractiveness of the position the attrition rate over the last five years for inspectors for reasons other than retirement is greater than 20%.<sup>175</sup> This rate increases if the inspector is female. Given the resources allocated to the recruitment and training of inspectors, and the need to retain their expertise, this matter warrants further investigation.
- 8.27** In its closing submission WorkCover appears quite satisfied with its performance in relation to workplace death and serious injury. The submission states for its part, 'WorkCover is an efficient and effective organisation which is comprised of dedicated and professional staff.'<sup>176</sup> WorkCover's submission did not respond to many issues raised by union, employer and professional groups.

### **WorkCover's random and targeted investigations**

- 8.28** In its written submission, WorkCover indicated that it undertakes both random and targeted investigations of workplaces in NSW to assess compliance by employers and employees with their OH&S responsibilities. Recent random and targeted investigations include:
- a crane compliance blitz targeting new self-erecting tower cranes to determine compliance with requirements for design, use and certification of operators

<sup>173</sup> See for example Ms Buchtman, Evidence, 17 February 2004, p44. See also Submission 50, NSW Nurses' Association, pp7,12

<sup>174</sup> Submission 30, NSW Bar Association, p5

<sup>175</sup> WorkCover, Response to Questions on Notice from 15 March 2004, pp 31-32

<sup>176</sup> Submission 29A, WorkCover, p 9

- a framework compliance blitz focusing on specific issues in the concrete industry, including safe erection of formwork
- a construction industry blitz targeting asbestos and demolition site compliance
- a construction industry blitz concentrating on commercial development, industrial warehouse constructions and two to five storey unit developments
- the 'HouseSafe 5' blitz targeting building contractors and unsafe working at heights and scaffolding
- the rural safety blitzes targeting nurseries, tree felling, vineyards and tractor roll-over protection systems.

**8.29** In addition to random and targeted investigations, WorkCover also investigates accidents notified to it by employers, employees, OH&S representatives and the unions.<sup>177</sup>

**8.30** As a representative sample, WorkCover indicated in its response to questions on notice on 2 March 2004 that in 2002/03, the construction industry team identified 5,019 breaches overall, of which 1,967 (approximately 39%) were identified as a result of random unannounced blitzes of commercial building sites.<sup>178</sup>

**8.31** In relation to targeted investigations, the Committee raised in the hearing on 17 February 2004 whether WorkCover has undertaken closer scrutiny of the worksites under the direction of Mr Denson since the death of Mr Exner. In response, WorkCover indicated that since the death of Mr Exner, WorkCover inspectors have visited a number of sites where Garry Denson Metal Roofing Pty Ltd and JB Metal Roofing Pty Ltd were operating, including sites at Erskine Park, Campbelltown, Rhodes, Liverpool and Eastern Creek.<sup>179</sup>

**8.32** The Committee examines in greater detail in the next chapter WorkCover's responsibility to take proactive action where necessary to prevent workplace injuries and deaths.

### **The reporting of workplace incidents**

**8.33** On 1 September 2003, WorkCover brought in new procedures for notification of workplace incidents. For serious incidents, the employer must inform WorkCover of the matter immediately on a dedicated phone number (13 10 50). For other incidents, the employer must inform the employer's workers compensation insurer (within 48 hours). The insurer is then required to inform WorkCover of the incident. An incident report form is no longer used to inform WorkCover of an incident.

**8.34** The Committee notes that these procedures for the reporting of workplace incidents were not raised in great detail during the inquiry. However, the Committee wishes to note the submission of Mr Peter Griffiths, a former OH&S representative at the Picton Police Station, in which he outlined the following procedures for the reporting of hazardous situations in the workplace:

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<sup>177</sup> Submission 29, WorkCover, p10

<sup>178</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p10

<sup>179</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p15

1. All places of employment should be supplied with accountable books by WorkCover to record matters of danger/unsafe work practices. It is just not good enough to inform someone and not have a permanent record of it.
2. The pages should have unique numbering.
3. The book should have triplicate pages. When an employee becomes aware of something that he/she thinks should be reported or is a hazard, an entry should be completed.
4. The employee should retain one copy.
5. Once copy should be forwarded immediately to WorkCover, either by fax, email or post and a numbered receipt issued by WorkCover. This number should then be cross referenced/posted in the book opposite that relevant entry, or in a space somewhere on that entry.
6. The other copy should remain in the book where it can be inspected by a WorkCover Inspector on a regular basis, say every 3, 6 or 12 months.
7. The book should also be tabled at each and every meeting of the Workplace committee, where each and every entry should be discussed. Any outstanding matters should be followed up as a matter of urgency and it would help keep all relevant information flowing to the committee.
8. There should be a section at the bottom of the page and left in the book to indicate what action has been taken (eg. time, date, place and by whom etc).
9. The person making the entry should be advised by mail to their private address of what action has been taken by WorkCover to either address or dispel their concerns.
10. There should be a set period that the book has to be retained for, say 10 or 20 years after the last entry.<sup>180</sup>

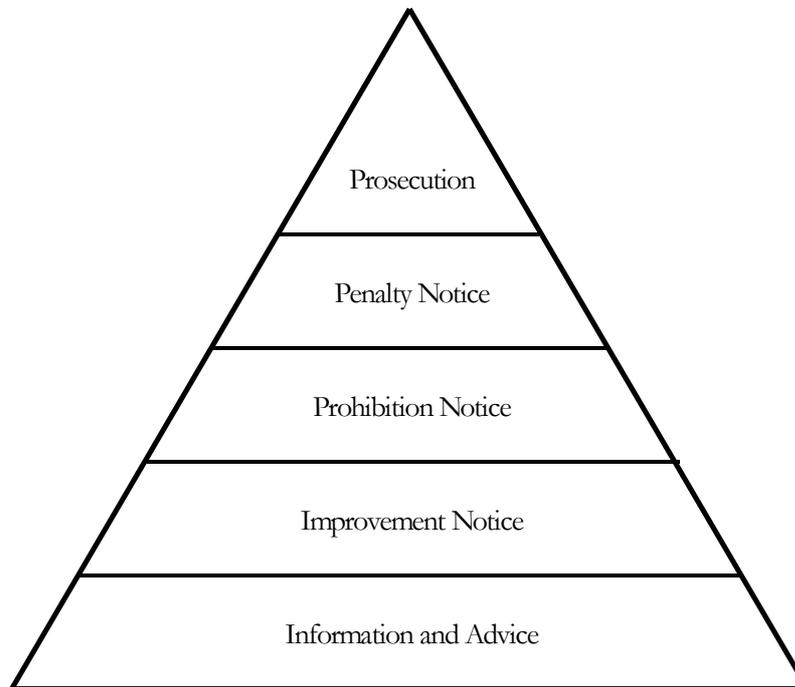
**8.35** While the Committee is not aware of any concerns regarding WorkCover's procedures for the notification of incidents, the Committee believes there may be merit in WorkCover examining in more detail the proposals of Mr Griffiths to ascertain whether they might be useful in some contexts.

### **WorkCover compliance and enforcement options**

**8.36** Where WorkCover inspectors identify a breach of the *OH&S Act 2000* or the *OH&S Regulation 2001*, they have a number of compliance and enforcement options available to them. Those compliance and enforcement options are shown in Figure 8.2 below.

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<sup>180</sup> Submission 4, Mr Griffiths, p4

**Figure 8.2** WorkCover Inspector's compliance and enforcement options

Source: Submission 29, WorkCover, p 11

**8.37** Importantly, the Committee notes WorkCover's advice that the compliance and enforcement pyramid shown above reflects the increasing severity of compliance and enforcement options available, but is not meant to imply a staged response to an identified breach of the *OH&S Act 2000* or the *OH&S Regulation 2001*. Each breach is considered on its merits, and action is taken accordingly.<sup>181</sup>

**8.38** The Committee examines in detail below WorkCover Inspectors five compliance and enforcement options.

#### ***Information and advice***

**8.39** WorkCover's inspectors provide information and advice to employers to ensure that they meet their OH&S and workers compensation obligations. This support is offered in numerous ways, including through face-to-face advice, trade shows, seminars, field days and workshops.

**8.40** Inspectors are supported in the provision of information and advice by WorkCover's website, printed publications, WorkCover News, corporate advertising, direct mail campaigns, media releases and articles in the general and industry press.<sup>182</sup>

<sup>181</sup> Submission 29, WorkCover, p11

<sup>182</sup> Submission 29, WorkCover, p11

***Improvement Notices***

- 8.41** WorkCover's inspectors may issue an Improvement Notice where they are of the opinion that there is a breach of the *OH&S Act 2000* or the OH&S Regulation 2001. The Improvement Notice generally states the nature of the breach and may provide suggestions as to how it may be remedied.
- 8.42** The current maximum penalty for non-compliance with an Improvement Notice is \$82,500 for a corporation, \$41,250 for a non-employee, and \$2,475 for an employee.<sup>183</sup>

***Prohibition Notices***

- 8.43** WorkCover's inspectors may issue a Prohibition Notice where they are of the opinion that an activity involves an immediate risk to the health and safety of any person. The notice requires the cessation of all relevant work until the situation is made safe.
- 8.44** The current maximum penalty for non-compliance with a Prohibition Notice is \$165,000 for a corporation, \$82,500 for a non-employee and \$4,950 for an employee.<sup>184</sup>

***Penalty Notice***

- 8.45** WorkCover's inspectors may issue a Penalty Notice where a person commits an offence under Schedule 2 (penalty notices) of the OH&S Regulation 2001. Currently, the range of penalty amounts is between \$200 and \$1,500.
- 8.46** A Penalty Notice may be dealt with by the person in question paying the fine, or by taking the matter to court. However, the payment of a Penalty Notice on time will preclude a prosecution for the same offence. Payment of a Penalty Notice is not to be regarded as an admission of liability for the purposes of, nor in any way as affecting or prejudicing, any civil claim, action or proceedings arising out of the same occurrence.<sup>185</sup>

***Prosecution***

- 8.47** WorkCover's inspectors have the discretion to prosecute under the *OH&S Act 2000*, however not every breach automatically results in a prosecution being pursued by WorkCover.
- 8.48** As noted above, the payment of a Penalty Notice on time will preclude a prosecution for the same offence. However, the issuing of Improvement Notices or Prohibition Notices does not necessarily preclude the commencement of a prosecution by WorkCover.<sup>186</sup>
- 8.49** The Committee examines WorkCover's conduct of prosecutions in greater detail in Chapter 10, and the fines applying to successful prosecutions in Chapter 11.

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<sup>183</sup> Submission 29, WorkCover, p12

<sup>184</sup> Submission 29, WorkCover, p13

<sup>185</sup> Submission 29, WorkCover, p13

<sup>186</sup> Submission 29, WorkCover, p14

*Interstate comparison*

**8.50** The Committee notes that data from the *Workplace Relations Ministerial Council: Comparative Performance Monitoring Report*, 2nd Ed, August 2002, which indicated that in 2001, WorkCover:

- issued more overall ‘compliance notices’ than any other jurisdiction in Australia
- issued more than six times the number of penalty notices than any other jurisdiction that currently uses penalty notices
- issued more improvement notices than any other jurisdiction
- conducted nearly twice as many successful prosecutions as all other jurisdictions combined.<sup>187</sup>

**8.51** These results are shown in Figure 8.3 below.

**Figure 8.3** Compliance and enforcement actions taken in Australian jurisdictions 2001

	Improvement Notices	Penalty Notices*	Total compliance notices <sup>^</sup>	Successful prosecutions
NSW	12,480	1636	15,448	404
Victoria	6,867	-	9,619	107
Qld	9,610	188	11,794	54
SA	532	-	716	1
WA	8,460	-	9,196	36
Tasmania	498	-	591	9
NT	0	67	68	1
ACT	47	-	89	0
Commonwealth	7	-	10	1

\* As at August 2002, Queensland and the Northern Territory were the only other jurisdictions that issued penalty notices. In November 2002 Tasmania passed legislation in relation to penalty notices under its *Workplace Health and Safety Act 1995*. Other jurisdictions are considering implementing similar penalty regimes.

<sup>^</sup> Total compliance notices means the sum total of Improvement Notices, Prohibition Notices (not included in table) and Penalty Notices.

Source: Submission 29, WorkCover, pp 12-15

**Additional compliance and enforcement options**

**8.52** In its written submission, the Labor Council argued that the current compliance and enforcement options available to WorkCover inspectors outlined above should be supplemented by three additional measures:

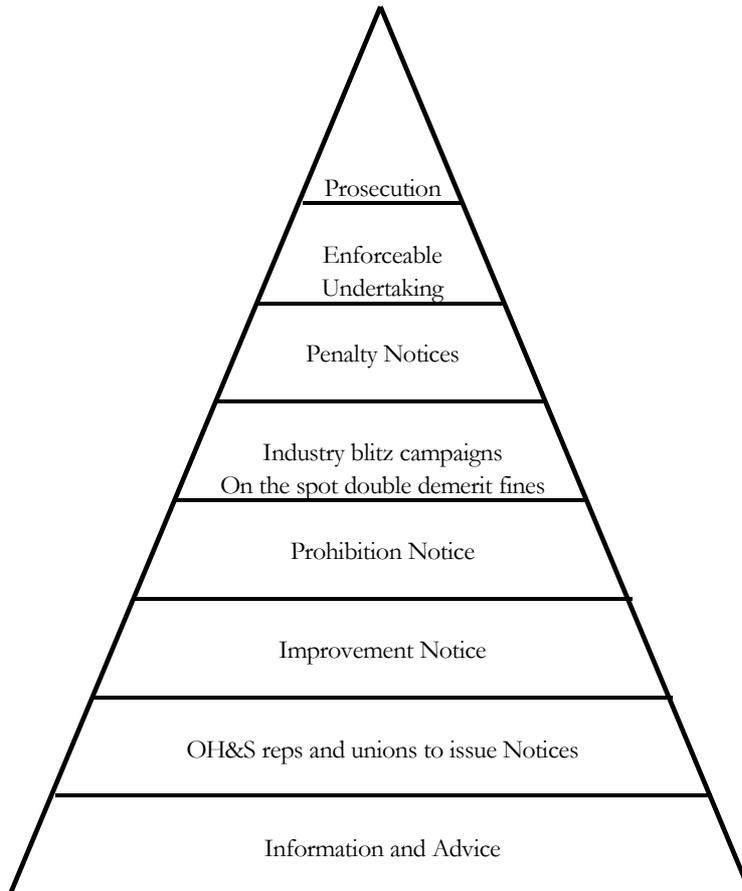
- enforceable undertakings

<sup>187</sup> Submission 29, WorkCover, executive summary

- industry blitz campaigns with on-the-spot double demerit fines
- OH&S representatives and unions to issue notices.

**8.53** These proposals are shown in the Labor Council's enforcement pyramid shown below in Figure 8.4.

**Figure 8.4** Labor Council proposed compliance and enforcement options



*Source: Submission 54, NSW Labor Council, p 23*

**8.54** In its written submission, the Labor Council specifically highlighted its proposal for enforceable undertakings for alleged offenders as an alternative to prosecutions. The Labor Council indicated that enforceable undertakings have recently been introduced in Tasmania and Queensland under amendments to their respective OH&S legislation. The Labor Council noted that in his second reading speech, the Queensland Minister for Industrial Relations described the anticipated use of enforceable undertakings as follows:

... an enforceable undertaking is an additional tool to prosecutions. It allows the chief executive of the Department to enter into a written undertaking with someone who has breached the Act that sets out what actions a person or company will take, over and above rectification of their breach of the Act. For example, a company may agree to provide publicity or education programs to deter potential offenders, or implement programs to prevent future contraventions. This can be used as an incentive to

improve health and safety, rather than as a punishment for having failed to comply with the legislation.<sup>188</sup>

**8.55** The Labor Council in turn noted that the Queensland provision is particularly broad – it permits the CEO of WorkCover Queensland to accept a workplace undertaking such as:

- to cease certain behaviour
- to take specific action to redress the impact on parties adversely affected by a contravention of the law
- to implement specific actions or programs to prevent future breaches
- to implement other publicity or educative programs.

**8.56** In addition, the Labor Council noted that enforceable undertakings are also used by Consumer Affairs Victoria, and increasingly used by the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).

**8.57** Based on this evidence, the Labor Council submitted that enforceable undertakings are a new and largely unexamined enforcement measure that is popular with both regulators and the regulated as a means of avoiding protracted litigation. Accordingly, the Labor Council recommended amendment to the *OH&S Act 2000* to provide for the entering into of enforceable agreements, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission, so that in the event the offender does not comply with the agreement, a prosecution may proceed.<sup>189</sup>

**8.58** The Committee believes that the Government should consider the introduction of enforceable agreements in NSW, but wishes to emphasise that enforceable agreements should be available as an additional measure available under the current enforcement regime, not as a replacement to that regime.

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### **Recommendation 15**

That the Government consider how best to include enforceable agreements in the compliance regime contained in the *OH&S Act 2000*, as an addition to prosecution for breaches of the *OH&S Act 2000*, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission so that in the event the offender does not comply with the agreement, a prosecution may proceed.

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<sup>188</sup> Legislative Council, Queensland, *Hansard*, 3 December 2002, p5232, cited in Submission 52, Labor Council, pp24-25

<sup>189</sup> Submission 52, Labor Council, pp24-25

## WorkCover Inspectors' dual education and enforcement functions

**8.59** During the inquiry, a number of parties expressed concerns about WorkCover inspectors dual education and enforcement function. The Committee previously examined this issue in its 2002 report entitled *NSW Workers Compensation Scheme: Second Interim Report*.<sup>190</sup>

**8.60** In evidence on 2 March 2004, Mr Pattison from Australian Business Ltd (ABL) indicated that members of ABL were at times reluctant to engage WorkCover inspectors in an advisor/education capacity, for fear that they also have an enforcement function which they might also employ. Accordingly, Mr Pattison recommended a splitting of WorkCover inspector's advisory/education function from their enforcement function.<sup>191</sup> Mr Pattison cited the following example:

... a member of ours some years ago had a WorkCover officer attend their office because the officer had asked for a bit of help on a matter. He duly provided that person with about an hour and a half's engagement, support, advice and discussion and on the way out the door the inspector then identified some minor issues and issued five PIN notices. That inspector has not been invited back or would find it difficult to get assistance from that business in the future.<sup>192</sup>

**8.61** Similarly, in the same hearing on 2 March 2004, Mr Goodsell from the Australian Industry Group (AIG) also indicated his belief that there is a real difficulty for employers in accessing information on their workplace OH&S which derives from WorkCover inspector's dual advisory/education and enforcement functions. Accordingly, Mr Goodsell also raised the possibility of WorkCover being split into two organisations, or two divisions within an organisation.<sup>193</sup>

**8.62** The Committee notes that this position was also expressed by Ms Yaager in the hearing on 17 February 2004:

I think we have said that we have to review WorkCover's compliance policy and there has to be certainly a split in their roles in terms of enforcement and education.<sup>194</sup>

**8.63** In response to this issue, Mr Watson from WorkCover defended the dual roles of inspectors during the hearing on 2 March 2004. Mr Watson submitted to the Committee that the advantage of inspectors having both an advisory/education function and an enforcement function is that they can provide an appropriate response to a particular circumstance or issue. Mr Watson contrasted this with a situation where an inspector with an enforcement only function could not provide advice or assistance to an employer. As stated by Mr Watson:

Until we are in the workplace it is unclear what the appropriate response needs to be ...<sup>195</sup>

<sup>190</sup> General Purpose Standing Committee No 1, Report 17, *NSW Workers Compensation Scheme: Second Interim Report*, January 2002.

<sup>191</sup> Mr Pattison, Evidence, 2 March 2004, p2

<sup>192</sup> Mr Pattison, Evidence, 2 March 2004, p6

<sup>193</sup> Mr Goodsell, Evidence, 2 March 2003, pp12-13

<sup>194</sup> Ms Yaager, Evidence, 17 February 2004, p73

<sup>195</sup> Mr Watson, Evidence, 2 March 2004, p47

- 8.64** WorkCover also addressed this issue in its supplementary submission. WorkCover argued that a separate information and advice inspectorate would significantly reduce the overall effectiveness of WorkCover's inspectors. WorkCover submitted that dual role for inspectors could lead to situations where immediate risks to workers' safety are not addressed because the "advisory inspector" attending the workplace could not issue an enforcement notice requiring the employer to take immediate action. Conversely, if an inspector only had a compliance function, their role would be limited to issuing compliance notices.
- 8.65** WorkCover further noted that for some years prior to the implementation of its current Compliance and Enforcement Policy in 2001, Victorian WorkCover inspectors primarily acted as consultants to workplace parties, but that this approach was discontinued, and current Victorian practice reflects that in NSW. Similarly, WorkCover indicated that Queensland WorkCover at one stage employed advisors in addition to inspectors, but that this was discontinued in favour of an integrated model similar to WorkCover NSW.<sup>196</sup>
- 8.66** The Committee believes that a WorkCover inspector who attends a worksite and becomes aware of an inherently dangerous work practice raising real danger of a serious injury or death must be in a position to take immediate action to protect the welfare of the employees on the worksite, regardless of the original reason for the visit.
- 8.67** That said, the Committee recognises that many employers are working in good faith to achieve a safe workplace.

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### **Recommendation 16**

That WorkCover NSW examine the possibility of splitting its inspectorate into education and prosecution branches, or other ways to minimise confusion regarding the roles of inspectors.

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<sup>196</sup> Submission 29A, WorkCover, p5

## Chapter 9 WorkCover's role in injury prevention

### Introduction

- 9.1 During the inquiry, a number of parties raised concerns in relation to WorkCover's role in preventing serious injury and death in the workplace in NSW. This chapter examines:
- WorkCover's advice and support services
  - WorkCover's interpretation of OH&S law
  - WorkCover's investigation of recognised workplace hazards.
- 9.2 The Chapter concludes with a detailed study of the case of Mr Rees, and whether WorkCover could have prevented his death.

### WorkCover's advice and support services

- 9.3 The Committee notes that WorkCover has committed significant financial and human resources to preventing serious injury and death in the workplace in NSW. Some of the initiatives are examined below.

#### WorkCover Assist

- 9.4 The WorkCover Assist program provides registered employers and their worker organisations with financial support to enable them to help their members understand their OH&S and workers compensation responsibilities.
- 9.5 During 2002 and 2003, WorkCover Assist provided \$10 million to over 50 organisations and reached more than 4,250 different workplaces through industry specific strategies including workshops, training presentation and guides, web based information and video packages. An additional \$5 million has been allocated for the final year of the program in 2004.<sup>197</sup>
- 9.6 In its written submission, the Labor Council indicated its belief that the WorkCover Assist program has been very successful in generating a higher level of awareness about OH&S in the workplaces where it has been funded. The Labor Council itself has produced a broad range of relevant information for distribution to employers, employees, teachers, students and workplaces across the state under the program.<sup>198</sup>
- 9.7 The Labor Council also highlighted the very positive experience of the NSW Police Association in relation to the WorkCover Assist program. The NSW Police Association has been the recipient of two rounds of funding, which the association has used to conduct a substantial amount of training of NSW Police Service managers, both civilian and senior police officers.

<sup>197</sup> Submission 29 WorkCover, p5. See also Submission 29A, WorkCover, p2

<sup>198</sup> Submission 52, Labor Council, p17

- 9.8 Similarly, in its written submission, Workplace Safety Australia, a private sector corporation based in Sydney, indicated that it has participated in two very successful training programs under the WorkCover Assist program. Workplace Safety Australia continued:

In our opinion we ... have demonstrated that private industry and trade associations and trade unions can and have developed outstanding workplace education programs. We acknowledge the significant contribution and assistance from WorkCover NSW in the management and funding of these initiatives. ...

Perhaps your committee may well consider that the excellent WorkCover Assist program could be expanded and funding increased accordingly and that a greater role may well be possible for private industry in spreading the message of safety in the workplace.<sup>199</sup>

- 9.9 Given the support from stakeholders for the WorkCover Assist program, the Committee believes that the Government should continue to fund the program at least at the same level as currently funded beyond the current 2004 deadline.

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### **Recommendation 17**

That the Government continue to fund the WorkCover Assist program at least at the same level as currently funded for an additional three years beyond the current 2004 deadline.

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### **The NSW Workplace Safety Summit**

- 9.10 The NSW Workplace Safety Summit was held in Bathurst in July 2002, and was attended by over 200 delegates, including leaders from business, employer groups, trade unions and government. In the Communiqué from the Summit released on 5 July 2002, a number of different commitments were outlined across 11 different industries. The Government has committed \$13 million over three years to the initiative.<sup>200</sup>

### **Education curriculum**

- 9.11 The Government's response to the NSW Workplace Safety Summit noted that young people should learn how to manage risk in the workplace before they enter the workforce. Accordingly, the Government indicated that it would integrate information on safety and risk management into education curriculum, together with specific training for students and trainees in vocational education.
- 9.12 During the hearing on 2 March 2004, the Committee raised with WorkCover representatives the progress on this initiative. In its response to questions on notice, WorkCover indicated that significant progress has been achieved with the introduction of revised HSC syllabuses in the education curriculum in a large range of industries and occupations.

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<sup>199</sup> Submission 58, Workplace Safety Australia, pp1-2

<sup>200</sup> Submission 29, WorkCover, p6

**9.13** In addition, WorkCover indicated that it has introduced a range of training programs and information kits targeting young students in vocational education, together with a number of other initiatives including face-to-face information and advice, and the provision of additional information in publications, CD ROMS, web sites, advertising and news articles.<sup>201</sup>

### **Other initiatives**

**9.14** In addition to the initiatives outlined above, WorkCover highlighted in its supplementary written submission a number of other strategies it has in place to promote injury prevention and workplace safety in NSW:

- WorkCover's Small Business Assistance Strategy, launched in February 2003, includes free information seminars across the state to assist small businesses to assess risks and hazards
- the Premium Discount Scheme provides eligible employers with a financial incentive to improve workplace safety by providing discounts on their workers compensation premiums of up to a maximum of \$75,000
- the WorkCover Assistance Service provides a telephone help line on which employers and employees can get practical information and advice on workplace safety
- WorkCover's Industry Reference Groups assist industries to improve their OH&S, injury management and workers compensation performance by identifying priority industry-specific issues, trends and concerns and developing industry-specific solutions
- WorkCover conducts advertising campaigns on television and radio, and through direct mail and the print media to raise community awareness about workplace safety.<sup>202</sup>

**9.15** The Committee commends WorkCover for the various initiatives it has undertaken in an attempt to preventing serious injury and death in the workplace in NSW.

### **WorkCover's interpretation of OH&S law**

**9.16** During the inquiry, a number of parties raised concerns in relation to WorkCover's interpretation of OH&S law as it relates to injury prevention, and accordingly WorkCover's willingness to identify and tackle known workplace hazards.

**9.17** In his written submission, Mr Ganesh Sahathevan, a member of the OH&S Committee at the Willoughby depot of State Transit NSW from mid-2001 to mid-2002, argued that WorkCover is unable or unwilling to properly interpret section 66 the OH&S Regulation 2001 relating to work in confined spaces.<sup>203</sup> Section 66 states in part:

<sup>201</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p6

<sup>202</sup> Submission 29A, WorkCover, p2

<sup>203</sup> Submission 3, Mr Sahathevan, p2

In this Division:

**confined space**, in relation to a place of work, means an enclosed or partially enclosed space that:

- (a) is not intended or designed primarily as a place of work; and
- (b) is at atmospheric pressure while persons are in it; and
- (c) may have an atmosphere with potentially harmful contaminants, an unsafe level of oxygen stored substances that may cause engulfment; and
- (d) may (but need not) have restricted means of entry and exit.

Examples of confined spaces are as follows:

- (b) storage tanks, tank cars, process vessels, boilers, pressure vessels, silos and other tank-like compartments;
- (c) open-topped spaces such as pits or degreasers;
- (d) pipes, sewers, shafts, ducts and similar structures ...

**9.18** In his submission, Mr Sahathevan indicated that the OH&S Committee at the Willoughby depot of State Transit NSW raised with the STA and WorkCover the nausea and other ailments suffered by cleaners when using chemicals to clean the interior of buses in the absence of ventilation. However, Mr Sahathevan indicated that in response, a WorkCover official who attended a meeting of the OH&S Committee indicated that the definition of a confined space does not include buses – ‘only things like pits’.

**9.19** Mr Sahathevan also indicated that he received a similar response from the Willoughby depot manager. Mr Sahathevan claimed that the Willoughby depot manager indicated his belief, supported by the Department of Transport and the then Minister for Transport, Mr Scully, that STA buses were designed and intended primarily as places of work for cleaners and mechanics as well as drivers, and that accordingly, s 66 did not apply.

**9.20** In response, Mr Sahathevan submitted that neither the Department of Transport nor WorkCover were able to provide any justification for their particular interpretation of s 66. Accordingly, Mr Sahathevan concluded:

It would appear from the above that WorkCover limits itself from the very onset of any possible violation being brought to its attention by the application of the provisions of the OH&S Act and Regulations in such a manner that ensures prosecution would be unlikely. In the process of doing so it takes an interpretation that favours the employer rather than the employee.<sup>204</sup>

**9.21** The Committee was also informed by the submission of Deck Guardrail Australia Pty Ltd (DGA). DGA manufactures various roof edge protection systems which prevent workers from falling from heights.<sup>205</sup>

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<sup>204</sup> Submission 3, Mr Sahathevan, p3

<sup>205</sup> Mr Stokes acknowledged that Deck Guardrail Australia has a vested interest in some areas covered by the Committee’s inquiry.

**9.22** In its submission, DGA highlighted the issue of passive and active safety protection for workers working at heights on construction sites. Passive systems simply mean guardrails and safety meshes that arrest a fall should a worker slip on a roof. Active safety measures on the other hand mean measure which require workers to take measures to protect themselves against falls. In practice, this means the use of harnesses and other restraining devices.<sup>206</sup>

**9.23** DGA argued that WorkCover's Codes of Practice for people working at height indicate that passive roofing protection systems are the preferred means of improving workers' safety. WorkCover's Code of Practice entitled *Safe Work on Roofs, Part 1 – Commercial and Industrial Buildings* states:

Provision should be made to prevent persons falling if work is to be carried out within two metres of any edge on a new or existing roof from which any person could fall two metres or more.

The method selected is generally determined by individual job factors including the nature of the work, the size of area to be roofed, availability of equipment and interaction with other trades. The need to minimise the risk of falls and the risk of injury when a fall occurs should also be taken into account when selecting protective measures.

The recommended method is safety mesh and guardrails. Other available methods include individual fall arrest systems, scaffolding, safety nets or a combination of these methods. These other methods should only be used if the recommended method cannot be used. The use of on-ground prefabrication also helps to reduce risks.

**9.24** However, DGA also argued that WorkCover in NSW does not enforce its own codes of practice that passive roofing protection systems are the preferred means of improving safety for workers working at heights. Instead, DGA submitted that WorkCover seems to permit the use of safety harnesses as a first option, although often the safety harnesses are in fact not used at all. As stated by DGA:

We maintain the evidence clearly shows that WorkCover is unable or unwilling to effectively police its own Code of Practice in relation to roofing safety.

**9.25** DGA also submitted that the Queensland and Victorian WorkCover Authorities both strongly police the use of passive roof safety systems, as a result of which there have not been any recorded deaths or serious injuries from roofing accidents in these two states.<sup>207</sup>

**9.26** The Committee is concerned by this evidence, and is of the opinion that the OH&S laws and codes of practice, designed to maximise the safety of workers at the workplace, should be properly interpreted and enforced by WorkCover.

### **WorkCover's investigation of workplace hazards**

**9.27** In its written submission, DGA also raised concerns in relation to WorkCover's investigation of identified workplace hazards.

<sup>206</sup> Submission 15, Deck Guardrail Australia Pty Ltd, p7

<sup>207</sup> Submission 15, Deck Guardrail Australia Pty Ltd, pp7-8

- 9.28** DGA indicated that in 2001-02, the Managing Director of the company, Mr Stokes, commissioned Sydney-based marketing and PR firm, Terry Biscoe and Associates, to visit building sites in Sydney to conduct a simple visual check of whether safety procedures were being followed. The results showed an inordinate number of sites, commercial and industrial, where there were no safety measures in place for people working at heights, or where safety procedures were being ignored.
- 9.29** DGA subsequently presented this evidence of dangerous worksites around Sydney to WorkCover, together with supporting photographs, but indicated that in each case, there was a delay of at least two to three days before WorkCover inspected the sites.<sup>208</sup>
- 9.30** The Committee also notes the written submission of Mr Jenkins. Mr Jenkins worked at the Sydney Markets for 22 years, and was seriously injured while at work in the separate cases of negligence during 1998 and 1999. A decision in his favour was handed down in the Supreme Court on 9 December 2003 in *Jenkins v Sydney Markets Limited [NSWSC] 1162*. Mr Jenkins submitted that:
- during his time at work at Sydney Markets, it was a very dangerous place to work, with serious injuries a regular occurrence
  - at no time during his 22 years of working at the markets did a WorkCover inspector check his forklift licence
  - at no time did he see a WorkCover inspector issue infringements for dangerous driving of forklifts
  - at no time did he see a WorkCover inspector inspect the areas in which he was injured.<sup>209</sup>
- 9.31** Mr Jenkins also raised concern that during his employment at Sydney Markets, he became aware of contaminated soil on the site which the Sydney Market Authority had failed to divulge to employees. He indicated that when he raised this matter with WorkCover, WorkCover did ‘not even want to look into this very serious matter.’<sup>210</sup>
- 9.32** Such evidence raises concerns that in some instances WorkCover inspectors are failing to rigorously and fully enforce the OH&S laws. The Committee notes the following evidence from Ms Buchtmann, appearing on behalf of the CFMEU, during the hearing on 17 February 2004:

I have certainly seen some inspectors who appear to support unsafe employers. They duck and weave and go around every corner they can, rather than serve a notice. I know from my experience that employers will never take responsibility unless they are made to.<sup>211</sup>

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<sup>208</sup> Submission 15, Deck Guardrail Australia Pty Ltd, p11

<sup>209</sup> Submission 9, Mr Jenkins, p3

<sup>210</sup> Submission 9, Mr Jenkins, pp4-5

<sup>211</sup> Ms Buchtmann, Evidence, 17 February 2004, p5

**9.33** Similarly, the Committee notes the following evidence of Mr Ferguson, again on 17 February 2004:

We would like to see the culture change. We would like to see a bit more passion from the top in terms of inspectors, to get them out there in terms of an effective blitz. We have seen media releases about blitzes here or blitzes there, but they are not done in a meaningful way with the cultural backup that is required to get results in this industry.<sup>212</sup>

**9.34** Some stakeholders were concerned by evidence of what has been called institutional timidity within WorkCover. Again as stated by Ms Buchtman:

Employers have stated to me that they have no fear of WorkCover at all. They are a toothless tiger. They have said we do not care, they can come out, they will not serve notices on us.<sup>213</sup>

**9.35** In contrast to this evidence, the Committee notes the figures in Figure 8.3 illustrating the level of enforcement action undertaken by WorkCover. In 2001, WorkCover imposed 12,480 improvement notices, 1,636 penalty notices and conducted 404 successful prosecutions, nearly twice as many as all other jurisdictions combined in 2001. For a full comparison, see Figure 8.3 following paragraph 8.42.

**9.36** The Committee recognises that WorkCover has a primary role in advising and assisting employers to meet their OH&S obligations, and is not simply there to apply the heavy hand of regulation. However, the Committee also believes that in some instances, WorkCover must take strong action against employers and employees knowingly and wilfully breaching OH&S law.

**9.37** As an extension of this point, the Committee also notes the written submission of the Brief Group, a national workplace safety and workers compensation consultancy. The Brief Group noted that the vast majority of prosecutions initiated by WorkCover in the Industrial Relations Commission relate to an actual serious injury or fatality, and that WorkCover tends not to prosecute where a serious injury or fatality has not occurred. However, the Brief Group recommended:

... that WorkCover place more emphasis in this forum on the importance of employers being prosecuted for risk (alone) and not merely reacting to a death or serious injury.<sup>214</sup>

**9.38** The Brief Group subsequently expanded on this recommendation by arguing that WorkCover should investigate and prosecute life-threatening work practices that are largely ignored by fringe employer elements in particular industries. Doing so would both educate them in relation to risk and given them an incentive to initiate measures that might otherwise be avoided due to (perceived) cost impediments. As the Brief Group stated:

<sup>212</sup> Mr Ferguson, Evidence, 17 February 2004, p45

<sup>213</sup> Ms Buchtman, Evidence, 17 February 2004, p38

<sup>214</sup> Submission 10, The Brief Group, p2

It is an unfortunate fact that some businesses do not invest in necessary safety reforms until after an accident for which they are prosecuted and at risk of substantial monetary penalties.<sup>215</sup>

**9.39** The Committee also notes the comment of the NSW Bar Association that:

The present day experience is that inspectors will not offer advice and are only interested, or allowed to be interested in prosecutions rather than preventions. This criticism should not be seen to be directed to individual inspectors, as it appears to be the reflection of the WorkCover corporate attitude.<sup>216</sup>

**9.40** The Committee accepts that prosecution of employers and co-workers who are deemed to have placed their workers at excessive risk of accidents is an important element in preventing serious injury and death in the workplace.

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### **Recommendation 18**

That WorkCover commit to prosecuting employers and co-workers alleged to have breached OH&S law and to have placed workers at excessive risk of serious injury or fatality, even where that risk has not resulted in a serious injury or fatality. That WorkCover commence these proceedings in the Industrial Relations Commission.

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**9.41** There was a divergence of opinion among the Committee over whether Recommendation 14 whether Recommendation 18 should be extended to also apply to employers and co-workers who place members of the public at excessive risk of serious injury or fatality.

### **The case of Mr Rees**

**9.42** In relation to the above recommendation, the Committee wishes to comment particularly on the role of WorkCover in the case of Mr Rees, who was killed on 19 September 2002 when he was crushed during the demolition of No 6 Ore Bridge at the former Newcastle BHP Steelworks site at Port Waratah.

#### **The demolition incident at No 5 Ore Bridge**

**9.43** In their written submission, Mr and Mrs Rees, the parents of Mr Rees, raised concern in relation to a prior demolition incident at No 5 Ore Bridge in which three workers were almost killed on 11 October 2001. In particular, they highlighted emails from Mr Terry Perkins, a WorkCover Inspector, sent to his Team Coordinator on 17 and 19 June 2002 citing concerns about the demolition process at No 5 Ore Bridge. The Committee notes the following passage from Mr Perkin's email of 17 June 2002:

The information I am providing below is put forward with the intention of highlighting the potential for deficiencies in demolition skills, experience and

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<sup>215</sup> Submission 10, The Brief Group, p3

<sup>216</sup> Submission 30, NSW Bar Association, p5

knowledge with respect to safety inspectors asked to undertake investigation and supervision of demolition work. I sincerely believe this situation needs to be addressed.

I came into possession of a video that depicts details of the demolition of a large structure. The person supplying the video did not wish to be identified for fear of dismissal from his employment. This person indicated that WorkCover should be informed of what happened during this demolition as 3 people narrowly missed being killed and to date there appears to have been no action from WorkCover.

...

When I viewed the video it became apparent from the start what was about to happen. The boilermaker, working from a MEWP, was cutting through the only member that was keeping the structure erect. Throughout this activity a considerably number of personnel (onlookers presumably) were moving around directly below the structure that was to collapse, unexpectedly, shortly after.

