

LEGISLATIVE COUNCIL GENERAL PURPOSE STANDING COMMITTEE No. 1
INQUIRY INTO SERIOUS INJURY AND DEATH IN THE WORKPLACE
Complete set of Questions on Notice and Answers

Questions Taken on Notice on Tuesday, 17 February 2004

1.1 The Chairman asked Mr Blackwell for a copy of the 'internal working document' on the procedures to be followed when liaising with the relatives of deceased workers (Hansard, page 8).

Answer:

Attached is a copy of the flow-chart and guide outlining the procedures followed when liaising with the relatives of deceased workers. The *Guide for Families, Dealing with Workplace Death* is currently being published.

1.2 Mr West asked Mr Blackwell should the protocol for liaising with the Courts, Attorney General's Department and the Office of State Debt Recovery in relation to the payment of fines should include arrangements for liaising with the family of deceased workers (Hansard, page 13).

Answer:

As indicated at paragraph 7.11 of WorkCover's submission a new position has been created in the Workplace Fatalities Investigation Unit to liaise with families and coordinate counselling services. During ongoing liaison families will be asked if they want to be advised about the progress of the enforcement of penalties.

1.3 Mr Primrose asked Mr Blackwell for a flow chart indicating who is 'actually involved in the process of decision making for debt recovery' (Hansard, page 14).

Answer:

A copy of a flow chart outlining the steps for the recovery of fines by the State Debt Recovery Office is outlined at paragraph 8.6 of WorkCover's submission.

Given that this matter falls under the administration of the State Debt Recovery Office, WorkCover has referred the Committee's question to the State Debt Recovery Office.

1.4 The Chairman asked Mr Watson: Have you got inspectors who have no industry experience (Hansard, page 16).

Answer:

No. All 301 inspectors have industry-specific knowledge. It is one of the selection criteria for inspector recruitment. WorkCover interacts with every industry in NSW and have 13 designated industries overseen by 7 industry and 2 Country Teams.

Selection criteria for WCA inspectors since 1993 have required industry-specific and/or technical, scientific experience and expertise. More importantly, an understanding of & experience in application of risk management principles has been essential. Every inspector in OHSD possesses a range of experience, skills & attributes that are carefully assessed through a rigorous recruitment process. There has also been a purposeful shift towards enhancing the investigative skills of the inspectorate through recruitment of those possessing investigative skills (such as police officers) and training programmes.

As indicated at paragraph's 5.6 to 5.9 of WorkCover's submission, inspectors have experience in a range of trades and professions. Inspectors taking part in the two most recent recruitment programs have tertiary qualifications and professional skills in areas including building and construction; engineering; medical biotechnology; health sciences; policing and forensic investigation and mechanics.

As a representative sample, of the 49 inspectors in the Construction & Utilities Team, all have industry specific knowledge and possess trade qualifications and industry experience including carpentry, plumbing, electrics, mechanics, fitting and turning, engineering, and science (eg hygienists and asbestos experts).

In addition to their industry qualifications and experience, inspectors also undertake an 18 month Inspector Induction Program, including theoretical studies and field-based training under the supervision of an experienced inspector.

After successful completion of the program new inspectors are eligible to receive a nationally recognised Diploma of Government (Workplace Inspection). Inspectors also regularly take part in specialist courses and ongoing professional development to ensure their skills and knowledge are up-to-date and at the forefront of industry best practice.

1.5 The Chairman asked Mr Blackwell for an organisational chart of the inspectorate of WorkCover by industry (Hansard, page 16).

Answer:

A copy of the organisational chart is attached.

1.6 Mr West asked if the Committee could get a description of what inspectors would normally expect to do in any given week (Hansard, page 16).

Answer:

Inspectors undertake random and targeted investigations of workplaces and investigate notified incidents. During the course of a week inspectors visit workplaces to:

- investigate workplace incidents and breaches of legislation;
- respond to OHS complaints from workers, unions, OHS committees and the public;
- give advice and information on the development and improvement of systems to eliminate or reduce the risk of injury and illness;
- conduct compliance inspections relating to workplaces and industry hazards;
- target hazards in industry sectors as part of specific injury prevention projects and campaigns; and
- participate in after hours and weekend emergency response roster.

