

Final Report

Final

Review of the *Occupational Safety and Health Act 1984*

Richard Hooker

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Report

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REVIEW OF OCCUPATIONAL SAFETY AND HEALTH ACT 1984

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CHAPTER 1. INTRODUCTION AND BACKGROUND

Foundation for Review

- 1.1. It is an express requirement of the *Occupational Safety and Health Act* 1984 (WA) (the OSH Act) that a review of the Act's operations be carried out on every fifth anniversary of its commencement. This is the Report of the fourth such review. Previous reviews were completed in 1992, 1998 and 2002. The first and third reviews were conducted by Mr Robert Laing, a former Commissioner of the Australia Industrial Relations Commission¹. The second review was undertaken by Mr Jeremy Allanson, a barrister of the independent bar of Western Australia, with particular expertise and experience in public law and government administration.
- 1.2. The 1992 and 2002 Reports of Mr Laing provide succinct and enlightening summaries of the background to the OSH Act itself². It is unnecessary to recapitulate any of that history in any detail. Importantly, practically all of the interested parties who contributed to the present Review were familiar with the context in which the legislation and its enforcement have evolved to this point in Western Australia. In particular, participants are well familiar with the substantial influence provided by the report of the British Committee of Inquiry into Safety and Health at Work, established in 1970 and chaired by Lord Robens³ (variously, as the context permits, Robens Report or simply Robens). As will be reflected at various junctures in the present report, the influence of Robens remains important both within this State and as progress towards a unified national regulatory framework for occupational safety and health gathers momentum. That influence is particularly prevalent in:
 - The ongoing importance of what are broadly termed “general duty”-type provisions, in Western Australia contained in Part III of the OSH Act, by which workplace participants are obliged to, so far as is reasonably practicable,

¹ References in this Report to “the Laing Review” or to cognate expressions such as “recommendations of Mr Laing” are to the *second* review and report of Mr Laing (hence the third review in total), unless expressly stated otherwise. The present statutory review is variously referred to as the “Review” or the “Inquiry”. Other frequently used terms are contained in the List of Abbreviations at Appendix C.

² See particularly Laing Review at [37]-[71].

³ Robens Committee (1972), Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee*, HMSO, London.

provide and maintain safe systems of work and otherwise take reasonable care for the safety of certain workplace participants.

- The supporting of those general duties with a regime of more detailed prescription through regulations and other forms of delegated legislation.
- The imperative to achieve a more effective self-regulating system through consultation and related interaction between workplace participants.

As will be developed, the enduring influence of the Robens Report ought not blind contemporary participants in occupational safety and health to the significance of changes in work practices, work relationships and the nature of government regulation that have taken place in the ensuing three and a half decades.

- 1.3. The enactment and commencement in 1985 of the OSH Act and, subsequently, its Regulations, applying from the outset to essentially all industries with the exception of mining and petroleum, replaced four previous Acts and 21 sets of Regulations. The OSH Act thus met one of the considerable concerns raised by Robens in the context of British legislation, that much of it was fragmented, out of date, highly prescriptive and even limited in some of its coverage of the work force. The OSH Act as initially enacted sought to partially meet those problems by providing for the establishment of a tripartite body, then termed the Occupational Health, Safety and Welfare Commission. Simultaneously, the predecessor of the WorkSafe division of the Department of Consumer and Employment Protection, the Department of Occupational Health, Safety and Welfare, was established as the agency responsible for the administration of OSH laws in this state. Amendments enacted in 1987, operative from September 1988, then introduced the substantive provisions now contained in Part III dealing with general obligations and duties of all parties having a role in safety and health at work (frequently referred to in this Report as “workplace participants”). That first set of amendments also established aspects of the basic consultative framework that has become an essential feature of OSH law and administration in Western Australia.

1.4. The text of s.61 of the OSH Act provides the legislative foundation for a five yearly statutory review and, in effect, enacts its terms of reference. The provision therefore warrants citation in full:

“61. Review of Act

- (1) The Minister shall carry out a review of the operations of this Act on every fifth anniversary of the commencement of this Act and in the course of such review the Minister shall consider and have regard to –
 - (a) the attainment of the objects of this Act;
 - (b) the administration of the Acts and laws relating to occupational safety and health administered by the Minister;
 - (c) the effectiveness of the operations of the Commission, any advisory committees and the department;
 - (d) the need for the continuation of the Commission and any committees established under this Act;
 - (e) such other matters as appear to him or her to be relevant.
- (2) The Minister shall prepare a report based on his or her review of this Act and shall, as soon as is practicable after its preparation, cause the report to be laid before each House of Parliament.”

1.5. Although s.61 contemplates “the Minister” himself or herself carrying out such a review and laying before each House of Parliament a report “based on his or her review” it is scarcely conceivable that the considerable task of conceptualising and conducting a review and its report ought to be undertaken by a Minister of the Government of Western Australia. Plainly, as with many other areas of individual ministerial responsibility, the reality is that the Minister will cause another person to carry out each five yearly review contemplated, whether through direct engagement or otherwise.

1.6. The present Review was formally initiated in February 2006 by the then Minister for Consumer and Employment Protection, the Hon John Kobelke MLA, appointing Mr Richard Hooker, a barrister at the independent bar of Western Australia, to conduct a review under s.61 of the OSH Act. Later in February 2006, pursuant to a reallocation of roles within the Cabinet of the Government of Western Australia, the Hon John Bowler JP MLA became the Minister for Employment Protection and thus assumed ultimate responsibility for the Review.

1.7. From its inception, the Inquiry has remained cognisant of the nature and scale of the review and very comprehensive associated report undertaken by Mr Laing as finalised

in November 2002. A major consequence of the Laing Review was a range of legislative amendments effected by the *Occupational Safety and Health Legislation Amendment and Repeals Act 2004*, many provisions of which came into effect as recently as 4 April 2005. Mr Laing also recommended a number of administrative changes and other alterations to the operation of the regime for occupational safety and health in Western Australia. The correspondence initiating the Review acknowledged that recent context, whilst appreciating that any review of the Act's operation pursuant to s.61 must necessarily have general regard to the attainment of the Act's objects, as well as the administration and effectiveness of the present occupational safety and health legislative regime.

- 1.8. Nonetheless that context has given rise to a tension which has remained constant throughout the undertaking of the Inquiry. On the one hand, the relatively short period since the finalisation of the Laing Review, particularly the implementation of most of the amendments and variations in response thereto, suggests the need for particular caution and circumspection in recommending any further change. Indeed, a number of contributors to the Review emphasised, and continually returned to, precisely that point. On the other hand, it is incumbent upon any administrative inquiry to fulfil what the High Court of Australia has termed its necessary "statutory task"⁴. In short, an inquiry must undertake what, on a proper interpretation of its enabling legislation, Parliament has contemplated will be done. The history of previous inquiries and legislative and executive amendments form part of the context which may shape the issues identified to be of relevance and pursued accordingly. Ultimately, however, there must be, as a matter of substance, a performance of the task required by the legislature. To achieve that balance will require an exercise of judgment in many instances.
- 1.9. Another factor influencing the extent of the task undertaken has been the scale of the operation. The Review has essentially been undertaken by Mr Hooker himself with assistance being largely confined to that of a clerical and secretarial nature. The Inquiry has not been of a magnitude which even approximates that of, for example, the Maxwell Review of Victoria's occupational safety and health system and legislation⁵.