When the structural member, which was being cut, failed under tensile loading before the cut was complete and in fact while the cutting was still taking place, both of the legs of the structure moved rapidly apart and the structure collapsed.

Two men standing next to the MEWP ran from the area but the boilermaker making the cut did not appear until a short time later.

The boilermaker, from his own report, was underneath the structure when it hit the ground. If you watch closely, after the dust clears, you can see the bottom plate of the structure's box section beam has buckled upwards, in a position just to the left of the machinery room, which had been mounted on top of this beam. The boilermaker was on the ground, after jumping/being thrown from the MEWP, directly underneath where this buckled section of the beam came to rest. He was inside the buckled section and reported that he felt it hit his back as he was on the ground when it hit. I call that very lucky. The MEWP was not so lucky.<sup>217</sup>

- 9.44** Mr and Mrs Rees and subsequently Mr Perkins provided the Committee with a copy of the video footage of the collapse of the No 5 Ore Bridge. The footage is very disturbing, and appears to support the opinion of Mr Perkins that it was very lucky that nobody was seriously injured or killed during that incident.
- 9.45** WorkCover subsequently began an investigation into the incident at No 5 Ore Bridge on 12 September 2002, a week before the death of Mr Rees. Charges were laid against the employer in the Industrial Relations Commission on 1 October 2003.
- 9.46** Based on this evidence, Mr and Mrs Rees raised their concern that if WorkCover had done more to investigate the concerns of Mr Perkins in the three months after they were raised in June 2002, the death of their son on 19 September 2002 may have been avoided.<sup>218</sup> Mr Rees reiterated these concerns in the hearing on 16 February 2004:

<sup>217</sup> Cited in submission 15, Mr and Mrs Denis and Sharon Rees, appendix C

<sup>218</sup> Submission 15, Mr and Mrs Denis and Sharon Rees, p2

That is what gets to my wife and me: If WorkCover was notified three months prior to our son's accident why was something not done? Why was it not looked into? Why was the whole site not looked at? It does not add up. It may not have prevented our son's accident. Nothing will ever bring him back.<sup>219</sup>

**9.47** The Committee subsequently placed a question on notice with WorkCover in relation to the length of time taken to begin an investigation into the incident at No 5 Ore Bridge. In response, WorkCover indicated:

The incident was reported to WorkCover on 11 October 2001 and WorkCover started its investigation on 12 October 2001. The investigation concluded in November 2001 and no further action was recommended. Decisions regarding this matter were made on the information and evidence available at the time.

Subsequent information came to light in June 2002 and further lines of enquiry were followed. A Construction Team Inspector from Sydney was assigned, and commenced an investigation on 12 September 2002. The incident resulting in the death of Gregory Rees occurred on the 19 September 2002 and was subject to a separate investigation.

This matter was subsequently prosecuted in the Industrial Relations Commission. On 18 February 2004 Gardner Perrot Demolition Division of Brambles Australia Ltd pleaded guilty to the charges. The matter has been adjourned and a sentencing hearing is to be set.<sup>220</sup>

**9.48** In response, the Committee in turn received a written submission from Mr Perkins in which he argued that WorkCover failed to respond in a timely manner to the BHP No 5 Ore Bridge collapse, and only conducted an investigation following intervention from the CRMEU and in turn the Minister. Mr Perkins alleged that WorkCover's response occurred in 4 stages:

1. The initial response to my approaches was to dismiss the matter, and the issues I raised, completely. This lack of concern caused me personally some considerably anxiety so I made the matter known to the local branch of the CFMEU. Normally I would never consider taking matters outside the organisation but this was too serious to let drop.
2. The subsequent approach by the CFMEU to the Newcastle office met with the same response as I had experienced. The Newcastle people refused to investigate and insisted that the incident was not a cause for concern.
3. The CFMEU then approached the Minister. This action resulted in Newcastle officers being directed to investigate the Ore Bridge incident. The outcome of this investigation was that there were no breaches evident to the investigators and that the incident was not considered to have presented a risk of injury to persons. John Watson personally informed me of this outcome in October 2002 during a telephone conversation.

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<sup>219</sup> Mr Rees, Evidence, 16 February 2004, p38

<sup>220</sup> WorkCover, Response to Questions on Notice from 17 February 2004, pp7-8

4. I am not aware of the reason or motivation that procured or forced the final investigation undertaken by people from Head Office. This investigation disclosed breaches so serious and clearly supported by evidence, that the recommendation to prosecute was reviewed and lodged with the Industrial Commission within a 5 working day period by WorkCover's legal representatives. The average time taken for such reviews is typically months at the very best.<sup>221</sup>

- 9.49** The Committee is very concerned by this evidence, particularly the delay of approximately three months between the provision of additional information by Mr Perkins in mid-June 2002, and the commencement of a subsequent investigation on 12 September 2002.
- 9.50** The Committee understands, however, that a coronial inquest into this matter is under way and is likely to review the evidence in relation to this matter in greater detail.

### **The death of Mr Rees during the demolition of No 6 Ore Bridge**

- 9.51** Mr and Mrs Rees also raised concern in their submission that at the time of their son's death, the WorkCover inspector who had been supervising the site, Mr McMartin, had gone on leave and had not been replaced.<sup>222</sup> As stated by Mr Rees in the hearing on 16 February 2004:

I believe that there should have been someone there for such a major job – dropping a building with more than 1,000 tonnes of steel. Someone should have been there to make sure that they were complying with the Act and doing it correctly.<sup>223</sup>

- 9.52** In conjunction with this lack of supervision, Mr and Mrs Rees made a supplementary submission and provided evidence in the hearing on 16 February 2004 that at the time of their son's death, the wind in the area was in excess of 20 knots. Under section 255 of the OH&S Regulation 2001, demolition of a chimney stack (similar although not the same as an ore bridge) is not to be done in a wind that exceeds 20 knots.<sup>224</sup>
- 9.53** The Committee subsequently placed a question on notice with WorkCover during the hearing on 17 February 2004 in relation to the supervision of the demolition of No 6 Ore Bridge on 19 September 2002, the day of Mr Rees' death. In response, WorkCover indicated:

It is not the role of WorkCover to supervise demolition work. Under the terms of OHS Act 2000 that duty rests with the demolition company.

Inspector McMartin was one of a number of inspectors operating out of the Newcastle office at the time of this incident. As a part of his duties as a Regional Inspector, Mr McMartin had been in contact with the State Coordinator Asbestos and Demolition regarding this project during the granting of permission to use mechanical means to fell the structure.

<sup>221</sup> Submission 49, Mr Perkins, pp3-4

<sup>222</sup> Submission 15, Mr and Mrs Denis and Sharon Rees, p2

<sup>223</sup> Mr Rees, Evidence, 16 February 2004, p36

<sup>224</sup> Submission 13a, Mr and Mrs Denis and Sharon Rees, pp 3-4. See also Mr Rees, Evidence, 17 February 2004, p33

During Inspector McMartin's leave of absence the site was serviced, on a needs basis by other inspectors from the Newcastle office.<sup>225</sup>

- 9.54** WorkCover subsequently indicated in its further response to questions on notice taken on 2 March 2004 that no inspectors attended the site of the No 6 Ore Bridge during the leave taken by Inspector McMartin.<sup>226</sup>
- 9.55** Again, the Committee notes in turn the response of Mr Perkins in his written submission. Mr Perkins acknowledged that WorkCover's role is not to supervise demolition work, but indicated that under Chapter 11 of the OH&S Regulation 2001, the carrying out of demolition work requires a permit, which must be 'considered' by a WorkCover officer prior to work commencing.<sup>227</sup>
- 9.56** Given this evidence, the Committee reiterates its previous concerns that WorkCover may, in some instances, be failing to take strong action, including prosecution, against those employers and employees knowingly and wilfully breaching OH&S law.

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<sup>225</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p7

<sup>226</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p11

<sup>227</sup> Submission 49, Mr Perkins, p3

## Chapter 10 The conduct of WorkCover prosecutions

### Introduction

**10.1** This chapter examines the conduct of prosecutions by WorkCover, with particular reference to:

- the role of WorkCover's Criminal Law Practice
- the procedures for notifying WorkCover of a serious injury or fatality
- WorkCover's procedures for investigating a serious injury and fatality
- the decision to undertake a prosecution
- the time to commence prosecutions
- the strict liability placed on employers under the OH&S legislation.

### The role of WorkCover's Criminal Law Practice

**10.2** As indicated in Chapter 4, WorkCover's Criminal Law Practice branch is responsible for conducting prosecutions for breaches of the OH&S legislation. The Criminal Law Practice is located within the Legal Group, which is in turn part of the Corporate Governance Division.<sup>228</sup>

**10.3** In September 2002, WorkCover formed the Workplace Fatalities Investigation Unit within the Criminal Law Practice branch. This initiative arose out of the NSW Workplace Safety Summit held in July 2002. The unit is designed to foster close cooperation between the Unit's solicitors and the inspectors involved in the investigation of particular cases.<sup>229</sup>

**10.4** During the hearing on 17 February 2004, Mr Ferguson from the Construction, Forestry, Mining and Energy Union (CFMEU) raised concerns about the legal expertise of solicitors in the Criminal Law Practice:

I'd like us to study the prosecutions unit about the number of staff, the qualifications of staff, the turnover of staff and have that issue subject to some public accountability rather than be told, we've got lots of solicitors down there, don't worry about it.<sup>230</sup>

**10.5** The Committee requested from WorkCover details of the legal expertise of members of the Criminal Law Practice during the hearing on 17 February 2004.

**10.6** In response, WorkCover indicated that there are twelve qualified solicitor positions in the Criminal Law Practice reporting to the Manager, Litigation and the Director, Legal Group. WorkCover highlighted that:

<sup>228</sup> Submission 29, WorkCover, pp3-4

<sup>229</sup> Submission 29, WorkCover, p21

<sup>230</sup> Mr Ferguson, Evidence, 17 February 2004, p36

- the Director, Legal Group has more than 26 years legal practice experience in the areas of litigation, advice, prosecution and coronial work. The Director has previously held the position of Assistant Crown Solicitor for two different litigation practice groups in the Crown Solicitor's Office, and also acted in the position of Practice Manager for that office
- the Manager, Litigation has more than 20 years legal practice experience in litigation having occupied senior solicitor positions in the Crown Solicitor's Office. Both officers also have extensive experience in the administration and management of legal practices.<sup>231</sup>

**10.7** WorkCover subsequently also provided in response to questions on notice on 1 March 2004 details of the legal qualifications of the other solicitors in the Criminal Law Practice. For brevity, the Committee does not repeat them here.<sup>232</sup>

### **Prosecutions outsourced to private firms**

**10.8** In her evidence to the Committee on 17 February 2004, Ms Yaager from the NSW Labor Council (Labor Council) raised concerns about the workload of solicitors in the Criminal Law Practice, and stated that in her opinion, WorkCover does not employ enough solicitors.<sup>233</sup>

**10.9** The Committee raised with WorkCover representatives during the hearing on 17 February 2004 the proportion of prosecutions outsourced to private legal firms in 2002 and 2003.

**10.10** In its response, WorkCover indicated that:

- during the 2001/02 financial year, WorkCover conducted 680 defendant matters. Of those matters, 176 (25%) were conducted in-house by WorkCover and 504 (75%) were conducted by external legal service providers at a cost of \$2.2 million
- during the 2002/03 financial year, WorkCover conducted 442 defendant matters. Of these matters, 158 (36%) were conducted in-house by WorkCover and 284 (64%) were conducted by external legal service providers at a cost of \$3.1 million.

**10.11** WorkCover further indicated that since the establishment of the Workplace Fatalities Investigation Unit in September 2002, it has been WorkCover's policy to conduct all fatality prosecutions in-house and to instruct external legal service providers to conduct prosecutions for less serious incidents. WorkCover argued that this practice enables it to direct its in-house prosecution resources to fatalities and other incidents of major concern, and is consistent with the practice of other government law enforcement agencies.<sup>234</sup>

**10.12** The Committee notes that in its response to questions on notice from 15 March 2004, WorkCover provided the Committee with a list of the firms to which it currently refers cases

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<sup>231</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p23

<sup>232</sup> WorkCover, Response to Questions on Notice from 2 March 2004, pp15-16

<sup>233</sup> Ms Yaager, Evidence, 17 February 2004, pp61-62

<sup>234</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p2

for prosecution, the areas of legal expertise of those firms, and a copy of the whole-of-government guidelines on the outsourcing of legal services.<sup>235</sup>

## The procedures for notifying WorkCover of a serious injury or fatality

**10.13** Under s 86 of the *OH&S Act 2000*, employers are required to inform WorkCover of a serious incident<sup>236</sup> in the workplace. Section 86 of the Act states in part:

- (1) The occupier of any place of work must give WorkCover notice in accordance with this section of any of the following incidents:
  - (a) any serious incident at the place of work (as referred to in section 87),
  - (b) any incident at or in relation to the place of work that the regulations declare to be an incident that is required to be notified to WorkCover.

...
- (3) Any such notice must, in the case of a serious incident, also be given:
  - (a) immediately the occupier becomes aware of the incident, and
  - (b) by the quickest available means.

**10.14** The Committee notes, however, serious concerns about the procedure for notifying WorkCover of a serious injury or fatality raised by the case of Mr Hampson.

### The case of Mr Hampson

**10.15** As indicated in Chapter 2, Mr Hampson stated in his written submission that his employer, Garry Denson Metal Roofing Pty Ltd, failed to notify WorkCover following his accident at Gosford High School in June 2001. Rather, Mr Hampson indicated that WorkCover was only notified of the accident in October 2003, over two years later, and then only by Mr Ferguson from the CFMEU after he became aware of the case.<sup>237</sup>

**10.16** By contrast, as indicated in Chapter 2, the Committee received evidence from Mr Denson that he reported Mr Hampson's accident to WorkCover in writing two days after the accident.<sup>238</sup>

**10.17** As a result of the alleged failure of Garry Denson Metal Roofing Pty Ltd to report Mr Hampson's accident, WorkCover did not carry out an investigation of the circumstances of Mr Hampson's injury. WorkCover did lay charges against Garry Denson Metal Roofing Pty Ltd on 16 February 2004, importantly however, the charges were for failure to notify WorkCover of the accident suffered by Mr Hampson, rather than for any possible breach of

<sup>235</sup> WorkCover, Response to Questions on Notice from 15 March 2004, pp21-22 & attachment

<sup>236</sup> A serious incident is defined in s 87 of the *OH&S Act 2000* as an incident that results in a person being killed or any other incident prescribed by the regulations for the purposes of this definition.

<sup>237</sup> Submission 27, Mr Hampson, pp2-3

<sup>238</sup> Correspondence from Mr Denson to Committee Chairman, 12 March 2004.

the *OH&S Act 2000* in relation to Mr Hampson's accident. This is because under section 107 of the *OH&S Act 2000*, charges for an offence under the Act must be instituted within two years of the offence.<sup>239</sup>

- 10.18** In the hearing on 2 March 2004, the Committee raised with WorkCover representatives the case of Mr Hampson, and the fact that Garry Denson Metal Roofing Pty Ltd was able, through the non reporting of the injury to Mr Hampson for over two years, to successfully avoid prosecution for any possible breach of the *OH&S Act 2000* in relation to Mr Hampson's accident.
- 10.19** In response, Ms Grant from WorkCover indicated that WorkCover is strictly constrained by the requirement that charges for an offence under the Act must be instituted within two years of the offence. Accordingly, WorkCover was not in a position to prosecute Garry Denson Metal Roofing Pty Ltd for any possible breach of the Act in relation to Mr Hampson's accident.<sup>240</sup>
- 10.20** However, WorkCover did subsequently indicate that as a result of this matter being raised by the Committee, it is currently preparing further advice on this matter. WorkCover did not indicate to whom that advice was to be tendered.<sup>241</sup>
- 10.21** The Committee believes that the case of Mr Hampson highlights a clear anomaly in the *OH&S Act 2000*, whereby an employer can effectively avoid prosecution for a breach of the *OH&S Act 2000* through non-reporting of a serious incident in the workplace for two years. The Committee welcomes WorkCover's indication that it is currently preparing a brief on this matter, but believes that the issue should be addressed urgently.

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### Recommendation 19

That the Government take urgent steps to amend the *OH&S Act 2000* to redress the anomaly whereby an employer can effectively avoid prosecution for a breach of the Act through non-reporting of a serious incident in the workplace for two years.

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- 10.22** On a related issue, while Mr Hampson's accident was not reported to WorkCover, Mr Hampson did, however, lodge a workers' compensation claim following his accident. In accordance with requirements, the insurer assessed Mr Hampson's claim and provided him with support including weekly benefits, together with medical and rehabilitation treatment. The insurer also notified WorkCover of the claim in consolidated data as part of their normal reporting procedures.<sup>242</sup>

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<sup>239</sup> Mr Blackwell, Evidence, 2 March 2004, pp62-63

<sup>240</sup> Ms Grant, Evidence, 2 March 2004, pp67-68

<sup>241</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p11

<sup>242</sup> Submission 29, WorkCover, p2

- 10.23** The Committee notes that on 1 September 2002, WorkCover instigated a procedure to cross-reference workers compensation claims with the reporting of accidents by employers under s 86 of the *OH&S Act 2000*. This cross-referencing is designed to increase WorkCover's capacity to identify incidents that are not notified to it directly. In the case of Mr Hampson, such a system could have identified that he had lodged a workers' compensation claim, but that his employer had not lodged a notice of his accident.<sup>243</sup>
- 10.24** The Committee welcomes this initiative by WorkCover.

### **WorkCover's procedures for investigating a serious injury or fatality**

- 10.25** In its written submission, WorkCover indicated that once it is advised of a serious injury or fatality in the workplace, an inspector is allocated to investigate the matter. The inspector's role is to:
- attend the site of the serious injury and fatality, and if action has not been taken by the police, to secure the site
  - determine in consultation with the investigating Police Officer the scope of the WorkCover investigation and the level of interaction with the NSW Police
  - commence the investigations process, serving rectification notices if required, and conducting interviews with witnesses
  - establish contact with a solicitor from the Legal Group allocated to the case
  - maintain liaison with the investigating Police Officer, including the exchange of information
  - complete the investigation and provide a report to the Coroner (if appropriate) and WorkCover recommending appropriate action.<sup>244</sup>
- 10.26** On 27 January 2004, the Minister for Police, the Attorney-General, the Minister for Industrial Relations and the Director of Public Prosecutions released the Protocol for the Investigation and Provision of Advice in Relation to Workplace Deaths and Serious Injury and Prosecutions Arising Therefrom. This protocol sets out investigative guidelines between relevant agencies in the event of a serious injury or fatality in the workplace. In its written submission, WorkCover cited the underlying principles of the protocol as follows:
- the decision to proceed to a prosecution in any particular matter will be based on a sound investigation of all the circumstances of the workplace death or incident of serious injury
  - all investigations will begin with both the Police and WorkCover undertaking a joint appraisal of the circumstances of the fatality or incident of serious injury. Where there is evidence of certain criminal conduct, the Police will undertake an investigation. WorkCover will, in any event, undertake its own investigation of OH&S issues. Both agencies will, in all cases, liaise and co-operate with each other. Cases that will benefit from a joint investigation are to be identified as early as possible to permit the most

<sup>243</sup> Submission 29, WorkCover, pp2-3. See also Mr Blackwell, Evidence, 17 February 2004, p5

<sup>244</sup> Submission 29, WorkCover, pp15-16

efficient use of resources. Any investigation, whether joint or otherwise, requires both the Police and WorkCover, given their separate and distinct coercive powers arising under statute and the common law, to co-operate to the fullest extent possible in the exchange of information necessary to progress each agency's investigation to completion. The aim is to minimise the duplication of tasks where practicable within the legal framework governing the operation of each agency

- in the case of a fatality, all relevant material is to be provided to the Coroner to determine whether an inquest is to be held, or the papers are to be referred to the Police for consideration of referral to the DPP
- the decision to prosecute will be made as soon as practicable after the completion of the investigation and the Coroner's consideration of the matter (where applicable) or consideration by the DPP
- the families of the deceased or victim are to be kept informed of the progress of an investigation and any subsequent prosecution.<sup>245</sup>

**10.27** In its written submission, the Law Society of NSW (Law Society) noted that typically, if the NSW Police reach a view that the death did not involve a breach of the *Crimes Act 1900*, WorkCover inspectors will conduct an investigation as to whether the *OH&S Act 2000* has been breached.

**10.28** When conducting an investigation, the Law Society noted that WorkCover inspectors have wide powers of search, seizure and investigation which are similar to the powers conferred on Royal Commissions. In particular, the Law Society noted that under the *OH&S Act 2000*, individuals can be compelled to answer questions, whether or not their answers might incriminate them. However, the person being questioned in that situation does have a right to object to answering questions, and if such objection is made, or the person is not advised of his or her right to object, then the answers provided cannot be used in any proceedings against that person. By contrast, inspectors with the NSW Police Service have no such equivalent powers, and must rely when investigating suspected crime upon witnesses and/or accused consenting to make a statement.<sup>246</sup>

**10.29** While the Committee received few comments on WorkCover's general investigation procedures, the Committee notes the concerns expressed in a confidential submission about the timeliness of WorkCover investigations. In the submission, it was recommended that where a worker is killed or left unconscious, WorkCover should be required to investigate the accident on the day it occurs, rather than days or months later.<sup>247</sup>

**10.30** The Committee believes that there would be merit in such an approach, particularly given the case of Mr Welch examined later in this chapter. However, the Committee is conscious of the resource constraints on WorkCover.

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<sup>245</sup> Submission 29, WorkCover, pp16-17

<sup>246</sup> Submission 23, The Law Society of NSW, pp4-5

<sup>247</sup> Confidential

### **The case of Mr Howell**

- 10.31** In relation to WorkCover's investigations processes, the Committee wishes to note the case of Mr Howell, who as indicated in Chapter 2, was injured at the Pine Grove Memorial Park Ltd cemetery on 5 May 1992.
- 10.32** During the public hearing on 17 February 2004, Mr Howell indicated to the Committee that he initially went to work at the Pine Grove Memorial Park Ltd cemetery in 1987, but that in 1991 he was moved to work in a different part of the cemetery where he was employed lifting granite headstone slabs.
- 10.33** Subsequently, Mr Howell indicated that he suffered initial injuries at the cemetery in October 1991, after which he requested on several occasions mechanical assistance to do his job. However, Mr Howell stated that this was not provided, and in May 1992 he suffered the further injuries cited by the Committee in Chapter 2.
- 10.34** In his evidence, Mr Howell expressed his concern that at no time did WorkCover investigate the circumstances of his case, despite his allegation that he repeated requests for mechanical assistance to perform his job:

... I was made to do extremely heavy work of lifting large granite slabs and landscaping, which required carrying heavy loads.

In October 1991, at the age of 28, my first injury occurred to my back and legs. I notified my employers and it was reported to WorkCover. After this incident I asked my employer for machinery to help lift the heavy loads. This never happened. I was never told to go on light duties and I didn't hear anything from WorkCover.

In May 1992, at the age of 29, I suffered a major injury of two disc ruptures. ...

I have not been approached by WorkCover under any circumstances. If I had of been, if I had been I would not be standing here right now addressing the Committee inquiry. I would also not be suffering a permanent debilitating spinal injury if you, the WorkCover Authority had of investigated.<sup>248</sup>

- 10.35** The evidence before the Committee is that WorkCover received notification of the injuries suffered by Mr Howell and should have investigated his case. The Committee is unaware why WorkCover did not do so.

### **The decision to undertake a prosecution**

- 10.36** WorkCover noted in its response to questions on notice from 17 February 2004 that the decision to prosecute a case ultimately resides with the CEO of WorkCover in accordance with his other statutory responsibilities for the management and control of WorkCover. However, the CEO has delegated the decision making in respect of all but workplace fatalities to the Director of the Legal Group and the Director Service Deliver OH&S Division, or such

<sup>248</sup> Mr Howell, Evidence, 17 February 2004, p49

other senior members of the OH&S Division as nominated by the Division's General Manager.<sup>249</sup>

**10.37** In its written submission, WorkCover indicated that there are several steps in the decision to prosecute a case:

- once an inspector has completed an investigation, he or she may make a recommendation to senior management in the OH&S Division that a prosecution take place
- senior management in the OH&S Division review the inspector's recommendation, report and other relevant material, and decide whether to forward a prosecution brief to the Legal Group for consideration
- solicitors within the Legal Group review the information provided and consider whether to commence a prosecution. As indicated, all recommendations concerning the prosecution of fatalities are referred to the CEO for final decision.<sup>250</sup>

**10.38** WorkCover further indicated in its supplementary written submission that under its *Compliance Policy and Prosecutions Guidelines*, a decision to prosecute any matter, including a fatality, is made having regard to the public interest, with particular reference to:

- whether the admissible evidence available is capable of establishing each element of the offence (ie whether a prima facie case can be made out)
- whether there is a reasonable prospect of conviction
- whether there are discretionary factors which nevertheless dictate that the matter should not proceed in the public interest. An example of factors that might outweigh the public interest in prosecution would be the potentially harsh and oppressive effect of prosecuting a father whose child is killed by a tractor on a farm on which the family home is located.<sup>251</sup>

**10.39** The Committee notes the evidence of the NSW Bar Association that when bringing a prosecution, WorkCover tends to make as many allegations as possible without necessarily determining precisely and succinctly the breach to be charged. This approach, the Association submitted, has the very significant disadvantage that proper consideration of the prosecution brief is expensive and time consuming. Furthermore, while a defendant might agree that a breach has been committed, the defendant is unable to agree to all of the allegations of breach or to all of the particulars said to support the multiplicity of allegations.<sup>252</sup>

**10.40** There was a divergence in opinion amongst the Committee over whether to make a recommendation in relation to this issue.

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<sup>249</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p17

<sup>250</sup> Submission 29, WorkCover, p17

<sup>251</sup> Submission 29A, WorkCover, p6

<sup>252</sup> Submission 30, NSW Bar Association, pp4-5

### Public safety and work safety

- 10.41** A particular issue raised during the inquiry in relation to prosecutions was that of public safety, and incidents or risks to health and safety where it is unclear whether they have a direct link to the workplace placing them within the scope of the OH&S legislation.
- 10.42** An example cited by WorkCover in its supplementary written submission was crowd control and safety and risk management at large-scale public events such as public performances or concerts. WorkCover submitted that responsibility for these kinds of events usually rests with agencies including the Department of Environment and Conservation, the NSW Police, the Department of Health and the Department of Sport and Recreation.<sup>253</sup>
- 10.43** The issue of public safety and work safety arose in relation to a number of cases examined by the Committee. These are discussed below.

#### *The case of Mr David Selinger*

- 10.44** As indicated in Chapter 2, Mr David Selinger was a member of the public killed on 15 July 2001 at Fox Studios in Sydney when temporary chain mesh fencing panels erected for the Sydney Fringe Festival fell on him during a severe wind storm. The Coroner's subsequent report made no recommendations regarding breaches of the *OH&S Act 2000* in relation to WorkCover, and no prosecution has been commenced by WorkCover.
- 10.45** During the hearing on 2 March 2004, the Committee raised with WorkCover representatives why WorkCover chose not to proceed with a prosecution in this case. In response, Ms Grant observed:

This case falls within a description of what we call public safety issues. While every site in Sydney is potentially a workplace, you do not generally prosecute for every single incident that occurs on every site in Sydney. This unfortunate fatality occurred when a young boy attending a recreational activity at the Fox Studios site just happened to be near this fence when a wind gust, believed to be up to 100 miles an hour, caused the fence to collapse onto him. On a very strict approach one might say there had been a breach of OHS legislation but the view was taken because this was more of a public safety issue that we would not be commencing prosecution of an employer in the circumstances.<sup>254</sup>

- 10.46** Mr Grant subsequently noted that while the *OH&S Act 2000* does address the safety of non-employees at workplaces, WorkCover took the view that this particular case was one of public safety and not one that would ordinarily be prosecuted under the OH&S legislation. Had there been an employer-employee relationship involved, Ms Grant indicated that WorkCover may well have taken a different view.<sup>255</sup>
- 10.47** In its subsequent response to questions on notice from 2 March 2004 in relation to the qualifications of the person employed to stack the fence at the Fox Studio site, WorkCover further indicated that:

<sup>253</sup> Submission 29A, WorkCover, p7

<sup>254</sup> Ms Grant, Evidence, 2 March 2004, p72

<sup>255</sup> Ms Grant, Evidence, 2 March 2004, pp72-74

Employers are required under section 8(1)(d) of the OHS Act to provide appropriate information, instruction, training and supervision as may be necessary to ensure employees' health and safety at work. The duty does not extend to providing training to ensure the health or safety of people other than employees. The circumstances surrounding the Selinger matter did not fall within the employment relationship covered by the OHS Act and the situation was not one specified by the objects set out in section 3 of the OHS Act.<sup>256</sup>

- 10.48** The Committee notes the advice of WorkCover that the Selinger family has commenced civil proceedings in the Supreme Court against Fox Studios Pty Ltd, the Sydney Fringe Festival Inc and Events Security Personnel Pty Ltd.<sup>257</sup>

*The case of Mrs Welch*

- 10.49** As indicated in Chapter 2, Mrs Lola Welsh was killed on 30 June 2001 when she was struck by the trailer of a truck at a construction site on Mona Vale Road in St Ives in Sydney. WorkCover initially left the investigation to the NSW Police, on the basis that the accident occurred outside the workplace and was a road safety issue, but subsequently undertook an investigation following representations from Mr Alan Welch that the accident had in fact occurred on the footpath outside the construction site while part of the vehicle was still on the site.

- 10.50** During the hearing on 2 March 2004, the Committee raised with WorkCover representatives the case of Mrs Welch, and the delay in the decision to undertake an investigation. In response, Mr Watson acknowledged:

It appeared on the first summing up of the matter that it clearly fell within the Motor Traffic Act and was a matter for the New South Wales Police. It subsequently became clear that that was not the case. We were happy to review the matter and happy to put in place a full investigation to ensure that breaches of the legislation were brought to account.<sup>258</sup>

- 10.51** The Committee subsequently questioned Mr Watson why the WorkCover inspector was not in a position to determine personally precisely where the accident occurred. In response, Mr Watson indicated his belief that the WorkCover inspector only attended the site of the accident two days after it occurred, when the employer notified WorkCover of the accident.<sup>259</sup>

- 10.52** The Committee notes that regrettably, the NSW Police did not notify WorkCover of their decision not to prosecute the case.<sup>260</sup>

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<sup>256</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p23

<sup>257</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p21

<sup>258</sup> Mr Watson, Evidence, 2 March 2004, pp75-76

<sup>259</sup> Mr Watson, Evidence, 2 March 2004, p76

<sup>260</sup> Mr Watson, Evidence, 2 March 2004, p76

*The case of Ms Lin*

- 10.53** As indicated in Chapter 2, Ms Chun Lin was killed on 19 April 2000 when she was struck by a truck and was crushed on the campus of the University of NSW. WorkCover initially left investigation of the accident to the NSW Police, however, in February 2004, the Director of Public Prosecutions (DPP) advised WorkCover that it would not be taking any actions in regard to the accident. As a result, WorkCover is now reviewing the case to determine whether it should launch an action of its own.
- 10.54** During the hearing on 2 March 2004, the Committee raised with WorkCover representatives the case of Ms Lin, and whether WorkCover should review its procedures when it is a member of the public, not an employee, who dies on a work site. In response, Mr Blackwell noted:

... the Coroner made a decision to refer the matter to the DPP. The DPP subsequently made a decision not to prosecute. That means we would normally wait for the outcome of the Coroner's decision before we take any further action. That is what we are doing in this particular case. I do not believe there is any reluctance at all on the part of WorkCover not to prosecute where we believe we can prosecute and where we believe that we have some reasonable chance of success in terms of prosecution.<sup>261</sup>

*The Intergovernmental Working Party on Public Safety*

- 10.55** To address this issue of public/workplace safety, the Committee notes that the Premier's Department convened an Intergovernmental Working Party on Public Safety in early 2003. The working party includes representatives of WorkCover, the NSW Police, the Department of Sport and Recreation and emergency services.<sup>262</sup>
- 10.56** Following the hearing on 2 March 2004, the Committee placed questions on notice with WorkCover asking whether the Intergovernmental Working Party on Public Safety has finalised the responsibilities of government agencies in respect of public safety. In response, WorkCover indicated:

The issue has not yet been finalised. The Premier's Department is the lead agency.<sup>263</sup>

- 10.57** The Committee believes that this issue is a matter of considerable public importance. However, the Working Party appears to have made little progress to date. This is unacceptable and the Committee believes that this matter should be finalised as soon as possible.

<sup>261</sup> Mr Blackwell, Evidence, 2 March 2004, p77

<sup>262</sup> Submission 29A, WorkCover, p7

<sup>263</sup> WorkCover, Response to Question on Notice from 2 March 2004, p23

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**Recommendation 20**

That the Premier's Department make public the report of the Intergovernmental Working Party on Public Safety when completed, and take urgent steps to finalise, through the Working Party, the responsibilities of government agencies, including WorkCover, in relation to public safety.

**Recommendation 21**

That the CEOs of each Government Agency be responsible for the development and implementation of guidelines outlining the responsibility for public safety. These guidelines should be developed in full consultation with WorkCover, the Premier's Department, employers and the Labour Council of NSW.

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**The time to commence prosecutions**

- 10.58** As indicated previously, s 107 of the *OH&S Act 2000* provides that, generally, proceedings under the *OH&S Act 2000* and OH&S Regulation 2001 must be commenced within two years of the Act. Ms Grant summarised the rules in relation to limitation periods in her evidence on 2 March 2004:

The Act provides for limitation periods. So it is not governed by any general rule. Generally, it is two years from the date of the incident. In the case of coronial proceedings, generally it is two years from the Coroner's findings, provided an appearance of an offence is present in the findings. In respect of notifications, it is two years from the date of the incident, or six months from WorkCover becoming aware, whichever is the later.<sup>264</sup>

- 10.59** In relation to the two year time limit, Mr Ferguson told the Committee that he did not understand the reason for it being two years:

... in terms of prosecution there is some reference to a two year limit. I'm a lay person, as I said, I don't know why there's a two year limit. In other areas of law there is no two year limit. I don't see a need for a two year limit anyway. I would like a better understanding of the issue of the two year limit.<sup>265</sup>

- 10.60** The Committee questioned the WorkCover representatives about the two year time frame during the hearing on 2 March 2004. By way of comparison, Ms Grant informed the Committee that the time limit for personal injury cases is three years. When questioned about possible reasons for the two year limitation period, Ms Grant replied 'that is really a policy matter for the Government'.<sup>266</sup>

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<sup>264</sup> Ms Grant, Evidence, 2 March 2004, p65

<sup>265</sup> Mr Ferguson, Evidence, 17 February 2004, p35

<sup>266</sup> Ms Grant, Evidence, 2 March 2004, p65

**10.61** Many witnesses and submissions expressed concern that it appears WorkCover does not institute proceedings until the two year limit has almost expired. The Bar Association noted that this delay creates ‘considerable and unexplained’ anguish for the family and friends of the deceased.<sup>267</sup> The Bar Association’s submission continued:

The delay in commencement of proceedings involves a significant level of unfairness, which ought to be seen as unacceptable. Delay in the commencement should only be accepted where th[ere] is an exceptional relevant matter than cannot be accommodated within the initial investigation.<sup>268</sup>

**10.62** Mr Peter Remfrey from the NSW Police Association suggested that one result of WorkCover’s slowness is preventing alternatives should WorkCover decide not to prosecute:

One of the issues raised by the unions is the time it takes for WorkCover to make a decision about whether or not they are going to prosecute. Obviously that leaves very little time for the alternative prosecutor, which is the union secretary under the Act, to undertake the relevant investigative processes and prosecute if that is the ultimate outcome.<sup>269</sup>

**10.63** Other practical implications of the delay in commencing prosecutions were outlined in the Bar Association’s submission. They include:

- the information in the brief is often stale
- the persons who might have relevant information regarding the alleged breach will have their memories affected as a consequence of the effluxion of time
- the capacity of a defendant to investigate the matters, the subject of the breach, is often adversely affected by persons having moved on from a defendant’s employment
- records are often hard or impossible to locate
- individuals may be unable to give or incapable of giving evidence a number of years after the particular event thereby excluding them from being cross-examined as to relevant matters going to a legitimate defence
- witnesses, victims and defendants are exposed to unnecessary anguish as a consequence of the delay in the commencement of the proceedings.<sup>270</sup>

**10.64** Employer representatives were also critical of the time it takes WorkCover to commence prosecutions. Mr Goodsell, representing the Australian Industry Group, reflected the concerns of his organisation’s members:

We have a concern, reflected to us by our membership, that anecdotally they feel that WorkCover or the prosecuting arm of it uses all of the two years that it has to prosecute. That is to say, they use up all that time before launching a prosecution. I am aware of statistics that confirm that concern. Of the most recent 20 or 30

<sup>267</sup> Submission 30, NSW Bar Association, p3.

<sup>268</sup> Submission 30, NSW Bar Association, p3.

<sup>269</sup> Mr Remfrey, Evidence, 17 February, p63

<sup>270</sup> Submission 30, NSW Bar Association, p2

prosecutions, more than 90 per cent were launched between 22 and 24 months after the event. ...

**10.65** Mr Goodsell identified two main effects on his member companies of WorkCover's delays in instituting proceedings:

- the ability of a company to garner resources to properly prepare a defence is compromised by the delay, often due to staff mobility and loss of corporate knowledge
- the long delay between the accident and the prosecution means that there are fewer lessons likely to be learnt from the whole process.<sup>271</sup>

**10.66** Mr Pattison from Australian Business Limited (ABL) also cited statistics illustrating the length of time a case can take in the courts. Mr Pattison assumed WorkCover makes a press release at or about the time of a court decision. Looking at 22 press releases, Mr Pattison calculated:

... the shortest date between the period of the incident and the tribunal decision was 2.2 years, the longest was 6.1 and the average was 3.7. So it seems to us that, while the punitive objective of prosecutions is being met, the preventive element is substantially reduced when it takes so long between the event and the decision.<sup>272</sup>

**10.67** The Committee questioned WorkCover about the time it takes for them to institute legal proceedings. Mr Blackwell gave a number of reasons for the length of time, including the complexity of gathering evidence and interviewing witnesses and the amount and quality of evidence required in court to support contested charges in court.<sup>273</sup>

**10.68** A possible solution suggested to the Committee was extending the time period to five years. In response to a suggested five year time limit, Mr Remfrey replied:

We would be happy to see that time line, although we wouldn't like it delayed. There needs to be procedures put in place to accompany an extended timeframe, to ensure that the relevant WorkCover Authority makes a decision in good time. There are some reasons why prosecutions get delayed with injuries being able to settle down and investigations taking longer than they ought, but we would like to see a scenario where somebody who is guilty of an offence under the Act is not prosecuted by the dint of the passage of time. That would be absurd.<sup>274</sup>

**10.69** Mr Pattison also thought that an extended time limit is not the answer, and that improving WorkCover's internal processes would be more beneficial:

A suggested solution at that time was to increase the time limit. We would argue that the answer is not to increase the time limit but to improve the speed with which WorkCover determines whether or not it will commence proceedings.<sup>275</sup>

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<sup>271</sup> Mr Goodsell, Evidence, 2 March 2004, p12

<sup>272</sup> Mr Pattison, Evidence, 2 March 2004, p2

<sup>273</sup> Mr Blackwell, Evidence, 2 March 2004, p65

<sup>274</sup> Mr Remfrey, Evidence, 17 February 2004, p63

<sup>275</sup> Mr Pattison, Evidence, 2 March 2004, p3

**10.70** Indeed, Mr Blackwell also acknowledged that WorkCover needs to speed up its processes that are affecting the timely commencement of prosecutions:

... it is our view that we can do it more quickly than we have in the past. We can and probably should get the filings done well within the two-year period as opposed to shortly before the end of the two-year period.