As indicated at paragraphs 5.12 and 5.13 of WorkCover's submission, inspectors investigate workplace incidents by:

- attending the incident site and, if action has not been taken by the Police, securing and preserving the site;
- contacting and discussing the incident with the investigating Police Officer to determine the scope of the WorkCover investigation and level of interaction with the Police;
- commencing the investigation process, serving Prohibition and Improvement Notices under the OHS Act, if required, and conducting interviews with witnesses;
- establishing contact with a solicitor from the Legal Group allocated to case manage the investigation with the inspector;

- maintaining liaison with the investigating Police Officer and agreeing, where possible, to the exchange of information; and
- completing the investigation and providing a report to the Coroner (if appropriate) and WorkCover recommending appropriate action.

1.7 Ms Rhiannon asked Mr Blackwell for additional information about how many fines have been paid and what amount has been paid (over the last 5 years) (Hansard, page 17).

Answer:

Data on the number of fines paid is available from 1 July 2000. For the three years to 30 June 2003, 928 fines have been paid and \$23.9 million has been paid.

1.8 Ms Rhiannon asked Mr Blackwell whether he was aware that in relation to the death of Mr Jardine on 3 July 2002, there is evidence of tampering at the scene of the incident, including the placing of a hard hat and a vest near the deceased's body (Hansard, page 18).

Answer:

Yes, WorkCover is aware of this allegation. These matters have been taken into account as part of the prosecution proceedings commenced in the Industrial Relations Commission.

1.9 Mr Clarke asked Mr Blackwell to indicate to the Committee the percentage of employers who have actually paid their fines (as opposed to the percentage of fine moneys collected) for the past five years (Hansard, page 21).

Answer:

Data on the number of fines paid is available from 1 July 2000. For the three years to 30 June 2003, 80% of employers have paid their fines.

1.10 The Chairman asked Ms Grant whether there are any records of any employers being gaoled for a fatality in the workplace (Hansard, page 25).

Answer:

Under section 12 (c) of the OHS Act the Industrial Relations Commission in Court Session can in the case of an individual (being a previous offender) impose a penalty of \$82,500 or imprisonment for 2 years, or both. As yet there has been no instance of a person being imprisoned under this section or its predecessor – section 51A of the OHS Act 1983.

The decision to imprison an offender under the OHS legislation is entirely within the discretion of the sentencing court.

1.11 Ms Cusack asked Mr Blackwell whether authorities in other States would be entitled to information about parking offences in NSW, but would not be entitled to know if an individual running a company had a worker killed at his or her workplace in a serious breach of the Act (Hansard, page 25).

Answer:

The road transport legislation in New South Wales is largely based on a national framework of rules and offences. This framework facilitates the exchange of information between jurisdictions. Occupational health and safety legislation on the other hand varies from jurisdiction to jurisdiction with respect to the nature of the offences and the penalties for those offences.

There are also limits under the OHS Act 2000 as to what offences can be used to determine a person – a “previous offender”. There are substantial increases in penalty under section 12 of the OHS Act 2000 where an individual or corporate offender has been a “previous offender”.

A “previous offender” is defined under section 4 of the OHS Act 2000 to be a person who has, at any time before being sentenced for the current offence, been convicted of any other offence of any kind against the OHS Act 2000 or the OHS Act 1983. Therefore offences committed in other jurisdictions in Australia under other Acts could not be used for the purposes of designating an offender under the OHS Act 2000 as a “previous offender”.

WorkCover also interacts with the inspectorates of Queensland and Victoria on joint operations to target companies operating across borders. Recent examples include joint programs to target the construction industry, including falls from heights, and the cotton industry. WorkCover also regularly meets other States to discuss current and emerging compliance issues.

1.12 Ms Cusack asked Mr Blackwell how many fines have been issued in the last twelve months by WorkCover (Hansard, page 25).

Answer:

Fines are also referred to as Penalty and Infringement Notices or “On the Spot” Fines. In 2002/03 WorkCover issued 1259 fines.

1.13 Ms Cusack asked Mr Blackwell how many breaches of the Act WorkCover has identified in the last twelve months (Hansard, pages 25-26).

Answer:

As indicated at paragraphs 5.27 and 5.30 of WorkCover’s submission in 2002/03, WorkCover identified 15, 143 breaches of the OHS Act comprising:

• Improvement Notices	12,646
• Prohibition Notices	776
• Penalty Notices	1,259
• Prosecutions	462
Total Breaches	15,143

1.14 Ms Cusack asked Mr Blackwell how many cases have been contested following the identification of a breach of the Act (Hansard, page 26).