⁴ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

⁵ See further paragraphs 2.47-2.51.

Hence some issues, identified in the course of the Report as warranting sustained examination, independent research or verification, or ongoing consideration of a specialist or technical nature, were beyond the legitimate scope of the Review to pursue in any detail.

- 1.10. The Review, as with most administrative inquiries, was obliged to accord procedural fairness.⁶ However, merely to acknowledge at a general level the applicability of the rules of procedural fairness of itself says little as to the operative components, or actual practical requirements, of that doctrine. That is largely because procedural fairness is a flexible obligation to adopt procedures which are appropriate and adapted to the circumstances of a particular administrative task. Hence, the nature of any given administrative inquiry, its subject matter, and any statutory obligations which it may satisfy, are among the factors that will shape the practical content of the principles of procedural fairness.⁷ Of particular significance to an inquiry of this kind, which examines (among numerous other things) the performance of a government department and its officers and employees, is the well established component of the principles of procedural fairness concerning findings regarding reputation. Whether “reputation” in any given context is of a personal, business or commercial nature, it constitutes an interest which should not be damaged by a factual finding following a statutory inquiry unless the person or entity whose reputation is likely to be affected has had a proper opportunity to show why the findings should not be made.⁸ As it turned out, no factual findings were made which could sensibly be regarded as adverse to the reputation of any person or entity. Nevertheless, certain provisional findings were communicated to WorkSafe and some other entities and individuals where it was thought appropriate or desirable for an opportunity for comment to be provided.
- 1.11. Aside from properly fulfilling their statutory task (where sourced in statute) and complying with applicable principles of procedural fairness, administrative inquiries may be undertaken in a variety of ways. Provided legal constraints of the kind identified are satisfied, they may generally inform themselves and conduct their

⁶ Used interchangeably in the Report with the synonymous term “natural justice”.

⁷ *Kioa v West* (1985) 159 CLR 550 at 585; *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1962) 113 CLR 475 at 501.

⁸ *Annetts v McCann* (1990) 170 CLR 596 at 608-609; *South Australia v O’Shea* (1987) 163 CLR 378 at 389.

processes as they see fit. It is open, in particular, to an administrative inquiry or tribunal to undertake its work in a way that draws, to a greater or lesser degree, on methods of *adversarial* adjudication or, on the other hand, *inquisitorial* or *investigative* procedures. It is open to view the two contrasting models as located at extreme ends of a continuum within which any given mode of determination and its associated set of procedures will fit. The concept of adversarial adjudication generally involves a contest between opposing parties, where the parties conceptualise and seek to establish their own claims, generally through the giving of oral testimony which, at least in a forensic setting, is usually regulated by the rules of evidence and tested by cross-examination. By contrast, inquisitorial (or the less pejorative term “investigative”) procedures draw on the traditions of courts in civil law jurisdictions, the essence of which lies in the active participation of an impartial investigator from the outset of the proceedings. It will be the investigator or inquirer who has primary responsibility for defining the issues and hence the conceptualisation of the form of evidence gathering and the supervision of that process as it unfolds.⁹

- 1.12. It may be, though, that the contrasting labels of “adversarial” and “inquisitorial” provide little more than a starting point in the process of an identification and enunciation of the actual, practical, components of an inquiry’s processes and procedures. However it necessarily follows, the assumptions of some notwithstanding, that an administrative inquiry need not operate through formal “court room style” hearings for any or all of its proceedings. Nor, and contrary to the apparent belief of some contributors to this Review, are administrative inquiries generally obliged to provide notification of their provisional findings and recommendations in draft form to interested parties. As a general proposition, the nature and appropriate processes of this Inquiry involved a method considerably more akin to an inquisitorial process than an adversarial one.
- 1.13. The Inquiry undertook a process of engaging in consultation with a wide range of organisations, groups and individuals with an interest in occupational safety and health

⁹ Aronson et al, *Judicial Review of Administrative Action* (3rd edition, Law Book Co, 2004) 489-490.

(OSH)¹⁰ in Western Australia. Written submissions were called for and received from many of those entities. An initial round of consultations, in both written and oral form, informed the preparation of a Discussion Paper which was issued in March 2006 and widely distributed to interested parties. Contributors who had provided a submission to the Inquiry to that date were sent a copy, as were numerous other groups and individuals. The Discussion Paper was also made publicly available on the website of WorkSafe.

- 1.14. The Discussion Paper canvassed the thrust of submissions and observations received, as well as summarising some important issues of relevance to contemporary OSH in Western Australia. It posed some 52 questions, designed to stimulate ongoing consideration and debate on topics of importance. That debate is by no means concluded, irrespective of the findings and conclusions of this Inquiry. The Commission may wish to facilitate its continuation in tandem with the implementation of the Report's recommendations.
- 1.15. Many interested parties provided additional submissions and/or other comments in response to the Discussion Paper. Ongoing verbal discussions also continued until about September 2006. With respect to a small number of issues of particular complexity, sensitivity or emerging importance, discussions have continued until relatively shortly before the finalisation of this Report. A List of Contributors appears at Appendix D.
- 1.16. Inevitably, some commentators will perceive that their contributions have received less attention, and express reference in the Report itself, than others. The Inquiry has sought to draft the Report so as to reflect the range and depth of submissions as best it can. Selectivity has, however, been unavoidable.

The OSH Act – Some Issues of Interpretation

- 1.17. Given the direct role that s.61(1) of the Act plays, by very force of statute, in marking the parameters of the Inquiry's task, it will be necessary on occasion to return to its text. Some preliminary observations are appropriate, however.

¹⁰ For economy, the abbreviation "OSH" is frequently used, including in some contexts as an abbreviation of the

- 1.18. Fundamentally, the Review is one of the *operations* of the Act. That language, of its natural meaning, suggests a direction of attention to how the Act (which, naturally, includes regulations and other subsidiary legislation made pursuant to the Act¹¹) works, that is administered and enforced, rather than the content of the legislation itself. Plainly, though, a consideration of the content and meaning of the legislation is necessary as a preliminary step to an appreciation of the broader area of inquiry. The point serves to highlight that references to the Review as one merely of the “Occupational Safety and Health Act” or as being a “legislative review” can be somewhat misleading. The term “statutory review” is to be preferred because it directs attention to the Inquiry’s source, whilst avoiding any implied confinement of its role.
- 1.19. Section 61(1)(a) requires that the Review consider and have regard to the attainment of the objects of the Act itself. This Report will return to certain aspects of the objects but for now it is to be noted that they are expressed in the following terms:

“5. Objects

The objects of this Act are-

- (a) To promote and secure the safety and health of persons at work;
- (b) To protect persons at work against hazards;
- (c) To assist in securing safe and hygienic work environments;
- (d) To reduce, eliminate and control the hazards to which persons are exposed at work;
- (e) To foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;
- (f) To provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;
- (g) To promote education and community awareness on matters relating to occupational safety and health.”