**10.71** The Committee shares witnesses' concerns that in many instances WorkCover is taking close to two years to initiate proceedings for breaches of OH&S legislation, and is pleased that WorkCover has acknowledged this as a problem and is committed to addressing it. The Committee recommends that WorkCover closely examine the procedures for determining whether to initiate prosecution for ways this process can be streamlined to reduce the amount of time between an accident and commencement of prosecution. Such a review should not initiate any measures that would inhibit the likely success of prosecutions.

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### **Recommendation 22**

That WorkCover closely examine its procedures for determining whether to initiate prosecution for ways the process can be streamlined so as to reduce the length of time between an accident and commencement of prosecution. Such a review should not initiate any measures that would inhibit the likely success of prosecutions.

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## **The strict liability placed on employers under the OH&S legislation**

**10.72** In the hearing on 2 March 2004, the Committee questioned WorkCover officials as to what proportion of prosecutions are contested in the courts, and the proportion of guilty pleas.

**10.73** In its response, WorkCover indicated that the OH&S legislation is relatively simple in the obligations it places on employers and others in the workplace, and that a high proportion of OH&S proceedings end in pleas of guilty. WorkCover suggested that the reasons for this are that:

- WorkCover undertakes thorough investigations and prepares sound prosecutions
- employers often recognise that they have committed an offence and want proceedings to be concluded as quickly and efficiently as possible
- employers recognise that that they may get a discount on their sentence for a plea of guilty. The NSW Court of Criminal Appeal has issued a sentencing guideline recognising that the utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25% discount on sentence: *R v. Thomson and Houlton* (2000) 49 NSWLR 383.<sup>276</sup>

**10.74** However, the Committee was also presented with evidence highly critical of strict liability placed on employers under the OH&S legislation, and rejecting any moves to make compliance by employers any more onerous.

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<sup>276</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p20

- 10.75** In its written submission, the National Electrical Communications Association (NECS) argued that employers will often make a commercial decision to plead guilty to a prosecution brought against them by WorkCover, even where they are advised they have a good defence. The NECS submitted that this is an unfair outcome:

If an employer has in place clear and sound OHS policies and practices and acted in good faith in implementing these, but an employee has acted outside these policies and this has led to an accident, too often the employer is prosecuted for being the one who has failed to ensure OHS at the workplace. This is an unconscionable and unfair outcome and constitutes a clear and unreasonable disincentive to ethical business.<sup>277</sup>

- 10.76** As an extension of this point, NECS submitted that while WorkCover may bring double the number of prosecutions of all the other jurisdictions in Australia combined, statistics from the National Occupational Health and Safety Commission (NOHSC) indicate that this rigorous prosecution system in NSW has not led to better safety outcomes in terms of workplace deaths. Rather, NECS argued that the focus of the OH&S system, and this inquiry, should be on education and prevention strategies, rather than the punitive emphasis on prosecution. In addition, NECS recommended the establishment of a mechanism for an independent review of the circumstances of prosecutions. Such a mechanism should allow a defendant to have confidence that any material presented would be considered independently (of WorkCover) and appropriately.<sup>278</sup>

- 10.77** The Committee notes that similar concerns were raised in hearings. For example, in the hearing on 2 March 2004, Mr Pattison from AIG observed:

Our constituency has more likely described the legislation regime as tough not in relation to the objective of making workplaces safer and reducing workplace injuries, but tough in relation to the absolute liability that falls on employers and the difficulty that many of them face in trying to establish what is a safe system of work and what is not. We would say, therefore, that the issue is not one concerning the adequacy of the legislative framework; rather, it is one of application.<sup>279</sup>

- 10.78** Mr Brack, Chief Executive of Employer First, put a similar position to the Committee during the hearing on 2 March 2004. He argued that there are instances where employers have an impeccable approach to safety, and yet nevertheless due to employee recklessness, are still liable for prosecution under the current OH&S legislation.<sup>280</sup>

- 10.79** Mr Brack also cited the difficulty for employers in mounting a defence under NSW OH&S legislation. He argued that in NSW, 91% of prosecutions are successful, compared to 72% in the UK. Of the 9% that are not successful, Mr Brack argued that many are because of insufficient documentation, meaning that in only 2-4% of prosecutions is a successful defence mounted.<sup>281</sup> As Mr Brack stated:

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<sup>277</sup> Submission 57, NECA, pp1-2

<sup>278</sup> Submission 57, NECA, p2

<sup>279</sup> Mr Pattison, Evidence, 2 March 2004, p2

<sup>280</sup> Mr Brack, Evidence, 2 March 2004, p33

<sup>281</sup> Mr Brack, Evidence, 2 March 2004, p34

... what the legislation says is, if you are a corporation you are deemed guilty. Nowhere else do they deem you guilty. You are not deemed guilty in the criminal law. There is a presumption of innocence. Here there is not. There is no presumption of innocence. You have got to try to defend yourself and the defences themselves are appropriately structured so that effectively you cannot do it.<sup>282</sup>

**10.80** Mr Brack also argued that the sanctions imposed in NSW following a successful prosecution are in excess any other state in Australia, higher than New Zealand, the USA, and higher than the UK, on average.<sup>283</sup>

**10.81** By contrast to this evidence, the Committee notes the position expressed by Mr Ferguson from the CFMEU:

From our point of view we want to see a culture of zero tolerance towards bad safety. Rather than people visiting a site, talking to people, we want to see more action and more enforcement in relation to non-compliance of safety laws. We want to see a greater effort by WorkCover in terms of prosecutions and we also want to see some legislative change to ensure there are effective and meaningful sections, so it is no longer cheaper for employers to break the laws than to pay fines.<sup>284</sup>

**10.82** The Committee addresses this issue further in Chapter 12 on criminal responsibility for workplace deaths.

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<sup>282</sup> Mr Brack, Evidence, 2 March 2004, p40

<sup>283</sup> Mr Brack, Evidence, 2 March 2004, p38

<sup>284</sup> Mr Ferguson, Evidence, 17 February 2004, p31



## Chapter 11 The level and payment of fines

### Introduction

11.1 Term of reference 1(c) for this inquiry required the Committee to inquire into and report on:

the method and monitoring of payment of penalties where an employer has been convicted of an offence relating to a serious accident or death.

11.2 This chapter examines the following issues:

- the level of fines imposed on employers
- the procedure for collecting a fine
- liaison between WorkCover and the State Debt Recovery Office (SDRO)
- the rate of recovery of fines
- “Phoenix” companies.

### The level of fines imposed on employers

11.3 In NSW, responsibility for determining whether a person or corporation is guilty of an offence under the *OH&S Act 2000*, and if so the appropriate penalty, rests with the Industrial Relations Commission (IRC) and the Chief Industrial Magistrate’s Court (CIMC).

11.4 In its supplementary written submission, WorkCover indicated that the penalties in NSW for an offence under the *OH&S Act 2000* are the highest of any jurisdiction. As indicated in Chapter 4, they are:

- \$55,000 for the first offence by an individual
- \$82,500 or two years imprisonment (or both) for a subsequent offence by an individual
- \$550,000 for the first offence by a corporation
- \$825,000 for a subsequent offence by a corporation.<sup>285</sup>

11.5 However, while the current penalty regime in NSW for an injury or death in the workplace is severe, in its written submission, WorkCover cited the following statistics from the NSW Judicial Commission on the fines imposed for fatalities in the workplace under the old *OH&S Act 1983*:

- in 23% of cases, defendants were fined 5% or less of the maximum penalty
- in 48% of cases, defendants were fined 10% or less of the maximum penalty
- in 75% of cases, defendants were fined 20% or less of the maximum penalty

<sup>285</sup> Submission 29A, WorkCover, p3. See also submission 52, Labor Council, p53

- only 9% of cases attracted 50% plus of the maximum penalty or above
- there were no cases that attracted 80% or more of the maximum penalty.<sup>286</sup>

**11.6** In no cases has a person been imprisoned for breach of either the 1983 OH&S legislation or the *OH&S Act 2000*.

**11.7** The issue of excessively lenient fines imposed on employers for deaths in the workplace was raised by a number of parties to the inquiry.<sup>287</sup> The Committee notes in particular the evidence of Mr Ferguson from the Construction, Forestry, Mining and Energy Union (CFMEU):

I know cases where it might cost \$100,000 to provide scaffolding to a site, but it costs \$20,000 if someone is killed, to pay for a fatality. So we want to see effective sanctions that act as real deterrents, to provide for safer workplaces.<sup>288</sup>

**11.8** Mrs McGoldrick had similar concerns about the level of fines imposed by the Courts. In relation to the fine imposed on her son's employer she said in evidence:

The court did not use what was available to it. The fine could have been a lot larger. It could have gone through a different court. The court system does not work either because the judges are not using what is open to them. They set it on a precedent from another case. Until they really start to set something that is going to work, it will keep happening.<sup>289</sup>

**11.9** The Committee asked WorkCover representatives during the hearing on 2 March 2004 whether WorkCover ever appeals a sentence. In response, WorkCover indicated that it has made a number of appeals in the IRC on sentences and acquittals, but that such appeals, like other Crown appeals, must be exercised with caution, as was noted by Kirby J in *Dinsdale v The Queen [2000] HCA 54*. WorkCover also noted that the right to appeal OH&S proceedings was not available to WorkCover until section 196 of the *Industrial Relations Act 1996* commenced in September 1996.<sup>290</sup>

**11.10** WorkCover provided the Committee with some recent examples of WorkCover appeals to the IRC on sentence and acquittal, all under the 1983 OH&S Act.<sup>291</sup> These include:

- *Inspector Neil Buggy v Weathertext P/L*, 2003<sup>292</sup> – successfully appealed sentence. Fine of \$18,750 increased to \$70,000
- *Legge v Coffey Engineering P/L (No 3)*, 2002<sup>293</sup> – successfully appealed dismissal of charges. New fine \$15,000 plus \$20,000 costs

<sup>286</sup> Submission 29, WorkCover, p19

<sup>287</sup> See for example the NUW, Submission 47, p3, also Mr Keenan, Evidence, 16 February 2004, p23

<sup>288</sup> Mr Ferguson, Evidence, 17 February 2004, pp31-32

<sup>289</sup> Mrs McGoldrick, Evidence, 16 February 2004, p15

<sup>290</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p13

<sup>291</sup> WorkCover, Response to Questions on Notice from 15 March 2004, p23

<sup>292</sup> [2003]NSWIRComm273 proceeding under s16(1) OH&S Act 1983

<sup>293</sup> [2002]NSWIRComm30 proceeding under s15(1) OH&S Act 1983

- *Vierow v Ridge Consolidated P/L (No 2)*, 2002<sup>294</sup> – successfully appealed acquittal. New fine \$105,000 plus costs
- *Batty v Graincorp Operations Limited*, 2002<sup>295</sup> - successfully appealed sentence. Fine of \$26,000 increased to \$65,000
- *Bullitude v Grice Constructions P/L*, 2002<sup>296</sup> - successfully appealed acquittal. New fine \$10,000 plus \$6,000 costs
- *Inspector Ian Lancaster v Burnshaw Construction P/L*, 2002<sup>297</sup> – successfully appealed sentence. Fine of \$13,000 increased to \$26,000.

### Guideline judgment

- 11.11** In response to this issue, the Committee placed on notice with WorkCover whether there has been any consideration given to approaching the Attorney-General for him to apply to the IRC for a guideline judgment under the *OH&S Act 2000* in an attempt to reduce the incidence of excessively lenient penalties and provide greater consistency in sentencing offenders who breach the *OH&S Act 2000*.
- 11.12** In its response, WorkCover indicated that in August 2002, the Minister made a preliminary approach to the Attorney-General in relation to a sentencing under s 125 of the *OH&S Act 2000*. In response, the Attorney-General indicated that WorkCover should contact the Crown Advocate directly for advice in relation to the application. Accordingly, WorkCover sent a brief to the Crown Advocate on 11 November 2002 on this matter and meetings were held between the Crown Advocate and WorkCover during 2003.<sup>298</sup>
- 11.13** Mr Blackwell informed the Committee that WorkCover received the following advice from the Crown Advocate:
- There is quantitative evidence of a pattern of excessive leniency. The evidence suggests that in between two-thirds and three-quarters of workplace death cases, sentencing tribunals have been consistently imposing sentences no greater than 20% of the available maximum. At the same time, the legislature has been substantially increasing those available maximum sentences. In our opinion, the qualitative analysis and tabulations of the details of offences also point to a pattern of excessive leniency in respect of sentencing under ss 15 and 16 of the *OH&S Act 1983*.<sup>299</sup>
- 11.14** In light of this advice and in response to community concern regarding the level of penalties available and awarded against companies and individuals, in November 2003 the Minister for Commerce, the Hon John Della Bosca MLC, appointed a panel of eminent legal practitioners

<sup>294</sup> [2002]NSWIRComm254 proceeding under s15(1) OH&S Act 1983

<sup>295</sup> [2002]NSWIRComm49 proceeding under s15(1) OH&S Act 1983

<sup>296</sup> [2002]NSWIRComm234, see also *Bullitude v Grice Constructions P/L* [2002]NSWIRComm20 proceeding under s15(1) OH&S Act 1983

<sup>297</sup> [2002]NSWIRComm319 proceeding under s15(1) OH&S Act 1983

<sup>298</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p19

<sup>299</sup> Cited in Submission 29, WorkCover, p19

to advise him on the OH&S legal framework, including in relation to workplace fatalities. The panel comprises Mr Peter Hall QC, Mr Adam Hatcher (barrister), Mr Adam Searle (barrister) and Prof Ron McCallum, Dean of the Law School at the University of Sydney. The panel has indicated that it needs until 31 May 2004 in order to report to the Minister.<sup>300</sup>

**11.15** The Panel has been asked to address the following questions:

1. A minor breach of OHS obligations may have consequences ranging from death to minor injury; conversely a substantial breach may not give rise to harm. What is the best legislative method of reconciling the objective seriousness of an OHS offence with the gravity of its consequences while retaining strict liability for offences in a manner consistent with the rest of the Act?
2. What is the appropriate penalty for an offence resulting in a workplace death both in respect of corporations and individuals, taking into consideration comparative penalties in other States and in other legislative schemes such as the Crimes Act 1900 and EPA legislation?
3. The OHS legislation currently provides for different penalties for first and subsequent convictions for offences. In relation to an OHS offence resulting in death, is there a rational jurisprudential basis to maintain this difference?
4. With respect to sentencing, how would the doctrine of precedent operate in relation to a possible new offence, such as that resulting in a workplace death? Are courts necessarily bound by existing principles when sentencing under a new provision or is there scope to depart to some extent from existing principle?
5. What are the principal aggravating factors cited by courts when sentencing under OHS? Of these factors what are of such fundamental importance to OHS sentencing principles that consideration should be given to legislating them?
6. Are there any relevant aggravating factors used by courts in sentencing under the general law or other legislative schemes, such as those for offences under EPA legislation, that could be utilised by courts when sentencing in relation to fatalities under OHS?
7. What would be the legal implications of moving OHS fatality matters to the District Court or Supreme Court?
8. What would be the legal implications of moving appeals in OHS fatality matters to the District Court or Supreme Court?
9. What is the scope of the term “all due diligence” under section 26 of the OHS Act?
10. What is the scope of the term “concerned in the management of the corporation” under section 26 of the OHS Act?
11. Do existing defences under section 26 frustrate, to an extent if any, the purpose of that section?<sup>301</sup>

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<sup>300</sup> Submission 29, WorkCover, pp 19-20. See also Submission 29A, WorkCover, pp3-4

<sup>301</sup> Submission 29A, WorkCover, p3

- 11.16** The Committee notes that the legal panel has not specifically been asked to comment on a possible guideline judgment. The breadth of the Minister's instructions does allow the panel to consider this important option in ensuring appropriate penalties are given to offenders of OH&S legislation.

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### Recommendation 23

That the legal panel appointed by the Minister for Commerce to advise the Government on the OH&S legal framework specifically address the suitability of a guideline judgment in relation to penalties for breach of the *OH&S Act 2000*.

Following the advice from the legal panel, that the Minister for Commerce apply to the Attorney General for a guideline judgment under s 125 of the *OH&S Act 2000*.

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### Victim impact statements

- 11.17** WorkCover noted in its written submission that under Part 2 of the *Crimes (Sentencing Procedure) Act 1999* the IRC can receive and consider a victim impact statement 'where certain offences under the *OH&S Act* result in death or actual physical bodily harm.'<sup>302</sup> A victim impact statement can be received and considered by the IRC at any time after the offender is convicted but before the sentence is delivered. The victim impact statement may be read in court by the victim, a member of the victim's family or some other representative.<sup>303</sup>
- 11.18** In response to a question on notice from the 1 March hearing, WorkCover acknowledged that to date, no victim impact statements have been tendered to the IRC.<sup>304</sup> In evidence given during the hearing on 15 March 2004, the Director of WorkCover's legal branch, Ms Bernadette Grant, explained to the Committee why this is so:

We are implementing a process now. We have some matters coming up in April and throughout 2004. We will make contact with families and offer them an information pack. ... The relevant provision affecting the Industrial Relations Commission was inserted to coincide with the commencement of the 2000 Act. It came into force on 1 September 2001.<sup>305</sup>

- 11.19** The Committee believes that the opportunity to make a victim impact statement may benefit victims and/or their families by providing a means by which they can tell the court the impact of the accident on their lives. The use of victim impact statements may also effect the level of fine awarded by the IRC for breaches of the *OH&S Act 2000* that result in death or actual

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<sup>302</sup> The *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2004* extends the victim impact statement scheme to all courts. This Act has not yet commenced. Once commenced it will have the effect of enabling the Industrial Magistrates Court to consider victim impact statements where the requirements of Part 2 are satisfied.

<sup>303</sup> Submission 29, WorkCover, p20

<sup>304</sup> WorkCover, Response to Questions on Notice from 2 March 2004, p1

<sup>305</sup> Ms Grant, Evidence, 15 March 2004, p30

physical bodily harm. The Committee therefore recommends that WorkCover offer victims and/or their families the opportunity to make a victim impact statement whenever the requirements of the Part 2 of the *Crimes (Sentencing Procedure) Act 1999* are satisfied, and that WorkCover should tender these statements at the appropriate time during court proceedings for consideration by the Court in sentencing the offender.

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#### **Recommendation 24**

That WorkCover offer victims and/or their families the opportunity to make a victim impact statement whenever the requirements of the Part 2 of the *Crimes (Sentencing Procedure) Act 1999* are satisfied, and that such statements be tendered at the appropriate time during court proceedings for consideration by the court in sentencing the offender.

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#### **The case of Mr McGoldrick**

**11.20** During her evidence in the hearing on 16 February 2004, Mrs McGoldrick raised concern about the size of the fine imposed on Mr Poleviak following the death of her son Dean McGoldrick:

The result of the WorkCover prosecution was that John Poleviak was fined a miserable \$20,000 by the chief industrial magistrates court. This was cheaper than providing a fall protection system. How fair is that? My son lost the rest of his life and John Poleviak still has his freedom. This Court result is a joke<sup>306</sup>

**11.21** The case of Mr McGoldrick was prosecuted in the CIMC, which has a maximum penalty cap of \$55,000.<sup>307</sup>

**11.22** Mr Blackwell, CEO of WorkCover, raised the case of Mr McGoldrick and the fine imposed on Mr Poleviak in the hearing on 17 February 2004. Mr Blackwell indicated that at the time, it was decided to prosecute the case in the CIMC because both the IRC and the CIMC would be bound by the *Fines Act 1996*, and would presumably have imposed similar penalties.

**11.23** However, Mr Blackwell indicated that since July 2002, it has been WorkCover's policy to commence all prosecutions in relation to workplace fatalities in the IRC, rather than the CIMC, on the basis that the IRC is likely to impose a larger fine where employers are found to be in breach of their obligations.<sup>308</sup>

**11.24** The Committee welcomes this decision taken by WorkCover to undertake all future prosecutions in the IRC. It is a matter of regret that this decision was not taken earlier, prior to the prosecution of Mr Poleviak for the death of Mr McGoldrick.

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<sup>306</sup> Mrs McGoldrick, Evidence, 16 February 2004, p5

<sup>307</sup> Submission 28, CFMEU, p12

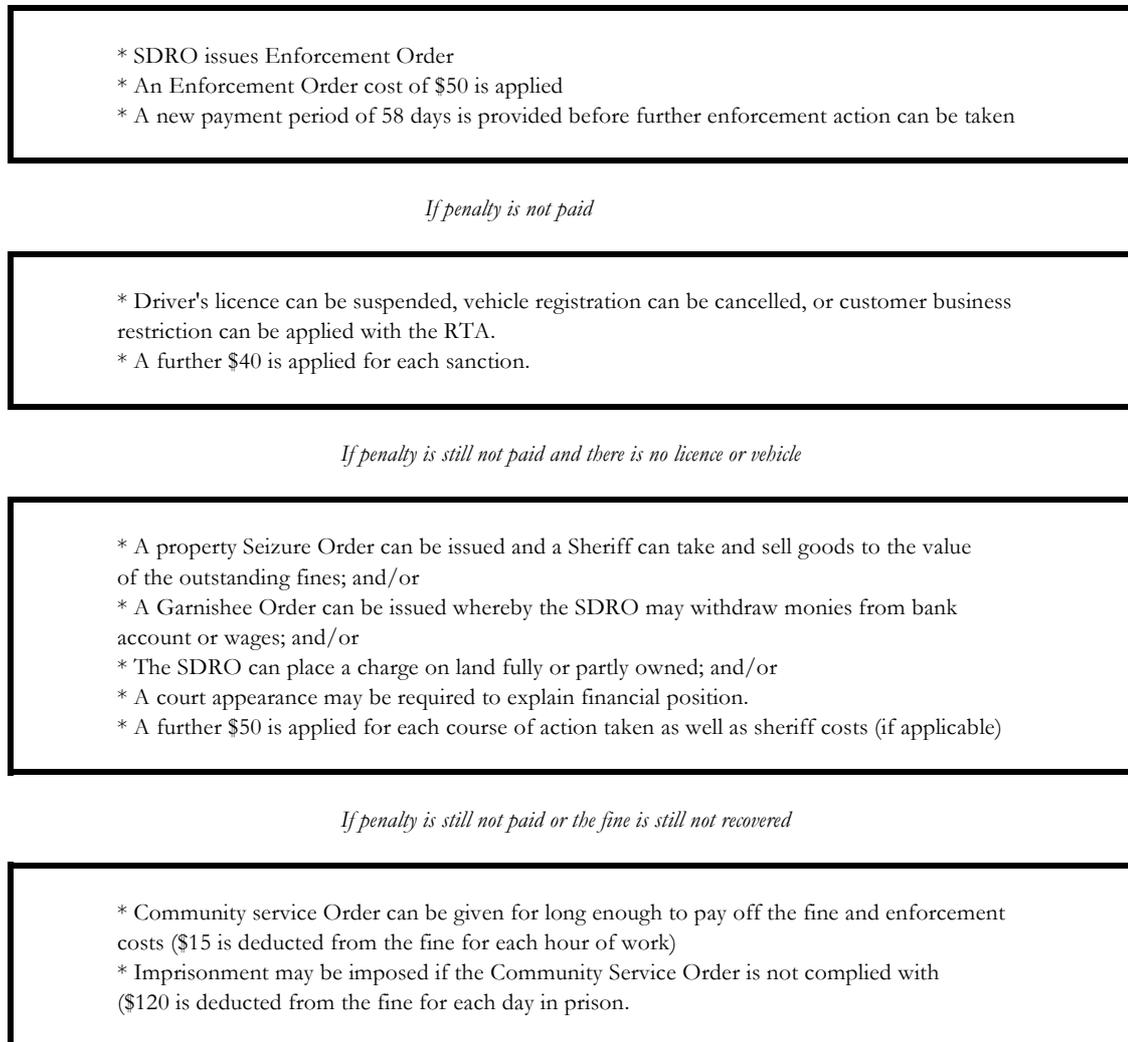
<sup>308</sup> Mr Blackwell, Evidence, 17 February 2004, p6

## The procedure for collecting a fine

- 11.25** The Committee notes that WorkCover has no express statutory role in relation to the enforcement of court imposed sanctions or the recovery of unpaid penalties. Under the *Fines Act 1996*, it is the courts which set the penalties and the courts and the SDRO who recovers the moneys.
- 11.26** The procedures for collecting a fine imposed by a court, including a fine imposed by a court on an employer convicted of an offence regarding a serious injury or death in the workplace, are set out in section 5 of the *Fines Act 1996*:
- a fine imposed by a court is payable within 28 days of its imposition
  - the person on whom the fine is imposed is to be notified of the fine, the arrangements for payment and the actions that may be taken under the Act to enforce the fine
  - a court registrar may allow further time to pay the fine on the application of the person
  - if payment of the fine is not made by the due date, a Court Enforcement Order may be made against the person. If the person does not pay the amount (including the enforcement costs) within 28 days, enforcement action authorised by the Act may be taken.
- 11.27** Under sections 7 and 13 of the *Fines Act 1996*, if a fine imposed by a court is not paid within 28 days and no alternative arrangements have been made, the Registrar of the relevant court is to refer the matter to the SDRO.<sup>309</sup> The SDRO in turn has the power to:
- make a Court Enforcement Order
  - suspend or cancel driver's licences
  - cancel vehicle registration
  - seize property
  - garnishee debts, wages and salary
  - make a person go to court to explain their financial situation
  - place a charge on land
  - order community service.
- 11.28** The Committee presents below in Figure 11.1 a flow chart of the full process by which the SDRO recovers unpaid fines referred to it by the courts. The chart is taken from WorkCover's written submission.

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<sup>309</sup> Submission 29, WorkCover, p27

**Figure 11.1** SDRO process for recovering unpaid fines

Source: Submission 29, *WorkCover*, pp 28-29

**11.29** In its written submission, the SDRO indicated that it applies the above process for all unpaid fines, including convictions that relate to injury and death in the workplace, with limited exceptions such as juveniles. The nature of the fine or offence is not critical to the timing or method of enforcement.<sup>310</sup> This was reiterated by Mr Robertson, Director of the SDRO, during the hearing on 1 March 2004:

We receive the fine or infringement referred to us, but the nature of the fine or the infringement is not the issue. In some cases it is not even immediately evident on data that we are given. The effect is that we typically enforce matters as we receive them and that could be from any agency. Certainly as to the matters that we have from WorkCover, the offence does not indicate consequential injury or death.<sup>311</sup>

<sup>310</sup> Submission 36, SDRO, p2

<sup>311</sup> Mr Robertson, Evidence, 1 March 2004, p40

**11.30** The SDRO also indicated in its supplementary written submission that there are a number of principles for selecting enforcement sanctions based on the *Fines Act 1996*. For example:

- if the defaulter has provided an affidavit of financial circumstances to the SDRO as part of a time to pay (TTP) application, and then defaults on that TTP, it is likely that the SDRO would have information about the defaulter's employer and bank accounts, and would issue a garnishee order in those circumstances
- for property seizures, the SDRO does not direct the Sheriff's officers to an address unless the address has been confirmed by a source other than the SDRO. The SDRO has access to some government and publicly available databases and uses these in an attempt to confirm the address details of a fine defaulter
- if the SDRO has only one address for a defaulter and no information about assets, accounts or employment details, it can issue an examination notice to the defaulter. This notice requests information from the fine defaulter and if complied with, avoids the need to issue a court summons. With such information the SDRO can make a decision about the application of the most appropriate sanction.<sup>312</sup>

### **Liaison between WorkCover and the State Debt Recovery Office**

**11.31** The Committee notes that while WorkCover has no express statutory role in relation to the enforcement of court imposed sanctions or the recovery of unpaid penalties, nevertheless, it clearly has an interest in the recovery of fines. As stated by Mr Blackwell during the hearing on 17 February 2004:

In short, we do not have a statutory responsibility in relation to fine collection, however, it is something which is clearly of interest to us and clearly of interest to the families concerned ...<sup>313</sup>

**11.32** Currently, the SDRO works closely with WorkCover in monitoring the recovery of outstanding fines. In its written submission, the SDRO indicated that:

WorkCover now provides the SDRO with an updated list of outstanding fines relating to breaches of occupational health and safety legislation. The SDRO regularly monitors the lists provided and, where possible, expedites enforcement action against individuals and companies that do not meet their obligation. This strategy will provide a regular update on the progress of enforcement action against all non-payment and will assist in situations such as that presented by Mr Poleviak as director of Metal Gutter Fascia Services Pty Ltd.<sup>314</sup>

**11.33** In return, the SDRO indicated in its written submission that it has undertaken a number of initiatives to assist WorkCover, including:

- regular reports on the current status of approximately 1,000 WorkCover matters

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<sup>312</sup> Submission 36A, SDRO, pp2-3

<sup>313</sup> Mr Blackwell, Evidence, 17 February 2004, p12

<sup>314</sup> Submission 36, SDRO, p2

- a single point, easy access “hotline” for WorkCover officers to contact the SDRO, staffed by a SDRO client contact officer who is briefed on WorkCover matters
- a focus on WorkCover prosecutions to ensure that timely and appropriate sanctions are applied to the relevant fines.<sup>315</sup>

**11.34** In order to formalise these contacts between WorkCover and the SDRO, the Committee notes that WorkCover is currently in the process of developing an enforcement protocol between itself, the Attorney-General’s Department, the Industrial Relations Commission, Local Courts and the SDRO. As stated by Mr Nugent, Deputy Director of the SDRO, during the hearing on 1 March 2004:

WorkCover has been consistent since day one that I have been with the State Debt Recovery Office in asking us for reports and an automated system of reporting of information. We have been doing what we call ad hoc reporting, that is, basically at their request. The protocol we have been working on is a more systemic process of doing checks every month against all the fines that WorkCover has outstanding.<sup>316</sup>

**11.35** WorkCover provided the Committee with a copy of the draft enforcement protocol as part of its response to question on notice arising out of the hearing on 2 March 2004.

**11.36** The Committee welcomes this initiative and earnestly hopes that it will assist WorkCover officers when liaising with workers injured at the workplace and the families of workers killed in the workplace.

### **The rate of recovery of fines**

**11.37** In its written submission, WorkCover cited data indicating that between 1 July 1995 and 30 June 2003, 88% of fines totalling \$40,600,000 imposed by the courts for breaches of the *OH&S Act 2000* had been recovered. In addition, between 1 July 1999 and 30 June 2003, 85% of fines totalling \$7,276,590 imposed by the courts for workplace fatalities were recovered.<sup>317</sup>

**11.38** In the hearing on 17 March, the Committee raised these figures, and requested from Mr Blackwell a further breakdown of the payment of fine payments by individual cases, as opposed to the proportion of moneys paid. In its response, WorkCover indicated that:

- over the three year period from 1 July 2000 to 30 June 2003, 80% of employers found to be in breach of the *OH&S Act 2000* had paid their fines. This represented 928 fines totalling \$23.9 million
- over the four year period from 1 July 2000 to 30 June 2003, there were 85 fines imposed by the Courts for workplace fatalities, of which 67 had been paid in full, eight were being paid in instalments, and 10 were with the SDRO for recovery.<sup>318</sup>

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<sup>315</sup> Submission 36, SDRO, pp2-3

<sup>316</sup> Mr Nugent, Evidence, 1 March 2004, p40

<sup>317</sup> Submission 29, WorkCover, p29

<sup>318</sup> Tabled Document, WorkCover NSW, ‘Summary - Recommendations – Coroner’, 17 December 2002, pp 4,7

- 11.39** The Committee also notes that in its supplementary written submission dated 1 March 2004, the SDRO indicated that as at 1 March 2004, it had some 135 WorkCover prosecutions<sup>319</sup> under management, of which 100 were against companies.<sup>320</sup>
- 11.40** Mr Nugent expanded on these figures during the hearing on 1 March 2004. Mr Nugent indicated that the total amount owing in the 135 prosecutions under management was \$3.8 million. However, he also indicated that of the 135 cases, 100 related to companies, of whom 73 were unlikely to pay, representing \$1.99 million in unpaid moneys. Of the 73 companies, 33 were under external administration, 35 were deregistered, and 5 had either changed their names or involved other data discrepancies.<sup>321</sup>
- 11.41** The Committee notes evidence from WorkCover's written submission that in 2002/03, WorkCover inspectors issued 1259 penalty notices and conducted 462 prosecutions with a conviction rate of 96%, a total of over 1700 matters all up.<sup>322</sup> Based on this figure over 1700 matters, the 135 matters outstanding at 1 March 2004 indicates a high rate of fine recovery.
- 11.42** That said, the Committee acknowledges that any non-payment of a fine, however rare, adds to the suffering of the individual family affected. Accordingly, it is very important that the SDRO continues to work to recover fines in full wherever possible.

#### **Recovery of the fine imposed on Metal Gutter Fascia Services Pty Ltd and Mr Poleviak**

- 11.43** Particular concerns were raised during the inquiry in relation to payment of the \$20,000 fine imposed on Metal Gutter Fascia Services Pty Ltd and the owner of the company, Mr Poleviak, following the death of Mr McGoldrick. In particular, the Committee notes the evidence of Mrs McGoldrick:

I have since been informed that John Poleviak has only paid a paltry \$1800.00 towards the fine ... The newspapers inform me that John Poleviak appears to be doing OK. He has a brand new Harley-Davidson motorbike – a gift from his wife. He is also noted to have been working around the Tamworth area. He is obviously drawing some sort of income and does not appear to be in financial difficulty.<sup>323</sup>

- 11.44** In its written submission, the SDRO indicated that the full Court Order in this matter was made on 25 May 2001 in the Downing Centre Local Court. The order, made under the *Occupational Health and Safety Act 1983*, stated:

The defendant is convicted, but no penalty provided the defendant company pays \$20,000, in default of the company failing to pay, the defendant is liable for fine in case number 20031026/00/2.<sup>324</sup>

<sup>319</sup> WorkCover prosecutions constituted only a small fraction of the total 2.8 million fines that the SDRO had under management at 1 March 2004.

<sup>320</sup> Submission 36A, SDRO, p2

<sup>321</sup> Mr Nugent, Evidence, 1 March 2004, pp40-42

<sup>322</sup> Submission 29, WorkCover, p14

<sup>323</sup> Submission 26, Mrs McGoldrick, p2

<sup>324</sup> Cited in submission 36, SDRO, p2

- 11.45** In May 2002, the fine against Metal Gutter Fascia Services Pty Ltd was referred to the SDRO by the registrar of the Downing Centre Local Court after the company failed to comply with an instalment payment arrangement. The SDRO immediately issued an Enforcement Order against the company, however in August 2002, the Insolvency and Trustees Service of Australia advised the SDO that Metal Gutter Fascia Services Pty Ltd had gone into liquidation.<sup>325</sup> The Committee understands that at that time, the matter lapsed.
- 11.46** It was only in October 2003, 2½ years after the making of the Court Order in May 2001, that the SDRO became aware, following representations from WorkCover, that the Court Order of 25 May 2001 also made Mr Poleviak liable for the outstanding \$20,000 following the failure of Metal Gutter Fascia Services Pty Ltd to pay.<sup>326</sup> In the hearing on 1 March 2004, Mr Nugent commented:
- The enforcement order was unusual for courts and, to draw on my experience, it was very unusual for even the courthouse and the court process ... the company named in the fine was referred to the State Debt Recovery Office and then the court withdrew that referral from the State Debt Recovery Office when it realised there was an order that basically made the individual liable. Once we had worked out what the issue was, they then re-referred the fine for Mr Poleviak.<sup>327</sup>
- 11.47** The SDRO issued a court Fine Enforcement Order against Mr Poleviak on 28 October 2003.<sup>328</sup>
- 11.48** The Committee understands that this matter is still proceeding, and that there is no statute of limitation on the collection of the fine against Mr Poleviak. At present, Mr Poleviak is under a TTP arrangement, paying \$200 a month off the fine, pending full payment by Mrs Poleviak, who has undertaken to meet the outstanding fine through the sale of personal assets (a house). The SDRO has seen a copy of a contract of sale on the house to validate that the sale is going ahead.<sup>329</sup>

### “Phoenix” companies

- 11.49** The issue of “phoenix” companies, was an issue of particular concern raised during the inquiry in relation to the collection of fines.
- 11.50** The term “phoenix” companies refers to companies which deliberately go into receivership in order to avoid their legal obligations – in this context to workers or the families of workers who have been injured or killed while working for the company. In turn, the company simply begins operation under a different name, with the assets transferred to a different director.

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<sup>325</sup> Submission 36, SDRO, pp2-3

<sup>326</sup> Mr Nugent, Evidence, 1 March 2004, p44

<sup>327</sup> Mr Nugent, Evidence, 1 March 2004, p44

<sup>328</sup> Submission 36, SDRO, pp2-3

<sup>329</sup> Mr Nugent, Evidence, 1 March 2004, p47

**11.51** The Committee notes in particular the evidence of Mr Henry from the Australian Manufacturing Workers Union (AMWU) during the hearing on 17 February 2004 in relation to “phoenix” companies:

... we currently have problems in New South Wales where companies enter into receivership leaving workers who may be affected by diseases or be killed or seriously injured on the work site without recourse.<sup>330</sup>

**11.52** Mr Ferguson also expressed his concern about “phoenix companies” during his evidence on 17 February 2004:

One would think if you kill, you’re penalised, our costs go up – that’s not the case. You fold your business. WorkCover doesn’t track it. You set up another company. I know one building company that’s had twenty companies. They used to be the directors. Then they used their wife as the director. I think they’re now using their grandkids as the directors of the building company. They don’t pay the fines. They don’t pay the taxes. They don’t pay the worker’s compensation premiums. They rip off the system and it becomes a spiral where the cheats are rewarded with contracts, survive and grow in the industry and good companies don’t survive.<sup>331</sup>

**11.53** The issue of “phoenix” companies was addressed in some detail in the *Final Report of the Royal Commission into the Building and Construction Industry*, released in August 2002. The Royal Commissioner, the Honourable Terence Cole QC found in relation to “phoenix” companies:

- there appears to be no clear guidelines at the Commonwealth level as to which Commonwealth agencies are responsible for detecting and policing fraudulent “phoenix” company activity in the building and construction industry. Accordingly, the Commissioner recommended the establishment of guidelines on the separate responsibilities of the major agencies, particularly Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO), in combating fraudulent “phoenix” company activity
- there is evidence of persons associated with fraudulent “phoenix” company activity in the building and construction industry being appointed as directors of other companies in the industry, although they are bankrupt and disqualified to act as directors. Accordingly, the Commissioner recommended that ASIC implement measures to check all new company officers against the National Personal Insolvency Index, to ensure that new company directors have not been previously declared bankrupt
- there is evidence of low penalties being imposed by the courts where persons have been convicted of an offence in relation to “phoenix” company activity in the building and construction industry. Accordingly, the Commissioner recommended that the Commonwealth consider an increase in the maximum penalties provided in the *Corporations Act 2001 (Cth)* for offences that may be associated with fraudulent “phoenix” company activity
- the *Corporations Act 2001 (Cth)* gives ASIC the power to disqualify a person from managing a corporation defined in s 206F of the *Corporations Act 2001 (Cth)* if the

<sup>330</sup> Mr Henry, Evidence, 17 February 2004, p59

<sup>331</sup> Mr Ferguson, Evidence, 17 February 2004, p37

person in question has been an officer of two or more corporations which have been wound up and subject to a liquidator's report under s 553(1) of the *Corporations Act 2001 (Cth)*. The Commissioner recommended, however, that this power to disqualify a person from managing a corporation be made available to ASIC after a person had only one previous placement as an officer of a corporation which has been wound up.<sup>332</sup>

- 11.54** In its supplementary submission, WorkCover indicated that as part of the NSW Government's response to the Royal Commission into the Building and Construction Industry, WorkCover and the SDRO are working with other law enforcement agencies, including ASIC and the ATO, in the sharing of information to target "phoenix" company activity. As part of this initiative, WorkCover indicated that it would refer information to ASIC and ask it to disqualify directors of "phoenix" companies from holding office, and/or participating in the administration of companies.<sup>333</sup>
- 11.55** The Committee welcomes this initiative. To assess its ongoing impact, the Committee believes that WorkCover should report to Parliament each year the names of former directors of "phoenix" companies that have been disqualified from holding office by ASIC, when acting on information referred to it by WorkCover.