Answer:

Under section 108 of the OHS Act 2000 a person who appears to have committed an offence under the Act may be issued with a penalty notice. The person served with the notice may either pay the fine imposed by the penalty notice or choose to have the matter dealt with and contested in court.

During 2002/03 16 Penalty Notices were contested. The range of results in these matters include a court imposing a fine; the court dismissing the notice; and the fine being paid by the alleged offender or the notice being withdrawn by WorkCover before going to court.

1.15 Ms Cusack asked Mr Blackwell how many fines for fatalities have been paid (in raw numbers rather than percentages) (Hansard, p. 26).

Answer:

Data on the number of fines paid is available from 1 July 1999. In the four years to 30 June 2003, of the 85 fines issued by the Courts for fatalities, 67 fines have been paid in full, a further 8 are being paid by instalments in accordance with arrangements with the Courts and/or the State Debt Recovery Office, and the remaining 10 are with the State Debt Recovery Office for recovery action.

1.16 Ms Rhiannon asked Mr Blackwell in relation to the death of Mr Rees in September 2002 whether the Newcastle BHP site was supervised during the period in August and September when Inspector Steve McMartin was on leave (Hansard, pages 26-27).

Answer:

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.

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

1.17 Ms Rhiannon asked Mr Blackwell in relation to the death of Mr Reece in September 2002 why WorkCover took 23 months to begin the investigation into the previous accident at No 5 Ore Bridge at Newcastle BHP (Hansard, page 27).

Answer:

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.

1.18 Ms Rhiannon asked Mr Blackwell in relation to the death of Mr Rees in September 2002 whether it was a coincidence that WorkCover began an investigation into Mr Reece's death only following the release of a video into the earlier No 5 Ore Bridge demolition at Newcastle BHP (Hansard, page 27).

Answer:

No. The video was released in June 2002. Mr Rees was fatally injured in September 2002.

1.19 Mr West asked Mr Blackwell for information of any action taken in the Industrial Relations Commission following the death of Mr Darri Haynes in a train crash in 1999 (Hansard, page 28).

Answer:

Mr Darri Haynes, a former employee of Sayogi Pty Ltd (trading as Hitchcock Haulage) was killed when his truck was incinerated following an accident in northern New South Wales on 1 September 1999. Following an investigation of this incident, WorkCover has commenced prosecution proceedings against the Director of Hitchcock Haulage in the Industrial Relations Commission, in Court Session.

Hearing dates for the prosecution commenced in December 2002 and proceedings are currently adjourned for final submissions in March 2004.

1.20 Mr West asked Mr Blackwell to advise how many CEOs there has been of WorkCover in the last ten years (Hansard, page 28).

Answer:

Four including Mr Blackwell.

1.21 Mr West asked Mr Blackwell for a detailed report of which WorkCover inspectors visited the Australand site prior to the death of Mr Joel Exner and the date of those visits, together with copies of all infringement and prohibition notices that were issued prior to the fatality (Hansard, page 28).

Answer:

WorkCover Inspectors had not visited the Australand site prior to the tragic fatality of Mr Joel Exner. This would not be unexpected as WorkCover had received no complaints from any party such as the union, workers or the safety committee regarding safety concerns at the site prior the accident. WorkCover had also received no incident notifications regarding any prior incidents at the site that would give rise to a workplace inspection.

WorkCover had received no complaints or incidents regarding the workplace including matters regarding harnesses that would have initiated a workplace inspection.

1.22 Mr West asked Mr Blackwell why WorkCover did not deal with the issue of harnesses prior to Mr Joel Exner's death (Hansard, page 28).

Answer:

WorkCover has dealt with the issue of harnesses by undertaking a number of interventions which focussed on working at heights, for example:

- In 1993 WorkCover developed, in consultation with industry, the Code of Practice for Safe Work on Roofs (Commercial).
- In 1995 WorkCover developed, in consultation with industry, the Code of Practice for Safety Line Systems.
- In 1997 WorkCover developed, in consultation with industry, the Code of Practice for Safe Work on Roofs (Residential).
- In 2000 a blitz on the housing industry that resulted in 452 employers visited & 390 notices issued.
- In 2001 WorkCover ran a television advertisement focusing on working at heights in the construction industry.
- In 2001 a blitz on medium density construction (unit construction) that resulted in 645 employers visited and 827 notices issued.
- In 2003 a blitz on commercial building construction that resulted in 503 employers visited and 680 notices issued.