- 1.20. Aside from having the direct relevance specified by s.61(1)(a), the objects as enacted in s.5 read with the long title of the Act¹² carry a secondary purpose of importance to the interpretation of the entirety of the legislation. It is an accepted principle of statutory

reverse order of words – “occupational health and safety” as opposed to “occupational safety and health”.
¹¹ *Interpretation Act* 1984 (WA), s.46.

¹² “An Act to promote and improve standards for occupational safety and health, to establish the Commission for Occupational Safety and Health, to provide for a tribunal for the determination of certain matters and claims, to

interpretation that a construction that would promote the purpose or object underlying an act shall be preferred to a construction that would not do so¹³. Of related importance is the principle, regularly enunciated by the High Court in recent years¹⁴ that *context* is to be considered at the outset in any task of statutory interpretation, whether or not any ambiguity has been identified. The notion of “context” is capable of encompassing a range of issues and themes connected with the subject matter, history and practical setting of a given piece of legislation. To select an obvious example, the Robens recommendations and their influence within Australia provide important context to any interpretation of the OSH Act.

- 1.21. Section 61(1)(b) requires a review to consider and have regard to the administration of the Acts and laws¹⁵ relating to occupational safety and health administered by the Minister. Clearly enough, this requirement encompasses all legislative instruments, including Regulations and codes of practice, as well as, arguably, materials such as guidance notes made by the Commission under s.14(1)(b)(iii) and (e) of the OSH Act. It is, in that sense, perhaps a specific dimension to the basic and overall requirement that the Review be one of the “operations of the Act”.
- 1.22. The next two matters enacted in s.61(1)(c) and (d) are of a more specific nature, being concerned with the Commission itself established under s.14 of the Act in terms of the effectiveness of its operations (including any advisory committees to it) and the need for continuation of the Commission itself and any of those committees. More broadly, s.61 requires that consideration to be given to the operations of the “Department” that is, WorkSafe itself.
- 1.23. Section 61(1)(e) directs attention to other matters of apparent relevance. To identify and have regard to such matters is perhaps inherent in the fundamental requirement that an administrative inquiry fulfil its statutory task, in the manner previously alluded to. The course of the Inquiry has, of its own nature, highlighted a number of such

facilitate the coordination of the administration of the laws relating to occupational safety and health and for incidental and other purposes”

¹³ *Interpretation Act* 1984 (WA), s.18. A statutory provision to similar effect exists for every other Australian jurisdiction.

¹⁴ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1 at [10]-[11] (and the cases therein cited).

¹⁵ The complex debate over what genuinely constitutes a “law” need not be pursued here. The Review generally construes the concept broadly, thus “delegated legislation” is liberally taken to include codes of practice made under s.57, despite the discussion at 8.16-8.24.

matters of varying degrees of contemporary importance to participants in OSH in Western Australia. Before turning to a summary of those matters, it is desirable to make one additional observation concerning the general approach to the interpretation of the Act and other relevant laws, that from time to time becomes of importance.

- 1.24. It is sometimes said of certain categories or kinds of legislation that a particular approach or perspective to interpretation is appropriate. Specifically, there is authority for the proposition that laws concerned with occupational safety and health or (to use a less fashionable expression) “industrial safety” are for, fundamentally, the protection of employees and other people undertaking work. Therefore, so the principle proceeds, in the case of any doubt, ambiguity or hiatus in the legislative text a “beneficial” or “liberal” interpretation should be favoured. Although this principle has not been consolidated into any legislative form, it is well enough established under the common law of Australia for it to be a premise on which the Inquiry proceeds, where appropriate.
- 1.25. However at times a competing principle of statutory interpretation arises, causing potential complication. An alternative approach to statutory interpretation is that, where legislative provisions create a criminal or quasi-criminal offence, provisions of that kind should be interpreted in the case of any doubt, ambiguity or hiatus, in a manner that is *favourable* to the person charged, or potentially to be charged, with an offence. The potential for tension between these two principles of statutory interpretation will be readily apparent. How does one reconcile, on the one hand, interpreting occupation safety and health legislation liberally, so as to protect employees and other workers yet, on the other hand, interpreting offence-creating provisions narrowly, even strictly, in favour of a defendant?
- 1.26. The High Court of Australia has resolved this difficulty by determining that, in the case of such a conflict, the *dominant* purpose is to be enunciated which is then to override the more secondary purpose. In the case of occupational safety and health law, it is the former, or protective character which is of a dominant and overriding nature¹⁶. This principle has been recognised and applied by the Supreme Court of Western Australia

¹⁶ *Waugb v Kippen* (1986) 64 ALR 195.

both with respect to the OSH Act itself¹⁷ and the *Occupational Safety and Health Regulations* 1996 (the Regulations)¹⁸.

Overview of Submissions Received and Issues Highlighted

1.27. The covering material to the initiation of the Review itself identified three discrete matters as being of particular interest to the then Minister, namely:

- (a) The evidentiary status and legislative effectiveness of codes of practice made under s.57 of the OSH Act;
- (b) The concept of a chain of responsibility for commercial vehicle preparations (and, perhaps by implication, the feasibility of like concepts for other areas of OSH regulation); and
- (c) The appropriateness of WorkSafe being given the authority to stop heavy vehicles for inspection as recommended in a report of the Auditor General of Western Australia of June 2005¹⁹.

As will be seen, the Inquiry has assessed the first issue to be one of considerable importance and complexity, the second issue to be one of moderate complexity, and the third issue to be one capable of relatively short treatment.

1.28. Attention was also drawn by the Hon Minister to any matters of potential significance flowing from legislation recently introduced in the Commonwealth Parliament generally known as the WorkChoices legislation²⁰. Ongoing pronouncements of policy development and implementation at federal level have added to the significance and complexity of WorkChoices.

1.29. WorkSafe Western Australia, for its part, identified what it described as three key strategic issues which it regarded as being of particular importance:

¹⁷ *Go-Crete Pty Ltd v Innes* [2002] WSCA 240 at [33]-[35].

¹⁸ *Stratton Creek Pty Ltd v Morrison* [2005] WASC 84 at [46]-[48].

¹⁹ Auditor-General of Western Australia, Report No. 4 of 2005, *Regulation of Heavy Vehicles*.

²⁰ See more fully paragraphs 4.1-4.13 below.

- (a) What was termed as the “continued level of prescription” in the Regulations with, as an “adjunct issue”, the appropriate nature and role of codes of practice. This issue thus encompassed the first issue as identified by the Minister, yet occupied a somewhat broader ambit.
- (b) The question of “chain of responsibility” as one primarily articulated by the National Road Transport Commission, but being potentially of broader application. WorkSafe noted that the concept, as so conceptualised, is designed to ensure that all who exercise control over conduct which affects compliance have responsibilities under the law and are held accountable for any failure to discharge those responsibilities. The extent to which such a principle ought play a role within the legislative framework governing OSH was identified as being one of importance. As will be noted, the notion of “control” *per se*, recurred from time to time throughout the Review.
- (c) Issues and consequences flowing from the outcome of two important and high profile prosecutions heard and determined in the Magistrates Court in 2005. One such consequence was said to be the determination of “control” in circumstances where there are complex contractual obligations, and was advanced as a difficult matter which may merit ongoing consideration.