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### **Recommendation 25**

That WorkCover report to Parliament each year the names of former directors of "phoenix" companies that have been disqualified from holding office by ASIC, when acting on information referred to it by WorkCover.

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<sup>332</sup> *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 1, Summary of Findings and Recommendations, 2002, pp108-110

<sup>333</sup> Submission 29A, WorkCover, pp 8-9. See also Mr Blackwell, Evidence, 15 March 2004, pp62-63

## Chapter 12 Criminal responsibility for workplace deaths

In this chapter the Committee examines the current manslaughter laws in NSW, and their limited application to corporations. It also looks at arguments for and against the introduction of a new offence in NSW, drawing on the experience of the ACT and Victoria, and some other non-legislative options for increasing corporate responsibility for occupational health and safety standards. The focus of this chapter is on increasing the responsibility of employers and corporations for ensuring the occupational health and safety of their employees.

### Introduction

- 12.1** The penalties available under the *OH&S Act 2000* are discussed in Chapter 12. Although witnesses generally agreed that the *OH&S Act 2000* is very comprehensive, many were disappointed with its application and the penalties received for breaching the Act. Prosecutions under the *OH&S Act 2000* were thought by some, especially the families of victims of industrial accidents, to be ineffective in deterring future life-threatening breaches of OH&S legislation.
- 12.2** An alternative that the Committee considered was the criminal law and in particular the common law relating to manslaughter. The Committee heard that there has not been a successful prosecution for manslaughter where the death occurred in a workplace situation. Responding to this, many participants in the inquiry called for the introduction of a new manslaughter offence specifically targeted at employers whose gross negligence results in the death of a worker. The Committee also heard a lot of evidence opposing the creation of a new offence of industrial manslaughter.

### What is meant by the term ‘industrial manslaughter’?

- 12.3** The term ‘industrial manslaughter’ has been used throughout this inquiry without a clear understanding of what it means. In their submission, the NSW Road Transport Association (NSWRTA) acknowledged that the term had not yet been properly defined:

What the term ‘industrial manslaughter’ means will ultimately depend upon the enacted legislation and the jurisdiction that enforces such laws. Generally, the term refers to workplace related homicide that leads to criminal prosecution and potentially the imposition of a penal sentence upon conviction.<sup>334</sup>

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<sup>334</sup> Submission 43, NSW Road Transport Association, p3

- 12.4 The Australian Manufacturing Workers Union (AMWU) referred to ‘industrial manslaughter’ as:

Legislation that will in future hold corporations and/or senior offices liable for a charge of Industrial Manslaughter where the decision (or omission of a decision) by the boardroom or senior management results in the death of an employee.<sup>335</sup>

### Preferred definition – corporate manslaughter

- 12.5 The Committee agrees with the need to clarify what stakeholders are referring to when using the term ‘industrial manslaughter’. When most people refer to ‘industrial manslaughter’ they are really advocating a mechanism by which corporations and their directors/senior officers can be held criminally responsible for gross negligence resulting in death. Although this usually occurs in a workplace or industrial setting, the principles are not limited to workplaces and could apply wherever the gross negligence of a corporation results in death. The term ‘corporate manslaughter’ encompasses all situations including industrial deaths and is, in the Committee’s view, a more inclusive and therefore more appropriate term than ‘industrial manslaughter’.

## Current manslaughter laws in NSW

- 12.6 ‘Manslaughter’ is defined in section 18 of the NSW *Crimes Act 1900 (Crimes Act)* to mean all instances of punishable homicide other than murder.<sup>336</sup> As explained by Mr Nicholas Cowdery, NSW Director of Public Prosecutions (DPP), ‘it is a common law offence that has been developed over the centuries’ and ‘can be committed in a huge variety of circumstances’.<sup>337</sup> Section 24 of the *Crimes Act* provides for a maximum penalty of twenty-five years imprisonment for a person convicted of the crime of manslaughter.
- 12.7 Manslaughter can be voluntary or involuntary. ‘Voluntary’ manslaughter refers to situations where a partial defence such as provocation, substantial impairment by abnormality of mind (diminished responsibility) or excessive force used in self defence is relied on to reduce a charge of murder to manslaughter. ‘Involuntary’ manslaughter occurs when the accused causes the death of a person but does not have the requisite mental element (*mens rea* or ‘guilty mind’) for murder. There are two types of involuntary manslaughter:

- manslaughter by unlawful and dangerous act carrying with it an appreciable risk of injury

<sup>335</sup> Correspondence from Mr Paul Bastian, State Secretary, AMWU, 11 February 2004, p3

<sup>336</sup> *Crimes Act 1900* (NSW), s18(1)(b) Under section 18(1)(a) ‘murder’ is defined in the following way:

Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with the intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years

<sup>337</sup> Mr Nick Cowdery QC, Director of Public Prosecutions, Evidence, 15 March 2004, pp 37-38

- manslaughter by criminal negligence involving such a high risk that death or serious bodily injury would follow the act/omission of the accused so as to merit criminal punishment.<sup>338</sup>

**12.8** Mr Cowdery explained that, in relation to workplace deaths, manslaughter by criminal negligence is the most appropriate category.<sup>339</sup> In their submission the AMWU agreed that ‘this aspect of manslaughter ... is most likely to form the basis of a charge against a corporation’. The submission also explained the elements of this category of involuntary manslaughter very clearly:

The elements of this offence [manslaughter by criminal negligence] are that the accused:

- (a) was under a duty of care for the deceased
- (b) was grossly negligent (or perhaps reckless) and failed to perform that duty; and
- (c) as a result of the failure to perform the duty, whether through act or omission, death was occasioned or accelerated.<sup>340</sup>

**12.9** The Committee heard a lot of evidence that the current manslaughter laws are not appropriate for prosecuting corporations whose negligence has resulted in the death of a worker. The problems presented to the Committee are explained in the following paragraphs.

### **Reasons for the lack of successful manslaughter prosecutions**

**12.10** To date, there has been no successful prosecution of an individual for manslaughter arising from a workplace fatality.<sup>341</sup> Reasons given for this lack of successful prosecution include:

- the high level of negligence, and the standard of proof, required to prove manslaughter by gross negligence
- the difficulty in attributing criminal liability to a corporation

**12.11** The effect of these difficulties is that under the current manslaughter laws, co-workers whose gross negligence results in the death of a colleague may be convicted under common law of manslaughter. However, the offence of manslaughter does not apply as easily to a corporation. As Mr Bastian, Secretary, (AMWU) claimed:

where the common law fails now is that the larger the corporation, the higher up the tree you go, the more likely it is that you will not be charged under the common law provisions.<sup>342</sup>

<sup>338</sup> The Honourable Mervyn Finlay QC, *Review of the law of manslaughter in New South Wales*, April 2003, para 9.1

<sup>339</sup> Mr Cowdery, DPP, Evidence, 15 March 2004, p 37

<sup>340</sup> Submission No 37, Australian Manufacturing Workers Union (AMWU), p5

<sup>341</sup> Mr Cowdery, DPP, Evidence, 15 March 2004, p 35

<sup>342</sup> Mr Paul Bastian, Secretary, Australian Manufacturing Workers Union, Evidence, 1 March 2004, p19

### **Level of negligence and standard of proof**

- 12.12** One limitation of the current manslaughter laws raised in evidence is a general difficulty in proving the high level of negligence necessary to succeed in a charge of manslaughter by criminal negligence. Mr Cowdery explained the level of negligence required to be:

negligence which the courts have said takes the matter beyond mere compensation between individuals and projects it into the realm of criminality. So there has to be something approaching, but not quite there, recklessness or deliberate disregard for proper standards on the part of the accused. It is a rather high test to meet.<sup>343</sup>

- 12.13** The difficulty establishing that a duty of care exists was also highlighted by the AMWU in its submission:

The duty of care has been defined as ‘one recognised by law, to avoid conduct fraught with unreasonable risk of danger to others.’ ... “Gross negligence” has been defined as ‘such a great falling short of the standard of care which a reasonable man would have exercised and which involved such higher risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment’.

... The standard of care which might be exercised by a reasonable corporation is a difficult concept to define, and may prove confusing to juries.<sup>344</sup>

- 12.14** Another limitation of the current laws is the standard of proof required to prove negligence. Mr Cowdery explained that of the six cases arising out of workplace deaths that the Department of Public Prosecutions had examined it was the level of evidence necessary to prove beyond reasonable doubt that the accused was grossly negligent that had prevented successful prosecution. In each case, the DPP was unable to prove beyond reasonable doubt that the accused had been grossly negligent.<sup>345</sup>

### **Attributing criminal liability to corporations**

- 12.15** Another problem with using the manslaughter charge relates to the fact that the employer involved in many industrial accidents is a corporate entity rather than an individual, and that it is often difficult to attribute criminal liability to only one person or entity in the event of a death or serious workplace injury. Mr Bastian gave a practical illustration of the problem in his evidence to the Committee:

... as the law stands in terms of common law manslaughter, unless you are a director who has got hands-on work on the shopfloor and hands-on knowledge, you are not going to be subject to manslaughter charges. That is, the further up the tree you go—the larger the corporation—the harder it is under the common law test to find a conviction against individuals who the Occupational Health and Safety Act says have ultimate responsibility. It is impossible to get a conviction against a corporation.<sup>346</sup>

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<sup>343</sup> Mr Cowdery, DPP, Evidence, 15 March 2004, p37

<sup>344</sup> Submission 27, Mr Anthony Hampson, p6

<sup>345</sup> Mr Cowdery, DPP, Evidence, 15 March 2004, p37

<sup>346</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, p13

- 12.16** The Committee heard evidence from Mr Rozen, an occupational health and safety law barrister practising at the Victorian Bar. Mr Rozen stated that the current law effectively provides a legal immunity to large corporations because the common law has not developed an adequate mechanism for deciding if a corporation is grossly negligent:

I take the view that the law should operate within the workplace in the same way that it operates outside the workplace: that is, that grossly negligent conduct within the workplace should be able to be prosecuted and punished in the same way as grossly negligent conduct outside the workplace. The way that the common law is in Victoria—and in New South Wales it is no different—is that effectively a legal immunity applies to large and even medium-size employers under the law as it stands in relation to offences where gross negligence has to be proved—for example, manslaughter or causing serious injury by gross negligence.

The difficulty arises because of the clumsy, in my view, way in which the courts have tried to develop rules that enable the prosecution to prove whether a corporation is grossly negligent or not. There has not been developed in the common law a mechanism for deciding if a company—a corporate employer, for example—is grossly negligent that takes into account the true structure of corporations. By focusing, as the courts have done, on directors and other senior officers within those corporations, they have not properly developed rules that enable them to determine whether a corporation has been grossly negligent or not.<sup>347</sup>

- 12.17** Mr Rozen very clearly outlined the current law as it related to corporate criminal responsibility. The starting point is that, in principle, a corporation can commit an offence such as manslaughter:

The starting point is that the courts have accepted now for the best part of half a century that, in principle, a corporation can commit an offence such as manslaughter by gross negligence. The state of the law is that if the prosecution proves that the corporation has been guilty of gross negligence, and that gross negligence has caused the death of an employee or somebody else who happens to be walking past the building, for example, then the corporation can be found guilty.<sup>348</sup>

- 12.18** The difficulty arises with determining whose negligence can be attributed to the corporation:

Whose gross negligence? That is because the corporation is a legal fiction; ultimately, it is a bit of paper, and is made up of directors and employees, contractors and so on. Whose negligence can be attributed to the corporation? That needs to be determined so that a court can ultimately say the corporation is guilty of gross negligence.<sup>349</sup>

- 12.19** There are two issues that need to be addressed when determining whose gross negligence should be attributed to the corporation. The first is referred to as ‘identification’ and the second is ‘aggregation’.

<sup>347</sup> Mr Rozen, Evidence, 1 March 2004, p2

<sup>348</sup> Mr Rozen, Evidence, 1 March 2004, p3

<sup>349</sup> Mr Rozen, Evidence, 1 March 2004, p3

### *Identification*

**12.20** The rule that developed following the 1972 *Tesco Supermarkets case* in England is that it is only those people who are the ‘controlling mind’ of the corporation, who are the ‘directing mind and will’, whose conduct (including their negligence) can be attributed to the corporation. Generally, it is only the managing director or someone in a similar role who is in a position to determine the direction of the corporation.<sup>350</sup>

**12.21** Mr Rozen identified the problem with this approach to be that safety decisions are generally not made at the highest level of a company but at the workplace level:

... safety-related decisions are, by definition, made at the workplace level. They are not generally made in board rooms. The board might implement a general safety policy, and might reach particular views about appropriate levels of training, supervision and so on, but the day-to-day decisions which result in either safe workplaces or unsafe workplaces generally are made at lower, hands-on levels, often not even at the plant level but, as members of the Committee will know, by shop floor supervisors, foremen and so on. That is the level at which such decisions are made.<sup>351</sup>

**12.22** Mr Rozen used the example of a director of a company operating shopping centres who has ignored advice about safety precautions and someone dies as a result of this gross negligence, to illustrate the difficulty of attributing criminal responsibility to large corporations:

Conceptually that could result in a charge. The reality of the situation, though, is that, depending of course on the corporate arrangements, it would be unusual for a director, particularly of a large organisation that is running a shopping centre for example, to be intimately involved in the day-to-day safety and related decisions. So negligence ... would tend to be one, two or perhaps three steps removed from whatever it was—the dangerous lift well, or whatever it was that resulted in the ultimate death.<sup>352</sup>

### *Aggregation*

**12.23** The other issue is referred to as ‘aggregation’. Mr Rozen summarised the problem:

... the courts have been unwilling, in determining whether or not a corporate body has been guilty of gross negligence, to aggregate the conduct of several employees together and to say that is the conduct of the corporation. So the courts have said that, unless the prosecution can identify one employee who is the directing mind of the company, and who was as an individually grossly negligent, then the company cannot be guilty of gross negligence. The difficulty with that, it seems to me, is that a corporation is more than just a group of individuals. Corporations have policies, rules of behaviour, and ways of doing their activities that are sometimes written and sometimes unwritten, and to make any sense of the inquiry "Was the corporation grossly negligent" the inquiry needs to go beyond just looking at a particular individual, and needs to examine a broader range of practices, policies and procedures within the corporation itself, to see whether they were grossly negligent.<sup>353</sup>

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<sup>350</sup> Mr Rozen, Evidence, 1 March 2004, p3

<sup>351</sup> Mr Rozen, Evidence, 1 March 2004, p3

<sup>352</sup> Mr Rozen, Evidence, 1 March 2004, p3

<sup>353</sup> Mr Rozen, Evidence, 1 March 2004, p4

**12.24** The Workers Health Centre also raised this concern:

... present limitations of the current criminal law, which make the offence of manslaughter in the workplace almost impossible to apply to corporate entities. A single responsible senior person cannot usually be identified because a number of people are usually involved in decisions.<sup>354</sup>

**Summary: Problems with the existing manslaughter offence**

**12.25** Mr Bastian summarised the AMWU's understanding of the law as it currently applies to corporate entities:

For a corporation to be found guilty of manslaughter, under the current law, it is necessary to establish that the top level decision makers were directly responsible for the relevant harm. A single person must be identified as the 'directing mind and will' of the corporation for the corporation to be found guilty. In modern corporations, it is very rare that only one person makes decisions about the health and safety, or about the budgetary allocations for health and safety.<sup>355</sup>

**12.26** The effect of this, according to Mr Bastian, is that

The current law only captures small businesses, leaving large corporations immune.<sup>356</sup>

**12.27** The Committee acknowledges the primary concern of witnesses being that corporations whose employees die as a result of an industrial accident should be held responsible. Under the current criminal law of manslaughter as it relates to corporations it is very difficult to secure a conviction because of the level of negligence required and the difficulty of attributing negligent action to the corporation. It is rare that decisions affecting the health and safety of workers are made by a person senior enough to be classified as the "controlling mind and will" of the corporation.

**12.28** In response to these problems, a number of suggestions were made to the Committee. They include:

- legislative amendment creating a specific industrial manslaughter offence
- the use of more innovative sentencing options
- a national safety monitor

**Creation of a specific industrial manslaughter offence**

**12.29** One response to the problems with attributing criminal liability to corporations was a call for a special offence of industrial manslaughter. The Committee heard many calls for the introduction of a special offence. There was also a number of reasons given as to why a specific industrial manslaughter offence should not be created.

<sup>354</sup> Submission 25, Workers Health Centre, p16

<sup>355</sup> Submission 37, AMWU, p8

<sup>356</sup> Submission 37, AMWU, p8

**Those supporting an industrial manslaughter offence**

- 12.30** The calls for an industrial manslaughter offence were particularly strong from family members of workers who died as a result of an industrial accident, who claimed that if their relative had been killed in a non-work context, those responsible were more likely to be convicted and jailed. A family friend of Joel Exner, Ms Kim Williams, presented to the Committee a petition of 4,000 signatures calling for an offence of industrial manslaughter to be established.<sup>357</sup> Mrs Sue Baxter, Joel Exner's mother stated:

I fully support the charge of industrial manslaughter being introduced into New South Wales. Had Joel been killed outside the workplace, I would have seen the responsible person face some sort of justice already ... the fines issued by the Courts are inadequate and do nothing to prevent accidents and deaths continuing to happen on a daily basis in workplaces. I would like to see my son's employer face a jail sentence for failing to look after Joel while he was his employer.<sup>358</sup>

- 12.31** Similarly, Mrs Karen Boland, whose husband was killed while working as a dogman at the rail depot at Heathcote said in her submission:

I fully support Industrial Manslaughter for all employers who fail to supply a safe workplace. It is not fair that the people responsible for Michael's death are allowed to just continue on with their lives. They have not been punished or made accountable for failing to ensure a safe workplace for my husband. ... I would like to see Michael's employer stand up in a court of law and justify why they should not be sent to jail. If Michael had been killed outside of the workplace his children and me would have already seen some legal action taken against the person responsible.<sup>359</sup>

- 12.32** Dean McGoldrick's mother Robyn also supported the introduction of an industrial manslaughter offence. She argued that fining employers who fail to provide a safe workplace is not a sufficient deterrent, and that the only way to make employers take health and safety seriously is the possibility of a jail sentence:

The prosecution outcome of Dean's death clearly demonstrates an unfair and unjust system. Fining employers who fail to provide a safe workplace is inadequate. It does not stop them or others re-offending. The ease in which companies can declare bankruptcy and then reopen again with no safe systems in place for the workers has to be stopped. The only way to stop this and make bosses accountable and take health and safety seriously is to make them face the possibility of going to jail. Let them lose their freedom. My son lost his.<sup>360</sup>

- 12.33** Family members were not the only people who supported the introduction of an industrial manslaughter offence. Mr Andrew Ferguson, State Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU), spoke on behalf of the union saying:

We would like to see industrial manslaughter legislation, not for the purpose of having people imprisoned, but for the purpose of having some consistency in terms of

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<sup>357</sup> Evidence 16 February 2004, p7.

<sup>358</sup> Submission 34, Ms Sue Baxter, pp2-3

<sup>359</sup> Submission 45, Karen Boland, p2

<sup>360</sup> Submission 26, Ms Robyn McGoldrick, p3

other crimes in the community and also, most importantly, to act as a deterrent. There is not a fear of WorkCover in the workplace.<sup>361</sup>

- 12.34** This view was shared by the Workers Health Centre, an independent organisation providing occupational health and safety services to industry including the construction industry:

We call for those in control of workplaces to be held accountable for acts or omissions that result in death or serious injury, for penalties to be applied against individual directors, and not just middle management scapegoats. In line with changes needed to corporations laws, there is a need to impose criminal liability on directors and senior managers – the crime should follow the person, to stop company liquidation allowing perpetrators to go free; ranges of sentencing options should be explored – custodial sentences, community sentencing, disbaring from conducting businesses in the future; all employers including public servants and partnerships to be treated the same.<sup>362</sup>

- 12.35** The AMWU also supported an industrial manslaughter offence being created:

... we have sought and have argued for some time that there is a need for a new law, a law of industrial manslaughter, that would hold those ultimately responsible for safe systems of work liable—regardless of their status in the organisation—that is capable of convicting a corporation, and that would reinforce and support our occupational health and safety legislation and would provide for a range of sentences. ... We have not called for this law lightly. The law that we see is one that would be applied in the strictest circumstances, it would be on the basis of gross negligence. We simply say that that would act as a deterrent; it would also give some justice to the families and victims of workplace deaths to know that their case would be heard.<sup>363</sup>

### **Those opposed to the creation of an industrial manslaughter offence**

- 12.36** There were a number of reasons presented as to why a specific industrial manslaughter offence should not be created. These centred around the adequacy of existing OH&S legislation, the lack of evidence that the introduction of the offence will have a real impact on OH&S practices and the danger in creating a lower test for manslaughter in an industrial context.

#### ***OH&S Laws sufficient***

- 12.37** One view was that existing OH&S laws provide sufficient scope to adequately prosecute employers, and until the existing laws were explored there is little to be gained from introducing new industrial manslaughter laws. Mr Hugh McMaster from the NSWRTA stated that:

<sup>361</sup> Mr Andrew Ferguson, Secretary, Construction, Forestry and Mining Union (CFMEU), Evidence, 17 February 2004, p41

<sup>362</sup> Submission 25, Workers Health Centre, p16

<sup>363</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, p14

... until such time as the existing provisions are utilised to a greater degree industrial manslaughter laws, as a method of combating OHS related injury and death, would have no firm basis for their creation.<sup>364</sup>

- 12.38** The Chamber of Commerce (NSW) agreed that the current OH&S legislation provided adequate scope to punish those responsible for industrial deaths:

Corporate manslaughter legislation is also unnecessary given the adequate nature of OH&S legislation in NSW. Section 12 of the *Occupational Health and Safety Act* provides for financial penalty and or imprisonment for breaches of the Act. WorkCover is also able to prosecute, not only to penalise, but also to prevent safety hazards in the workplace.<sup>365</sup>

- 12.39** This view was shared by the Insurance Australia Group (IAG), one of the largest providers of workers' compensation insurance in NSW and the insurance provider to the employer of Dean McGoldrick:

Specifically, in relation to the question of the liability of directors or managers of companies, New South Wales has a very strict regime, shared only by Queensland which (under s26 of the OHS Act) places the onus of proof on the manager to show why they should not be personally liable for any breach of the OHS Act committed by their company which results in an injury or 'serious incident'.<sup>366</sup>

- 12.40** The IAG also noted that the accident leading to Dean McGoldrick's death occurred before the commencement of the *OH&S Act 2000*, which 'significantly tightened the duties particularly of small businesses, in respect of workplace safety'.<sup>367</sup>

- 12.41** The view was common among employer representatives. Mr Pattison, representing Australian Business Limited (ABL) said in evidence:

We are opposed to the creation of a new offence of industrial manslaughter. We would argue that the current law is adequate. It provides for substantial fines and potential imprisonment for offenders. Even though there has not been, if you will, a successful prosecution for industrial manslaughter or for manslaughter arising out of an industrial event, there have been four matters referred to the DPP, as I understand the evidence, one of which has actually proceeded to court, albeit that matter was concluded by the judge, we would argue as evidence of the fact that this possibility exists and in fact is being pursued.<sup>368</sup>

- 12.42** Mr Garry Brack, Chief Executive, Employers First, also disagreed with the introduction of an industrial manslaughter offence, and in particular with using aggregation as a means by which corporations may be held liable for industrial accidents resulting in death:

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<sup>364</sup> Submission 43, NSW Road Transport Association, p4

<sup>365</sup> Submission 7, The Chamber of Commerce, p2

<sup>366</sup> Submission 22, Insurance Australia Group, p6

<sup>367</sup> Submission 22, Insurance Australia Group, p6

<sup>368</sup> Mr Greg Pattison, General Manager, Workplace Solutions, Australian Business Limited, Evidence, 2 March 2004, p 3

Alternatively, they [supporters of industrial manslaughter] want manslaughter by gross negligence and they want to be able to aggregate a series of unrelated prior events inside the company. They want to be able to say, "Those prior events, where we aggregate them, amount to a culture of gross negligence." Even though none of them was actually manslaughter they say there is a culture of gross negligence. Even though they could not find the parties guilty of manslaughter, just looking at the facts of the instant case, they want to be able to aggregate history together with the instant case and then find people guilty. I reject ... those propositions as purely manipulative.<sup>369</sup>

- 12.43** Representatives from WorkCover did not express an opinion to the Committee with regards to the possible introduction of an industrial manslaughter offence. WorkCover's CEO Mr Jon Blackwell told the Committee in his submission and again in evidence that the Minister for Commerce, the Hon John Della Bosca MLC, has 'engaged an independent panel of eminent legal practitioners to advise him on the legislative framework in relation to workplace fatalities'.<sup>370</sup> The panel is expected to report to the Minister by the end of May 2004.

***Lack of evidence of effect of industrial manslaughter offence on improving OH&S***

- 12.44** The Chamber of Commerce (NSW) was very strong in its opposition to the introduction of corporate manslaughter legislation in NSW, on the basis that it would have little impact on actual work safety:

The State Chamber of Commerce (NSW) is totally opposed to the introduction of this legislation. Corporate manslaughter legislation would do little to improve on the OH&S culture in this State and would do nothing to prevent accidents in unsafe workplaces. The emphasis should be on preventing injury and death in the workplace, not 'demonising' business or responsible employers.<sup>371</sup>

- 12.45** The Law Society of NSW (Law Society), while expressing no opinion whether or not a special offence should be created, contended in its submission that

So far as the Society is aware, there has not been any study or investigation into the question of whether the current system and sanctions in relation to occupational health and safety in this State would better achieve their objective if there was the prospect of individuals being charged with a special offence called "industrial manslaughter" where they can be subject to gaol sentences upon conviction.<sup>372</sup>

- 12.46** Mr Goodsell, Director, NSW, Australian Industry Group (AIG) made the additional point that the focus of the *OH&S Act 2000* is to promote a risk free or 'risk-managed' environment and there is not necessarily a correlation between the gravity of a breach of the OH&S legislation and the resultant level of injury or illness:

The gravity of the consequences of a particular unsafe practice or method of work is not necessarily linked to the inherent risk of that particular unsafe practice or work method. It is possible that a serious breach of safety may not result in any injury,

<sup>369</sup> Mr Garry Brack, Chief Executive, Employers First, Evidence, 2 March 2004, p42

<sup>370</sup> Submission 29, WorkCover NSW, p19

<sup>371</sup> Submission 7, The Chamber of Commerce, p2

<sup>372</sup> Submission 23, The Law Society of NSW, p5

illness or fatality. Equally, it is possible that a minor breach, in objective terms, could lead to a fatality. So it is a difficult concept.<sup>373</sup>

- 12.47 Mr Goodsell continued that it is unclear what the proponents of industrial manslaughter hope it will achieve – is its aim punishment or deterrence:

The statistics, as we have said, have been showing quite consistent reductions in injuries over a number of years. There seems to be an ambiguous approach from those who promote industrial manslaughter as to whether it is really about punishing evildoers or whether it is part of the promotion of occupational health and safety. We think the evidence is probably a bit weak on the latter, as to whether it really will make much of a difference in promoting occupational health and safety beyond the punitive measures that are already in place.<sup>374</sup>

*Different standards for industrial manslaughter compared to 'general' manslaughter*

- 12.48 The Law Society argued in their submission that the creation of a special industrial manslaughter offence would:

offend the long-standing principle of the Criminal Law pertaining to equal justice and equal punishment. The fact that a death occurs at work should not mean that the accused is treated in a more or less favourable way than had for example the crime of manslaughter been committed in a non-industrial context.<sup>375</sup>

- 12.49 This evidence contrasted with that of Mr Rozen. When questioned whether industrial manslaughter would lower the bar for corporations in respect of the existing law Mr Rozen replied:

No, they would not. My proposals would result in a levelling of the playing field in the sense that at the moment there are two bars. If the corporation is small and has a hands-on director or manager, the bar is at a same level as for any individual being charged with gross negligence. The bigger the corporation, the higher the bar. If the corporation is very large it is an impossibly high standard for prosecution.<sup>376</sup>

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<sup>373</sup> Mr Mark Goodsell, Director, NSW, Australian Industry Group, Evidence, 2 March 2004, p10

<sup>374</sup> Mr Mark Goodsell, Director, NSW, Australian Industry Group, Evidence, 2 March 2004, p13

<sup>375</sup> Submission 23, The Law Society of NSW, p6

<sup>376</sup> Mr Rozen, Evidence, 1 March 2004, pp6-7

- 12.50** Mr Cowdery was also of the view that the test should be the same for industrial and other forms of manslaughter:

It is a rather high test to meet, but I would suggest that there should not be different classes of manslaughter. In other words, it would be contrary to principle to introduce some lesser kind of test, some lesser standard of manslaughter, for workplace deaths than applies generally to motor vehicles or other ways in which manslaughter can be committed<sup>377</sup>

### **Experience in other jurisdictions**

- 12.51** The Committee heard evidence about the recently commenced industrial manslaughter legislation in the ACT and an industrial manslaughter bill that was passed by the Victorian Legislative Assembly but ultimately defeated in the Legislative Council. The United Kingdom experience in relation to industrial manslaughter is also relevant.

#### ***Australian Capital Territory's Crimes (Industrial Manslaughter) Amendment Act 2003***

- 12.52** The ACT's *Crimes (Industrial Manslaughter) Amendment Act 2003* was passed in November 2003 and commenced operation on 1 March 2004. There have been no cases tried under the new legislation so far. The Act is appended as Appendix 4. The explanatory memorandum to the Bill states that the purpose of the Bill is to

Provide improved protection of the health and safety of workers by establishing new offences of industrial manslaughter. The offences will apply where an employer or senior officer of an employer causes the death of a worker through recklessness or negligence.

- 12.53** The Act amended the ACT Crimes Act by creating two new manslaughter offences, section 49C and 49D:

#### **49C Industrial manslaughter – employer offence**

An employer commits an offence if –

- (a) a worker of the employer –
  - i. dies in the course of employment by, or providing services to, or in relation to, the employer; or
  - ii. is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the employer's conduct causes the death of the worker; and
- (c) the employer is –
  - i. reckless about causing serious harm to the worker, or any other workers of the employer, by the conduct or
  - ii. negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

<sup>377</sup> Mr Cowdery, DPP, Evidence 1 March 2004, p37

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

#### **49D Industrial manslaughter - senior officer offence**

A senior officer of an employer commits an offence if –

- (a) a worker of the employer –
  - i. dies in the course of employment by, or providing services to, or in relation to, the employer; or
  - ii. is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the senior officer's conduct causes the death of the worker; and
- (c) the senior officer is –
  - i. reckless about causing serious harm to the worker, or any other workers of the employer, by the conduct or
  - ii. negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

*Note* The general offence of manslaughter in s 15 applies to everyone, including workers

**12.54** The Act includes omission to act in the definition of conduct for the purposes of sections 49C and 49D.<sup>378</sup> 'Senior officer' is defined in new section 49A to include:

- for an employer that is a government or a government entity, a Minister, a person occupying a chief executive officer position or a person occupying an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the government or government entities
- for an employer that is another corporation, an officer of the corporation (as defined in section 9 of the Corporations Act)<sup>379</sup>

<sup>378</sup> *Crimes Amendment (Industrial Manslaughter) Act 2003* (ACT), s49B

<sup>379</sup> Section 9 of the Corporations Act defines an officer of a corporation to mean:

- (a) a director or secretary of the corporation
- (b) a person who
  - i. makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation; or
  - ii. who has the capacity to affect significantly the corporation's financial standing; or
  - iii. in accordance with whose instructions or wishes the directors of the corporation are accustomed to act ...
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of a company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

- for an employer that is another entity, a person occupying an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity, or a person who would be an officer of the entity if the entity were a corporation.

**12.55** Ms Penny Shakespeare, Director of the Office of Industrial Relations in the ACT Chief Minister's Department, provided the Committee with information about the new laws during her evidence. Ms Shakespeare told the Committee that the main objective of the legislation is to:

... allow corporate employers to be prosecuted for manslaughter where the employers had caused the death of a worker. Prior to the enactment of the industrial manslaughter laws, it was difficult in the Australian Capital Territory to prosecute a corporation for a criminal offence such as manslaughter because corporations do not have a physical presence. Without a physical presence it is difficult to show that someone has committed a criminal offence.<sup>380</sup>

**12.56** Ms Shakespeare pointed out that there are only a few workplace deaths in the ACT, so the main intention of the legislation is to 'act as a deterrent'.<sup>381</sup> She also noted that the elements of the general manslaughter offence still apply to the new industrial manslaughter offence, insofar as a person must cause the death of another person recklessly or negligently if they are to be found guilty of the offence. Therefore, a senior officer of a corporation can not be prosecuted for industrial manslaughter simply because she or he is a senior officer in a corporation that had caused the death of a worker. The person must have directly caused the death of the worker to be prosecuted under the new provisions.<sup>382</sup>

**12.57** The legislation does not impose aggregate responsibilities on employers. Rather, the legislation uses the criminal responsibility provisions in the Model Criminal Code, which have been imported into the ACT Crimes Act. Part 2.5 of the Model Criminal Code is reproduced in Appendix 5. The Code states:

if intention, knowledge or recklessness is a required fault element of an offence, that fault element exists on the part of a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.<sup>383</sup>

**12.58** The test may be satisfied by proving:

- that the board of directors intentionally, knowingly or recklessly engaged in that conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence
- that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in that conduct and expressly, tacitly or impliedly authorised or permitted the commission of the offence. This test will not be satisfied if the body corporate can prove that it exercised due diligence to prevent that conduct

<sup>380</sup> Ms Penny Shakespeare, Director, Office of Industrial Relations, Chief Minister's Department, ACT, Evidence 2 March 2004, p20

<sup>381</sup> Ms Penny Shakespeare, ACT Chief Minister's Department, Evidence 2 March 2004, p21

<sup>382</sup> Ms Penny Shakespeare, ACT Chief Minister's Department, Evidence 2 March 2004, p21

<sup>383</sup> Model Criminal Code section 501.2

- that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to con-compliance with the relevant provision or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.<sup>384</sup>

**12.59** ‘Corporate culture’ is defined in the Code to mean:

an attitude, policy, rule course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.<sup>385</sup>

**12.60** Factors that can be taken into account when determining the corporate culture include:

- whether authority or permission to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate
- whether the servant, agent, employee or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.<sup>386</sup>

**12.61** The rationale supporting this approach to corporate criminal liability is that the concept of corporate culture is “both fair and practical” and that companies should be held “liable for the policies and practices adopted as their method of operation”. Furthermore, the corporate culture concept is closely analogous “to the key concept in personal responsibility – intent.”<sup>387</sup>

**12.62** Ms Shakespeare elaborated on how the new ACT provisions would work in practice:

Essentially, you need to make sure that the person who has been prosecuted is the person who had control over the circumstances that led to the death. It is not limited by the employment relationship, so it is not just going to apply to people who employed people directly; it also covers people employed under contracts for services as opposed to contracts of service. Where a principal is engaging somebody else to perform work for them as an independent contractor or an outworker, or even as a volunteer, if the way they direct you to perform that work causes the death of that person, they can still be charged.<sup>388</sup>

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<sup>384</sup> Model Criminal Code section 501.1

<sup>385</sup> Model Criminal Code section 501.2.2

<sup>386</sup> Model Criminal Code section 501.2.1

<sup>387</sup> Model Criminal Code, page 109.

<sup>388</sup> Ms Penny Shakespeare, ACT Chief Minister’s Department, Evidence, 2 March 2004, p24

**12.63** Ms Shakespeare also clarified the meaning of 'reckless' in the ACT legislation:

Recklessness is where you know there is a risk that the outcome of what you are doing could cause the death of that person and you are aware that that could be the result of your actions but you take that unjustifiable risk anyway with that person's life.<sup>389</sup>

***Victorian Crimes (Workplace Deaths and Serious Injuries) Bill***

**12.64** The Crimes (Workplace Deaths and Serious Injuries) Bill was passed in the Victorian Legislative Assembly in May 2002 but defeated in the Legislative Council in June that year. The approach adopted by the Victorian Bill differs from that of the ACT legislation. The Victorian Bill's main tool for assigning criminal liability to corporations is by aggregating the conduct of any number of the employees, agents or officers of a corporation to determine the conduct of the corporation as a whole.

**12.65** Mr Rozen explained to the Committee the way in which the Victorian bill addressed the issues of aggregation and consolidation. The key provisions are clauses 14A. and 14B:

**14A. Attribution of certain conduct**

- (1) For the purposes of the definition of "agent" in section 11, the conduct of--
  - (a) an employee of an agent; or
  - (b) a senior officer of an agent--
 

acting within the actual scope of their employment, or within their actual authority, must be attributed to the agent.
- (2) For the purposes of sections 13 and 14--
  - (a) the conduct of employees, agents and senior officers of a body corporate acting within the actual scope of their employment, other than in the course of judicial or quasi judicial duties, or within their actual authority, must be attributed to the body corporate, including a body corporate that represents the Crown; and
  - (b) the conduct of--
    - (i) agents and members of, and persons who are appointed or employed to work for, an unincorporated body (other than a body deemed to be a body corporate) that is established by or under an Act and represents the Crown; or
    - (ii) senior officers of the Crown -- acting within the actual scope of their employment, or within their actual authority, must be attributed to the Crown.
- (3) Only the conduct referred to in sub-section (2)(b) may be attributed to the Crown.

**14B. Negligence**

- (1) For the purposes of section 13, the conduct of a body corporate is negligent if it involves--
  - (a) such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances; and
  - (b) such a high risk of death or really serious injury—

<sup>389</sup> Ms Penny Shakespeare, ACT Chief Minister's Department, Evidence, 2 March 2004, p24

that the conduct merits criminal punishment for the offence.

For the purposes of section 14, the conduct of a body corporate is negligent if it involves—

(a) such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances; and

(b) such a high risk of serious injury—

that the conduct merits criminal punishment for the offence.

(3) In determining whether a body corporate is negligent, the relevant duty of care is that owed by the body corporate to the person killed or seriously injured.

(4) In determining whether a body corporate is negligent, the conduct of the body corporate as a whole must be considered.

(5) For the purposes of sub-section (4)--

(a) subject to paragraph (b), the conduct of any number of the employees, agents or senior officers of the body corporate (a) may be aggregated;

(b) regard may be had to the negligence of any agent in the provision of services but that negligence must not be attributed to the body corporate.