- A further compliance blitz on working at heights in the construction industry commenced on February 16 2004. To coincide with the blitz, WorkCover is re-running a television advertisement focusing on the need for employers to provide a safe workplace, proper training and supervision for workers, with a particular emphasis on young workers. The advertisements commenced on Sunday, 22 February 2004.
- WorkCover is also working with the Heads of Safety Authorities to address falls from heights in the construction industry by participating in a new campaign that will start in March 2004 and include 800 inspector visits to construction sites around Australia.

1.23 West asked Mr Blackwell whether he was aware of the serious injuries to Mr Fuller, who it is understood worked at the same site as Mr Exner and Mr Hampson (Hansard, page 29).

Answer:

On 25 September 1998 at St Peters, Mr Garry Fuller, an employee of Gary Denson Metal Roofing suffered a broken jaw, bone & facial damage to the right side of his face while operating an Elevated Work Platform.

The matter was verbally notified to WorkCover and WorkCover conducted an investigation into the incident. Prosecution proceedings commenced in the Chief Industrial Magistrate's Court against the defendant company, which was found guilty and penalised \$5000 on 5 June 2001. The fine has been paid in full.

Questions Tabled by Mr Primrose on Tuesday, 17 February 2004

1.24 Mr Primrose tabled in relation to the death of Mr Jardine, is WorkCover aware there is evidence of tampering with the accident scene by placing a hardhat near Mr Jardine's body after the accident – no hardhats or vests were issued or worn?

Answer:

Please see answer to question 1.8.

1.25 Is WorkCover aware there is evidence and witnesses to a forgery of Mr Jardine's signature after the accident stating he attended a site induction prior to the accident?

Answer:

Please see answer to question 1.8.

1.26 As there was no workers compensation insurance covering Mr Jardine at the time of the accident, why did WorkCover not advise Mr Jardine's family of the scheme which would provide cover in this instance or offer any legal advice?

Answer:

A senior inspector of the Construction Team liaised with Mrs Jardine shortly after the fatality of her husband and advised her about WorkCover's role and the ongoing investigation by WorkCover and the State Coroner. Ms Jardine was subsequently provided with the publication, entitled *After a Workplace Fatality*, which outlines the support which family and friends might find of assistance, such as:

- 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 (including details of ULIS, WorkCover Legal Aid, and how to get further information); and
- contact details for further help including bereavement support, counselling services, legal aid and entitlements to compensation.

In July 2003 Mrs Jardine was subsequently contacted by the senior investigating inspector, in order to provide an update on the progress of the investigation. WorkCover has recently contacted Mrs Jardine to advise her of the progress the investigation and indicate that prosecution proceedings have commenced.

1.27 Who assessed the excavator driver Mr Brian Monroe for a certificate of competency to operate an excavator and what date was this performed?

Answer:

This matter is currently subject to criminal proceedings in the Industrial Relations Commission. WorkCover is concerned that the disclosure of this information is not in the public interest because it may adversely affect the prosecution proceedings.

1.28 Is WorkCover aware no work method statements were given to either Mr Brian Monroe or Mr Geoff Jardine?

Answer:

Please see answer to question 1.27.

1.29 Is WorkCover aware that the excavator driver is alleged to have had his dog in the excavator cabin at the time of the incident?

Answer:

Please see answer to question 1.27.

1.30 What are the consequences/penalties for the workplace safety breaches found in the case of the death of Mr Jardine?

Answer:

WorkCover has commenced prosecution proceedings in relation to the tragic fatality of Mr Jardine. If convicted, under section 12 of the OHS Act the Industrial Relations Commission in Court Session can impose penalties of:

- (a) in the case of a corporation (being a previous offender)—\$825,000, or
- (b) in the case of a corporation (not being a previous offender)—\$550,000, or
- (c) in the case of an individual (being a previous offender)—\$82,500 or imprisonment for 2 years, or both, or
- (d) in the case of an individual (not being a previous offender)—\$55,000.