WorkSafe subsequently addressed each of the issues and specific questions raised in the Discussion Paper and provided important content on a range of other matters of relevance.

- 1.30. Generally speaking, organisations representing employers’ interests urged that the Review adopt a conservative and circumspect approach in light of the scope and scale of the Laing Review, and the implementation of its recommendations. Although a number of employers’ groups responded in some detail to the Discussion Paper, the general position of those groups was that little, if any change, be it legislative or executive in nature, was required.
- 1.31. By way of exception to that general trend, however, some important submissions of particular employers’ groups included:

- Minimisation (or as submitted by some groups, repeal) of the jurisdiction of the Occupational Safety and Health Tribunal (the Tribunal).
- Maintaining a separation – as put by one body a “unique dichotomy” – between occupational safety and health and, on the other hand, industrial relations.
- Ensuring that “responsibility” is not imposed on independent contractors and other business operators “as if” they were employers, nor “deeming” those in the former category to “be” employers.
- Reviewing the operation of s.23 of the OSH Act so as to, in the view of some groups, provide for a more equitable attribution of responsibility in the supply or potential supply of plant and other items.

1.32. The trend of the positions advanced by union interests, or other groups suggesting a greater protection for employees, was more assertive both in tone and content. Far from urging caution in light of the outcomes of the Laing Review, many such interests suggested there were significant areas of underperformance in the operation of the Act and, accordingly, a range of further legislative and executive changes was warranted. Of particular import were:

- Maintaining and enhancing the jurisdiction of the Tribunal.
- Taking a range of steps to avert certain consequences of Commonwealth legislative change.
- Enabling unions and others to commence prosecutions.
- Developing and strengthening processes for consultation and risk management.
- Increasing the systemic ability to reduce, and otherwise respond to, intangible workplace hazards.

1.33. Thus the following topics emerged during the course of the Review as being of particular interest – and in many cases concern – to parties and persons involved in occupational safety and health in Western Australia:

- (1) The role and functions of the Tribunal, and in particular the appropriate extent (if any) of its conferral of jurisdiction. (The concerns expressed as to the appropriate “dichotomy” between occupational safety and health and industrial relations, whilst on one view a significant point in its own right, largely related in a practical sense to this issue).
- (2) The appropriateness of unions being empowered with authority to bring prosecutions under the OSH Act and its delegated legislation.
- (3) The existence of intangible forms of workplace hazard, most notably bullying and stress, and appropriate means for the minimisation of those hazards and accountability of employers who are responsible accordingly.
- (4) What may generally be termed “chain of responsibility” issues, seen to be of particular importance in certain industries, most notably the agricultural industry, the road transport industry and persons involved in importing or other on-supply of plant and other items.
- (5) The quantity and nature of regulatory material, both as a potential shortcoming of the system in its own right, and as presenting a particular problem for small to medium sized businesses.
- (6) The nature, and potential implications, of activity occurring at Federal level, with a particular concern, for many union interests, of the impact on occupational safety and health of new commonwealth legislative provisions further restricting right of entry entitlements.
- (7) The nature of the obligation on employers to genuinely consult, both as to the operation of those provisions presently in the OSH Act and, from a policy or normative point of view, how extensive provision of that kind *ought* to be.
- (8) The scope of the operation of the general duty provisions of the Act, particularly having regard to the insertion of s.23D-23F of the Act and the current conceptualisation, in Western Australia, of the notion of practicability.

(9) The presence of, and ongoing potential for, discrimination against employees (whether safety and health representatives or not) who raise occupational safety and health issues or otherwise engage the OSH system.

1.34. The Review has given particular attention to those issues and topics. Some have required more detailed analysis than others. Other, less frequently recurring concepts are addressed, albeit often in lesser detail. The Report also canvasses a number of specific and sundry issues, many of them of an uncontroversial nature.

General Impressions of Occupational Safety and Health in Western Australia

1.35. The Inquiry is cautiously satisfied with the *overall* state of occupational safety and health legislation and administration in Western Australia. As will be elaborated upon, the legislation, whilst continuing the Robens-inspired tradition and principles, effects what is, on balance, a legitimate and appropriate mix of general duty offence-creating provisions and prescriptive regulatory material. Although, at times, that legislative mix does give rise to significant regulatory burdens for some workplace participants, there is in the Inquiry's view no preferable alternative in light of the complex and dynamic nature of OSH in the contemporary business world. The basic tripartite structure of the Commission, whilst open to potential variation, continues to serve the administration of OSH in this State most satisfactorily. The peak bodies involved in that administration by and large work well with each other, respectful of their various differences, yet appropriately collaborative. Most importantly, there is a common understanding of the overriding objectives of occupational safety and health and a broad level of consensus as to the fundamental steps that ought be taken in achieving those ideals.²¹

1.36. The consultative process undertaken by this Inquiry has reflected the strength of the system. Practically all interested parties have provided intelligible, interesting, and in some cases provocative, contributions on a range of matters within the statutory terms

²¹ By way of an interesting - albeit sobering - contrast, another recent review identified two critical systemic failings of mines safety in NSW. The first was a *mistrust* between members of the tripartite process at all levels. The second was a *disconnect* between regulators' and employers' stated desires to reduce risk through systems and management plans and, on the other hand, the reality of risk encountered at the "coal face": Wran QC and McClelland, *NSW Mine Safety Review – Report to the Minister for Mineral Resources*, February 2005. Pleasingly, the Inquiry has found no arguable case of such phenomena in OSH in Western Australia.

of reference. Those submissions have been invaluable to the Inquiry's discharge of its statutory task.

- 1.37. These positive and optimistic observations should not be taken to suggest any cause for complacency. There are areas of the legislation's content and its enforcement which, in the Inquiry's view, even allowing for the considerable work achieved by the Laing Review and its implementation, do warrant improvement. Undoubtedly, other possible shortcomings will come to light and warrant attention in the short to medium term. Ultimately, however, the Inquiry is confident that the basic legislative and executive structures in this State provide a very sound vehicle for meeting any such difficulties as and when they arise.

CHAPTER 2. OCCUPATIONAL SAFETY AND HEALTH DEVELOPMENTS SINCE LAING

Significant Outcomes of Laing Review

- 2.1. As noted, the Laing Review was a comprehensive and exhaustive process, culminating in a detailed written report presented to the Parliament of Western Australia by the then Minister. It included some 107 recommendations for legislative, executive and other changes and variations to the OSH system. Appendix A to this Report is a table which sets out those recommendations and summarises the responses of the Government of Western Australia thereto.
- 2.2. The main legislative amendments concerned the following:
- (a) An expansion of the general duties of care, particularly concerning obligations imposed on those engaging independent contractors and the labour hire industry.
 - (b) A substantial increase in penalties for those committing offences contrary to the OSH Act, particularly for corporations, including provision for imprisonment in cases involving serious harm or death where the breach involves “gross negligence”.
 - (c) The establishment of the Safety and Health Tribunal within the Western Australian Industrial Relations Commission, empowered to exercise certain jurisdiction as specifically conferred on it by the OSH Act.
 - (d) The conferral of power on safety and health representatives to issue Provision of Improvement Notices (PINs) and provision for the regime of a PIN’s force and operation.
 - (e) Establishment of more flexible processes for the election of safety and health representatives and the creation of safety and health committees.
 - (f) The express provision for prosecution action to be taken against alleged statutory breaches by government agencies.