(6) Without limiting this section, negligence of a body corporate may be evidenced by the failure of the body corporate--

(a) adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or

(b) to engage as an agent a person reasonably capable of providing the contracted services; or

(c) to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or

(d) to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or

(e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.

(7) For the purposes of sections 13 and 14, if the conduct of a body corporate complies with the **Occupational Health and Safety Act 1985**, regulations made under that Act and any relevant code of practice approved under that Act, it must be presumed, in the absence of evidence to the contrary, that the conduct of the body corporate is not negligent.

**12.66** Subclause 14B(5) provides that the conduct of any number of the employees, agents or officers of the corporation may be aggregated. Subclause 14B(6) deals with the question of gross negligence. As Mr Rozen explained, if inquiries were to be made into whether a corporation was grossly negligent, one would not be limited to looking at a senior employee and attributing his or her conduct, rather, one could amalgamate or aggregate the conduct, acts or omissions of any officers, agents or employees.<sup>390</sup>

**12.67** Mr Rozen used an example of a prohibition notice being served on a building company, and the company's subsequent failure to comply with that notice, as a situation where corporate criminal responsibility may be proven under the proposed Victorian legislation:

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<sup>390</sup> Mr Rozen, Evidence, 1 March 2004, p5

Referring back to my example about the prohibition notice being served on the building company, it is formally served on the company as a whole. However, in most circumstances it would not be brought to the attention of a person who is a director of the company; it would stay on site with perhaps a foreman or building supervisor. Under this provision, that would be sufficient to affix the company with knowledge of the hazard—that is, the hazard of employees working at height. If the company did not take reasonable action in response to that notice—for example, issuing a directive to all employees and ensuring that safety harnesses were available and could be attached appropriately—that would be evidence of gross negligence under this legislation. Under the existing law it would not be admissible as evidence against the corporation.<sup>391</sup>

### *United Kingdom*

- 12.68** Mr Cowdery referred the Committee to the recent report of NSW Law Reform Commission (the Commission) into sentencing corporate offenders, released in November 2003. In this report the Commission included a chapter on corporate criminal liability generally and referred to an English Law Commission report on corporate manslaughter published in 1996 that recommended the enactment of an offence of “corporate killing”. These proposals were largely adopted in 2000 in an English Home Office consultation paper.<sup>392</sup>
- 12.69** The basis of the Home Office argument was that the identification doctrine had resulted in few prosecutions for corporate manslaughter, and only three successful ones, all of small companies. A bill, entitled the Offences Against the Person Bill, was appended to the consultation paper. The bill has not yet been introduced into Parliament although a commitment has been given by the Home Secretary that it will be introduced.<sup>393</sup>

### **Threshold issues**

- 12.70** Given this overseas and interstate experience, the questions must be considered whether and in what form legislative amendment is required in NSW. If there is to be legislative amendment a number of questions arise. These include:
- whether the offence should form part of the *OH&S Act 2000* or the Crimes Act
  - whether the offence should be one of strict liability or not.

- 12.71** The Law Society in its submission stated that:

Without amending the law in relation to corporate responsibility generally, the introduction of an industrial manslaughter offence will not overcome the difficulties

<sup>391</sup> Mr Rozen, Evidence, 1 March 2004, p 5

<sup>392</sup> *Reforming the law on industrial manslaughter: the Government's proposals*, 23 May 2000, <http://www.homeoffice.gov.uk/docs/invmans.html>

<sup>393</sup> Hon D Blunkett MP, Secretary of State for the Home Department, House of Commons, *Hansard*, 2 December 2003, column 385. A private members bill – the Corporate Killing Bill 2003/2004 was introduced into the House of Commons on 30 March 2004 by Mr Frank Doran MP. Its second reading is scheduled for 21 May 2004.

associated with successfully obtaining convictions of senior officers in large corporations.<sup>394</sup>

**12.72** During his evidence, Mr Cowdery suggested that:

The law of manslaughter in itself I think is not in need of amendment to be appropriate to workplace fatalities. ... I do not see a need for any amendments to the offence itself. It seems to me in the context of workplace deaths that the issue is rather the question of who can be made liable under that law. ... my researches have been unable to uncover any case of a prosecution of a body corporate for manslaughter for deaths arising in the workplace, or any successful prosecution of an individual for manslaughter. But I do not think that that highlights a fault with the law of manslaughter in itself; rather, it shows that some consideration perhaps should be given to making corporations responsible for gross negligence occasioned to a worker.<sup>395</sup>

***Should the offence sit in the Crimes Act or OH&S Act?***

**12.73** The Law Society of NSW stated that, if an offence of industrial manslaughter were to be introduced (a question upon which the Society expressed no opinion), the more appropriate 'vehicle' for the legislation is the Crimes Act:

... the Society would recommend against such an offence being implemented as an amendment to the 2000 [OH&S] Act for the following reasons:

Firstly, whilst the Industrial Relations Commission of New South Wales is a superior court of record, it has rarely exercised the powers of imprisonment ...

Secondly, decisions of the Full Bench of the Industrial Relations Commission are final and there is for practical purposes no appeal to any other court from such decisions ... whether such a state of affairs would be constitutionally permissible, the Society cannot say, but the lack of appeal rights would militate against the Commission being given jurisdiction over the proposed special offence.

Thirdly, currently under the 2000 [OH&S] Act, individuals can be found guilty of offences under section 20 ... and section 26... Both these offences are 'strict liability' offences – that is generally speaking liability is established irrespective of the subjective intention of the individual ... to introduce into the 2000 Act an offence in respect of which individuals could be sent to prison would involve concepts at odds with the 'strict liability' character of the 2000 Act ...

Fourthly, a much wider class of persons may bring proceedings under the 2000 Act compared to the prosecution of offences under criminal laws, in particular the Crimes Act. ... Consequently it could be envisaged that persons other than independent prosecutors subject to published prosecution guidelines, could institute and pursue such proceedings.

Fifthly, prosecutions for offences against the 2000 act are subject to strict time limits [generally 2 years]. In contrast, under the Crimes Act generally no time limitation exists in relation to the initiation of a prosecution alleging the commission of the offence of manslaughter.

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<sup>394</sup> Submission 23, The Law Society of NSW, p8.

<sup>395</sup> Mr Cowdery, DPP, Evidence, 15 March 2004, p34

Finally, the Society believes that were inspectors of WorkCover NSW to investigate and prosecute for the crime of Industrial Manslaughter, significant difficulties would arise in terms of the admissibility of evidence obtained under the coercive powers of inspectors.<sup>396</sup>

**12.74** Mr Bastian also expressed a preference for the offence to be created under the Criminal law:

We also have a predisposition for a criminal law under the Crimes Act as opposed to a criminal conviction under the Occupational Health and Safety Act. We do so for primarily two reasons: one is that we are saying it is a gross negligence, a charge that would be against a corporation or individuals, and that the proper forum for that is in a criminal court before a jury; we also say that there is a status that the community attaches, if you like, and respect in terms of criminal convictions before a criminal court and jury, as opposed to a conviction under occupational health and safety legislation.<sup>397</sup>

**12.75** The Committee noted in the previous chapter that the Minister for Commerce has established a panel of legal experts to examine using the OH&S legislation to prosecute workplace deaths. The findings of this panel should assist in finding an answer to this question.

***Should the offence be one of strict liability?***

**12.76** The Law Society described a strict liability offence as one where ‘generally speaking liability is established irrespective of the subjective intention of the individual (ie whether the individual meant to breach the relevant law or not)’.<sup>398</sup> Mr Matthew Thistlewaite, Assistant Secretary, Australian Workers Union, supported strict liability for an industrial manslaughter offence:

Our unit is an advocate of some form of industrial manslaughter law in New South Wales. We are of the view that such a law should be one that is similar to culpable driving where it is a strict liability offence. If you commit the crime the mental element is not so important but you are guilty of the offence where there are circumstances where the Act has been breached and that breach directly leads to a death or serious injury in the work place.<sup>399</sup>

**12.77** The Law Society took a different view, on the basis that strict liability is inappropriate for offences where the punishment is imprisonment:

... it could never be intended that individuals should be exposed to the prospect of their loss of liberty simply because of their acts, without any regard to their subjective intention.<sup>400</sup>

**12.78** The effect of creating a strict liability offence is that it reverses the onus of proof. This was explained to the Committee, with reference to the current provisions of the *OH&S Act 2000*, by Mr Brack:

<sup>396</sup> Submission 23, The Law Society of NSW, pp 7-9

<sup>397</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, p14

<sup>398</sup> Submission 23, The Law Society of NSW, p8

<sup>399</sup> Mr Matthew Thistlewaite, Assistant Secretary, Australian Workers Union (AWU), NSW Branch, Evidence, 17 February 2004, p61

<sup>400</sup> Submission 12, Ms Margaret Treanor, p8

If you are a corporation and a corporation is taken to have contravened a provision of the Act, then each director and each person concerned in the management of the corporation is taken to have contravened the same provision. That means—is deemed guilty. They have reversed the onus of proof. You are deemed guilty. They reversed the onus of proof and you get to try and prove one of these two defences—the section 26 or the section 28 defences. The section 26 defences are almost impossible to prove and, by the way in this context, a manager is every person concerned in the management of the corporation. WorkCover believes that that goes down as far as a supervisor on the basis of its prosecutions to date, whether successful or otherwise.<sup>401</sup>

### **Conclusion: The need for legislative change**

- 12.79** The Committee agrees that current manslaughter laws mean it is difficult to successfully prosecute a corporation for manslaughter where gross negligence leads to the death of a worker. The Committee also believes that the primary objective of any criminal law amendment should be to increase corporate criminal responsibility generally. To be practical and effective, an industrial manslaughter law must also address the issues of corporate criminal liability more broadly.
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### **Recommendation 26**

That as a matter of urgency, discrete and specific offences of “corporate manslaughter” and “gross negligence by a corporation causing serious injury” be enacted in the *Crimes Act 1900* (NSW).

### **Recommendation 27**

That the Government refer to the NSW Law Reform Commission and the Panel of Review a request to examine the broader issues of corporate liability for non-workplace and workplace deaths generally, including harsher penal sentences.

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- 12.80** There was a divergence of opinion amongst the Committee in relation to how the evidence presented in this Chapter should be interpreted. Some Committee members did not support Recommendations 26 and 27.

### **Innovative sentencing options under the *OH&S Act***

- 12.81** A number of options presented to the Committee refer to increasing the sentencing options available to the courts so that a fine is not the only sentence imposed on corporations for breaching OH&S legislation. In respect to fines, Mr Bastian recommended that the fines for corporate manslaughter should be increased to \$1.25 million, representing a “a substantial increase in the fine available under the current regime.”<sup>402</sup>

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<sup>401</sup> Mr Garry Brack, Employers First, Evidence, 2 March 2004, pp38-39

<sup>402</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, p16

**12.82** Mr Bastian canvassed a range of additional sentencing options during his evidence:

In relation to a corporation, for example, fines is one area; orders requiring some form of public benefit or community service, seizure of assets, deregistration, debarring directors from holding office or, indeed, custodial sentences against individuals, should not be ruled out.<sup>403</sup>

There would be a pre-sentencing report and that would go to the conduct of the corporation in relation to its occupational health and safety record, previous convictions, et cetera. Some options have been raised through the Victorian legislation when it considered this and included that the company be required by the court to perform a specific act, to establish or carry out specific projects in the public interest, community service orders, damages payable to injured workers, an increase in fines, deregistration of a corporation—which ultimately would be a serious step to take and in our view would have to be considered in the light of the record of the company— forfeiture of assets and suspension of shareholder-directors. The Longford case, which may have been raised previously, involved a fine. The amount of the fine is contained in our submission. When one considers the profit Longford made, the fine was inconsequential; about \$256 million profit. How that acts as a deterrent is beyond me.<sup>404</sup>

**12.83** There are a variety of sentencing options which the government could examine to ensure negligent employers receive effective punishment. Several of these were raised in evidence but prior to this inquiry were also examined by the NSW Law Reform Commission. The options include:

- equity fines
- incapacitation
- correction orders
- community service orders and publicity orders
- reparation.

**Equity fines****12.84** Equity fines require that a corporation issue a certain number of shares to a third party, for example a victims' compensation fund. This option was not raised during evidence presented to the Committee. The Committee notes that the Commission's fifth recommendation was that equity fines should not be a sentencing option.<sup>405</sup>**Incapacitation****12.85** 'Incapacitation' refers to orders aimed at preventing a corporation from carrying out certain commercial, trading or investment activities or taking advantage of certain rights

<sup>403</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, p14

<sup>404</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, pp15-16

<sup>405</sup> NSW Law Reform Commission, Report 102, *Sentencing Corporate Offenders*, Recommendation 5

(“disqualification”) and orders aimed at winding up a corporation either directly or indirectly (“dissolution”). The Commission noted in its report that:

some have suggested that disqualification is closely analogous to imprisonment so far as it can be applied to a corporation. In this context it has been suggested that the term of the disqualification could be related to the term of imprisonment that an individual offender would be required to serve for the same offence.<sup>406</sup>

**12.86** The Committee heard evidence from various union representatives suggesting that companies and parent companies should be deregistered where the company has been found to have seriously breached the *OH&S Act 2000*. It was also suggested that individual directors should be disqualified from holding directorships where the company has been found negligent and to have caused the death or serious injury of a worker. Mr Thistlewaite stated:

There are a number of options that we would like this Committee to look at in terms of sentencing options, up to and including industrial manslaughter. One of those options is the possible deregistration of companies and parent companies where there have been circumstances where a company has been found to have breached the OH&S Act and caused serious injury and death in the work place, and, secondly, the disqualification of directors, up to and including bans from holding directorships where those companies are found to have been negligent and caused death or serious injury in the work place.<sup>407</sup>

**12.87** Mr Bastian made a similar suggestion:

In terms of directors’ conduct, we say they should not be allowed to hold directorships, nor be able to set up other companies, phoenix companies, and rise again. It would be a total and flagrant disregard for workplace deaths and for justice for victims and their families, and for community standards, to allow that to go on.<sup>408</sup>

**12.88** The types of orders that are designed to restrain the activities of corporations include orders to:

- cease certain commercial activities for a particular period
- refrain from trading in a specific geographic region
- revoking or suspending licences for particular activities
- disqualifying the corporation from particular contracts (for example, government contracts)
- freezing the corporation’s profits.<sup>409</sup>

**12.89** The Commission acknowledges that dissolution is a ‘drastic’ penalty and should only be used ‘in a very limited range of cases involving the most serious kind of criminal wrongdoing’.<sup>410</sup>

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<sup>406</sup> NSW Law Reform Commission, Report 102, para 8.3

<sup>407</sup> Mr Thistlewaite, AWU, Evidence, 17 February 2004, p61

<sup>408</sup> Mr Bastian, AMWU, Evidence, 1 March 2004, p15

<sup>409</sup> NSW Law Reform Commission, Report 102, para 8.2.

<sup>410</sup> NSW Law Reform Commission, Report 102, para 8.18.26

The Commission also acknowledges a point that was raised in the Committee's evidence, that the interaction of the Commonwealth *Corporations Act 2001* and the NSW Crimes Act could 'operate to render a NSW provision for the winding up of a corporate offender invalid'.<sup>411</sup> The Commission's report addresses this concern in recommendation 7 which states that a provision relating to the dissolution of corporations should contain a statement to the following effect: "to extent necessary to do so, this provision is declared a Corporations legislation displacement provision."<sup>412</sup>

- 12.90** The issue of reincorporation raised in evidence is addressed by the Commission, which supports the view that when ordering the dissolution of a corporation, the court should also have the power to:

... order that shareholders and directors cannot reincorporate in circumstances, including where the new corporation is intended to carry on the same activities as the dissolved corporation.

The court may also order that the directors and shareholders of the dissolved corporation cannot have any beneficial interests in a corporation that substantially conducts the same activities as the dissolved corporation.

Such an order should be imposed only once any other person bound by it has been given an opportunity to be heard by the court prior to sentencing.<sup>413</sup>

### ***Correction orders***

- 12.91** Correction orders include probation orders that aim to alter corporate behaviour, for example by achieving some internal discipline in the corporation or reforming the organisation by means of external monitoring. They also include punitive injunctions that involve a more severe form of intervention in the operation of the corporation. Such orders might involve specific internal controls, or require that particular activities cease or be undertaken.
- 12.92** The Labor Council highlighted the benefits of enforceable undertakings in its written submission. These are very similar to correction orders in that they enable the CEO of WorkCover to enter into an agreement with someone who has breached the Act that sets out what actions the person or company will take, over and above rectification of their breach of the act. The Labor Council's proposal is discussed in Chapter 8.
- 12.93** The Labor Council noted that enforceable undertakings have recently been introduced into Queensland and Tasmanian OH&S legislation as an alternative to prosecution. Enforceable undertakings are also a suitable sentencing option, and are consistent with the aim of making corporations more accountable for breaches of OH&S legislation leading to serious injury or death in the workplace.

<sup>411</sup> NSW Law Reform Commission, Report 102, para 8.28

<sup>412</sup> NSW Law Reform Commission, Report 102, recommendation 7

<sup>413</sup> NSW Law Reform Commission, Report 102, recommendation 8

***Community service orders and publicity orders***

- 12.94** Community service orders may direct a corporation to undertake or contribute to work or projects that benefit the community or a part of the community in some way. Publicity orders include orders designed to inform specific people, groups of people or the community, of details relating to the offender, the offence and the penalty imposed for the offence.
- 12.95** The Committee notes that the ACT legislation includes a number of publicity orders and community service orders that the court may apply in addition to or instead of any other penalty the court may impose on the corporation. These include an order to:
- take any action to publicise the offence, the deaths or serious injuries or other consequences resulting from or related to the conduct from which the offence arose and any penalties imposed or other orders made, because of the offence
  - take any action stated by the court to notify one or more stated people of the order to publicise
  - do stated things or carry out a stated project for the public benefit even if the project is unrelated to the offence.<sup>414</sup>
- 12.96** In making the order, the court may state a period within which the action must be taken, and may impose any other requirement that it considers necessary or desirable for enforcement of the order or to make it effective. A \$5million limit was placed on total cost to the corporation of compliance with an order. The legislation gave examples that included:
- advertising on television or in a daily newspaper
  - publishing a notice in an annual report or distribute a notice to shareholders of the corporation
  - developing and operating a community service.

***Reparation***

- 12.97** Reparation involves orders for both compensation and restitution to victims of corporate crime. The Commission concluded that no specific provision need be made for the courts to order corporations to make restitution, because restitution is currently possible in NSW in the case of identifiable individual victims. Restitution orders can involve not only compensation for particular victims but also such things as remedial work designed to compensate a broader range of victims or particular parts of the community.<sup>415</sup>

**Conclusion**

- 12.98** There are many sentencing options available that would provide a disincentive to repeat offending by employers. These sentencing options should be available to the courts when sentencing offenders under the *OH&S Act 2000* in addition to imposing a fine. After considering whether or not these sentencing options should be made generally available in

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<sup>414</sup> *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT), s49E

<sup>415</sup> Law Reform Commission Report 102, para 12.13

addition to a fine when sentencing corporate offenders, the Commission made the following recommendation:

**Recommendation 4**

In sentencing a corporation, a court, in addition to or instead of imposing a fine, should be able to make one or more other orders that it considers will best achieve the objectives of sentencing. These orders are:

- (a) orders for incapacitation;
- (b) correction orders;
- (c) community service orders; and
- (d) publicity orders.

Each order should be capable of being a separate, non-exclusive sanction.

The orders should form part of the general sentencing regime but should be expressed to apply only to corporations.

The orders should not detract in any way from existing legislative provisions and common law that are applicable to the sentencing of corporations.

- 12.99** The Committee endorses the NSW Law Reform Commission's report 102 – *Sentencing Corporate Offenders* and recommends that the Government give consideration to how best to implement Recommendation 4 of that report in particular.

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**Recommendation 28**

That the Government amend the *OH&S Act 2000* to incorporate sentencing options in addition to fines, including in particular:

- incapacitation (disqualification or dissolution)
- correction orders
- community service orders and publicity orders.

**Recommendation 29**

That the Government adopt and give consideration to how best to implement the NSW Law Reform Commission's Report No 102 – *Sentencing Corporate Offenders*, particularly Recommendation 4.

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***Restorative conferencing***

- 12.100** Another sentencing option raised with the Committee refers to restorative conferencing as an alternative to a financial penalty. The system proposed by the Hon Arthur Chesterfield-Evans in his submission would see:

... a system of contact between the seriously injured person, and their families and management responsible for the workplace at the time. WorkCover would be responsible for facilitating and enforcing this.<sup>416</sup>

**12.101** Dr Chesterfield-Evans outlined the two principal objectives of restorative conferencing in his submission:

The first would be a feeling of closure in the injured worker, in that the organisation recognised and acknowledged the problem, were motivated to help and also to ensure that such an incident never happened again.

The second would be that the relevant level of management would become fully aware of the impact that the accident has on the lives of employees, and the problems would be given a human face.<sup>417</sup>

**12.102** It was clear from evidence that many victims do not believe the employers are aware of the personal cost of their actions. Restorative conferencing provides a means by which the needs of victims may be addressed, although it is completely untried in this context.

### **Guideline judgment**

**12.103** The possibility of a guideline judgment was canvassed in Chapter 11. The Committee recommended that the Government re-consider applying to the Attorney General for a guideline judgment under section 125 of the *OH&S Act 2000*.

**12.104** The Committee believes that it would be appropriate if a guideline judgment included a discussion of sentencing options other than fines, providing guidance in relation to the situations where a full range of sentencing options would be appropriate.

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### **Recommendation 30**

That any guideline judgment that applies to offences under the *OH&S Act 2000* include a range of sentencing options to complement fines when sentencing corporate offenders, particularly where a corporation's negligence has resulted in the death of a worker.

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## **A national safety monitor**

**12.105** The Committee heard calls for a national system or database that may be used to record details of the occupational health and safety performance of corporations and individuals.<sup>418</sup> A model that may be useful is the United Kingdom's Corporate Health and Safety Performance Index (CHaSPI). The purpose of this index is to 'assist external stakeholders in assessing how

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<sup>416</sup> Submission 21, The Hon Dr Arthur Chesterfield-Evans MLC, p1

<sup>417</sup> Submission 21, The Hon Dr Arthur Chesterfield-Evans MLC, p1

<sup>418</sup> For example, Ms Yaager, NSW Labor Council, Evidence, 17 February 2004, p81; Mr McMaster, NSW Road Transport Association, Evidence, 15 March 2004, p16.

well an organisation is managing its risks and responsibilities towards workers and the public.<sup>419</sup> The index applies to companies or private sector organisations with over 250 employees. Presently participation is not compulsory. The Committee notes that the CHaSPI is still in its pilot stage, with the final version likely to be launched early in 2005.

- 12.106** The Index fulfils its purpose by providing nine indicators based on a mix of numerical and qualitative data. The quantitative indicators generate the overall Index Score for the organisation, and the qualitative indicators provide more information on the performance and management of health and safety within the organisation. The overall index result is calculated from the ratings of the following 5 indicators:

**Figure 12.1** Corporate health and safety performance index – quantitative indicators

Indicator 1	<b>Health and Safety Management Rating</b>	This indicator is made up of 11 sub-indicators, all structured as a series of statements. Each statement must be answered as either 'yes', 'some' or 'no'.  One of these sub-indicators considers the status of health and safety management within the organisation, and is supported by a questionnaire to help guide any organisation unsure as to how to complete this.
Indicator 2	<b>Injury rate – employees and contractors</b>	This indicator asks for data on injury and the numbers of employees and contractors from which a standard result can be calculated.
Indicator 3	<b>Employee sickness absence rating</b>	This indicator is similar to indicator 2 and asks for data on either the average number of sickness absence days recorded per year per employee or on the total number of days of sickness absence in the last year among all employees.
Indicator 4	<b>Occupational health rating</b>	This indicator is similar to indicator 1 in the way it considers occupational health management through a series of statements.
Indicator 5	<b>Major incident rating</b>	This indicator is based on a scale of incidents. The organisation has to consider whether it has had any such incidents and, if so, whether the appropriate numbers against the relevant categories. The results from this scale are then standardised against the employee numbers.

Source: *About CHaSPI – The Corporate Health and Safety Performance Index*, p5.

- 12.107** The following four qualitative indicators provide information on the activities and approach to health and safety performance within the organisation and are designed to complement the quantitative indicators 1-5.

<sup>419</sup> *About CHaSPI – The Corporate Health and Safety Performance Index*, <http://www.chaspi.info-exchange.com/downloads/About%20CHaSPI%20v3.PDF>, downloaded 6 April 2004

**Figure 12.2** Corporate health and safety performance index – qualitative indicators

Indicator 6	<b>'Under Watch' flag</b>	This section of CHaSPI asks the organisation to declare whether it has suffered an 'Under Watch' flag and to say what actions it is taking in response to that event.  This indicator will relate to both past or current major events. Such an event might range from a significant adverse report from a regulator to a major disaster.
Indicator 7	<b>Conduct of highly regulated activities</b>	This section of CHaSPI asks the organisation to declare whether it carries out any activities that are subject to special laws, eg asbestos licensing, both within and outside of the UK.
Indicator 8	<b>Directors' declaration</b>	This section of the CHaSPI asks the organisation to indicate whether the Board has made a declaration that it has assessed the health and safety hazards associated with its activities, and has implemented an appropriate set of risk management controls.
Indicator 9	<b>CHaSPI Verification</b>	This section of CHaSPI asks the organisation to acknowledge whether the data input into the Index has been verified by another organisation.

Source: *About CHaSPI – The Corporate Health and Safety Performance Index, p5.*

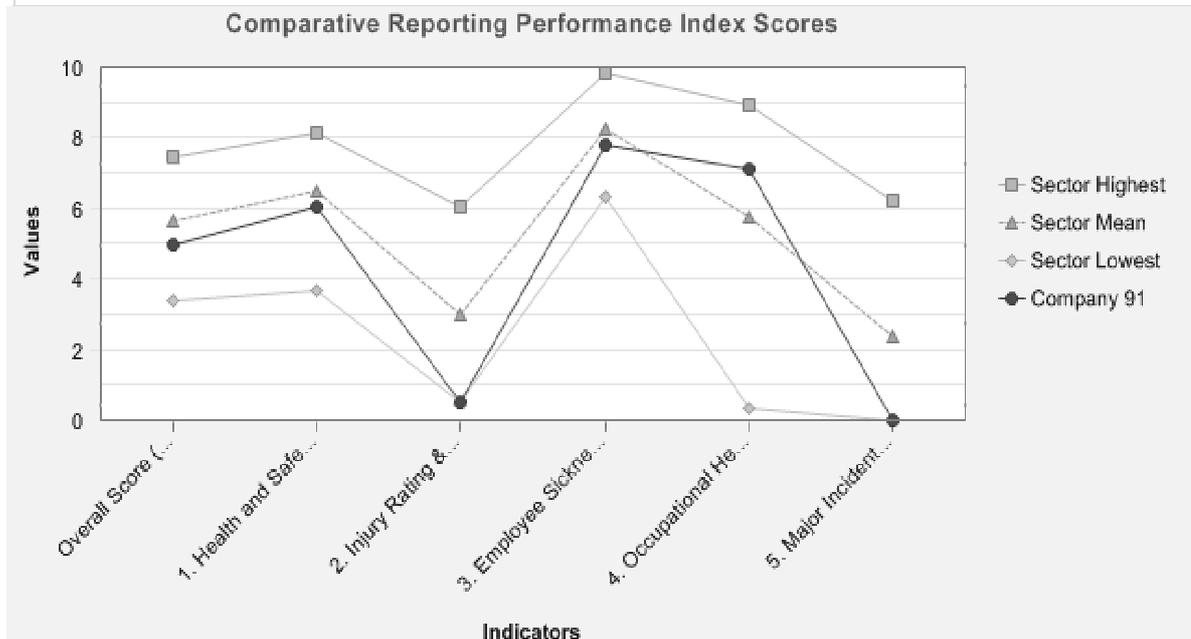
**12.108** The CHaSPI allows members of the public to generate comparative reports about a particular company. An example of a report about a corporation in the construction industry is extracted below.

**Figure 12.3** Sample CHaSPI report

Benchmark an Company / Organisation Primary Indicator scores against the highest, lowest & average across all companies/organisations or within a Sector.			
PI ID #:	PI-70	Company ID #:	91
Locked / Unlocked:		Company Name:	Withheld
Date Created:	Thu 29/01/2004 14:32	Date Completed:	Thu 29/01/2004 19:21
FTSE Sector:	Construction & Building Materials	Business Sector:	Construction
Employees:	500 - 999	Contract Employees:	250 - 499
Turnover:	£50 - 99 million		

Displaying comparative scores for the following FTSE Sector: *Construction & Building Materials*

	Overall Score (weighted)	1. Health and Safety Ma...	2. Injury Rating -...	3. Employee Sickness Ab...	4. Occupational Health...	5. Major Incident Ratin...
<b>Company 91</b>	5.0	6.0	0.5	7.8	7.1	0.0
Sector Highest	7.5	8.1	6.1	9.8	8.9	6.2
Sector Mean	5.7	6.5	3.0	8.2	5.8	2.4
Sector Lowest	3.4	3.7	0.5	6.3	0.4	0.0



Source: <http://www.chaspi.info-exchange.com/indexresults.asp?action=3show>

**12.109** The Committee believes that a national database would serve a number of purposes by providing information to individuals and other external stakeholders about the OH&S record of corporations. A data base of this kind may increase corporations' transparency and accountability over OH&S and would enable the public to make more informed choices about future business partners. The existence of a national database of this kind would also increase awareness of OH&S requirements generally. This in turn may have the flow-on effect of improving the OH&S performance of companies that wish to avoid negative comparisons with other organisations in their sector.

**12.110** A national database may also enable 'good' employers to publicise their commitment to OH&S. This issue was raised by Mr Goodsell in his evidence:

We at the Australian Industry Group understand public expectations about occupational health and safety, particularly fatalities, have demonstrably risen in the past few years. In the past three to four months, at both the State and national level, we have discussed being seen to be taking more responsibility for occupational health and safety. One of the things frustrating these kinds of debates is that everybody is telling everybody else what they should do. We think one of the things that we employers can do at this time is put our hand up and say, "We know we are

responsible under the law, and we want to be more visible about what we are doing."<sup>420</sup>

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### **Recommendation 31**

That WorkCover undertake an evaluation of the UK Corporate Health and Safety Performance Index to assess its suitability as a model that could be applied in Australia to provide the public comparative information about the occupational health and safety performance of companies.

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- 12.111** There was a divergence of opinion amongst the Committee in relation to whether or not there was sufficient evidence put before the Committee, and sufficient research and discussion by the Committee, to support Recommendation 31.

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<sup>420</sup> Mr Goodsell, AIG, Evidence, 2 March 2004, pp13-14.

## Chapter 13 WorkCover's liaison with victims and families

### Introduction

13.1 Term of reference 1 (b) for this inquiry required the Committee to inquire into and report on:  
the role and performance of WorkCover in liaising with victims and families.

13.2 This chapter examines:

- examples of WorkCover's liaison with victims and families
- changes to WorkCover's procedures for liaising with victims and families
- the role of insurers in liaising with victims and families.

### Examples of WorkCover's liaison with victims and families

13.3 One of the most common complaints to the Committee during the conduct of its inquiry was that WorkCover has in the past failed adequately to communicate with workers injured at the workplace and the families of workers killed in the workplace.

13.4 During the Committee's public hearings, the Committee took evidence from:

- Ms Baxter, the mother of Mr Exner
- Mrs McGoldrick, the mother of Mr McGoldrick
- Mrs Jardine and Mrs Murray, the wife and daughter of Mr Jardine
- Mr & Mrs Rees, the parents of Mr Rees
- Mr Howell
- Ms Boland, the wife of Mr Boland
- Mr Welch, the husband of Mrs Welch.

13.5 The Committee examines below WorkCover's liaison with these individuals in relation to their particular circumstances.

#### The case of Mr Exner

13.6 In her evidence to the Committee on 16 February 2004, Ms Baxter indicated that WorkCover only contacted her in relation to the death of her son, Mr Exner, on Thursday, 12 February 2004, almost five months after her son's death on 15 October 2003. The Committee notes that this was four days before Ms Baxter was due to give evidence at the Committee's public hearing on 16 February 2004.

- 13.7** The contact that Ms Baxter received was from Mr John Watson, Acting General Manager, Occupational Health and Safety, WorkCover NSW, who phoned Ms Baxter to provide her with an update on the coronial hearing and possible court proceedings against J.B. Metal Roofing Pty Ltd.
- 13.8** When asked by the Committee Chairman whether she would have expected an official visit from a WorkCover official, Ms Baxter replied:
- Definitely. Aren't they there for the protection of people? There are families to those people, they have all got feelings. They have to go and speak to people, to relate to people and tell them what is going on.<sup>421</sup>

### **The case of Mr McGoldrick**

- 13.9** In her evidence to the Committee on 16 February 2004, Mrs McGoldrick indicated that WorkCover failed to contact her following the death of her son, Mr Dean McGoldrick, on 1 February 2000. In turn, she indicated that she contacted WorkCover on several occasions, although she stated that she found that contact mostly unsatisfactory.<sup>422</sup>
- 13.10** The Committee notes, however, that in evidence on 2 March 2004, Mr Blackwell argued that WorkCover stayed in regular contact with Mrs McGoldrick through its solicitor working on the case and the team manager of the construction team.<sup>423</sup>
- 13.11** In evidence on 16 March 2004, Mrs McGoldrick acknowledged that the solicitor who was managing the case was in regular contact with her, was always available to provide additional information and supported her throughout the inquiry and prosecution. However, Mrs McGoldrick did express her surprise that the solicitor was not present on the day of the hearing in the Industrial Relations Commission.<sup>424</sup>
- 13.12** Similar to Ms Baxter, Mrs McGoldrick was also contacted by WorkCover in the few days prior to the conduct of the Committee's first public hearing on 16 February 2004.<sup>425</sup>
- 13.13** In the hearing on 17 February 2004, the Committee asked Mr Blackwell whether WorkCover only contacted Mr Baxter and Mrs McGoldrick as a result of the conduct of this inquiry. In response, Mr Blackwell indicated that the contact was made because WorkCover was about to commence an advertising campaign in relation to falls from heights, and that it was thought this would be a sensitive issue for the relatives of Mr Exner and Mr McGoldrick.<sup>426</sup>

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<sup>421</sup> Ms Baxter, Evidence, 16 February 2004, p7

<sup>422</sup> Mrs McGoldrick, Evidence, 16 February 2004, pp8-9

<sup>423</sup> Mr Blackwell, Evidence, 2 March 2004, p60

<sup>424</sup> Mr McGoldrick, Evidence, 16 February 2004, p16

<sup>425</sup> Mrs McGoldrick, Evidence, 16 February 2004, pp8-9

<sup>426</sup> Mr Blackwell, Evidence, 17 February 2004, p27

### The case of Mr Jardine

- 13.14** In her evidence to the Committee on 16 February 2004, Mrs Murray indicated that immediately following the death her father, Mr Jardine, on 3 July 2002, she and her mother were in contact with WorkCover, and received a booklet from WorkCover about the procedures of the Coroner. However, Mrs Murray indicated that WorkCover did not keep them up to date with the subsequent progress of the investigation.
- 13.15** In turn, Mrs Jardine indicated that the only means by which she found out about the investigation was because WorkCover contacted her to get a copy of Mr Jardine's signature (this related to the allegation noted in Chapter 2 that Mr Jardine's signature had been forced). The Committee notes in particular the following comment by Mrs Jardine:
- The main thing they do not take into consideration is the enormous shock of something like this, let alone all this that we had to put up with. As we have heard from so many people, including a few today, WorkCover does not follow through. It is just a powder puff.<sup>427</sup>
- 13.16** The Committee notes that this evidence was partially contradicted by WorkCover. In its response to questions on notice from 17 February 2004 and 2 March 2004, WorkCover indicated that:
- a senior inspector of the Construction Team liaised with Mrs Jardine shortly after the death of her husband and advised her about WorkCover's role and the ongoing investigation by WorkCover and the State Coroner
  - Mrs Jardine was provided with a copy of a publication entitled *After a Workplace Fatality* (discussed in greater detail later in this chapter)
  - Mrs Jardine was again contacted in July 2003 by a senior investigating inspector in order to provide her with an update on the progress of the investigation.<sup>428</sup>
- 13.17** The Committee is also pleased to note that following Mrs Jardine's evidence to the Committee on 16 February 2004, WorkCover has been in contact with her twice to update her on significant developments in her case:
- the Director of Legal Group contacted Mrs Jardine on 20 February 2004 to advise her that the investigation into her husband's death was complete, and to indicate that prosecution proceedings had commenced that day
  - the Director of the Legal Group met Mrs Jardine and her son on Tuesday 2 March 2004 in order to provide further details of the prosecution.<sup>429</sup>
- 13.18** On a separate matter, the Committee notes the evidence of Mr Ferguson in relation to Mrs Jardine and the assistance she received from WorkCover. Mr Ferguson indicated that:

<sup>427</sup> Mr Jardine, Evidence, 16 February 2004, p29

<sup>428</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p 11. See also WorkCover, Response to Questions on Notice from 2 March 2004, p17

<sup>429</sup> WorkCover, Response to Questions on Notice from 17 February 2004, p 11. See also WorkCover, Response to Questions on Notice from 2 March 2004, p17

I spoke to Mrs Jardine after her evidence. I have never met her before. She told me that she had to bury her husband with no financial compensation whatsoever from WorkCover. That contractor and it did not come out yesterday did not have any workers compensation insurance for the worker killed, for any of the casual workers employed by that company, nor any of the permanent workers employed by that company; no workers compensation insurance.

Mrs Jardine has been through the system. One would have thought she would have been provided with some assistance from WorkCover, or some Government agency, to help her. ... She had buried her own husband with her own money. She and her daughter have been going to counselling for the trauma at their own expense.

They were not aware of the uninsured workers liability scheme, where if an employer does not have a workers compensation policy, a family can pursue a claim for workers compensation where there is dependency and WorkCover pays for the funeral and for compensation.

She was not aware of that two years later and she was told yesterday by myself. I do not regard that as my job, to run around looking after every family who has had this sort of trauma. I expect a performance from WorkCover. The performance, quite frankly, in relation to that is zero. I give it zero out of 10 in relation to Mrs Jardine and I am hopeful that WorkCover will pay attention and give that issue some priority.<sup>430</sup>

- 13.19** The Committee agrees with Mr Ferguson that the situation Mrs Jardine and her daughter were left in was deplorable. The Committee believes that when liaising with the families of deceased workers, WorkCover has a responsibility to pass on information about obtaining compensation and counselling, and not just information on the status of the investigation.

### **The case of Mr Rees**

- 13.20** In their evidence to the Committee on 16 February 2004, Mr and Mrs Dennis and Sharon Rees indicated that they did not receive any direct contact from WorkCover following the death of their son, Mr Gregory Rees, on 19 September 2002. WorkCover did, however, contact their son's partner as his official next-of-kin.
- 13.21** When they did not receive any contact from WorkCover, Mr and Mrs Rees personally attended WorkCover's Toronto office, and were given the contact details of an officer in the Newcastle office. That officer subsequently sent the Rees two booklets about demolitions and fatalities in the workplace. Mrs Rees later again attended WorkCover's Toronto office, and received further information on the WorkCover investigation.
- 13.22** Subsequently, however, as examined in Chapters 2 and 9, Mr and Mrs Rees indicated that they were contacted in a private capacity by Mr Terry Perkins, in relation to a previous incident during the demolition of No 5 Ore Bridge at the former Newcastle BHP Steelworks.
- 13.23** The Committee examines these matters in greater detail in Chapter 9. However, in relation to WorkCover's liaison with Mr and Mrs Rees, the Committee believes that it is unfortunate that the Rees only found out about previous concerns about the demolition of ore bridges at the

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<sup>430</sup> Mr Ferguson, Evidence, 17 February 2004, pp32-33

former Newcastle BHP Steelworks through a private contact, rather than directly from WorkCover. Clearly, this would have been very upsetting to Mr and Mrs Rees.