1.31 Is there any action currently being taken in relation to the case of the death of Mr Jardine and will Mr Jardine's family be informed on the details?

Answer:

As indicated in the answer to question 1.26 above, following the investigation of the tragic fatality of Mr Jardine, WorkCover conducted an investigation and prosecution proceedings have been commenced. WorkCover has contacted Mrs Jardine to advise her of the commencement of prosecution proceedings.

Questions Arising from Evidence of Monday, 16 February 2004

1.32 Mr Hampson raised his concerns that 'he had never seen a WorkCover inspector on a site in 20 years'. How often do WorkCover staff conduct random workplace checks in the construction industry?

Answer:

Construction Team inspectors visit workplaces in response to complaints, to investigate incidents and injuries and to undertake targeted intervention visits. In 2002/03 the construction team responded to approximately 2500 complaints and conducted approximately 200 investigations.

In normal circumstances inspectors do not warn the workplace of their pending visit. In the case of targeted intervention visits where Inspectors target specific areas, such as falls from heights, there were 1249 employer visits in 2002/03. Whilst the industry as a whole may be forewarned about an upcoming blitz, specific sites are not warned. This strategy can achieve desired safety outcomes by promoting safety improvements without an inspector actually visiting. Details of WorkCover's fall blitzes are outlined in the answer to question 1.22 above. Other blitzes include:

- crane compliance blitz targeting new self-erecting tower cranes to determine compliance with requirements for design, use and certification of operators;
- formwork compliance blitz in Sydney metropolitan area, regional and rural New South Wales focusing on specific issues in the concrete industry, including safe erection of formwork and falsework;
- construction industry blitz targeting asbestos and demolition site compliance;
- construction site blitz concentrating on commercial developments, industrial warehouse constructions and 2 to 5 storey unit developments; and the 'HouseSafe 5' blitz targeting building contractors and unsafe working at heights and scaffolding.

1.33 Mr Hampson suggested that employers and insurers are not under an obligation to inform WorkCover of a workplace injury or death. Is that correct?

Answer:

No. Section 86 of the OHS Act 2000 requires the occupier of a place of work to give WorkCover notice of certain incidents in the workplace. An occupier includes a person who, at the relevant time, managed or controlled the premises or who was in charge of a particular operation being conducted on the premises.

These incidents include those that have resulted in a person being killed and incidents prescribed in clause 344 of the OHS Regulation 2001 for the purposes of section 87 of the OHS Act 2000. Incidents prescribed under clause 344 include incidents where injury results in the amputation of limbs; injury resulting in a loss of consciousness; or entrapment of person in a confined space.

Section 86 of the OHS Act 2000 also provides that additional incidents under clause 341 of the OHS Regulation 2001 are required to be notified to WorkCover. These incidents include an injury to a person that results in the person being unfit for work for a continuous period of 7 days and an incident that involves a risk of serious injury or illness to a person.

Under clause 342 of the OHS Regulation 2001 injuries and illnesses listed under clause 341 of the OHS Regulation 2001 are required to be notified by the employer to WorkCover.

1.34 Has WorkCover undertaken closer scrutiny of worksites under the direction of John Polviak since Dean McGoldrick's death?

Answer:

WorkCover's involvement has been:

- 1 February 2001: on the day of Mr McGoldrick's death inspectors issued two Prohibition Notices (Falls from heights and overhead protective structures). These Notices were complied with.
- 13 December 2002: following a complaint about unsafe roof work in Moonbi (northern NSW) WorkCover conducted an investigation of a site involving Seagrave Constructions (the principal contractor) and Advanced Roofing (the sub contractor). No breaches were identified.

1.35 Has WorkCover undertaken closer scrutiny of worksites under the direction of Garry Denson (the employer of Joel Exner and Anthony Hampson) since Mr Exner's accident?

Answer:

Yes. WorkCover inspectors have visited a number of worksites 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. During these visits a total of five Improvement Notices and four Prohibition Notices were served.

1.36 Mr Keenan also suggested that WorkCover has some very competent inspectors, but that it needs more inspectors with specific knowledge of the construction industry. How many inspectors have prior experience of the construction industry?

Answer:

Please see answer to question 1.4 above.