- 2.3. Notably Mr Laing’s most recent review of the OSH Act was completed in tandem with the equivalent statutory review of the *Mines Safety and Inspection Act 1994* (WA) (MSI Act). Mr Laing made certain observations concerning the appropriateness of alignment of general duty of care requirements between those two pieces of legislation, as well as their operation generally. A specific recommendation led to the establishment of a Mining Industry Advisory Committee to advise and make relevant recommendations in replacement of the former Mines Occupational Safety and Health Advisory Board established under the MSI Act. It is, naturally, beyond the statutory task of the present Review to inquire into the operations of the MSI Act. Although some limited comment is made, from time to time, about the possible desirability of further alignment between mines safety and occupational safety and health more generally, any such observations are of a highly provisional nature and without the benefit of appropriate consideration.
- 2.4. Since 1 July 2005, responsibility for safety and health regulation of mining, as well as dangerous goods and onshore petroleum operations, was transferred from the Department of Industry and Resources (DOIR) to the Resources Safety Division of the Department of Consumer and Employment Protection (DOCEP). WorkSafe itself constitutes another division of DOCEP. The Mining Industry Advisory Committee has been operative since April 2005 pursuant to s.14A inserted into the OSH Act. Amendments to the MSI Act came into effect on 4 April 2005 with the commencement of operation of the *Mines Safety and Inspection Amendment Act 2004* (WA). It is unnecessary to summarise the effect of those amendments save to note that many of them, consistently with the pertinent recommendations of Mr Laing, reflect a harmonisation with cognate provisions in the OSH Act.
- 2.5. Two pertinent observations about legislative coverage are apt. In short, the OSH Act does not apply to work carried out on a mine, petroleum well or petroleum pipeline to which any of a set of WA legislation may apply²². The definitions of “mine” in the Mining Act and the MSI Act are different. It is possible that a particular place may constitute a “mine” within the meaning of one of those acts, but not within the

²² That legislation is the *Mining Act 1978* (the Mining Act), the MSI Act itself, the *Petroleum Act 1967*, the *Petroleum (Submerged Lands) Act 1982* or the *Petroleum Pipelines Act 1969*.

meaning of the other²³. Although the MSI Act contains obligations regarding OSH that are for all intents and purposes similar in kind to the obligations in the OSH Act, the Mining Act has no such obligations, with the possibility of an unacceptable hiatus being present in respect of a workplace which only constitutes a “mine” by virtue of the applicability of the definition in the Mining Act. WorkSafe advanced two examples to demonstrate that such possibility is real and not merely hypothetical: namely a power station or a railway, each upon a mine site proper and thus a “mine” under the Mining Act, but not under the MSI Act.

- 2.6. It is possible for such hiatuses to be dealt with by means of an administrative declaration under s.4(3) of the Act. The Ministers responsible for administration of the OSH Act and the constellation of legislation concerned with mining and petroleum may jointly declare that the OSH Act applies to an excluded workplace as specified in an instrument in writing. That is an unsatisfactory remedy, in the Inquiry’s view. For there to be in effect a piecemeal method of solution, requiring a case by case identification of gaps in coverage, leaves open the foreseeable possibility that a hiatus will not be remedied until after a significant, even fatal workplace incident has taken place. The simple legislative solution is to remove the reference to the Mining Act in s.4(2) of the OSH Act, with the consequence that any workplace not covered by the MSI Act (or the legislation concerning petroleum) will automatically be covered by the OSH Act. The Chamber of Minerals and Energy, albeit not regarding any difficulty to be a significant one, supported such a proposal.
- 2.7. A somewhat different picture obtains concerning offshore petroleum safety. The National Offshore Petroleum Safety Authority (NOPSA) is the Commonwealth statutory authority which, since 1 January 2005, has had responsibility for administering and regulating OSH matters on such facilities, whether in Commonwealth or State waters²⁴. By virtue of s.4(2) of the OSH Act, as noted, legislation concerned with petroleum is, and has historically been, excluded from the jurisdiction of the OSH Act. The DOIR strongly submitted to the Inquiry that that exemption needs to be retained in light of the ongoing commitment of Western

²³ Compare definitions in s.8 of the Mining Act and s.4 of the MSI Act.

²⁴ Refer to relevant commonwealth legislation.

Australia to a common petroleum mining code. That commitment has given rise to amendments to the *Petroleum (Submerged Lands) Act 1982* (WA), in respect of offshore petroleum safety and subsequent amendments, assented to on 1 September 2005 (albeit not proclaimed), concerning onshore petroleum safety. Related amendments are understood to be pending to Regulations made under the *Petroleum Act 1967* (WA) and the *Petroleum Pipelines Act 1969* (WA) The effect of the regulatory regime, including pertinent regulations, is that OSH concerning *offshore* petroleum matters are administered by NOPSA (including certain waters and so-called island production “hubs”) with the balance of onshore area and pipeline licences being administered by DOCEP. The Inquiry is satisfied that there is no basis for other legislative change to s.4(2) of the OSH Act otherwise.

- 2.8. Although separate to the review by Mr Laing of the MSI Act, a separate administrative inquiry of major importance and consequence must be succinctly noted. In 2004, a ministerial inquiry undertaken by Mr Mark Ritter SC, a barrister at the independent bar of Western Australia with particular expertise and experience in industrial law, public law and native title, examined mine safety in Western Australia in the context of the tragic deaths of three people involved in the operations of BHP Billiton Iron Ore in Western Australia. Mr Ritter’s detailed report (the Ritter Report²⁵) found certain systemic shortcomings with regulation and enforcement regimes within mine safety in this State. In particular, concerning the Public Sector of Western Australia, conclusions were reached about what Mr Ritter SC termed a “disconnect” between the aims of regulators and implementation of those aims, inadequate enforcement generally (including, among other things, insufficient regulator resources, remunerations, skills and training), and a certain “culture” impeding further progress. This Inquiry has not considered it necessary to examine the findings of Mr Ritter SC, let alone the evidence and material before him, in any detail whatsoever. Indeed, to do so may have had little direct connection to the statutory terms of reference in s.61 of the OSH Act. For the avoidance of doubt, however, it is emphasised that there is no basis to translate the conclusions reached by Mr Ritter SC on the terms of reference and material before him

²⁵ In full, *Ministerial Inquiry: Occupational Health and Safety Systems and Practices of BHP Billiton Iron Ore and Boodarie Iron Sites in Western Australia and Other Matters* Minister for State Development, Perth, Western Australia, November 2004.

in that inquiry to any wider aspect of the regulation of occupational safety and health in Western Australia.