### **The case of Mr Howell**

- 13.24** In his evidence to the Committee on 17 February 2004, Mr Howell indicated that following his accident on May 1992, and again just two years ago, he had his solicitors contact WorkCover for the purposes of a prosecution. However, he indicated that his solicitors never received a response from WorkCover.<sup>431</sup>
- 13.25** Mr Howell subsequently provided to the Committee copies of two items of correspondence sent in October and November 2003 from his lawyers, Higgins & Higgins, in relation to his case. This correspondence was sent in October and November 2003, and requested that WorkCover investigate the alleged withholding of information by QBE Workers Compensation NSW Ltd.
- 13.26** On receipt of this correspondence from Mr Howell, the Committee sought advice from WorkCover on this matter. WorkCover indicated that it had no correspondence from Mr Howell in relation to possible breaches of the OH&S legislation. However, WorkCover acknowledged that it had responded to Mr Howell's solicitors concerning his claim for workers' compensation, and indicated that it had contacted the relevant insurer, QBE Workers' Compensation (NSW) Ltd, which had undertaken to provide to Mr Howell's solicitors, all medical records it had in respect of the injuries suffered by Mr Howell on 5 May 1992.<sup>432</sup>

### **The case of Mr Boland**

- 13.27** In her evidence to the Committee on 15 March 2004, Ms Boland indicated her belief that WorkCover did not keep her informed of the progress of the investigation into the death of her husband, Mr Boland, and that at all times it was she who had to initiate the contact. As Ms Boland stated:

WorkCover doesn't do anything. Honestly, I don't even know what they are meant to do. What are they meant to do? Is there any procedure or something in there that they are meant to follow? What happens after something like this happens? There is no guidance, and you feel so alone. Everything that I have had to do, I have had to do on my own. It has been hard, but I have just had to do it.<sup>433</sup>

- 13.28** Ms Boland indicated that rather than support from WorkCover, she received support from the Construction, Forestry, Mining and Energy Union (CFMEU), which ensured she consulted with a solicitor and offered her the services of a counsellor, although she subsequently sought her own assistance from counsellors and psychiatrists.<sup>434</sup>

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<sup>431</sup> Mr Howell, Evidence, 17 February 2004, pp52-53

<sup>432</sup> Correspondence from Mr Blackwell, CEO, WorkCover to Committee Chairman, 14 April 2004.

<sup>433</sup> Ms Boland, Evidence, 15 March 2004, p4

<sup>434</sup> Ms Boland, Evidence, 15 March 2004, pp3-5

- 13.29** The Committee notes that Mr Blackwell responded to the case of Ms Boland during subsequent evidence on 15 March 2004. Mr Blackwell expressed his sympathy for the tragic circumstances of Mr Boland death, but did indicate that WorkCover inspectors had been in contact with Mrs Boland on multiple occasions since the death of her husband.<sup>435</sup>

### **The case of Mrs Welch**

- 13.30** In his evidence to the Committee on 15 March 2004, Mr Welch indicated that following the death of his wife, Mrs Welch, his initial contact was with the NSW Police who attended his home and explained the circumstances of his wife's accident.<sup>436</sup>

- 13.31** As indicated in Chapter 2 and 10, WorkCover initially did not intend to take any further action in relation to the death of Mrs Welch on the basis that the accident occurred outside the workplace and was a road safety issue. It was only after Mr Welch personally contacted WorkCover with additional details of the accident to his wife that WorkCover undertook an investigation. As stated by Mr Welch:

When I got the letter from the general manager of WorkCover that had been sent to the Coroner, in which they said that they would not be taking any further action, I rang WorkCover and spoke to someone who put me through to a gentleman who was very good, Les Blake. When I told him the circumstances I think he almost dropped the phone. My wife was about one metre off the site when the trailer hit her. Most of the trailer would still have been on the site. WorkCover could not say that it had nothing to do with that construction site, because the trailer was still on the site.<sup>437</sup>

- 13.32** From this point on, Mr Welch indicated his belief that WorkCover 'performed as it should.' He subsequently had meetings with the investigator appointed to investigate the case, and received correspondence from the CEO of WorkCover indicating that WorkCover was opening the case.<sup>438</sup> When asked whether he was happy with the way he has been kept informed by WorkCover of the prosecution in the Industrial Relations Commission, he responded:

Yes, as far as letting me know that the investigation had resulted in charges being laid, or would be laid, against the building company and the contractor involved, the principal.<sup>439</sup>

### **Summary of the cases**

- 13.33** The Committee accepts that in at least some of the cases noted above, WorkCover's procedures for liaising with relatives were deficient. While in many of the cases cited, WorkCover was in official contact with the relatives of victims of workplace accidents, in

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<sup>435</sup> Mr Blackwell, Evidence, 15 March 2004, p50

<sup>436</sup> Mr Welch, Evidence, 15 March 2004, p10

<sup>437</sup> Mr Welch, Evidence, 15 March 2004, p11

<sup>438</sup> Mr Welch, Evidence, 15 March 2004, p12

<sup>439</sup> Mr Welch, Evidence, 15 March 2004, p12

many instances, the perception of the relatives was that WorkCover did not offer sufficient support.

- 13.34** This contrasts with many comments from the relatives of deceased workers praising the assistance they have received from the CFMEU. For example, as stated by Mrs McGoldrick in the hearing of 16 February 2004:

The only people out there who are really trying to protect the workers' health and safety are the unions. The Construction, Forestry, Mining and Engineering Union [CFMEU] has been the one that has stood by me and supported me since Dean's death. The same support or any support has not come from WorkCover or any other government agency.<sup>440</sup>

- 13.35** The Committee recognises that the CFMEU does take a very active and constructive approach to OH&S in the workplace, has clearly provided considerable assistance and comfort to many of the Committee's witnesses, and has clearly been the driver behind bringing the cases of many witnesses to the attention of the Committee.
- 13.36** That said, the Committee also recognises the difficulty that WorkCover faces in striking the correct balance when liaising with the relatives of victims of workplace accidents. This is examined in greater detail below.

### **Changes to WorkCover's procedures for liaising with victims and families**

- 13.37** In its written submission, WorkCover indicated that prior to August 2002, when a workplace fatality was reported to WorkCover, the General Manager sent the deceased worker's next of kin a condolence letter indicating that they could discuss WorkCover's role and the progress of the investigation by contacting a nominated Team Leader. The letter was accompanied by a publication, entitled *After a Workplace Fatality*, which outlined the support available to family and friends, including:
- interpreter assistance
  - the role of WorkCover
  - the role of the NSW Police
  - the role of the Coroner
  - possible prosecution by WorkCover
  - compensation
  - civil legal proceedings
  - workers' compensation insurance
  - contact details for further help including bereavement support, counselling services, legal aid and entitlements to compensation.

<sup>440</sup> Mrs McGoldrick, Evidence, 16 February 2004, p5

- 13.38** However, in September 2002, the former CEO of WorkCover decided that the approach outlined above should be discontinued, pending a review of the publication and consideration of additional counselling and support services.<sup>441</sup>
- 13.39** In the interim, WorkCover has established a new registered psychologist position within the Legal Group to coordinate liaison and counselling services with families. In addition, WorkCover has engaged the Salvation Army, on an interim basis, to provide counselling services pending finalisation of permanent arrangements.<sup>442</sup>
- 13.40** In the hearing on 17 February 2004, the Committee raised with Mr Blackwell criticisms of WorkCover's procedures for liaising with families as outlined by several witnesses to the inquiry. In response, Mr Blackwell reiterated that WorkCover was undertaking a review of its procedures, as outlined above, but continued:

we acknowledge that during the review of these practices, which has been ongoing, we have not always struck the right balance between a family's right to privacy and respect and their need for information, so I guess we are saying that in some circumstances we have not provided enough information to families. Regretfully in some instances families should have been contacted earlier concerning the progress of the investigation. However, I would then say that in the far majority of cases family members have been well aware and have been contacted on a regular basis by the inspectors concerned and by the legal team concerned.

More recently we have created a new position in our work place fatality investigation unit, which is within our legal group, to co-ordinate the provision of information and counselling services. We have engaged the Salvation Army to provide interim counselling services to grieving families, prior to the finalization of arrangements for the provision of counselling services over the longer term. The Salvation Army already provides counselling services to inspectors who have, for example, been involved in the investigation of a traumatic accident which may have led to serious injury or death. So that service is being extended to the families of deceased workers.<sup>443</sup>

- 13.41** Mr Blackwell subsequently acknowledged, however, that since September 2002, the staff in WorkCover's 27 offices have had no written guidance on the procedures to be followed when liaising with the families of deceased workers. In the interim, Mr Watson, Acting General Manager, Occupational Health and Safety, WorkCover, indicated to the Committee:

inspectors have been informed that they should contact their team manager, their line manager in respect of dealing with grieving relatives and that an appropriate response will be given in respect of the contact and we have put in place this arrangement with the Salvation Army so that we can provide assistance as appropriate and as requested to families as they do and I guess it's fair to note that with a number of these matters that we deal with not all families require contact and in fact some would prefer not to have contact.<sup>444</sup>

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<sup>441</sup> Submission 29, WorkCover, p26. See also Mr Blackwell, Evidence, 17 February 2004, pp6-7

<sup>442</sup> Submission 29A, WorkCover, p7

<sup>443</sup> Mr Blackwell, Evidence, 17 February 2004, p7

<sup>444</sup> Mr Watson, Evidence, 17 February 2004, p9

- 13.42 Mr Watson further indicated that WorkCover inspectors were informed of the revised procedures for dealing with families verbally through their team meetings.<sup>445</sup>
- 13.43 The Committee notes that since the withdrawal of the original procedures for liaising with families in September 2002, WorkCover has been developing new procedures, which are likely to be released soon by the executive group of WorkCover. WorkCover subsequently provided to the Committee a copy of the draft procedures entitled *Guide for Families, Dealing with Workplace Death*.<sup>446</sup>
- 13.44 The Committee welcomes the pending release of these new procedures giving WorkCover officers guidance when liaising with workers injured at the workplace and the families of workers killed in the workplace.
- 13.45 Regrettably, however, in the interim, the procedures that WorkCover has followed since the withdrawal of the previous procedures in September 2002 have been completely unsatisfactory. It is unacceptable that over a period of 20 months since September 2002, WorkCover inspectors have had no formal guidance on the procedures to be followed when liaising with workers injured at the workplace and the families of workers killed in the workplace.
- 13.46 While it is commendable that WorkCover is seeking to update its procedures for liaising with the families of deceased workers, the Committee believes that WorkCover should have undertaken this period of review prior to the withdrawal of the previous procedures on September 2002, and not subsequently.

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### Recommendation 32

That WorkCover give priority to completing and implementing its protocol for liaising with the families of deceased workers. This protocol should ensure that the families and victims are considered and consulted during an investigation and possible prosecution, that families are given a single point of communication with WorkCover, and that communication should occur regularly.

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- 13.47 As part of this review of its communications procedures, the Committee wishes to stress that when liaising with the families of deceased workers, WorkCover has a responsibility to pass on information about obtaining compensation and counselling, and not just information on the progress of the investigation. The situation in which Mr Jardine and her daughter were placed should not be repeated.

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<sup>445</sup> Mr Watson, Evidence, 17 February 2004, p10

<sup>446</sup> Mr Watson, Evidence, 17 February 2004, p11

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**Recommendation 33**

That WorkCover include in its protocol for liaising with the families of deceased workers the requirement that family members be informed about obtaining compensation and counselling, in addition to being kept informed of the progress of the investigation.

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- 13.48** On a separate matter, as indicated in Chapter 10, on 27 January 2004, the Minister for Police, the Attorney-General, the Minister for Industrial Relations and the Director of Public Prosecutions released the Protocol for the Investigation and Provision of Advice in Relation to Workplace Deaths and Serious Injury and Prosecutions Arising Therefrom. This protocol formally emphasises co-operation between the signatory agencies and requires the NSW Police and WorkCover to develop a strategy to ensure that the family and other interested parties are kept properly informed of developments during an investigation.<sup>447</sup>

**The role of insurers in liaising with victims and families**

- 13.49** Although not within the scope of term of reference 1(b), the Committee also wishes to comment on the role of insurers in liaising with victims and families.
- 13.50** The Committee received a written submission from Insurance Australia Group (IAG), the largest provider of workers' compensation insurance in Australia, and the insurer involved in the case of Mr McGoldrick. The company offered a number of comments on the operation of the workers' compensation system, especially as it relates to families.

**Insurer notification of a serious injury or fatality**

- 13.51** In its written submission, IAG noted that in the case of Mr McGoldrick, WorkCover was immediately notified of the fatality by the employer, as is required under s 86 of the *OH&S Act 2000*. However, IAG itself was not informed of the fatality by the employer until two days later, as is required under s 44 of the *Workplace Injury Management and Injury Compensation Act 1988*.
- 13.52** IAG argued that if it had been notified earlier of the fatality, it would have had a better opportunity to take more proactive action in managing the fatal injury claim than was possible in the circumstances. In particular, IAG indicated that both a fellow employee of Mr McGoldrick's (a boyhood friend) and his mother subsequently made successful claims against IAG (under the CGU Workers' Compensation brand) for psychological injuries suffered as a result of the fatality. IAG submitted that if it had been notified of the accident earlier, it may have been possible to offer counselling to at least the fellow worker, which may have lessened the psychological trauma he suffered.

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<sup>447</sup> Cited in Submission 39, Australian Business Limited, pp3-4

- 13.53** Accordingly, IAG recommended that WorkCover (in addition to the employer) should be required to inform the relevant insurer when it becomes aware of a serious injury or fatality, to allow early intervention and management of the claim by the insurer.<sup>448</sup>

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### Recommendation 34

That the Government amend the *OH&S Act 2000* to require WorkCover to inform the relevant insurer when it becomes aware of a serious injury or fatality.

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#### Insurer contact with non-insured persons

- 13.54** In respect of Mrs McGoldrick, IAG indicated that while Mr McGoldrick's work mate was a fellow employee insured by IAG, Mrs McGoldrick was not directly insured by IAG. Furthermore, Mrs McGoldrick was not directly covered by ss 25 to 32 of the *Workers' Compensation Act 1987* relating to family entitlements in the case of a fatal accident, as she was in no degree dependent on her son financially.
- 13.55** Nevertheless, IAG indicated that it was still liable for Mrs McGoldrick's psychological injury under s 3 of the *Compensation to Relatives Act 1897* because Tamworth Metal Gutter Fascia Services Pty Ltd, which IAG insured, negligently caused the death of her son, and her psychological injury were a consequence of this negligence.
- 13.56** In the event, IAG indicated that it did not have notice that Mrs McGoldrick had suffered psychological injury as a result of the accident until a notice of common law claim was received in September 2001, 19 months after the accident. Moreover, IAG noted that there is no mechanism in place for such injuries to be reported to insurers.
- 13.57** To address this perceived problem, IAG noted the provisions of the Protocol for the Investigation and Provision of Advice in Relation to Workplace Deaths and Serious Injury and Prosecutions Arising Therefrom, and WorkCover's new procedures for offering counselling to those affected by workplace deaths.
- 13.58** IAG recommended that as part of these procedures, WorkCover should adopt the practice of identifying the insurer to non-insured family members.
- 13.59** In support of this position, IAG noted that the Motor Accident Authority must also deal with a large number of fatal accidents, and that it offers the Claims Advisory Service (CAS) to assist people in making a claim. One useful service that the CAS provides is to inform relatives of a person killed in an accident of the details of the 'green slip' insurer involved in their case.<sup>449</sup>

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<sup>448</sup> Submission 22, IAG, pp1-2

<sup>449</sup> Submission 22, IAG, pp2-4

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**Recommendation 35**

That as part of its revised protocol for liaising with the families of deceased workers and injured workers incapable of acting on their own behalf, WorkCover should include a provision for identifying the insurer to non-insured family members of the worker(s).

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**Funeral expenses**

- 13.60** In its written submission, IAG indicated that because Mr McGoldrick left no dependants, Mrs McGoldrick was awarded damages to pay the cost of his funeral under s 27 of the *Workers' Compensation Act 1987 (1987 Act)*.
- 13.61** However, IAG noted that under s 25 of the *1987 Act*, when the deceased does leave dependants, they become entitled to a lump sum or weekly benefit, and no separate amount is payable for funeral expenses. This raises the possibility that benefits are not available to dependents prior to a funeral (due to the administration involved in processing such claims). In addition, if a dependant takes a weekly benefit, it will not be sufficient to cover the significant large one-off expense of a funeral.
- 13.62** Accordingly, IAG recommended that the *1987 Act* be amended to allow funeral expenses to be paid separately and directly by insurers in all cases, with or without a compensating discount to the lump sum payout or weekly benefit.<sup>450</sup>
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**Recommendation 36**

That the Government amend the *Workers' Compensation Act 1987* to allow funeral expenses to be paid separately and directly by insurers in all cases, with or without a compensating discount to the lump sum payout or weekly benefit.

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**Conclusion**

- 13.63** The Committee wishes to acknowledge at the end of its report that this has been a difficult inquiry for all participants.
- 13.64** While the Committee's work on this issue concludes with this report, the Committee recognises that for WorkCover staff, employers, employees, unions and most especially for the injured and families, the impact of workplace accidents continues.

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<sup>450</sup> Submission 22, IAG, pp4-5





## Appendix 1 Submissions

No	Author
1	Ward Mr Craig
2	Davis Mr Frank 2a – supplementary submission 2b – supplementary submission
3	Sahathevan Mr Ganesh
4	Griffiths Mr Peter
5	Smith Mr Tom, Managing Director, Daly Smith Corporation
6	Howell Mr Wayne
7	Osmond Ms Margy, Chief Executive, The Chamber of Commerce
8	Hawkins Mr Tony, Chief Executive Officer, WorkCover Queensland
9	Jenkins Mr Brad
10	Jardine Mrs Rosalie 10a – supplementary submission
11	Whitehead Mr Bruce, Director, The Brief Group
12	Treanor Ms Margaret
13	Rees Mr Denis & Mrs Sharon 13a – supplementary submission
14	Treadaway Ms Jackie
15	Stokes Mr Barry, Director, Deck Guardrail Australia Pty Ltd
16	Scott-Irving Mr Stewart
17	Vale Mr Brian, CEO, Medical Industry Association of Australia
18	O'Dwyer Mr Laurence, Vice President, Asia Pacific DuPont Safety Resources
19	Williamson Mr Michael, General Secretary, Health Services Union
20	McLaws Associate Professor Mary-Louise, Director, NSW Hospital Infection Epidemiology & Surveillance Unit School of Public Health & Community Medicine
21	Chesterfield-Evans Dr Arthur, Member of the Legislative Council
22	Pearce Mr Douglas, Group Executive, Safety and Personal Injury Insurance Australia Group
23	Salier Mr Gordon, President, The Law Society of New South Wales
24	Cooper Mr G, Director, Injuries Australia
25	Trompf Ms Peggy, Director, Workers Health Centre
26	McGoldrick Ms Robyn
27	Hampson Mr Anthony
28	Ferguson Mr Andrew, NSW State Secretary, Construction Forestry Mining Energy Union

No	Author
	(CFMEU) 28a – supplementary submission from Ms Karen Iles, Apprentice Officer with the CFMEU
29	Blackwell Mr Jon, CEO, WorkCover NSW 29a – supplementary submission
30	Harrison Mr Ian President The New South Wales Bar Association
31	Sokias Ms Vicki, Research Officer, Police Association of New South Wales
32	Naylor Mr Paul, General Manager, Master Plumbers Association of NSW
33	Pender Ms Karen, Karen Pender Injury Management
34	Baxter Ms Sue
35	Keenan Mr Stephen, OHS Manager, Baseline Pty Ltd
36	Robertson Mr Brian, Director, State Debt Recovery Office 36a – supplementary submission
37	Bastian Mr Paul, State Secretary Australian Manufacturing Worker's Union
38	Pattison Mr Greg, General Manager, Workplace Solutions Australian Business Limited
39	Sullivan Mr Bryan, Bayline Holdings Pty Ltd
40	Peterson Ms Debbie, Diabetes Educator, Diabetes Australia
41	Sinnott Dr Michael, Managing Director, Qlicksmart Pty Ltd
42	McMaster Mr Hugh, Government and Commercial Services Manager, NSW Road Transport Association Inc
43	Stewart Dr Greg, Chief Health Officer, NSW Health 43a – supplementary submission
44	Head Ms Margaret, President, The Ergonomics Society of Australia Inc
45	Boland Ms Karen
46	Welch Mr Alan
47	Hughes Ms Alisha, Secretary, The National Union of Workers
48	Gordon Ms Sue
49	Perkins Mr Terry
50	Holmes Mr Brett, General Secretary, NSW Nurses' Association
51	Jones Mr Luke
52	Yaager Mrs Mary, OH&S Workers Compensation Co-ordinator, NSW Labor Council
53	Likar Mr Steve 53a – supplementary submission 53b – supplementary submission
54	Goodsell Mr Mark, Director, NSW Australian Industry Group
55	Confidential
56	Sharp Mr Trevor, Co-ordinator The Building Trades Group of Unions

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<b>No</b>	<b>Author</b>
57	Lowrie Mr David, National Electrical Contractors Association
58	Schekeloff Ms Kim, Director Workplace Safety Australia Pty Ltd
59	Smith Mr Peter

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## Appendix 2 Witnesses

Date	Name	Position and Organisation
<b>Monday 16 February 2004</b>	Mr Anthony Hampson	OH&S Manager, Baseline P/L
	Mrs Robyn McGoldrick	
	Mr Tim McGoldrick	
	Ms Kim Ann-Marie Williams	
	Ms Sue Baxter	
	Mr Stephen Keenan	
	Mrs Rosalie Jardine	
	Ms Kate Murray	
	Mr Denis Rees	
	Mrs Sharon Rees	
<b>Tuesday 17 February 2004</b>	Mr Jon Blackwell	Chief Executive Officer, WorkCover
	Mr John Watson	Acting General Manager, OH&S, WorkCover NSW
	Mr Philip Reed	Acting General Manager, Corporate and Governance Committee, WorkCover NSW
	Ms Bernadette Grant	Director, Legal Group, WorkCover NSW
	Ms Maureen Buchtman	Manager, OH&S Training, M&J Buchtman Consultants
	Mr Andrew Ferguson	NSW State Secretary, Construction, Forestry, Mining and Energy Union
	Mr Wayne Howell	OH&S Workers Compensation Co- ordinator, NSW Labor Council
	Mrs Mary Yaager	Secretary, Police Association of NSW
	Mr Peter Remfrey	OH&S Officer, AMWU
	Mr Keith McGucken	OH&S Officer, Transport Workers Union of Australia
	Ms Alisha Hughes	Industrial Research Officer
	Mr Lincoln Kinley	Industrial Officer, Shop, Distributive & Allied Employees Association of NSW
	Mr Matthew Thistlethwaite	Assistant Secretary, Australian Workers Union, NSW Branch
	Mr Frank Davis	OH&S Officer

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Monday 1 March 2004</b>	Mr Peter Rozen	Barrister, OH&S
	Mr Paul Bastian	NSW State Secretary, AMWU
	Ms Trish Butrej	OH&S Co-ordinator, NSW Nurses' Association
	Mr Glenn Street	Regulatory Affairs Officer, Medical Industry Association of Australia
	Ms Susan Martland	Member of the Health Care Safety Special Interest Group, Medical Industry Association of Australia
	Mr Brian Robertson	Director, State Debt Recovery Office
	Mr Brendan Nugent	Deputy Director, State Debt Recovery Office
	Dr Greg Stewart	Chief Health Officer, NSW Health
	Ms Kim Stewart	Associate Director, AIDS and Infectious Diseases Unit, NSW Health
	<b>Tuesday 2 March 2004</b>	Mr Greg Pattison
Ms Chelsea Hampel		Policy Advisor, Australian Business Limited
Mr Mark Goodsell		Director, NSW, Australian Industry Group
Mr David Russell		Senior Advisor, Australian Industry Group
Ms Penny Shakespeare		Director, Office of Industrial Relations, Chief Minister's Department, ACT
Mr Garry Brack		Chief Executive, Employers First
Mr Jon Blackwell		Chief Executive Officer, WorkCover NSW
Mr John Watson		Acting General Manager, Occupational Health and Safety, WorkCover NSW
Mr Philip Reed		Acting General Manager, Corporate and Governance Committee, WorkCover NSW
Ms Bernadette Grant		Director, Legal Group, WorkCover NSW
Mr Rick Bultitude	Manager, Government Team, WorkCover NSW	

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**Monday 15 March 2004**

Ms Karen Boland	
Mr Alan Welch	
Mr Hugh McMaster	Government and Commercial Services Manager, Road Transport Association
Ms Hamina Cameron	Solicitor with WorkCover NSW
Ms Karen Windermoth	Solicitor, Commonwealth Director of Public Prosecutions
Ms Ramya Panagoda	Solicitor with WorkCover NSW
Mr Jon Blackwell	Chief Executive Officer, WorkCover NSW
Ms Bernadette Grant	Director, Legal Group, WorkCover NSW
Mr Nicholas Cowdery AM SC	Director of Public Prosecutions
Ms Karen Iles	CFMEU Apprentice Officer
Mr John Watson	Acting General Manager, Occupational Health and Safety, WorkCover NSW
Mr Philip Reed	Acting General Manager, Occupational Health and Safety, WorkCover NSW

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## Appendix 3 Tabled Documents

### Public Hearing held 16 February 2004

1. Denis and Sharen Rees  
Supplementary submission (No.13)
2. Rosalie Jardine  
“Summary-Recommendation-Coroner”  
WorkCover NSW
3. Robyn McGoldrick  
Article “Angry workers take to the streets”  
Unity magazine Dec 2003
4. Stephen Keenan  
Submission (No.35)
5. Susan Baxter  
Submission (No.34)

### Public Hearing held 17 February 2004

1. Questions tabled by Mr Peter Primrose
2. Frank Davis  
Supplementary submission (No.2)
3. Andrew Ferguson  
Information in relation to the death of Mrs Lola Welch on 30 June 2001
4. Mary Yaager  
PowerPoint presentation

### Public Hearing held 1 March 2004

1. Dr Greg Stewart, NSW Health
  - Submission (No.38)
  - “Monitoring Occupational Exposure to Blood-Borne Viruses in Health Care Workers in Australia”
  - “Hollow-bore needlestick injuries in a tertiary teaching hospital: epidemiology, education and engineering”
  - “Infection rates”
2. Brian Robertson, Director, State Debt Recovery Office  
Submission (No. 36)

### Public Hearing held 2 March 2004

1. Penny Shakespeare, Director, Office of Industrial Relations, Chief Minister’s Department, ACT
  - Criminal Code 2002
  - Crimes (Industrial Manslaughter) Amendment Act 2003
  - Crimes (Industrial Manslaughter) Amendment Bill 2002 – Explanatory Memorandum

- Crimes (Industrial Manslaughter) Amendment Bill 2002 – Report No 6 – Standing Committee on Legal Affairs – September 2003
2. Jon Blackwell, CEO, WorkCover
    - Answers to Questions on Notice
    - PowerPoint presentation
    - “When an Inspector Calls” A guide to WorkCover’s compliance strategy

### **Public Hearing held 15 March 2004**

1. Mr Alan Welch  
Map of St Ives
2. Mr Hugh McMaster, Government and Commercial Services Manager, Road Transport Association  
Supplementary submission No. 43 – NSW Road Transport Association
3. Ms Karen Iles, CFMEU Apprentice Officer.  
Data on employment injuries for workers under 25
4. Mr Jon Blackwell, Chief Executive Officer, WorkCover NSW
  - Response to Questions on Notice; and
  - *Protecting Young Workers* information booklet.

## **Appendix 4 Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT)**



Australian Capital Territory

## **Crimes (Industrial Manslaughter) Amendment Act 2003**

A2003-55

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2002 179B

Authorised by the ACT Parliamentary Counsel—also accessible at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)



Australian Capital Territory

## **Crimes (Industrial Manslaughter) Amendment Act 2003**

**A2003-55**

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An Act to amend the *Crimes Act 1900*

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The Legislative Assembly for the Australian Capital Territory enacts as follows:

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2002 179B

Authorised by the ACT Parliamentary Counsel—also accessible at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)

Section 1

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**1 Name of Act**

This Act is the *Crimes (Industrial Manslaughter) Amendment Act 2003*.

**2 Commencement**

This Act commences on 1 March 2004.

*Note* The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

**3 Act amended**

This Act amends the *Crimes Act 1900*.

**4 Section 7A, note 1**

*insert*

- section 49C (Industrial manslaughter—employer offence)
- section 49D (Industrial manslaughter—senior officer offence)

**5 New part 2A**

*insert*

**Part 2A Industrial manslaughter****49A Definitions for pt 2A**

In this part:

*agent*, of a person (the *first person*), means—

- (a) a person (the *second person*) engaged by the first person (whether as independent contractor or otherwise) to provide services to the first person in relation to matters over which the first person—

## Section 5

- (i) has control; or
  - (ii) would have had control apart from an agreement between the first person and second person; or
- (b) a person engaged by another agent of the first person, or by an agent of an agent, (whether as independent contractor or otherwise) to provide services, in relation to the first person, to the other agent in relation to matters over which the other agent—
- (i) has control; or
  - (ii) would have had control apart from an agreement between the agents.

**causes** death—a person's conduct **causes** death if it substantially contributes to the death.

**commissioner for OH&S** means the Occupational Health and Safety Commissioner under the *Occupational Health and Safety Act 1989*.

**conduct**—see the Criminal Code, section 13.

**death**—see the Criminal Code, dictionary.

**employee** means a person engaged under a contract of service.

**employer**, of a worker—a person is an **employer** of a worker if—

- (a) the person engages the worker as a worker of the person; or
- (b) an agent of the person engages the worker as a worker of the agent.

**government**—see the Legislation Act, section 121 (6).

**government entity**—an entity is a **government entity** for a function of the entity if—

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- (a) the entity's exercise of the function is subject to the control of a government (including a senior officer of the government); or
- (b) the entity is otherwise an agent of a government in exercising the function.

**independent contractor** means a person engaged under a contract for services.

**officer**, of a corporation—see the Corporations Act, section 9.

*Note* At the commencement of this section, the definition of **officer** in the Corporations Act, section 9 is as follows:

**officer** of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
  - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  - (ii) who has the capacity to affect significantly the corporation's financial standing; or
  - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

**outworker** means an individual engaged by a person (the **principal**) under a contract for services to treat or manufacture articles or materials, or to perform other services—

- (a) in the outworker's own home; or
- (b) on other premises not under the control or management of the principal.

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*provide services* to, or in relation to, a person includes perform work for, or in relation to, the person.

*senior officer*, of an employer, means—

- (a) for an employer that is a government, or an entity so far as it is a government entity—any of the following:
  - (i) a Minister in relation to the government or government entity;
  - (ii) a person occupying a chief executive officer position (however described) in relation to the government or government entity;
  - (iii) a person occupying an executive position (however described) in relation to the government or government entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the government or government entity; or
- (b) for an employer that is another corporation (including a corporation so far as it is not a government entity)—an officer of the corporation; or
- (c) for an employer that is another entity—any of the following:
  - (i) a person occupying an executive position (however described) in relation to the entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity;
  - (ii) a person who would be an officer of the entity if the entity were a corporation.

**Example for par (a) (ii)**

a person employed under the *Public Sector Management Act 1994*, section 28 (Engagement) or section 30 (Temporary performance of duties) to perform an office of chief executive

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**Example of executive position for par (a) (iii)**

an office created under the *Public Sector Management Act 1994*, section 54A

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

**serious harm**—see the Criminal Code, dictionary.

**volunteer** means a person who—

- (a) provides services—
  - (i) for, or in relation to, the trade or business of someone else; or
  - (ii) for an entity for, or in relation to, a religious, educational, charitable or benevolent purpose or otherwise in the public interest; and
- (b) receives no payment for the provision of the services (other than reasonable out-of-pocket expenses).

**worker** means—

- (a) an employee; or
- (b) an independent contractor; or
- (c) an outworker; or
- (d) an apprentice or trainee; or
- (e) a volunteer.

**49B Omissions of employers and senior officers**

- (1) An employer's omission to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—
  - (a) an act of the employer; or

## Section 5

- (b) anything in the employer's possession or control; or
  - (c) any undertaking of the employer.
- (2) An omission of a senior officer of an employer to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—
- (a) an act of the senior officer; or
  - (b) anything in the senior officer's possession or control; or
  - (c) any undertaking of the senior officer.
- (3) For this section, if, apart from an agreement between a person and someone else, something would have been in the person's control, the agreement must be disregarded and the thing must be taken to be in the person's control.

**49C Industrial manslaughter—employer offence**

An employer commits an offence if—

- (a) a worker of the employer—
  - (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
  - (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the employer's conduct causes the death of the worker, and
- (c) the employer is—
  - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or

**Section 5**

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- (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

**49D Industrial manslaughter—senior officer offence**

A senior officer of an employer commits an offence if—

- (a) a worker of the employer—
  - (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
  - (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the senior officer's conduct causes the death of the worker; and
- (c) the senior officer is—
  - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
  - (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

*Note* The general offence of manslaughter in s 15 applies to everyone, including workers.

**49E Court may order corporation to take certain actions**

- (1) This section applies if a court finds a corporation guilty of an offence against section 49C.

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- (2) In addition to or instead of any other penalty the court may impose on the corporation, the court may order the corporation to do 1 or more of the following:
- (a) take any action stated by the court to publicise—
    - (i) the offence; and
    - (ii) the deaths or serious injuries or other consequences resulting from or related to the conduct from which the offence arose; and
    - (iii) any penalties imposed, or other orders made, because of the offence;
  - (b) take any action stated by the court to notify 1 or more stated people of the matters mentioned in paragraph (a);
  - (c) do stated things or establish or carry out a stated project for the public benefit even if the project is unrelated to the offence.

**Example for par (a)**

advertise on television or in a daily newspaper

**Example for par (b)**

publish a notice in an annual report or distribute a notice to shareholders of the corporation

**Example for par (c)**

develop and operate a community service

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) In making the order, the court may state a period within which the action must be taken, the thing must be done or the project must be established or carried out, and may also impose any other requirement that it considers necessary or desirable for enforcement of the order or to make the order effective.

**Section 5**

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- (4) The total cost to the corporation of compliance with an order or orders under subsection (2) in relation to a single offence must not be more than \$5 000 000 (including any fine imposed for the offence).
- (5) If the court decides to make an order under subsection (2), it must, in deciding the kind of order, take into account, as far as practicable, the financial circumstances of the corporation and the nature of the burden that compliance with the order will impose.
- (6) The court is not prevented from making an order under subsection (2) only because it has been unable to find out the financial circumstances of the corporation.
- (7) If a corporation fails, without reasonable excuse, to comply with an order under subsection (2) (a) or (b) within the stated period (if any) the court may, on application by the commissioner for OH&S, by order authorise the commissioner—
  - (a) to do anything that is necessary or convenient to carry out any action that remains to be done under the order and that it is still practicable to do; and
  - (b) to publicise the failure of the corporation to comply with the order.
- (8) If the court makes an order under subsection (7), the commissioner must comply with the order.
- (9) Subsection (7) does not prevent contempt of court proceedings from being started or continued against a corporation that has failed to comply with an order under this section.
- (10) The reasonable cost of complying with an order under subsection (7) is a debt owing to the Territory by the corporation against which the order was made.

**6 Dictionary***insert**agent*, for part 2A (Industrial manslaughter)—see section 49A.*causes* death, for part 2A (Industrial manslaughter)—see section 49A.*commissioner for OH&S*, for part 2A (Industrial manslaughter)—see section 49A.*conduct*, for part 2A (Industrial manslaughter)—see the Criminal Code, section 13.*death*, for part 2A (Industrial manslaughter)—see the Criminal Code, section 13.*employee*, for part 2A (Industrial manslaughter)—see section 49A.*employer*, for part 2A (Industrial manslaughter)—see section 49A.*government*, for part 2A (Industrial manslaughter)—see the Legislation Act, section 121 (6).*government entity*, for part 2A (Industrial manslaughter)—see section 49A.*independent contractor*, for part 2A (Industrial manslaughter)—see section 49A.*officer*, of a corporation, for part 2A (Industrial manslaughter)—see the Corporations Act, section 9.*outworker*, for part 2A (Industrial manslaughter)—see section 49A.*provide services*, for part 2A (Industrial manslaughter)—see section 49A.*senior officer*, for part 2A (Industrial manslaughter)—see section 49A.

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*serious harm*, for part 2A (Industrial manslaughter)—see the Criminal Code, dictionary.

*volunteer*, for part 2A (Industrial manslaughter)—see section 49A.

*worker*, for part 2A (Industrial manslaughter)—see section 49A.

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**Endnotes****1 Presentation speech**

Presentation speech made in the Legislative Assembly on 12 December 2002.

**2 Notification**

Notified under the Legislation Act on 4 December 2003.

**3 Republications of amended laws**

For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

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I certify that the above is a true copy of the Crimes (Industrial Manslaughter) Amendment Bill 2003, which originated in the Assembly as the Crimes (Industrial Manslaughter) Amendment Bill 2002 and was passed by the Legislative Assembly on 27 November 2003.

Clerk of the Legislative Assembly

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## **Appendix 5 Model Criminal Code part 2.5 – Corporate Criminal Responsibility**

Note: Sections 11.2 (complicity and common purpose) and 11.3 (innocent agency) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

## PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY

### *Division 12*

#### General principles

12.1 (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

*[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]*

#### Physical elements

12.2 If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

#### Fault elements other than negligence

12.3 (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- or

- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2) (c) or (d) include:
- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:
- “board of directors” means the body (by whatever name called) exercising the executive authority of the body corporate;
- “corporate culture” means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place;

“high managerial agent” means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

#### Negligence

12.4 (1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

- (a) negligence is a fault element in relation to a physical element of an offence; and
- (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems or conveying relevant information to relevant persons in the body corporate.

#### Mistake of fact (strict liability)

12.5 (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
- (b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

#### Intervening conduct or event

- 12.6 A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

## PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY

### *Division 13*

#### Legal burden of proof prosecution

- 13.1 (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.
- (3) In this Code:  
"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

#### Standard of proof prosecution

- 13.2 (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

#### Evidential burden of proof - defence

- 13.3 (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

## Code

## PART 5 – CORPORATE CRIMINAL RESPONSIBILITY

## 501. Bodies corporate

This Code applies, with any necessary modifications, to bodies corporate in the same way that it does to natural persons. A body corporate may be found guilty of any offence, including one punishable by imprisonment.

501.1 A physical element of an offence committed by a servant, agent, employee or officer of a body corporate acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority must be attributed to the body corporate.