1.37 Why have Mr and Mrs Rees not been contacted by WorkCover since the death of their son Mr Greg Rees?

Answer:

WorkCover made arrangements for contact details to be provided to Mr Rees' defacto partner as his next of kin.

Questions Arising from WorkCover's Written Submission

1.38 How many prohibition notices have been served on employers under the OH&S Act 2000 (paragraph 5.24)? Where a prohibition notice has been issued, what does WorkCover do to ensure compliance with the notice?

Answer:

The OHS Act came into effect on 1 September 2001. As indicated at paragraph 5.27 of WorkCover's submission during 2002/03 inspectors issued 776 Prohibition Notices. Between 1 July 2003 and 31 December 2003 inspectors issued 514 Prohibition Notices.

WorkCover inspectors ensure compliance with Prohibition Notices through follow-up inspections and where appropriate recommending prosecution proceedings for non-compliance.

Inspectors also provide employee representatives with copies of Prohibition Notices and inform the Police where the public have been placed at immediate risk.

1.39 How many penalty notices have not been complied with (paragraph 5.27)?

Answer:

Fine recovery falls under the administration of the Infringement Processing Bureau. WorkCover has therefore referred the Committee's question to the Infringement Processing Bureau.

1.40 What proportion of the \$13 million in fines awarded by the courts in 2002/03 for breaches of OH&S legislation has been paid (paragraph 5.32)?

Answer:

76% paid.

1.41 Are the 'senior management' referred to in your submission who appear to make this decision legally qualified (paragraph 5.44 and 5.45)?

Answer:

No, because solicitors within Legal Group will review the information provided in the form of a prosecution brief and consider the recommendation to commence prosecution proceedings. All recommendations concerning the prosecution of fatalities are referred to the CEO for final decision.

1.42 Why must the CEO finally decide whether to commence a prosecution for a breach of OHS legislation leading to a fatality – why are these cases not automatically prosecuted?

Answer:

WorkCover would ordinarily prosecute in respect of a workplace fatality. However, the decision to prosecute in any matter including a fatality is made having regard to certain established principles being the overall public interest and in particular:

- whether the admissible evidence available is capable of establishing each element of the offence, ie a prima facie case;
- whether there is a reasonable prospect of conviction; and
- whether there are discretionary factors which nevertheless dictate that the matter should not proceed in the public interest. An example being whether it would be unduly harsh and oppressive and not in the public interest to prosecute a father, who, tragically killed his child with a tractor on a farm on which the family home was located.

The decision to prosecute is one which resides with the CEO in accordance with his statutory responsibility for the management and control of WorkCover. 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 Delivery OHS Division or such other senior member of the OHS Division as nominated by the General Manager OHS Division. The delegation does not prevent the CEO from making the decision in any matter he choses.

1.43 Is there a WorkCover policy document outlining the factors that are taken into account when determining whether to prosecute? If so, can the Committee be given a copy of this document (paragraph 5.47)?

Answer:

A copy of the document is attached.

1.44 Can WorkCover elect **not** to commence proceedings against the directors of a company which breaches OH&S legislation? If so, can the courts overrule this decision and find against directors, under section 12 of the OH&S Act (paragraph 5.48)?

Answer:

Yes. Please see WorkCover's Compliance Policy and Prosecution Guidelines. No, the Courts cannot overrule this decision.

1.45 Has any consideration been given to applying to the Attorney General for him to apply to the Industrial Relation Commission for a guideline judgment under section 140 of the OH&S Act? If so, what was the outcome? If not, why not? Is it possible that the use of a guideline judgment may reduce the incidence of excessively lenient penalties for breaches of OH&S legislation resulting in serious injury or death (paragraph 5.58)?

Answer:

The Government's response to the Workplace Safety Summit indicated that the Minister would approach the Attorney General regarding the making of an application to the Industrial Relations Commission for a sentencing guideline under section 125 of the OHS Act 2000.

In August 2002, the Minister made a preliminary approach to the Attorney General in relation to an application for a sentencing guideline under the OH&S Act in respect of workplace deaths. The Attorney General responded that WorkCover should the Crown Advocate directly for advice in relation to the application. A brief was sent to the Crown Advocate on 11 November 2002 and an initial conference held in December 2002.