- 2.9. Subsequently, the Western Australian Government established a tripartite Mine Safety Improvement Group (MSIG) to examine the findings of the Ritter Report and implement its recommendations. An interim report of the MSIG published in May 2005 recommended, among other things, that a safety case regime should be introduced in the minerals industry in Western Australia, to be further examined by a feasibility study to consider the establishment of a new body to oversee health and safety in Western Australia's resources industry. That feasibility study, chaired by Mr Stuart Hicks, a former senior public servant in Western Australia and Chair of the National Transport Commission, is, on this Inquiry's understanding, due to report to the Government of Western Australia in the immediate future.
- 2.10. Whether or not a safety case regime is introduced into the Western Australian mining industry²⁶ considerable care will need to be taken in any extrapolation of the reasons therefor to OHS in Western Australia beyond the resources sector. Aside from the obvious fact that the findings of the Ritter Report, the interim recommendations of the MSIG, and the conclusion of the Hicks Report will need to be considered on their own terms against the parameters of their respective tasks, there may be numerous reasons why any given safety case model would not necessarily be capable of ready application to other aspects of occupational safety and health regulation.

Recommendations:

- R.1** The *Occupational Safety and Health Act 1984 (WA)* be amended to remove the reference to the *Mining Act 1978* in s.4(2).

Recent Activity of Commission for Occupational Safety and Health

- 2.11. Since the Laing Review, the Commission has been engaged in the following activities of particular significance:

²⁶ For a detailed and enlightened examination of the likelihood of this course, together with its advantages and disadvantages, see Heiler, *Is the Australian Mining Industry Ready for a Safety Case Regime?* National Research Centre for OHS Regulation, Working Paper 45, March 2006.

- (1) Generally contributing to the development and implementation of the legislative changes arising from the Laing Review itself.
- (2) The development of new Regulations and a revised code of practice on the management of fatigue in the commercial vehicle industry;
- (3) The development of a new package of measure to improve safety standards in the tilt-up and precast concrete construction industry, including regulations, a code of practice and a one day training course.
- (4) The development of new Regulations concerning the safe operation of cranes.
- (5) The development of new Regulations and a training course to support the introduction, from 1 January 2007, of mandatory safety awareness training for people working in the building and construction industry.
- (6) Publication of new or revised codes of practice on concrete and masonry cutting and drilling, occupational safety and health in call centres, excavation, prevention of falls, first aid, managing noise, manual handling, legionnaires' disease, noise in the music industry, workplace amenities and personal protective clothing and equipment.
- (7) Publication of new or revised guidance notes on emergency evacuations, dealing with workplace bullying, powered mobile plant, isolation of plant, contaminated sites, environmental tobacco smoke, forklifts, the general "duty of care" obligations in the OSH Act, infectious diseases in childcare, and covert and dangerous operations in the WA Police Service.
- (8) Publication of a series of fact sheets addressing OSH in residential and community aged care facilities.
- (9) Release of draft codes of practice on working hours and workplace violence and bullying (the latter in revised form) for public comment and the finalisation of those codes.

- (10) Revision and enhancement of guidelines for the accreditation of introductory courses for safety and health representatives, in light of the amendments to the Act in 2005.
- (11) Development of a new legislation module for the introductory course for safety and health representatives, taking into account the changes to the Act effective from January 2005 and, further, from April 2005, development of a transitional training module to equip the existing safety and health representatives with the necessary knowledge and skills to issue provisional improvement notices and undertake this new role effectively.
- (12) Accreditation or re-accreditation of introductory training courses for safety and health representatives.

2.12. It has not been feasible or practicable for the Inquiry to review the full content of this substantial range of activities. Aspects of selected codes of practice and guidance notes have been examined from time to time both as illustrative examples in their own right, and within the consideration of the appropriateness of those forms of regulation. Of ongoing importance is the Commission's Strategic Plan 2006-2010. The Strategic Plan identifies five primary Objectives, each of which is then developed through a variety of more specific Strategies. The detail of the Plan warrants close perusal in its entirety, however the overriding importance of the Objectives warrants their recitation:

Objective 1: Through strong leadership, maintain the focus, viability and relevance of the Commission.

Objective 2: Align with the National Strategy/ies.

Objective 3: Engage with the community.

Objective 4: Ensure a relevant legislative framework.

Objective 5: Be forward looking.

2.13. It is hoped that this Inquiry, in various ways, will assist the Commission in meeting all of those objectives. Part of the very function of the Inquiry is to ensure that the

legislative framework for OSH in Western Australia remains relevant and meaningful. Moreover, the way in which the Review has been conceived is almost entirely “forward looking” so as to, in as positive a manner as possible, draw upon the commendable achievements of OSH in this State and use those achievements as a foundation for continued progress. Other particular parts of the Report, in different ways, deal with the focus and relevance of the Commission, the role of National Strategies in OSH, and ways in which broader views of the community can positively influence government decision-making in OSH.

- 2.14. The Commission emphasises, and indeed extols, its role as a tripartite body, with members representing employers, employees, government as well as occupational safety and health expertise. It points out, correctly, that it is the only state or territory body in Australia established under occupational safety and health legislation with an unbroken period of operation, regardless of political or administrative change. It attributes this laudable achievement to the commitment of its members (and those members’ nominating bodies) to the tripartite process and their ability to reach a consensus and consolidated position on issues impacting on Western Australian workplaces. Subject to a qualification about the complexities sometimes created, and time required accordingly, by the nature of the consultative process²⁷, the Inquiry endorses these observations.
- 2.15. A small number of contributors argued for a revision of the rationale for the Commission’s composition. Those related issues are addressed in a more suitable context in due course. Otherwise, there was no argument for a revision of the Commission’s role, functions or ongoing activities. Nor has any case been sought to be made out by any interested parties for a discontinuation (to adapt the language of s.61(1)(d)) of the Commission itself. The Inquiry sees no basis for a recommendation of that kind, nor of any related kind concerning the provisions in ss.13-14 of the Act which underpin the Commission’s existence and functions. Some comment is made, however, about the Commission’s advisory committees created under s.15 and related constituent bodies.²⁸

²⁷ See paragraphs 8.14-8.15.

²⁸ See paragraphs 7.65-7.67.