501.2 If intention, knowledge or recklessness is a required fault element of an offence, that fault element exists on the part of a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

501.2.1 The means by which this test may be satisfied include proving

- that the board of directors of the body corporate intentionally, knowingly or recklessly engaged in that conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence ;
- that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in that conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence but the test will not be satisfied if the body corporate proves that it exercised due diligence to prevent that conduct
- that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. Factors relevant to this issue include

## Commentary

## PART 5 — CORPORATE CRIMINAL RESPONSIBILITY

## 501. Bodies corporate

Recent history has emphasised the need for corporations to be subject to the criminal law. Critics of the existing law have cited recent major disasters — the Air New Zealand Mount Erebus crash, the Bhopal disaster in India, the Chernobyl explosion in what was the USSR, the Exxon Valdez oil spill in Alaska and the Zeebrugge ferry disaster — in support of arguments to reform the rules of corporate criminal responsibility. The committee has strived to develop rules which fairly adapt the general principles of criminal responsibility to the complexities of the corporate form.<sup>1</sup>

Criminal liability of corporations was virtually unknown until the latter half of the nineteenth century, and was in the early stages, limited to vicarious liability for strict liability offences in circumstances where a natural person would be criminally liable for the acts of his or her servant or agent.<sup>2</sup> With the growth and increasing importance of corporations, the criminal responsibility corporations was extended to offences involving fault elements. Examples of vicarious responsibility of corporations for offences involving mens rea in Australia date back to 1921. In *The King and the Minister for Customs v Australasian Films Limited and Anor* (1921) CLR 195, the High Court held that a body corporate may be guilty of an offence involving an intent to defraud the revenue where its servant or agent, in the course of his or her employment, had engaged in the proscribed conduct and that servant or agent, or some superior servant or agent by whose direction the conduct was engaged in, had the necessary intent.

Since 1944, corporations can also be held primarily responsible for the conduct of very senior officers, or persons to whom the particular functions of the corporation have been delegated so that they may be performed unsupervised. The rationale for this primary responsibility is that such an officer is acting as the company and the mind which directs his or her actions is the mind of the company. The leading authority is *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 173.

Given the “flatter structures” and greater delegation to relatively junior officers in modern corporations, the Committee concluded that the *Tesco* test - which among other things, requires the prosecution to prove, beyond reasonable doubt, that the officer was at a sufficiently high level to be regarded as “the directing will and mind” of the corporation - is no longer appropriate.

The position under the Griffith Code seems to be even more restrictive. The original Griffith Code did not contain principles of corporate criminal responsibility. This reflects its nineteenth century origin. The effect was that corporations could not be criminally liable. However, in 1978 Queensland added s.594A to its Code making procedural provision for the prosecution of

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- whether authority or permission to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate
  - whether the servant, agent, employee or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- 501.2.2 “Corporate culture” is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place. “High managerial agent” is a servant, agent, employee or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the body corporate.
- 501.2.3 If the law creating an offence specifies that recklessness is not a sufficient fault element in relation to a physical element of the offence, section 501.2.1 does not enable the required fault element to be proved by proving that the board of directors or a high managerial agent of the body corporate recklessly engaged in the conduct or authorised or permitted the commission of the offence.
- 501.3 The test of negligence for a body corporate is that set out in section 203.4.
- 501.3.1 If negligence is a required fault element of an offence, that fault element may exist on the part of a body corporate even though no individual servant, agent, employee or officer of the body corporate has that fault element if the conduct of the body corporate when viewed as a whole (that is, by aggregating the conduct of any number of its servants, agents, employees or officers) is negligent.

## Commentary

companies. However, it may only allow prosecution for a strict responsibility offence. One submission doubted that the position was so restrictive. At best, the situation is unclear.<sup>3</sup>

The Committee concluded that neither the common law nor the Griffith Codes was adequate in this area. It considered a range of proposals and recent attempts to deal with organisational blameworthiness. For example, under section 65 of the Ozone Protection Act 1989 (Cth), where conduct is engaged in on behalf of a body corporate by a director, servant or agent, both the state of mind and the conduct of the relevant person is deemed to be the conduct of the body corporate. The body corporate has a defence if it can prove, on the balance of probabilities, that it took reasonable precautions and exercised due diligence to avoid the conduct, ie if it can establish a lack of organisational blameworthiness. Two submissions favoured this approach but the Committee decided that such a general reversal of the onus of proof just because a company was charged, especially for the most serious offences (eg manslaughter), could not be justified. The Committee's objective was to develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation. The Committee believes that the concept of "corporate culture" - as defined in s.501.2.2 - supplies the key analogy. Although the term "corporate culture" will strike some as too diffuse, it is both fair and practical to hold companies liable for the policies and practices adopted as their method of operation. there is a close analogy here to the key concept in personal responsibility - intent. Furthermore, the concept of "corporate culture" casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.

It is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate. However, it would not be appropriate to adopt the reverse onus of proof as the general rule. Other than the two submissions mentioned, the response to the corporate responsibility provisions was favourable. Most of the submissions raised matters of detail.

- 1 On Mt. Erebus, see *Report of the Royal Commission to Enquire into the Crash on Mount Erebus, Antarctica, of a DC10 Aircraft Operated by Air New Zealand*. On Zeebrugge, see *UK Department of Transport, MV Herald of Free Enterprise* (1987) Report of Court No. 8974.
- 2 See the UK Law Commission, *Working Paper No. 4, General Principles: Criminal Liability of Corporations*.
- 3 The definition of "person" when used with reference to property includes corporations. That provision is designed to accommodate corporate ownership of property.

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- 501.4 A body corporate may rely on a defence of mistake of fact under section 307 to escape liability for conduct which would, but for this sub-section, constitute an offence on its part if
- the servant, agent, employee or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts which, had they existed, would have meant that the conduct would not have constituted an offence; and
  - the body corporate proves that it exercised due diligence to prevent that conduct.
- 501.5 Negligence or failure to exercise due diligence may be evidenced by the fact that the carrying out of the prohibited conduct was substantially attributable to
- inadequate corporate management, control or supervision of the conduct of one or more of its servants, agents, employees or officers; or
  - failure to provide adequate systems for the conveying of relevant information to relevant persons in the body corporate.
- 501.6 A body corporate may rely on section 310 except where the other person is a servant, agent, employee or officer of the body corporate.

## Commentary

## Section 501

Section 501 applies the Code to corporations subject to any necessary modifications. Some of those modifications are set out in s.501 itself. Others will have to be developed by the courts as this area develops.

Thus the general principles of liability, such as the definition of conduct in s.202.1 and the definitions of the various fault elements in s.203 (eg recklessness in s.203.3) apply to companies. Companies can be liable directly (eg for an omission where a statute imposes liability on the company) or indirectly through the acts of its servants and agents according to the attribution rules set out in s.501. The section provides that corporations can be found guilty of any offence, even if it is punishable by imprisonment alone. The English Draft Code (s.30(7)) restricts liability to offences punishable by a fine. This is not acceptable, see for example, VLRC, *Homicide* paras 15-21.

The Committee has not had time to consider sanctions for corporations. There is a vast amount of literature on this. See, for example, Fisse, "Criminal Law: The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 *Sydney LR* 277.

*501.1 Physical elements*

Section 501.1 attributes the physical elements of the offence to the company where these elements were committed by a servant, agent, employee or officer of the company acting within the actual or apparent scope of his or her employment or his or her actual or apparent authority. This does not impose vicarious liability because liability depends also on fault as defined below.

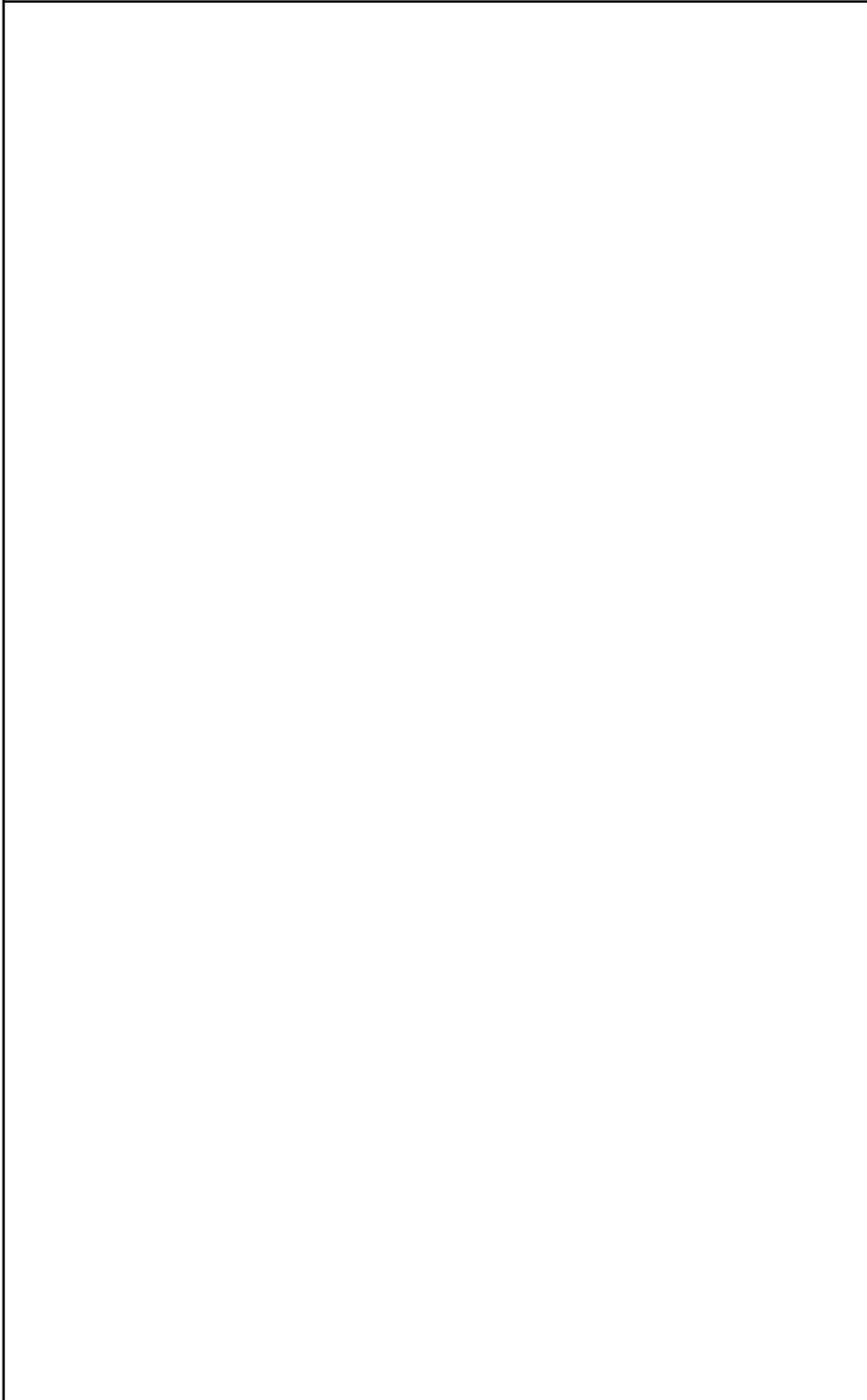
Fisse takes the view (common in the United States) that this ought to be limited also to those cases in which the individual acts "on behalf of the body corporate". This requirement leads to difficulties and American courts have adopted interpretations of it which strain its natural meaning. There is no such requirement in the English Draft Code, which takes a conservative approach in this area, nor in the Gibbs Committee Draft Bill (see s.4BA(1)(a)).

*501.2 Corporate intention, knowledge or recklessness*

This section deals with offences requiring proof of intent, knowledge or recklessness. The Discussion Draft had a separate provision for offences based on recklessness but, on reflection the Committee concluded that it was inconsistent and impractical to have different mechanisms for intent and recklessness. However, where an offence may only be committed intentionally

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## Commentary

or knowingly, recklessness will not suffice (s501.2.3). Where the requisite fault element is intention, knowledge or recklessness, that fault element exists on the part of the body corporate that expressly, tacitly or impliedly authorised the commission of the offence. Under s.501.2.1 that may be proved in three ways.

First, it may be shown that the conduct was performed or tolerated by the board of directors or a high managerial agent (defined as someone whose position in the company can be said to represent the policy of the company (s.501.2.2)). The test is based almost exactly on s.2.07(1)(c) US Model Penal Code. It is envisaged that this provision will be used in one-off situations where it cannot be said that there is any ongoing authorisation of the conduct. The company has a defence in the case of a high managerial agent if the company proves that it used due diligence to prevent the offence. the defence is not available in the case of the board of directors itself.

The third dot point deals with the more elusive situation of implicit authorisation where the corporate culture encourages non-compliance or fails to encourage compliance. The term "corporate culture" is defined in s.501.2.2. The rationale for holding corporations liable on this basis is that "...the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation." (See Field and Jorg, "Corporate Manslaughter and Liability: Should we be going Dutch?" [1991] *Crim LR* 156 at 159). The section extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (eg recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.

The notion of "corporate culture" draws on Fisse, "Corporate Criminal Responsibility" (1991) 15 *Crim LJ* 166 at 173 and Fisse, "Criminal Law: The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 *Sydney LR* 277 at 281ff, 286. See too the thought-provoking work done by Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991) 75 *Minnesota LR* 1095.

Code

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## Commentary

*501.3 Corporate negligence*

There was some confusion about the standard for negligence in the case of corporations. Section 501 applies the general rules of the Code to companies but for the sake of clarity s.501.3 makes the application of s.203.4 explicit.

Where negligence is the requisite fault element, it is not necessary to establish that any one employee, etc was negligent. If the conduct of the company when the acts of its servants, agents, employees and officers, viewed as a whole, is negligent, then the corporation is deemed to be negligent. In some cases this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent. This changes the common law on this point, see *R v HM Coroner for East Kent; ex parte Spooner* (1989) 88 Crim App R 10.



## Appendix 6 Minutes

Thursday 20 November 2003

In the Members' Lounge, Parliament House at 2.15pm

**1. Members Present**

Revd Nile (*Chairman*)

Mr Burke

Ms Burnswoods

Mr Primrose

**2. Apologies**

Ms Rhiannon

**3. Inquiry into serious injury and death in the workplace**

Resolved, on the motion of Mr Burke, that the closing date for submissions be Thursday 4 February 2004, or a similar date to be determined by the Chairman.

Resolved, on the motion of Ms Burnswoods, that advertisements calling for submissions be placed as soon as possible in the major Sydney and regional newspapers.

Resolved, on the motion of Mr Burke, that the Chairman write to interested parties inviting submissions, with Committee members invited to submit names to the secretariat.

Resolved, on the motion of Mr Burke, that the Chairman write to Anthony Hampson and the parents of Dean McGoldrick advising them of the Committee's inquiry.

**4. Adjournment**

The Committee adjourned at 2.28pm until 3.00pm on Monday, 1 December 2003 (Budget Estimates).

**Thursday, 12 February 2004**

**At Parliament House at 10.00am**

**1. Members Present**

Revd Nile  
Mr Clarke  
Mr Primrose  
Ms Griffin  
Ms Rhiannon

**2. Apologies**

Ms Burnswoods  
Ms Cusack

**3. Substitute arrangements**

The Chairman advised that for the duration of the inquiry into serious injury and death in the workplace, Ms Griffith would be substituting for Mr Burke, and Mr Clarke would be substituting for Mr Harwin.

**4. Confirmation of minutes No 11**

Resolved, on the motion of Mr Clarke, that Minutes No 11 be confirmed.

**5. Inquiry into serious injury and death in the workplace**

***Submissions received***

The Committee Director advised members of the Committee that a CD Rom of submissions 1-25 had been distributed.

***Adverse comment***

The Committee considered a memorandum prepared by the Committee Director about potential adverse comment in submissions and evidence to the inquiry.

Resolved, on the motion of Mr Primrose, that the Committee:

- Take as much evidence in public as possible;
- Make it clear in the Chairman's opening statement at the Committee's public hearings that if allegations are made about other persons or organisations, the Committee may invite them to make a submission or give evidence in response; and
- That the Committee Director should seek advice from the Clerk of the Parliament by Monday, 16 February 2004 on the Committee's proposal to hear evidence in public and send transcripts and/or submissions to people adversely mentioned, offering them the opportunity to send a written submission in response and/or appear before the Committee.

**Further meeting of the Committee**

Resolved, on the motion of Mr Primrose, that the Committee meet at 1:30 pm on Monday, 16 February 2004 to consider the Clerk's response and any other relevant matter.

The Committee deferred a decision on the publication of submissions until its meeting of 16 February 2004.

**Witnesses and hearings**

The Committee noted that the witnesses nominated by the CFMEU to appear at the public hearing on Monday, 16 February 2004 would be supported by CFMEU representatives, and also by the staff of the Committee Secretariat.

Ms Rhiannon indicated that she would speak to former lawyers with WorkCover with whom she is in contact in regard to making a submission or presenting evidence to the Committee.

Mr Primrose suggested the Committee consider as possible witnesses officers from the ACT and SA where industrial manslaughter legislation has been introduced.

Resolved, on the motion of Ms Rhiannon, that the witnesses and hearing programs for 16 and 17 February 2004 be endorsed.

**6. Filming of the Committee's hearings**

The Committee considered a request from Mr Quirk to film the Committee's hearings on 16 and 17 February 2004.

The Committee resolved, on the motion of Ms Rhiannon, to allow Mr Quirk to film the Committee's hearings, provided he follow the Parliament's broadcasting guidelines.

**7. Invitation from the CFMEU to attend the unveiling of a plaque to Mr Boland**

The Committee welcomed the invitation from the CFMEU to attend the unveiling of a plaque to Mr Boland, but noted that the ceremony takes place on a parliamentary sitting day.

Resolved, on the motion of Mr Clarke, that the Chairman should write to the CFMEU to give the Committee's apology, but to indicate that the Committee would be happy to attend another event when parliament was not sitting.

**8. Adjournment**

The Committee adjourned at 10.55am until 1:30 pm on Monday, 16 February 2004 (public hearing).

**Monday, 16 February 2004**

**At Parliament House at 1:30 pm**

**1. Members Present**

Revd Nile (Chairman)  
Mr West (Ms Burnswoods)  
Mr Primrose  
Ms Griffin  
Mr Clarke  
Ms Cusack  
Ms Rhiannon

**2. Apologies**

Ms Burnswoods

**3. Substitute arrangements**

The Chairman advised that for 16 February 2004, Mr West would be substituting for Ms Burnswoods.

**4. Confirmation of minutes No 12**

Resolved, on the motion of Mr Clarke, that Minutes No 12 be confirmed.

**5. Inquiry into serious injury and death in the workplace**

***Advice from the Clerk***

The Committee Director tabled advice from the Clerk of the Parliament in relation to adverse comment in submissions and by witnesses

Resolved, on the motion of Ms Cusack, to adopt the advice, and to be guided by Senate practice in relation to adverse comment during the inquiry.

***Submissions***

Resolved, on the motion of Mr Primrose, to publish submissions 1 to 33, with the exception of submission 4 (to be considered at a subsequent deliberative).

***Correspondence received***

The Chair noted the following item of correspondence received:

- Letter from Mr J Blackwell, CEO WorkCover NSW, received 13 February 2004
- Letter from Ms M Thompson, Deputy Director, Council of Social Services of NSW

***Parliamentary privilege***

The Chair noted that he would advise parties giving evidence to the inquiry that they are not protected by parliamentary privilege outside committee proceedings.

***Filming of Committee's hearing***

The Committee noted that Mr Quirk was intending to film the Committee's hearing on 16 February 2004 in order to make a documentary for the CFMEU.

Resolved, on the motion of Mr Primrose, that the Committee Director write to Mr Quirk to reiterate to him Parliament's broadcasting guidelines.

## 6. Public hearing – Inquiry into Serious Injury and Death in the Workplace

Witnesses, the public and media were admitted at 2:00 pm.

The Chair made an opening statement regarding parliamentary privilege and the making of adverse comments.

The following witnesses were sworn and examined:

- Mr Anthony Hampson,
- Ms Susan Baxter,
- Ms Robyn McGoldrick

The following document was tabled with the Committee:

- Ms Robyn Goldrick: Article from *Unity* (December 2003) entitled ‘Angry workers take to the streets’

The evidence was concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Stephen Keenan, Occupational Health and Safety Manager, Baseline Pty Ltd

The following submission was received by the Committee:

- Submission No 35 - Mr Stephen Keenan

The evidence was concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Rosalie Jardine
- Ms Kim Williams

The following supplementary submission was received by the Committee on the motion of Mr Primrose:

- Supplementary submission No 13a: Summary and recommendations of the Coroner in relation to the death of Mr Geoff Jardine

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr and Mrs Dennis and Sharon Rees

The following supplementary submissions was received by the Committee:

- Supplementary submission No 13a - Mr and Mrs Dennis and Sharon Rees

The evidence was concluded and the witnesses withdrew.

The public hearing was concluded and the media and public withdrew.

## 7. Adjournment

The Committee adjourned at 5:21 pm until 9:00 am on Tuesday, 17 February 2004 (public hearing).

**Tuesday, 17 February 2004**

**At Parliament House at 9:00 am**

**1. Members Present**

Revd Nile  
Mr Clarke  
Ms Cusack  
Ms Fazio (Burnswoods)  
Ms Griffin  
Mr Primrose  
Ms Rhiannon  
Mr West (participating member)

**2. Substitute arrangements**

The Chairman advised that Ms Fazio would be substituting for Ms Burnswoods until further notice, and that Mr West was a participating member.

**3. Inquiry into serious injury and death in the workplace**

***Publication of additional submissions***

Resolved, on the motion of Mr Primrose, that the submissions of Mr Keenan and Ms Baxter tendered at the hearing on 16 February be published by the Committee.

***Response to evidence regarding employers***

Resolved, on the motion of Mr Primrose, that the Committee write to the employers mentioned in evidence by Ms Baxter, Mr Hampson and Mrs McGoldrick and invite them to make a written submission to the transcript of evidence within seven days from the date of the letter sent.

The Committee indicated that they would then consider the matter further in light of the responses received.

**4. Public hearing – Inquiry into Serious Injury and Death in the Workplace**

Witnesses, the public and media were admitted at 9:05 am.

The Chair made an opening statement regarding parliamentary privilege and the making of adverse comments.

The following witnesses from WorkCover NSW were sworn and examined:

- Mr Jon Blackwell, Chief Executive Officer
- Mr John Watson, Acting General Manager, Occupational Health and Safety
- Mr Phillip Reed, Acting General Manager, Corporate and Governance Committee
- Ms Bernadette Grant, Director, Legal Group

The evidence was concluded and the witnesses withdrew.

The following witnesses representing or appearing on behalf of the CFMEU were called and examined:

- Mr Andrew Ferguson, Secretary, CFMEU
- Ms Maureen Buchtman, Manager, OH&S and Training, M & J Buchtman consultants

The following documents were tabled with the Committee:

- Mr Andrew Ferguson: Information in relation to the death of Mrs Lola Welch on 30 June 2001

The evidence was concluded and the witnesses withdrew.

The following witness was called and gave evidence:

- Mr Wayne Howell

The Committee took evidence in public.

Resolved, on the motion of Ms Fazio, that the Committee go in camera to take additional evidence.

The public and the media withdrew.

[Persons present other than the Committee: Mr Steven Reynolds, Ms Rachel Simpson, Mr Stephen Frappell, Ms Natasha O'Connor, Legislative Council, Hansard]

The in camera evidence concluded and the media and the public were re-admitted.

The Committee resumed taking evidence in public.

The evidence was concluded and the witness withdrew.

The following witnesses from NSW Labor Council were sworn and examined:

- Ms Mary Yaager, OH&S and Workers Compensation Officer
- Mr Peter Remfrey, Secretary, Police Association of NSW
- Mr David Henry, OH&S Officer, AMWU
- Mr Keith McGuckin, OH&S Officer, TWU
- Ms Alisha Hughes, Industrial Research Officer, NUW
- Mr Lincoln Kinley, Industrial Officer, Shop Distributive and Allied Employees Association of NSW
- Mr Mathew Thistlethwaite, Acting Secretary, AWU (NSW Branch)

The following document was tabled with the Committee:

- Ms Mary Yaager: Summary of PowerPoint presentation

The evidence was concluded and the witnesses withdrew.

The following witness was called and gave evidence:

- Mr Frank Davis (OH &S consultant)

The following supplementary submissions was received by the Committee:

- Supplementary submission No 2 – Mr Frank Davis

The evidence was concluded and the witness withdrew.

The public hearing was concluded and the media and public withdrew

## 5. Adjournment

The Committee adjourned at 5:35 pm until Monday, 1 March 2004 (public hearing).

**Thursday, 26 February 2004**  
**At Parliament House at 1.00pm**

**1. Members Present**

Revd Nile  
Ms Burnswoods  
Mr Clarke  
Ms Cusack  
Ms Griffin  
Mr Primrose  
Ms Rhiannon

**2. Apologies**

The Chairman noted that he had received a letter from Ms Rhiannon indicating that she would be delayed attending the meeting.

**3. Confirmation of minutes No 13 and No 14**

Resolved, on a motion of Mr Clarke, that Minutes No 13 and 14 be confirmed.

**4. Inquiry into serious injury and death in the workplace**

***Correspondence received***

The Chair noted the following item of correspondence received:

- Letter from Jon Blackwell, CEO, WorkCover received 18 February 2004 re Committee's request for WorkCover's files in relation to the death of Mr Jardine.

Resolved, on a motion of Mr Primrose, that:

- The Committee accept the approach suggested by WorkCover, but indicated that it would revisit this matter at a latter time.
- The Committee write to Mrs Jardine to update her on the Committee's consideration of her circumstances.

***Correspondence sent***

The Chair noted the following item of correspondence sent:

- Letter to Mr Andrew Ferguson re the unveiling of a plaque to Mr Bolton;
- Letter to Jon Blackwell, CEO WorkCover re correspondence from Mr Howell's solicitor;
- Letter to Mr John Poleviak re adverse mention; and
- Letter to Mr Garry Denson re adverse mention

The Committee Director indicated that he had received a request from Mrs Denson indicating that she and her husband would like to respond to the Committee's correspondence, but would appreciate additional time until Friday, 5 March 2004.

Resolved, on a motion of Mr Primrose, that Mr and Mrs Denson be given until Friday, 5 March 2004 to respond to the Committee's correspondence, and that a similar time extension be given to Mr Poleviak if he requests it.

***Submissions received***

The Committee Director advised members of the Committee that a CD Rom of submissions 1-42 had been distributed which included new submissions 34-42 and new supplementary submissions 2,10 and 13.

The Committee Senior Project Officer indicated that the author of submission 34 had contacted the Committee Secretariat to request that it be treated as partially confidential.

Resolved, on a motion of Ms Cusack that:

- the committee publish submissions 34-42 and supplementary submissions 2,10 and 13; and
- submission 34 be treated as partially confidential.

***Submission 4***

Resolved, on a motion of Mr Primrose, that submission 4 be treated as partially confidential.

***Tabled documents from 16 and 17 February***

Resolved, on a motion of Mr Primrose, that the tabled documents from 16 and 17 February be accepted and published.

***Questions on notice sent to WorkCover following the hearings on 16 and 17 February***

The Committee noted the questions on notice sent to WorkCover following the hearings on 16 and 17 February.

***Hearing schedules for 1 and 2 March 2004***

The Committee noted the attendance of representatives of three employer associations during the two days of hearings.

The Committee Director noted the attendance of two additional witnesses to those proposed on the hearing schedules:

- Dr Greg Stewart, the Chief Health Officer from NSW Health; and
- Mr Rick Bultitude, Manager, Government Team, WorkCover NSW on the suggestion of Mr Jon Blackwell, CEO WorkCover that the Committee would benefit from the attendance of an ‘on the ground’ inspector.

Resolved, on a motion of Ms Cusack, that the hearing schedules, with the additional witnesses, be accepted.

***Term of reference 1(e) regarding interstate comparisons – further action***

The Committee Director indicated that the Committee had received limited evidence in relation to the Committee’s term of reference 1(e), and questioned how the Committee wished to proceed.

The Committee noted the attendance of the following witnesses in a position to give evidence on the issue of industrial manslaughter legislation:

- Ms Penny Shakespeare, Director, Office of Industrial Relations, Chief Minister’s Office, ACT;
- Mr Peter Rozen, Occupational Health and Safety Lawyer; and
- Mr Paul Bastian, State Secretary, AMWU.

Resolved, on a motion of Ms Cusack, that the Committee also invite representatives of the Law Society to the hearing on 16 March 2004 or a subsequent hearing to give evidence on industrial manslaughter legislation.

***Request for additional witnesses***

Ms Rhiannon indicated her belief that the Committee would benefit from calling to the public hearing of the Committee on 16 or 17 March 2004 the solicitors in the Legal Branch of WorkCover to whom specific matters relating to the inquiry were assigned.

Resolved, on a motion of Ms Rhiannon, that consideration of this matter be deferred until the next deliberative meeting of the Committee following the hearings on 16 and 17 March and the receipt of additional evidence from the Director of the WorkCover Legal Branch.

***Consideration of the need for an additional half day hearing***

The Committee members undertook to consider possible additional hearing dates suitable to them, and to liaise with the Committee Secretariat.

**5. Adjournment**

The Committee adjourned at 1.55 pm until 9:00 am on Monday, 2 March 2004 (public hearing).

**Monday, 1 March 2004**  
**At Parliament House at 9.00am**

**1. Members Present**

Revd Nile (Chairman)  
 Ms Burnswoods  
 Mr Clarke  
 Ms Cusack  
 Ms Griffin  
 Mr Primrose  
 Ms Rhiannon  
 Mr West (participating member)

**2. Public hearing – Inquiry into Serious Injury and Death in the Workplace**

Witnesses, the public and media were admitted.

The Deputy Chair made an opening statement on behalf of the Chairman

The following witness was sworn and examined:

- Mr Peter Rozen, Occupational Health and Safety Lawyer.

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Paul Bastion, State Secretary, AMWU.

The evidence was concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Trash Butrej, NSW Nurses' Association;
- Mr Glen Street, Co-ordinator, Regulatory Affairs and Development, Medical Industry Association of Australia; and
- Ms Susan Martland, Member, Health Care Safety Special Interest Group, Medical Industry Association of Australia.

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Brian Robertson, Director, State Debt Recover Office; and
- Mr Brendan Nugent, Deputy Director, State Debt Recovery Office.

Resolved, on a motion of Ms Griffin, that the following supplementary submissions be received and published by the Committee:

- Supplementary submission No 36 – State Debt Recovery Office.

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Greg Stewart, Chief Health Officer, NSW Health; and
- Ms Kim Stewart, Associate Director, AIDS and Infectious Diseases Unit, NSW Health

Resolved, on a motion of Mr Primrose, that the following submission be received by the Committee:

- NSW Health.

Resolved, on a motion of Ms Griffin, that the following documents tendered by Ms Stewart be tabled with the Committee:

- MacDonald M and G Ryan, 'Monitoring Occupational Exposure to Blood-Borne Viruses in Health Care Workers in Australia', *Victorian Infectious Diseases Bulletin*, August 1999, Volume 2, Issue 3;
- Whitby R M and McLaws M, 'Hollow-bore Needlestick Injuries in a Tertiary Teaching Hospital: Epidemiology, Education and Engineering', *Medical Journal of Australia*, 21 October 2002, Vol 177; and
- NSW Health Website, *Infection Rates*.

The evidence was concluded and the witnesses withdrew.

The public hearing was concluded and the media and public withdrew.

### **3. Adjournment**

The Committee adjourned at 3.40 pm until 9:00 am on Tuesday, 2 March 2004 (public hearing).

**Tuesday, 2 March 2004**  
**At Parliament House at 9:00 am**

**1. Members Present**

Revd Nile (Chairman)  
Ms Burnswoods  
Mr Clarke  
Ms Cusack  
Ms Griffin  
Mr Primrose  
Ms Rhiannon  
Mr West (participating member)

**2. Public hearing – Inquiry into Serious Injury and Death in the Workplace**

Witnesses, the public and media were admitted.

The Chairman made an opening statement.

The following witnesses were sworn and examined:

- Mr Greg Pattison, General Manager, Workplace Solutions, Australian Business Limited; and
- Chelsea Hampel, Policy Advisor, Australian Business Limited.

The evidence concluded and the witnesses withdrew.

Resolved, on a motion of Ms Rhiannon, to make public the submission of AIG, which had been tendered by Mr Goodsell.

The following witnesses were sworn and examined:

- Mr David Russell, Senior Advisor, Australian Industry Group; and
- Mr Mark Goodsell, Director, NSW, Australian Industry Group.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Penny Shakespeare, Director, Office of Industrial Relations, Chief Minister's Department, ACT.

Ms Shakespeare provided the following documents to the Committee:

- Crimes (Industrial Manslaughter) Amendment Bill 2002 (ACT);
- Explanatory memorandum, Crimes (Industrial Manslaughter) Amendment Bill 2002 (ACT);
- *Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT)*; and
- *Criminal Code 2002 (ACT)*.

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Garry Brack, Chief Executive, Employers First.

The evidence was concluded and the witness withdrew.

The following witnesses continued their evidence, having been previously sworn:

- Mr Jon Blackwell, Chief Executive Officer, WorkCover NSW;
- Mr John Watson, Acting General Manager, Occupational Health and Safety, WorkCover NSW;
- Mr Phillip Reed, Acting General Manager, Corporate and Governance Committee, WorkCover NSW;
- Ms Bernadette Grant, Solicitor, Director, Legal Group, WorkCover NSW; and

The following witness was sworn and examined:

- Mr Rick Bultitude, Manager, Government Team, WorkCover NSW.

Resolved, on a motion of Ms Burnswoods, that the hearing be extended until 4.30 pm.

Resolved, on a motion of Ms Rhiannon, that the following documents tendered by Mr Blackwell be tabled with the Committee:

- WorkCover response to Questions on Notice;
- Summary of the WorkCover PowerPoint presentation; and
- *When an Inspector Calls: A Guide to WorkCover's Compliance Strategy.*

The evidence was concluded and the witnesses withdrew.

The public hearing was concluded and the media and public withdrew.

### **3. Deliberative meeting – Inquiry into Serious Injury and Death in the Workplace**

#### ***Confirmation of Minutes No 15***

Resolved, on a motion of Ms Cusack, that Minutes No 15 be confirmed.

#### ***Tabled Documents***

Resolved, on a motion of Ms Burnswoods, that the tabled documents received by the Committee during the public hearing be accepted and published.

#### ***Additional Questions on Notice for WorkCover***

Resolved, on a motion of Mr Primrose, that members of the Committee provide additional questions on notice for WorkCover to the Committee Secretariat by 5.00 pm Thursday, 4 March 2004.

#### ***Further public hearing***

Resolved, on a motion of Ms Rhiannon, that the Committee hold a further public hearing as part of its Inquiry into Serious Injury and Death in the Workplace from 9:30 am to 5:00 pm on Monday, 15 March 2004.

#### ***Additional witnesses***

Resolved, on the motion of Ms Rhiannon, that the following witnesses be called to the public hearing of the Committee on Monday, 15 March 2004:

- Ms Boland;
- Ms Karen Iles, Apprentice Officer, CFMEU;
- Representatives of the Road Transport Association;
- Representatives of the Law Society;
- The Director of Public Prosecutions or his representative;
- Ms Bernadette Grant from WorkCover and the solicitors in the Legal Branch of WorkCover who had carriage of the following matters:
  - The death of Mr Joel Exner;

- The death of Mr Dean McGoldrick;
- The injury to Mr Anthony Hampson;
- The death of Mr David Selinger at Fox Studios on 15 January 2001;
- The death of Mrs Welch, killed adjacent to a building site at St Ives on 30 June 2001;
- The death of a Taiwanese student adjacent to a building site at UNSW on 19 April 2000; and
- Mr Jon Blackwell and other representatives of WorkCover.

***Declaration of Ms Griffin***

Ms Griffin requested that it be noted in the Minutes that she was a friend of the family of Mr Fuller, whose case was raised in the evidence of Mr Blackwell and that she was not aware that his case was to be discussed at the hearing.

**4. Next meeting**

The Committee adjourned at 4.55 pm until 9:30 am on Monday, 15 March 2004 (public hearing).

**Monday, 15 March 2004**

**At Parliament House at 9:30 am**

**1. Members Present**

Revd Nile (Chairman)  
Ms Burnswoods  
Mr Clarke  
Ms Cusack  
Ms Griffin  
Mr Primrose  
Ms Rhiannon  
Mr Burke (Griffin, deliberative only)

**2. Deliberative meeting - Inquiry into Serious Injury and Death in the Workplace**

***Confirmation of Minutes Nos 16 & 17***

Resolved, on a motion of Ms Burnswoods, that Minutes Nos 16 & 17 be published.

***Correspondence sent***

The Chairman noted the following items of correspondence sent:

- Letter to Mr Jon Blackwell, CEO, WorkCover NSW, regarding questions on notice arising out of the 2 March 2004 hearing;
- Letter to Mr Jon Blackwell, CEO, WorkCover NSW, regarding witnesses at the hearing on 15 March 2004; and
- Letter to Mr Nicholas Cowdery SC, Director of Public Prosecutions, providing guidance on possible questions during his evidence on 15 March 2004.

***Correspondence received***

The Chairman noted the following items of correspondence received:

- Letter from Mr Paul Bastian, State Secretary, AMWU, regarding corrections to his evidence of 1 March 2004;
- Letter from Mr Peter Remfry, Secretary, Police Association of NSW, regarding industrial manslaughter laws;
- Letter from Mr Stephen O'Reilly, solicitor for Mr & Mrs Poleviak, regarding the Poleviak's response to the inquiry;
- Additional documentation from Mr Frank David, witness on 17 February 2004;
- Letter from Mr Terry Perkins regarding his training as a WorkCover inspector;
- Letter from Mr Knight, the Crown Solicitor, regarding concerns about WorkCover evidence at the hearing on 15 March 2004;
- Letter from Mrs Poleviak regarding the death of Dean McGoldrick; and
- Letter from Mr Garry Denson regarding adverse comments during the inquiry.

***Submissions received***

Resolved, on a motion of Mr Clarke, that submissions Nos 38, 43 to 46 and supplementary submissions Nos 28, 36 be published.

***Correspondence from Mr Poleviak and Mr Denson***

The Committee Director tabled statements received from Mrs Poleviak and Mr Denson.

Resolved, on a motion of Mr Primrose, that:

- the correspondence from Mrs Poleviak and Mr Denson be returned to the secretariat and be made available to members of the Committee in the Clerk's office; and
- the Committee deliberate at a later time on the publication of the letters.

***Questions on Notice sent to WorkCover following the hearing on 2 March 2004***

The Committee noted the questions on notice sent to WorkCover following the hearing on 2 March 2004.

***Correction of evidence given by Mr Paul Bastian on 1 March 2004***

Resolved, on a motion of Mr Primrose, that the Committee publish Mr Bastian's letter correcting his evidence of 1 March 2004 with the transcript, and that the secretariat write to Mr Bastian to inform him of the Committee's decision.

***Committee reporting timetable***

Resolved, on a motion of Ms Rhiannon, that the Committee adopt the proposed timetable for the remainder of the inquiry.

***Correspondence from Mr Knight, the Crown Solicitor***

The Committee Chairman noted that he had met with Mr Knight, the Crown Solicitor, together with Mr Blackwell, Mr Primrose, the Clerk Assistant - Committees and secretariat staff on 10 March 2004 in relation to the appearance of solicitors from WorkCover at the public hearing on 15 March 2004.