During 2003 meetings were held between WorkCover and the Crown Advocate. As indicated in paragraph 5.59 of WorkCover's submission the Crown Advocate stated:

"There is quantitative evidence of a pattern of excessive leniency. The evidence suggests that 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 tabulation of the details of offences also point to a pattern of excessive leniency in respect of sentencing under ss15 and 16 of the OHS Act 1983."

".....the overwhelming majority of penalties imposed have been one fifth or less of the maximum, whereas during the same period the legislature has seen fit to substantially increase the maximum penalty available for the offence not once but several times."

In the light of this advice, and recent community concern regarding the degree of penalties available and awarded against companies and individuals, the Minister for Commerce, the Honourable 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. This review will also specifically address the sentencing principles applied by courts in OHS matters. The Minister has also undertaken to consult with employer and worker representatives concerning any legislative change arising from that advice.

1.46 Please provide the Committee with a copy of the Crown Advocate's advice referred to in paragraph 5.59.

Answer:

Advice from the Crown Advocate is subject to legal professional privilege and the disclosure of this advice would be contrary to the public interest in the administration of justice, because it could form the basis of an application for a sentencing guideline to the Industrial Relations Commission in Court Session.

1.47 For how long will dependent family members continue to receive weekly benefits following a workplace fatality? Who are the "dependent family members" (paragraph 7.3)?

Answer:

Under section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* dependents are members of the worker's family who were wholly or partially dependent for support on the worker at the time of the worker's death, and includes:

- someone for whom the worker stands in the place of a parent
- someone who stands in the place of the worker's parent, and/or
- a dependent divorced spouse of the worker.

Under section 25 *Workers Compensation Act 1987*, if death results from a workplace injury, the dependent spouse is entitled to a lump sum benefit of \$285,750 (indexed) and weekly benefits are paid in respect of:

- each dependent child of the worker under the age of 16 years, and
- each dependent child of the worker being a student over the age of 16 years but under the age of 21 years.

These payments will continue until the child reaches the age of 16 years. In the case of a dependent child who is a student at the time of the worker's death or after reaching the age of 16 years, benefits will continue to be paid until the child reaches the age of 21 years. A student means a person receiving full-time education at a school, college or university.

The legislation defines a dependent child of the worker as a child or stepchild of the worker and includes a person to whom the worker stood in the place of a parent who was wholly or partly dependent for support on the worker.

In addition a single lump sum benefit is payable under section 25 of the Act to be apportioned between dependents, where the worker leaves any dependents wholly dependent for support on the worker.

1.48 Please provide details of any prosecution under section 23 of the Act – unlawful dismissal or other victimisation of employee.

Answer:

Under section 23 of the OHS Act 2000 an employer must not dismiss an employee, injure an employee in his or her employment or alter an employee's position to his or her detriment because the employee:

- makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health, or
- is a member of an OHS committee or an OHS representative, or
- exercises any functions conferred on the employee relating to consultation.

Currently WorkCover are investigating one matter with a view to prosecution under section 23 of the OHS Act 2000. Until that investigation is completed it would be inappropriate to comment in any detail on that matter.

There are no other records of a similar matter being prosecuted under section 23. Unfair dismissal matters are primarily dealt with under the Industrial Relations Act 1996 where persons affected can seek orders for reinstatement, re-employment, remuneration and compensation.

Matters are more likely to proceed under the Industrial Relations Act because of the personal remedies available to an unfair dismissal claimant, such as reinstatement or reemployment, and because matters will generally extend beyond strict safety issues to an examination of the circumstances surrounding the termination of employment (eg, constructive dismissal).

1.49 Please provide details of instances where defendants have relied on the defences contained in section 28 of the Act and the success of these defences.

Answer:

Section 28 of the OHS Act 2000 provides two defences under the Act as follows:

- That it was not reasonably practicable to comply with the Act;
- That the commission of the offence was due to causes over which the defendant had no control and against the happening of which it was impracticable for the person to make provision.

WorkCover records do not specifically track all defences raised in prosecution matters. The recording of all arguments made by a defendant during the course of proceedings would be onerous and of limited utility given some arguments may not be pursued by a defendant.

However some general comments may be made on how the section has been interpreted and applied by the courts. The onus of proving the defences under section 28 is on the defendant and this reversal of onus makes it significantly harder for a defendant to rely on this section.