Recent OSH Activity at Federal Level

- 2.16. It is important to recognise at the outset that the activities of the Commonwealth Government²⁹ are not *directly* within the ambit of the statutory terms of reference in s.61 of the OSH Act. It cannot be said that the content of any Commonwealth legislation, nor development of policy of any Commonwealth executive body, is within the scope of the “operations of” applicable State legislation. Nor, more specifically, are those matters directly covered by any of the matters referred to in s.6(1)(a)-(e).
- 2.17. There are various ways, however, in which an examination and understanding of those activities of Commonwealth Government may be *indirectly* relevant to the statutory terms of reference. For example, Commonwealth Government policy concerning OSH provides important context, and depicts numerous emerging trends regarding work practices and their regulation within Australia. More specifically, particular legislation in its operation may - given the effect of s.109 of the Commonwealth Constitution³⁰ - impact on the ambit of operation of relevant Western Australian legislation. And again, the importance and legitimacy of any Commonwealth policy may enable conclusions to be drawn about the level of involvement or commitment Western Australia plays at national level.
- 2.18. An appropriate starting point for a review of the recent activity of the Commonwealth Government concerning OSH is the Productivity Commission Inquiry Report into *National Workers’ Compensation and Occupational Health Safety Framework*³¹ (the Productivity Commission Report). The Commission was charged with the task of assessing possible models for establishing national frameworks for workers compensation and OSH arrangements. In a comprehensive report of over 500 pages, the Productivity Commission advanced a range of recommendations concerning national frameworks in each of those areas, as well as the subject of defining access and coverage to those potential regimes, injury management, common law access, statutory

²⁹ The term “Commonwealth Government” is, in this context, used in the broad sense to encompass activities of the Commonwealth Parliament, in its lawmaking function, and the Commonwealth Executive in the administration of its bureaucracy and development of policy with respect to occupational safety and health.

³⁰ “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

³¹ No. 27, 6 March 2004.

benefit structures, premium setting, matters of private and self insurance, and dispute resolution.

2.19. Specifically with respect to OSH, the Productivity Commission recommended that a cooperative OSH National Framework Model be developed, containing the following features³²:

- A National Occupational Health and Safety Commission (NOHSC) of five to nine members appointed by the Commonwealth Minister on the basis of those members' expertise and skills, the appointment to be approved by the Workplace Relations Ministers' Council (WRMC);
- Clear specification of the objective of achieving uniform national occupational health and safety legislation and regulation in all jurisdictions in the NOHSC enabling legislation;
- Agreement by all jurisdictions to adopt, without variation, the legislation and regulations proposed by the NOHSC and approved by the WRMC;
- The NOHSC have the ability to appoint advisory bodies, noting the importance of consulting with employers, unions and all jurisdictions;
- Specified timetables for WRMC review of proposals from NOHSC, similar to those applying in relation to food standards; and
- Funding of NOHSC to be shared by the jurisdictions, together with a commitment to funding research and data collection necessary to ensure the development of a best practice national occupational health and safety system.

2.20. The Productivity Commission examined current OSH arrangements within Australia, noting as a fundamental premise that under the Commonwealth Constitution the power to legislate on the subject is not expressly conferred on the Commonwealth Parliament. Although various possible sources of Commonwealth legislative power are

³² Productivity Commission Report, page xli.

of potential relevance³³ the system has inevitably evolved of nine distinct, yet in many ways substantially related, OSH systems within Australia: namely one Commonwealth, six State and two Territory systems.

2.21. Although all jurisdictions draw substantially on the approach to OSH regulation enunciated in the Robens Report there are nonetheless certain differences in the means by which each system gives effect to a regime of generalised duty of care supported by regulations, codes of practice and other more prescriptive regulatory material. Thus the Productivity Commission enunciated what it saw as the primary difficulties with the present overlapping regimes so as to support the case for uniform OSH legislation in Australia. In short, the following significant shortcomings were suggested:

- (a) In light of differing statutory text, and overall means of implementation of the Robens-sourced model, an overriding uncertainty as to the meaning of particular concepts and terms from jurisdiction to jurisdiction;
- (b) A variation in the nature and extent of OSH protection for employees and other workers according to the jurisdiction in which they may be working from time to time; and
- (c) The cost of compliance for employers whose business activities span more than one jurisdiction being greater than if there were a unified national regime.

2.22. In the course of its analysis the Productivity Commission traversed a number of related topics of interest to this Review and of relevance to contemporary OSH regulation in Western Australia. Reference was made to findings of the Cole Royal Commission into the Building and Construction Industry, and the emphatic support for national uniformity in OSH legislation advanced by that inquiry³⁴. Specific citation was made of the Cole Royal Commission's conclusions that:

From the perspective of the building and construction industry, there could be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety throughout Australia.

³³ Most naturally those concerning trading, financial or foreign corporations (s.51(xx)), interstate trade and commerce (s.51(i)), external affairs, including the implementation of obligations that arise under a treaty to which Australia is a party (s.51(xxix)) and insurance (s.51(xiv)).

³⁴ Productivity Commission Report, pp13-14.

and:

It is therefore not surprising that there is a strong – indeed, overwhelming support in the building and construction industry for a national system to regulate workplace health and safety in the industry.

- 2.23. One of the major responses of Commonwealth Government to the findings and recommendations of the Cole Royal Commission was the enactment of the *Building and Construction Industry Improvement Act 2005* (Cth). That Act, described by its long title as being “An Act to improve workplace relations practices in the building and construction industry, and for related purposes”, has certain express objects³⁵ centred around the provision of an improved workplace relations framework to ensure that building work is carried out fairly efficiently and productively for the benefit of all building industry participants and the Australian economy as a whole.
- 2.24. Most of the legislative initiatives contained in the BCII Act are beyond the scope of this Review. They encompass matters such as the creation of the office of an Australian Building and Construction Commissioner, the proscription of certain kinds of unlawful industrial action (as defined) and the conferral of power on certain courts to grant remedies for contravention of those proscriptions and other related civil penalty provisions.
- 2.25. Relevantly for present purposes, the BCII Act includes Chapter 4, dealing with occupational health and safety. A position in the Commonwealth public service of Federal Safety Commissioner is created, with a range of functions concerned with promoting occupational safety and health in relation to building work and monitoring and promoting compliance with the newly conceptualised Building Code, insofar as that Code deals with occupational safety and health.
- 2.26. The Productivity Commission dealt at a more general level with aspects of the interrelationship between OSH and industrial relations. Two particular points, although canvassed only briefly, are of real significance to this Review and will be returned to. First, the presence of dispute settlement procedures was adverted to. Specifically with respect to the Western Australian OSH system, reference was made to the Laing

³⁵ BCII Act, s.3.

Report's observation³⁶ that an earlier legislative proscription in the *Industrial Relations Act* 1979 (WA) - preventing the Western Australian Industrial Relations Commission from hearing matters arising out of safety and health - had been repealed. As will be developed, Commonwealth and Western Australian legislation alike enables, and in some situations compels, the regulation of employment relationships through the use of dispute settlement procedures. Such procedures will typically, by force of their general or specific terms, be capable of dealing with a problem, issue or controversy concerning occupational safety and health. Frequently, dispute resolution procedures will culminate in conferral of arbitral power on the Australian or Western Australian Industrial Relations Commission, or another independent person or body.