The Chairman indicated that he did not suggest that Mr Blackwell appear with the solicitors of WorkCover, as stated in the letter from Mr Knight. His suggestion to Mr Knight was that he put WorkCover's concerns in writing, to be determined by the Committee.

The Committee deliberated.

Resolved, on a motion of Mr Primrose, that Mr Blackwell appear with the solicitors of WorkCover at the public hearing on 15 March 2004.

**3. Public hearing – Inquiry into Serious Injury and Death in the Workplace**

Witnesses, the public and media were admitted.

The Chairman made an opening statement.

The following witness was sworn and examined:

- Ms Karen Boland.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Alan Welch.

Mr Welch tabled the following document with the Committee:

- Map of St Ives.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Hugh McMaster, Government and Commercial Services Manager, Road Transport Association.

Mr McMaster tabled the following document with the Committee:

- Supplementary submission No 43 – NSW Road Transport Association.

The evidence concluded and the witness withdrew.

The following witnesses from WorkCover continued their evidence having been previously sworn:

- Mr Jon Blackwell, Chief Executive Officer, WorkCover NSW; and
- Ms Bernadette Grant, Solicitor, Director, Legal Group, WorkCover NSW.

The following witnesses from WorkCover were sworn and examined:

- Ms Hamina Cameron, solicitor, WorkCover;
- Ms Karen Wildermoth, solicitor, WorkCover (currently on secondment to the Commonwealth DPP); and
- Ms Ramya Panagoda, solicitor, WorkCover.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Nicholas Cowdery SC, Director of Public Prosecutions.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Karen Iles, CFMEU Apprentice Officer.

Ms Iles tabled the following documents with the Committee:

- Data on employment injuries for workers under 25.

The evidence concluded and the witness withdrew.

The following witnesses from WorkCover continued their evidence having been previously sworn:

- Mr Jon Blackwell, Chief Executive Officer, WorkCover NSW;
- Mr John Watson, Acting General Manager, Occupational Health and Safety, WorkCover NSW;
- Mr Phillip Reed, Acting General Manager, Corporate and Governance Committee, WorkCover NSW; and

- Ms Bernadette Grant, Solicitor, Director, Legal Group, WorkCover NSW.

Mr Blackwell tabled the following documents with the Committee:

- Response to Questions on Notice; and
- *Protecting Young Workers* information booklet.

The evidence was concluded and the witnesses withdrew.

The public hearing was concluded and the media and public withdrew.

#### **4. Deliberative meeting – Inquiry into Serious Injury and Death in the Workplace**

##### ***Substitute member***

The Chairman indicated that on advice from the Government Whip, for the purposes of the deliberative, Mr Burke would substitute for Ms Griffin.

##### ***Tabled Documents***

Resolved, on a motion of Ms Burnswoods, that the tabled documents received by the Committee during the public hearing be accepted and published.

##### ***Additional Questions on Notice for WorkCover***

Resolved, on a motion of Mr Primrose, that members of the Committee provide any additional questions on notice for WorkCover to the Committee Secretariat by 12.00 noon on Wednesday, 17 March 2004.

##### ***Contact from Mr Cooper, Injuries Australia***

The Committee noted the call to the secretariat from Mr Cooper from Injuries Australia, and his request to give evidence to the Committee.

##### ***Correspondence from Mr Perkins***

Resolved, on a motion of Ms Rhiannon, that the Committee accept and publish Mr Perkins additional correspondence as a submission.

#### **5. Next meeting**

The Committee adjourned at 4.45 pm until 1:00 pm on Thursday, 18 March 2004.

**Thursday, 18 March 2004**

**At Parliament House at 2:20 pm**

**1. Members Present**

Revd Nile (Chairman)  
Ms Burnswoods  
Ms Cusack  
Ms Griffin  
Mr Primrose  
Ms Rhiannon

**2. Deliberative meeting - Inquiry into Serious Injury and Death in the Workplace**

***Confirmation of Minutes No 18***

Resolved, on a motion of Mr Primrose, that Minutes No 18 be confirmed.

***Correspondence sent***

The Committee Director noted that the Committee secretariat had informally emailed the questions on notice arising out of the hearing on 15 March 2004 to WorkCover, but was awaiting advice from the Clerk Assistant – Committees before sending the questions formally.

***Correspondence received***

The Chairman noted the following item of correspondence received:

- Letter from Mr Jon Blackwell, CEO, WorkCover NSW, enclosing answers to questions taken on notice following the hearing on 2 March 2004 (circulated on 15 March 2004).

***Correspondence from Mr Poleviak and Mr Denson***

The Chairman noted the advice circulated by the Committee Director in relation to the statements by Mr Denson and Mrs Poleviak.

The Committee deliberated on this advice.

Resolved, on a motion of Ms Burnswoods, that the Committee:

- Provide a copy of both statements to Mr Ferguson, NSW State Secretary, CFMEU on a confidential basis for his response, and then make a decision on publication once a response has been received; and
- Write to Mr Denson and Mrs Poleviak's lawyer to indicate that their statements remain confidential at the current time.

**3. Next meeting**

The Committee adjourned at 2:35 pm until 1:00 pm on Thursday, 27 April 2004

**Monday 27 April 2004**  
**At Parliament House, at 10am, Room 1108**

**1. Members present**

Rev Nile  
 Mr Primrose  
 Ms Burnswoods  
 Ms Cusack  
 Ms Griffin  
 Mr Pearce (Clarke)  
 Ms Rhiannon

**2. Substitution**

The Chairman advised that Mr Pearce would be substituting for Mr Clarke for the purposes of this deliberative meeting.

**3. Confirmation of Minutes No 19**

Resolved, on the motion of Mr Primrose, that Minutes No 19 be confirmed.

**4. Correspondence**

The Chairman tabled the following items of correspondence:

***Correspondence sent:***

- Letter to Mr Jon Blackwell, CEO, WorkCover, regarding Mr Wayne Howell
- Letter to Mr Garry Denson advising that the Committee has resolved to keep his correspondence confidential, pending further consideration.
- Letter to Mr Stephen O'Reilly, solicitor, advising that the Committee has resolved to keep Mrs Poleviak's correspondence confidential, pending further consideration.
- Letter to Mr Andrew Ferguson inviting response to issues raised by Mrs Poleviak.

***Correspondence Received:***

- Letter from BD Medical forwarding correspondence from Ms Marianne Saliba MP outlining her support for the MIAA submission.
- Letter from Mr Andrew Ferguson, CFMEU, in response to the letter from Mrs Poleviak
- Letter from Mr Jon Blackwell, CEO, WorkCover, containing answers to questions taken on notice 15 March 2004
- Letter from Mr Jon Blackwell, CEO, WorkCover, regarding Mr Wayne Howell
- Letter from Hugh McMaster, NSW Road Transport Association, containing answers to questions taken on notice 15 March
- Letter from Mr Jon Blackwell, CEO, WorkCover, containing answers to questions on notice regarding the agriculture industry
- Letter from Mr Wayne Howell, containing further information regarding his workplace accident
- Letter from Mr Jon Blackwell, CEO, WorkCover, regarding Mr Howell
- Letter from Mr Paul Bastian, AMWU, containing answers to questions taken on notice 1 March 2004

***Submissions received***

No. 47 – Ms Alisha Hughes (The National Union of Workers)  
 No. 48 – Ms Sue Gordon  
 No. 49 – Mr Terry Perkins (confidential until 3 May 2004)  
 Supplementary Submission No 49 – Mr Terry Perkins (confidential until 3 May 2004)  
 No. 50 – Mr Brett Holmes (NSW Nurses' Association)  
 No. 51 – Mr Luke Jones

- No. 52 – Mrs Mary Yaager (NSW Labor Council)
- No. 53 – Mr Steve Likar
- No. 54 – Mr Mark Goodsell (Australian Industry Group)
- No. 55 – Ms Prue Jeffrey (partially confidential)
- No. 56 – Mr Trevor Sharp (The Building Trades Group of Unions)
- No. 57 – Mr David Lowrie
- No. 58 – Ms Kim Schekeloff, Workplace Safety Australia P/L
- No. 59 – Mr Peter Smith (partially confidential)
- Supplementary No 29 – WorkCover

**5. Consideration of publication of adverse mention**

Mr Primrose moved that the letter from Mr Garry Denson in response to adverse mention made in evidence be published, and that the letter from Mr Poleviak's solicitor and letter from Mrs Poleviak, and the letter from Mr Ferguson in response to Mrs Poleviak's letter, be kept confidential.

The Committee deliberated.

The Committee divided:

Ayes:

Rev Nile  
Mr Primrose  
Ms Burnswoods  
Ms Griffin  
Ms Rhiannon

Noes:

Ms Cusack  
Mr Pearce

**6. Publication of submissions**

Resolved, on the motion of Ms Burnswoods, that the Committee send a copy of Mr Terry Perkins' submission to Mr Watson (WorkCover) and provide him the opportunity to respond to the claims if he wishes to, by Monday 3 May 2004, following which Mr Perkins' submissions should be published.

Ms Burnswoods noted that it may be desirable in future to make a distinction between submissions and correspondence that is received by the Committee after the closing date for submissions and after the end of the Committee's public hearings.

Resolved, on the motion of Ms Rhiannon, that submission Nos 47, 48, 50 to 54, 56 to 58 and supplementary submission No 29 be published, that submission nos 55 and 59 be considered partially confidential, and that submission No 49 and supplementary submission No 49 remain confidential until 3 May, then be published.

**7. Consideration of refusal by WorkCover to answer Committee question re hearing on 15 March 2004**

The Committee referred to WorkCover's answer to question no 3.2 taken on notice during the hearing on 15 March 2004.

Resolved, on the motion of Mr Pearce, that the Chairman write to Mr Blackwell, CEO, WorkCover, asking him to clarify the basis for WorkCover's decision not to prosecute for the death of Mr Selinger, and that Mr Blackwell be invited to respond by Monday 3 May 2004.

## 8. Consideration of the Chairman's draft report

The Chairman tabled his draft report entitled 'Serious injury and death in the workplace', Report No 24. Once circulated, that report was accepted as being read.

The Committee deliberated.

Resolved, on the motion of Mr Primrose, that paragraph 1.8 be amended to reflect the Committee's decision to write to Mr Blackwell about his refusal to answer the question taken on notice during the hearing on 15 March 2004, and Mr Blackwell's response, if any.

Resolved, on the motion of Mr Primrose, that Chapter 1, as amended, be adopted.

Resolved, on the motion of Ms Burnswoods, that each case in Chapter 2 be cross-referenced to where the cases are examined in detail later in the report.

Resolved, on the motion of Ms Burnswoods, that the word 'indicated' in paragraph 2.7 be replaced with the word 'claimed' and that the word 'indicates' be replaced with the words 'claims'.

Resolved, on the motion of Ms Cusack that the words 'that it only became aware' in paragraph 2.7 be deleted and replaced with the words 'that its investigations branch only became aware', and that footnote 8 be amended to reflect the change.

Resolved, on the motion of Ms Burnswoods, that a paragraph be inserted after paragraph 2.7 to reflect Mr Denson's advice regarding notification of the accident.

Resolved, on the motion of Mr Pearce, that the word 'more' be inserted after the words 'on the basis that it was' in paragraph 2.29, that the words 'and not strictly a workplace issue' at the end of paragraph 2.29 be deleted, and that footnote 22 be amended to reflect this change.

Resolved, on the motion of Ms Griffin, that Chapter 2, as amended, be adopted.

Resolved, on the motion of Ms Burnswoods, that the words 'available data' in paragraph 3.3 be deleted and replaced with 'latest publicly available data by industry' and that paragraph 3.3 be amended to reflect the statistics contained in the National Compendium of Workers' Compensation Statistics Australia 2001-02 and the additional unpublished provisional data provided to the Committee by WorkCover.

Resolved, on the motion of Ms Cusack, that a paragraph be inserted after paragraph 3.12 explaining that different jurisdictions in Australia use different definitions of workplace fatalities, making it impossible to compare the rate of workplace fatalities in different jurisdictions.

Resolved, on the motion of Mr Pearce, that a paragraph be inserted after the updated paragraph 3.22 indicating the Committee's disappointment at WorkCover's failure to publish more up-to-date data, and the need to address this urgently.

Resolved, on the motion of Mr Pearce, that a recommendation be inserted after the updated paragraph 3.22 stating that 'as a priority WorkCover address the inadequacies in data collection and reporting identified in this report.'

Resolved, on the motion of Ms Rhiannon, that Recommendation 1 be amended to include a separate sentence indicating that the national database on workplace injuries and fatalities include data on cause of death, and that particular consideration be given to improved information collection on the role of fatigue in accident and injury causation.

Resolved, on the motion of Ms Cusack, that material and a recommendation be inserted after Recommendation 1 on the desirability of nationally agreed definitions on matters relating to OH&S, citing in support any relevant material from the House of Representatives Committee report.

Resolved, on the motion of Ms Rhiannon, that Chapter 3, as amended, be adopted.

Resolved, on the motion of Ms Cusack, that Chapter 4 be adopted.

Resolved, on the motion of Mr Pearce, that an additional quote from an employer in relation to the safety record of the building and construction industry be inserted after paragraph 5.15.

Resolved, on the motion of Ms Cusack, that an additional dot point be inserted in paragraph 5.16, with accompanying material in the text, on the impact of cross-border issues on safety in the building and construction industry.

Resolved, on the motion of Mr Primrose, that Recommendation 2 be amended to insert 'as a priority' before 'WorkCover'.

Resolved, on a motion of Ms Rhiannon, that Recommendation 2 be amended to replace the word 'blitzes' which occurs twice with 'regular unannounced inspections'.

Resolved, on the motion of Mr Burnswood, that Recommendation 3 be amended to replace the word 'random' with 'frequent, random and unannounced'.

Resolved, on the motion of Mr Pearce, that the Secretariat update paragraph 5.37 if there is additional information available.

Resolved, on the motion of Ms Griffin, that Recommendation 4 be amended to replace 'on-hired employees, the host organisation and the on-hired employee service provider' with 'labour hire company, the host organisation and the on-hired employee', and that paragraph 5.40 be amended to reflect this change.

Resolved, on the motion of Ms Burnswoods, that a paragraph be inserted after paragraph 5.44 to reflect Mr Denson's advice regarding training given to Mr Hampson.

Resolved, on the motion of Ms Griffin, that Recommendation 5 be amended to replace 'a host employer and a Group Training Organisation' with 'a Group Training Organisation, a host employer and an apprentice'.

Resolved, on the motion of Ms Rhiannon, that Recommendation 6 be amended to insert at the end 'and similar programs in other industries'.

Resolved, on the motion of Mr Primrose, that a recommendation be inserted after paragraph 5.79 stating 'that WorkCover conduct a study on the effects of fatigue on workplace safety in the building and construction industry and other industries, to determine whether further measures should be adopted', and that paragraph 5.79 be amended to reflect this recommendation.

## **9. Adjournment**

The Committee adjourned at 1.00pm until 10.00am, Monday 3 May 2004, in Room 1108.

**Monday 3 May 2004**  
**At Parliament House, at 10am, Room 1108**

**1. Members present**

Rev Nile  
 Mr Primrose  
 Ms Burnswoods  
 Mr Clarke  
 Ms Cusack  
 Ms Griffin  
 Ms Rhiannon

**2. Confirmation of Minutes No 20**

Resolved, on the motion of Mr Primrose, that Minutes No 20 be confirmed.

**3. Correspondence**

The Chairman tabled the following items of correspondence:

***Correspondence sent:***

- Letter to Mr Jon Blackwell, CEO, WorkCover, regarding the death of Mr Selinger
- Letter to Mr John Watson, WorkCover, seeking a response to Mr Perkins' submission
- Letter to Mr Terry Perkins, retired WorkCover inspector, indicating the Committee's resolution to seek a response to his submission from Mr Watson
- Letter to Mr Andrew Ferguson, CFMEU, indicating the Committee's decision to keep his correspondence of 29 March 2004 confidential
- Letter to Mr Garry Denson, indicating the Committee's decision to publish in part his correspondence of 12 March 2004
- Letter to Mr Stephen O'Reilly, solicitor, indicating the Committee's decision to keep Mrs Poleviak's letter of 11 February 2004 confidential

***Correspondence received:***

- Emails from Mr Terry Perkins, re the provision of his submission to Mr Watson for comment
- Letter from Mr Jon Blackwell, re the decision not to prosecute for the death of Mr Selinger
- Letter from Mr John Watson, re the submissions of Mr Perkins

**4. Consideration of emails from Mr Terry Perkins and letter from Mr John Watson re Terry Perkins' submission**

The Committee considered the response from Mr Watson to the matters raised in Mr Terry Perkins' submissions.

Resolved, on the motion of Ms Rhiannon, that submission No 49 and supplementary submission No 49, be made public.

Resolved, on the motion of Ms Burnswoods, that Mr Watson's letter dated 30 April, in response to Mr Perkins' submissions, be made public.

Resolved, on the motion of Ms Burnswoods, that the Chairman write to Mr Perkins informing him of the Committee's resolution, and including a copy of Mr Watson's letter.

**5. Consideration of Chairman's draft report**

The Committee resumed consideration of the Chairman's draft report "Serious injury and death in the workplace".

Resolved, on the motion of Ms Cusack, that the words "and including definitions relevant to the road transport industry" be added at the end of recommendation 3.

Resolved, on the motion of Ms Cusack, that a paragraph be inserted before paragraph 6.7 identifying the discrepancy in evidence relating to the safety record of the road transport industry, and referring to the amended recommendation 3.

Resolved, on the motion of Ms Cusack, to insert a recommendation following paragraph 6.19 stating:

That the Government seek to amend the *OH&S Act 2000* to facilitate a greater role for WorkCover in the prevention of serious injuries and fatalities in the road transport industry in NSW.

Resolved, on the motion of Ms Rhiannon, to insert a recommendation following paragraph 6.21 stating:

That WorkCover engage the active cooperation of the other agencies involved in road accident investigations (the NSW Police, the NSW Roads and Traffic Authority) in identifying work-related crashes, with the aim of maximising the capture of fatigue and work related road transport accidents in WorkCover data.

and that Paragraph 21 be amended to reflect the new recommendation.

Resolved, on the motion of Ms Rhiannon, to insert a recommendation following paragraph 6.24 stating:

That WorkCover become more involved with employers, the NSW Road Transport Association, the Transport Workers Union and employers in seeking to prevent workplace injuries, including developing guidelines on drug and alcohol testing in the road transport industry.

Resolved, on the motion of Ms Cusack, that paragraphs be inserted after paragraph 6.32 pointing to the aggregation of the agriculture, forestry and fishing industries in statistics provided by WorkCover, and noting that this may obscure underlying trends in the individual industries.

Resolved, on the motion of Ms Rhiannon, that Chapter 6, as amended, be adopted.

Resolved, on the motion of Ms Burnswoods, that Recommendation 7 be amended by replacing the words 'a pilot study examining' with the words 'further study of the' and that paragraph 7.28 be amended to reflect the amended recommendation.

Resolved, on the motion of Mr Primrose, that Chapter 7, as amended, be adopted.

Resolved, on the motion of Ms Burnswoods, that the words 'later response was also received from Mr Perkins' in paragraph 8.18 be replaced with the words 'later responses were also received from Mr Perkins and Mr Watson'.

Resolved, on the motion of Ms Griffin, that a paragraph be inserted after paragraph 8.48 noting that the Committee supports enforceable agreements as an addition (not an alternative) to options available under current enforcement regime.

Resolved, on the motion of Mr Primrose, that recommendation 8 be deleted and replaced with the words:

That the Government consider how best to include enforceable agreements in the compliance regime contained in the *OH&S Act 2000*, as an addition to prosecution for breaches of the *OH&S Act 2000*, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission so that in the event the offender does not comply with the agreement, a prosecution may proceed.

Ms Rhiannon foreshadowed an amendment to Chapter 8 to reflect the training of WorkCover inspectors. Ms Cusack also foreshadowed an amendment to Chapter 8.

Resolved, on the motion of Mr Primrose, that Chapter 8 as amended and subject to foreshadowed amendments by Ms Rhiannon and Ms Cusack, be adopted.

Resolved, on the motion of Ms Burnswoods, to include the words "at least at the same level as currently funded" after the words "WorkCover Assist program" in Recommendation 9, and that paragraph 9.9 be amended to reflect the amended recommendation.

Resolved, on the motion of Mr Primrose, that the words "The Committee is concerned by any such" with "Some stakeholders were concerned by" and the word "might" be replaced by the words "has been" in paragraph 9.34.

Resolved, on the motion of Mr Primrose, that a paragraph be inserted after the quote in paragraph 9.34 noting WorkCover's prosecution record, quoting the figures from figure 8.3 in Chapter 8 and referring to figure 8.3 for full details.

Resolved, on the motion of Mr Clarke that the words "and co-workers" be inserted after the word "employers" and the words "their workers" be replaced by the word "workers" in Recommendation 10, and that paragraph 9.39 be amended to reflect the amended recommendation.

Mr Primrose moved that the words "knowingly and wilfully" be deleted from Recommendation 10.

The Committee divided:

Ayes:

Rev Nile  
Mr Primrose  
Ms Burnswoods  
Ms Griffin  
Ms Rhiannon

Noes:

Mr Clarke  
Ms Cusack

The question was resolved in the affirmative.

Resolved, on the motion of Mr Primrose, that Chapter 9, as amended, be adopted.

Resolved, on the motion of Ms Burnswoods, that paragraph 10.16 be amended to reflect the correspondence received from Mr Denson.

Mr Clarke moved that the words "said to have been uncovered rather than in a catch all manner" in Recommendation 12 be deleted and replaced with the words "to provide greater certainty to both the prosecution and the defence".

The Committee divided.

Ayes:

Rev Nile  
Mr Clarke  
Ms Cusack

Noes:

Mr Primrose  
Ms Burnswoods  
Ms Griffin  
Ms Rhiannon

The question was resolved in the negative.

The Chairman put: that Recommendation 12 be adopted.

The Committee divided:

Ayes:

Rev Nile  
Mr Clarke  
Ms Cusack

Noes:

Mr Primrose  
Ms Burnswoods  
Ms Griffin  
Ms Rhiannon

The question was resolved in the negative.

Resolved, on the motion of Ms Cusack, that the words “However, the Working Party appears to have made little progress to date. This is unacceptable and the Committee believes” be inserted after the words “considerable public importance” in paragraph 10.56.

Resolved, on the motion of Ms Cusack, that all words in Recommendation 13 be deleted and replaced by the following:

That the Premier’s Department make public the report of the Intergovernmental Working Party on Public Safety when completed, and take urgent steps to finalise, through the Working Party, the responsibilities of government agencies, including WorkCover, in relation to public safety.

Ms Burnswoods and Ms Rhiannon foreshadowed an amendment proposing additional paragraphs after Recommendation 13, in relation to the issue of WorkCover’s response to issues of public safety. Ms Cusack also foreshadowed an amendment to Chapter 10.

Resolved, on the motion of Mr Primrose, that the words ‘such a review should not initiate any measures that would inhibit the likely success of prosecutions’, be inserted at the end of Recommendation 14, and that paragraph 10.70 be amended to reflect the amended recommendation.

Resolved, on the motion of Mr Primrose, that Chapter 10, as amended and subject to the foreshadowed amendments of Ms Burnswoods, Ms Rhiannon and Ms Cusack, be adopted.

Resolved, on the motion of Ms Rhiannon, that the words “and that such statements be tendered at the appropriate time during court proceedings for consideration by the court in sentencing the offender” be inserted at the end of Recommendation 16 and that paragraph 11.20 be amended to reflect the amended recommendation.

Resolved, on the motion of Ms Burnswoods, that the first dot-point in paragraph 12.10 be amended to read “the high level of negligence, and the standard of proof, required to prove manslaughter by gross negligence”.

Ms Rhiannon moved that Recommendations 18 and 19 be deleted and be replaced by the following:

Recommendation 18

That as a matter of urgency, discrete and specific offences of “corporate manslaughter” and “gross negligence by a corporation causing serious injury” be enacted in the *Crimes Act 1900* (NSW).

Recommendation 19

That the Government refer to the NSW Law Reform Commission and the Panel of Review a request to examine the broader issue of corporate liability for non-workplace and workplace deaths generally, including harsher penal sentences.

The Committee divided:

Ayes:

Rev Nile

Mr Primrose

Ms Burnswoods

Ms Griffin

Ms Rhiannon

Noes:

Mr Clarke

Ms Cusack

The question was resolved in the affirmative.

**6. Extension of reporting date**

Resolved, on the motion of Ms Cusack, that the Chairman seek leave of the House to extend the reporting date for the inquiry until Friday 28 May 2004.

**7. Next meeting**

Wednesday 5 May 2004 at 1.15pm.

**8. Adjournment**

The Committee adjourned at 1.10pm until 1.15pm on Wednesday 5 May 2004, in Room 1108.

**Wednesday 5 May 2004**  
**At Parliament House, at 1pm, Room 1108**

**1. Members present**

Rev Nile  
Mr Primrose  
Ms Burnswoods  
Mr Clarke  
Ms Cusack  
Ms Griffin  
Ms Rhiannon

**2. Confirmation of Minutes No 21**

Resolved, on the motion of Mr Primrose, that Minutes No 21 be confirmed.

**3. Correspondence**

The Chairman tabled the following item of correspondence:

***Submission***

- Supplementary submission No 53b from Mr Steve Likar

Resolved, on the motion of Mr Primrose, that the Chairman write to Mr Likar (Submission 53, 53a and 53b) and to the author of confidential Submission No 55 thanking them for their submissions and informing them that the Committee considered their submissions but was unable to consider their cases in detail as the submissions were received after the final hearing date, and that the Chairman forward Mr Likar's submissions to WorkCover for their response.

Resolved, on the motion of Ms Rhiannon, that supplementary submission No 53b be published.

**4. Consideration of Chairman's draft report**

The Committee resumed consideration of the Chairman's draft report "Serious injury and death in the workplace".

Resolved, on the motion of Ms Rhiannon, that the words following the word 'broadly' in paragraph 12.77, be deleted, and that the quotation in paragraph 12.77 be inserted preceded by the words 'The Law Society in its submission stated:' following paragraph 12.71.

Resolved, on the motion of Mr Clarke, that paragraph 12.78 be deleted and replaced with the words 'During his evidence, Mr Cowdery suggested that:'.

Resolved, on the motion of Ms Rhiannon, that paragraph 12.78, including the quotation, be deleted and reinserted immediately before paragraph 12.73.

Resolved, on the motion of Ms Rhiannon, that paragraphs 12.79 and 12.80 be deleted.

Resolved, on the motion of Ms Burnswoods, that the words 'other than' be replaced with the words 'in addition to' in Recommendation 20.

Resolved, on the motion of Ms Rhiannon, that Recommendations 20 and 21 be adopted.

Resolved, on the motion of Mr Primrose, that Recommendation 22 be deleted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 23 be adopted.

Ms Burnswoods moved that Recommendation 24 be adopted.

The Committee divided.

Ayes:

Rev Nile  
Mr Primrose  
Ms Burnswoods  
Ms Griffin  
Ms Rhiannon

Noes:

Mr Clarke  
Ms Cusack

Mr Primrose moved that Chapter 12, as amended, be adopted.

The Committee divided.

Ayes:

Rev Nile  
Mr Primrose  
Ms Burnswoods  
Ms Griffin  
Ms Rhiannon

Noes:

Mr Clarke  
Ms Cusack

Resolved, on the motion of Ms Cusack, that Recommendation 25 be adopted.

Resolved, on the motion of Mr Primrose, that a new recommendation be inserted after paragraph 13.47 stating:

That WorkCover include in its protocol for liaising with the families of deceased workers the requirement that family members be informed about obtaining compensation and counselling, in addition to being kept informed of the progress of the investigation.

Resolved, on the motion of Mr Primrose, that Recommendation 26 be adopted.

Resolved, on the motion of Ms Cusack, that the words 'and injured workers incapable of acting on their own behalf' be inserted after the words 'deceased workers' and that the phrase 'family members of deceased workers' be replaced by the phrase 'family members of workers' in Recommendation 27.

Resolved, on the motion of Mr Primrose, that Recommendation 27 be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 28 be adopted.

Resolved, on the motion of Ms Cusack, that Chapter 13, as amended, be adopted.

## **5. Next meeting**

Monday 10 May 2004 at 10am.

## **6. Adjournment**

The Committee adjourned at 2.30pm until 10am on Monday 10 May 2004, in Room 1108.

Monday 10 May 2004  
At Parliament House, at 10am, Room 1108

**1. Members present**

Rev Nile  
Mr Primrose  
Ms Burnswoods  
Mr Clarke  
Ms Griffin  
Mr Pearce (Cusack)  
Ms Rhiannon

**2. Confirmation of Minutes No 22**

Resolved, on the motion of Mr Primrose, that Minutes No 22 be confirmed.

**3. Correspondence**

The Chairman tabled the following item of correspondence:

***Correspondence received:***

- Letter from Mr Terry Perkins, regarding his submissions to the inquiry
- Letter from Mr Geoff McDonald, regarding a late submission to the inquiry
- Letter from Mr Brian Robertson, Director, State Debt Recovery Office, regarding answers to questions taken on notice 1 March 2004

***Correspondence sent***

- Letter to Mr Steve Likar re his submissions to the inquiry (6/5)
- Letter to Mr Jon Blackwell, CEO, WorkCover, re the case of Mr Likar (6/5)
- Letter to the author of confidential submission No. 55 re her submission to the inquiry (6/5)

Resolved, on the motion of Mr Primrose, that the letter from Mr Perkins be noted by the Committee, and that in view of the closure of the inquiry, no further action be taken.

Resolved, on the motion of Mr Pearce, that the factual information contained in the letter from the State Debt Recovery Office be included in the appropriate place in the report.

Resolved, on the motion of Mr Pearce, that the Committee Secretariat write to Mr McDonald informing him that his correspondence was received when the Committee was well advanced in its consideration of evidence, and that the Committee was unable to investigate his issues of concern. Mr McDonald was also to be informed therefore that similar issues to those he raised were addressed in the report.

**4. Consideration of Chairman's draft report**

The Committee resumed consideration of the Chairman's draft report "Serious injury and death in the workplace".

Resolved, on the motion of Ms Rhiannon, that as previously foreshadowed, a recommendation be inserted after paragraph 8.18 stating:

That WorkCover introduce improved systems to incorporate feedback from inspectors about emerging issues and to assess current satisfaction levels of inspectors.

Resolved, on the motion of Ms Rhiannon, that as previously foreshadowed, a new section be inserted after paragraph 8.18 (and after the new recommendation) stating:

**Partnership with the NSW community**

- 13.65** Evidence given during the inquiry highlighted opposing views between WorkCover and industry about the effectiveness of WorkCover in managing issues related to death and serious injury, and in the broader context, about WorkCover's ability to achieve the outcomes of its mandate.
- 13.66** WorkCover's website declares that WorkCover's primary objective is to work in partnership with the NSW community to achieve safe workplaces, effective return to work and security for injured workers.
- 13.67** However, some witnesses stated that in fact WorkCover does not engage in meaningful consultation with the community, and is not able to proactively meet industry's needs.
- 13.68** Relatives of victims stated clear expectations of communication that they require from the regulator, when confronted with a workplace tragedy.
- 13.69** The CFMEU, NSW Bar Association and NSW Nurses' Association in their submissions articulate their expectation for WorkCover to provide assistance and advice for their membership.
- 13.70** The Committee believes that WorkCover's senior ranks needs to contain a breadth of industry experience.
- 13.71** Although several witnesses praised the work of individuals within WorkCover, many felt that front-line staff were constrained by a lack of management foresight, and a focus on reactive (rather than preventative) strategies. These comments were particularly aimed at the Occupational Health and Safety Division of WorkCover, which administer the work of the Inspectorate.
- 13.72** Mr Watson stated that the position of a WorkCover inspector is highly sought after. Despite the attractiveness of the position the attrition rate over the last five years for inspectors for reasons other than retirement is greater than 20%. This rate increases if the inspector is female. Given the resources allocated to the recruitment and training of inspectors, and the need to retain their expertise, this matter warrants further investigation.

In its closing submission WorkCover appears quite satisfied with its performance in relation to workplace death and serious injury. The submission states for its part, 'WorkCover is an efficient and effective organisation which is comprised of dedicated and professional staff. WorkCover's submission did not respond to many issues raised by union, employer and professional groups.

Resolved, on the motion of Mr Primrose, that the word "that where" be replaced with the word "many" in paragraph 8.58 and that the paragraph end after the words "safe workplace".

Resolved, on the motion of Mr Primrose, that a recommendation be inserted after paragraph 8.58 stating:

That WorkCover NSW examine the possibility of splitting its inspectorate into education and prosecution branches, or other ways to minimise confusion regarding the roles of inspectors.

Resolved, on the motion of Ms Burnswoods, that as previously foreshadowed, a recommendation be inserted after Recommendation 18 stating:

That the CEOs of each Government Agency be responsible for the development and implementation of guidelines outlining the responsibility for public safety. These guidelines should be developed in full consultation with WorkCover, the Premier's Department, employers and the Labour Council of NSW.

Resolved, on the motion of Mr Primrose:

1. That the report, as amended, be adopted.

2. The report be signed by the Chairman and presented to the House in accordance with the resolution establishing the committee of 3 July 2003.
3. That Pursuant to the provisions of section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under the authority of Standing Order 224, the Committee authorises the Clerk of the Committee to publish the report, minutes, correspondence and tabled documents (except those marked confidential).

Mr Clarke advised the Committee of his intention to make a dissenting report.

Resolved, on the motion of Mr Clarke, that the Members wishing to make a dissenting report provide the report to the Secretariat by 5pm Tuesday 11 May, and that Members note the requirements of Standing Order 220 in relation to dissenting reports.

Resolved, on the motion of Mr Primrose, that the Committee leave to the Chairman's discretion whether or not to hold a press conference following the tabling of the report.

Resolved, on the motion of Ms Rhiannon, that the Committee's next inquiry be the inquiry into the 2004 Mini Budget.

**5. Next meeting**

Monday 10 May 2004 at 11.45am.

**6. Adjournment**

The Committee adjourned at 11.40am until 11.45am on Monday 10 May 2004, in Room 1108 (2004 Mini Budget inquiry).



## Appendix 7 Statement of Dissent: Opposition Members

### Workplace Deaths

The issue of deaths resulting from gross negligence is highly charged in any setting – whether it be in a workplace, in a public venue, on the road, in a hospital, a prison or in the home. Negligence implies a breach of duty of care by a person who has power or some responsibility for the welfare of another person. The deliberate or reckless failure of any person or corporation to properly discharge such a duty of care is particularly abhorrent in any setting.

Our Committee focussed on workplace accidents. It is of great concern that on the evidence presented to the Committee nobody in New South Wales appears to have been ever found guilty of an offence related to criminal negligence causing a workplace death or serious injury. It is unbelievable to think that gross negligence has never been a factor in any such deaths and injuries sustained in workplaces across the state.

We are deeply sympathetic to the frustration and anger of families of workers who are victims as a result of another person's gross negligence and acknowledge their quest for justice.

We are also concerned by evidence noted in other sections of the report that that some companies in the building industry are gaining price advantages over their competitors as a result of cutting corners in relation to safety. This situation must be addressed.

On the other hand we noted that many of the cases presented to our inquiry where it appeared negligence led to death or serious injury did not relate to companies, rather, they involved actions or inactions by co-workers and contractors. We are of the view that all forms of gross negligence should be addressed because the failure is across the board. Otherwise we would be answering one injustice with a new injustice that is contrary to the principle that we are all equal in the eyes of the law.

The NSW Director of Public Prosecutions gave compelling evidence that there should not be differing crimes of “manslaughter“ and that the standards of proof required to secure a conviction should be the same for all deaths caused by criminal negligence, irrespective as to where such deaths occur.

The Australian Industry Group (Ai) presented impressive evidence to the Committee, including on the issue of Industrial Manslaughter. Ai summarised industry concerns in their formal submission (Ai 25/2/04 pp 15-17)

- **A key plank of most OHS laws is reciprocity of obligation between employer and employee. Industrial manslaughter laws are a targeted unilateral punishment and aimed at punishing employers with no equivalent sanction for employees who engage in unsafe practices, or indeed seek to consider the actions of other parties who have a very real and practical influence on how safety is managed in workplaces, such as unions or government agencies.**
- **Poorly drafted industrial manslaughter laws expose the possibility that individuals could be unfairly prosecuted and found guilty of offences as surrogates for systemic and aggregated or joint failings. The diminution of ‘mens rea’ or intent in the action goes against the principles that criminal law is based. There are practical questions that would need to be considered that**

may not have clear answers such as was an employee who directed an employee to act in an unsafe way acting within his or her authority given by the director of the company? The law has always distinguished between natural persons and legal persons. Criminal law has generally required that a natural person both has the intent and performs an act that is criminal. Accordingly a natural person can be imprisoned for the crime. Civil law has recognised both natural persons and legal persons like corporations, trusts or partnerships. The remedy for civil offences has not been the restriction of personal liberty but the awarding of damages or the requirement of specific performance. This separation has been made for good reasons.

- The reality is that failure of prosecutions on manslaughter in workplace situations has not occurred because of some inherent unfairness in the criminal system but as a result of hundreds of years of legal development and reasoning which has rightly protected people of being found guilty of crimes where the person neither committed the action that led to the death or had the intent to commit an act which led to the death.
- It has operated on the principle that if the sanction is one of imprisonment it becomes even more important that people are, not just adequately, but vigorously protected from outcomes that are flawed or mistaken. While the circumstances of a death in the workplace are always tragic the industrial manslaughter legislation submits to the argument that this fundamental notion of justice should be subverted.
- Industrial manslaughter by its very nature subverts the inherent justice that has been established in developing the existing manslaughter laws. Such a law is likely to lead to prosecutions having a greater chance of success in areas where there is a shorter chain of control or command. Small business owners and first line supervisors are the most likely individuals to be exposed by the regime.

During the Hearings additional evidence was given that employers powers to enforce safety requirements are becoming somewhat ambiguous in relation to safety due to other laws regarding unfair dismissal, discrimination laws and employing people with disabilities. (Ai Hearing 2/3/04 p 13)

Mr Cowdrey's Office has identified seven matters since 1987 for prosecution – one of which is still outstanding. Of the six resolved matters (all involving unsuccessful prosecutions) Mr Cowdrey says:

**“The cases I am going to mention do not highlight to me any need for a change in the law in any respect. In my view the law is clear enough.” (p 35)**

A summary of the six finalised cases revealed to the Committee by Mr Cowdrey are as follows:

- 1990 fall through roof – co-worker charged
- 1992 crane accident – co-worker charged
- 1996 – fall from roof - supervisor who had directed worker to wear harness – employer charged by police – DPP directed dropping charges
- 1998 – Crane accident – supervisor – employee charged

- current matter – collapse of brick wall (no info – under consideration)
- circa 1994 Carnival accident – operator (key witness died) – self employed operator charged

We also note evidence given by Mr Brack (Chief Executive, Employers First) that Premier Carr and his Government have repeatedly given assurances to employers that this Government will not legislate to introduce a new offence of Industrial Manslaughter. (ref: Transcript of Public Hearing 2/3/04 pp 43-44).

## RECOMMENDATIONS

- **The Government review investigation protocols and procedures between Workcover and the Police to ensure more co-operative, timely and effective gathering of evidence which will improve the brief of evidence given to the DPP for prosecution;**
- **The Government refer to the NSW Law Reform Commission and the Panel of Review a request to examine the broad issues of liability for deaths caused by gross negligence.**