Also, the defences under section 28 have been interpreted very narrowly by the courts thereby limiting the circumstances under which the defendant can rely on the section. Section 28 has been interpreted narrowly because the courts have recognised both the primary objectives of the statute to ensure health and safety in the workplace; and community concern for occupational health and safety: see *Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358 and *Southam v Petersville Ltd* (1988) 24 IR 186.

Therefore it is difficult for a defendant to rely on section 28 defences.

1.50 Please provide details of the experience of current qualified lawyers employed by WorkCover in its prosecution branch.

Answer:

There are twelve positions of qualified solicitors in the Criminal Law Practice reporting to the Manager, Litigation and the Director, Legal Group. The Director, Legal Group has more than 26 years legal practice experience in this State, in particular 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 this State, in particular 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.

The remaining solicitors in WorkCover's Criminal Law Practice have:

- tertiary qualifications in law and are admitted as legal practitioners in NSW and have current practising certificates;
- extensive experience in preparing and conducting complex prosecutions and/or civil law cases at a senior professional level;
- sound understanding of legal practice systems and work practices and their cost effective management within a quality assurance environment;
- comprehensive knowledge of OHS, injury management and workers compensation legislation and demonstrated ability to provide prompt expert and authoritative advice on legal and procedural issues;
- demonstrated achievement at a senior professional level in criminal and/or civil litigation; and
- excellent strategic, analytical, conceptual and legal reasoning skills.

1.51 Please explain the system of certificates of competency and in particular the role of WorkCover in large organisations which are able to issue their own certificates. Are there objective standards or does each organisation determine the standards? How does WorkCover ensure that the standards are applied?

Answer:

The National Occupational Health and Safety Commission has developed standards and assessment instruments for the certification of operators. Each State has adopted the Standards into their legislation.

NSW commenced using the Standards in 1995 and certificates of competency are currently issued to applicants under Part 9.1 of the *Occupational Health and Safety Regulation 2001*. These authorise certificate holders to undertake particular types of work such as scaffolding, dogging or rigging, or operate particular types of machinery such as forklifts or cranes.

Applicants are assessed by accredited assessors using the National Assessment Instrument developed by the National Occupational Health and Safety Commission. If the accredited assessor issues the applicant with a Notice of Satisfactory Assessment stating that they have the relevant competencies, the applicant can apply to WorkCover for a Certificate of Competency.

Organisations cannot issue Certificates of Competency. Some organisations do employ accredited assessors to assess persons in their company as part of their other duties. These are known as private assessors.

The same processes apply to private assessors and other accredited assessors. For example, both types of assessors are accredited by WorkCover, use the same National Assessment Instrument, and issue the same Notices of Satisfactory Assessment, that the applicant can then use to apply to WorkCover to apply for a Certificate of Competency. WorkCover monitors the performance of all assessors. Of the approximately 360 accredited assessors, 8 are classified as private assessors.

1.52 The Government Response to the NSW Workplace Safety Summit (page 10) noted two high risk industries – the forestry and transport industries – where the Government would work in partnership to help prevent workplace injuries:

- The Government indicated its support for the establishment of a Forestry Industry Safety Council to (amongst other things) establish OH&S safety benchmarks for the industry.
- WorkCover would initiate consultation with transport industry bodies and other regulatory agencies in relation of a MOU to help achieve a 40 per cent reduction in the incidence of injury in the transport industry by 2012.

How have these two proposals progressed?

Answer:

State Forests is the lead agent for the Forestry Industry Safety Council and advises that extensive consultation has taken place with stakeholders in the forestry industry concerning the terms of reference and membership of the Forestry Industry Safety Council, and that it is anticipated that the Council will be appointed shortly.

A Road Freight Safety Forum was held in late 2003 with over 100 senior industry leaders in the road freight and related industry sectors and government agencies in attendance. A large part of the forum was devoted to workshops to develop the MOU. This was to ensure it includes practical and achievable strategies that will lead to long-term safety outcomes in the sector. Following the Forum a working party of industry leaders was established to finalise the MOU.

The MOU will help drive a series of practical initiatives to improve safety in the road freight industry. This includes making sure all workers in the industry have access to induction training; developing strategies to improve the effectiveness of OHS consultative mechanisms in the industry; training for managers and supervisors on effective risk management; and ensuring 'safe design' principles are utilised in the design of trucks (to reduce vibration), equipment (improving the comfort of seat belts) and warehousing facilities.