- 2.27. Secondly, the Productivity Commission cited, by reference to findings of the Cole Royal Commission and otherwise, the emerging prevalence of the use of occupational safety and health “issues” as a means of leverage for industrial campaigns, often to the point of the abuse of both the OSH system and the industrial relations system. Indeed, as the Productivity Commission noted³⁷ the Laing Report recommended that the WorkSafe Commission investigate and develop recommendations to government to remove the use of occupational safety and health as a bargaining instrument in relation to other industrial claims. It appears that little progress has been made in implementing that recommendation. The extent and significance of this problem are central to arguments advanced by many employers’ interests concerning the appropriate “dichotomy” between OSH and industrial relations. It will be returned to accordingly.
- 2.28. In this Inquiry’s view, the Productivity Commission Report continues to offer much regarding the conceptual issues attending any models for a national framework for occupational safety and health. The detail of its analysis is a valuable source of information for administrators, practitioners and academics alike within OSH. Without intending to gloss over that detail, there is an overriding reality which in the Inquiry’s view is of particular importance to an appreciation of the impact of the Productivity Commission Report for the operation of the WA OSH Act. The nature and limitations of the conferrals of legislative power by the Commonwealth Constitution on the

³⁶ Productivity Commission Report, p55 referring to Laing Report at p105.

³⁷ Productivity Commission Report, p56 referring to Laing Report at p109.

Commonwealth Parliament mean that, in the absence of express agreement of all of the States, it is, practically speaking, impossible for the Commonwealth Parliament to enact a comprehensive and all-encompassing national OSH system. It *is* possible that a voluntary conferral of power on the Commonwealth Parliament could take place pursuant to s.51(xxxvii)³⁸. However, in the absence of such a formal referral of legislative power *per se* the reality remains that less formal *co-operative* schemes, *co-ordinated* at national levels are the likely means by which any less complete framework may be developed.

- 2.29. The complexity of the task of co-ordination is not to be underestimated. Without canvassing unnecessary detail, it has appeared to the Inquiry that the Western Australian Government has achieved an entirely legitimate balance in its participation in pertinent dialogue at national level.
- 2.30. Another important theme canvassed by the Productivity Commission was the changing composition of the Australian labour market. The Commission accurately noted the phenomenon of many businesses having resorted to management decentralisation, subcontracting, outsourcing, franchising, home-based work and downsizing. These means of flexible working arrangements have led to increases in what may generally be termed “non-traditional” forms of work, particularly casual, part-time and contingent means of work, self-employment, and the use of independent contracts as opposed to orthodox employment relationships. It referred to research undertaken by the National Research Centre for Occupational Health and Safety Regulation³⁹, asserting a need for OSH regulators to pay greater attention to work relations outside the traditional employment relationship. It also noted the work of Professor Michael Quinlan⁴⁰, which goes so far as to suggest a very close correlation between non-traditional work arrangements and “inferior OSH outcomes”.

³⁸ The Commonwealth Parliament has, subject to the Constitution, power to make laws for the peace, order and good government of the Commonwealth with respect to “... matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law”.

³⁹ Productivity Commission Report, p53 referring to NRCOHSR Report of 2003 at p6

⁴⁰ Submission 93 to the Productivity Commission Inquiry, and see too, *The Implications of Labour Market Restrictions in Industrialised Societies for Occupational Health and Safety*, University of NSW, Sydney, 1988.

- 2.31. Moreover specific reference was made to the Laing Report, insofar as it noted⁴¹ that the OSH Act is able to address the change in work environment because general duty of care and consultative processes - as enacted in Western Australia - are not dependent upon any particular workplace structure or set of technologies. However, as Mr Laing noted, the increase in non-traditional forms of employment, particularly involving successive levels of contracting, sub-contracting and out-sourcing, presents a significant potential impact on the future effectiveness of the OSH Act. These observations interrelate with a number of important recommendations of Mr Laing, now implemented by means of particular legislative amendment, which will be addressed directly.
- 2.32. Levels of non-traditional work, whilst remaining significant, appear to have plateaued somewhat. A more recent work of the Productivity Commission, *The Role of Non-Traditional Work in the Labour Market*^{A2} found that around 3.3 million people were engaged in a form of work that met this general description as of 2004, a figure representing approximately one third of all employed people. Whilst this number has grown in absolute terms since 1998 when an earlier assessment was undertaken, the share occupied by non-traditional work of the total workforce has remained largely unchanged during that period.
- 2.33. More specifically, casual employment is the largest non-traditional form of employment (1.9 million in 2004, or 20% of all employed persons). Whilst growth has been rapid for casual employment between 1998 and 2001, it has slowed since, resulting in a stable share of the employed population.
- 2.34. Less common forms of non-traditional work are self-employed contractors (0.8 million in 2004), fixed term employees (0.6 million) and labour hire employees (0.3 million). Again, total numbers in those categories grew between 1998 and 2001, but have subsequently levelled off. Moreover their combined share of the total workforce actually fell between 2001 and 2004. As a general rule, non-traditional work is mostly a temporary or transitory experience, except for a few groups of casual employees, such as women with children. For many people who are not currently employed, non-

⁴¹ Productivity Commission Report, p54, referring to Laing Report at pp54, 55.

traditional work provides a means of gaining employment in the first place, and/or a stepping stone to ongoing employment.

- 2.35. Two other areas of legislative activity of particular importance to the Inquiry for their potential impact on occupational safety and health in this State are an initiative regarding independent contracting, and rights of entry as substantially altered by the WorkChoices legislation. These subjects are addressed in Chapters 3 and 4 of the Report.

NOHSC/ASCC

- 2.36. The National Occupational Health and Safety Commission (NOHSC) was first established by relatively informal administrative means in October 1984 by the then Commonwealth Minister for Employment and Industrial Relations. However by the *National Occupational Health and Safety Commission Act 1985 (Cth)*, which commenced operation on 20 December 1985, the NOHSC was formally created as a body corporate with perpetual succession, and established as a tripartite statutory body, that is one which drew its composition and structure from representatives of government, employers' groups, and unions or other employees' groups.

- 2.37. As initially conceived, the NOHSC aimed to:

- Provide national leadership to effectively implement and further develop a national strategy for occupational safety and health in Australia (National Strategy);
- Improve the prevention of occupational deaths, injury and disease across Australia; and
- Provide a national forum for the cooperative improvement of OSH prevention efforts.

- 2.38. Upon formulation of a National Strategy as such, the functions of the NOHSC became those of:

⁴² Productivity Commission Research Paper, May 2006.

- Formulating strategies to improve national OSH performance;
- Developing and declaring national OSH standards or codes of practice;
- Coordinating and reviewing OSH research;
- Developing, maintaining, analysing and reporting on OSH data; and
- Assisting in developing national OSH skills and competencies, including by means of practical guidance.

2.39. On 7 February 2005, the NOHSC was succeeded by the Australian Safety and Compensation Council (ASCC). The latter, new tripartite advisory body was conceptualised as one of the responses by the present Commonwealth Minister for Employment and Workplace Relations to the Productivity Commission Report on a possible national workers compensation and OSH framework. Initially, the ASCC was created by the entry into a memorandum of understanding by the NOHSC and the Commonwealth Department of Employment and Workplace Relations (DEWR). The memorandum expressed agreement that NOHSC would transfer its remaining appropriation of funds, staff and other assets to DEWR. The latter would, in return, agree to provide services to support NOHSC in performing its functions pending the establishment of the ASCC. Subsequently, legislation to repeal the NOHSC Act and to provide a legislative source for the ASCC to declare national OSH standards and codes of conduct was enacted. To that end, the *National Occupational Health and Safety Commission (Repeal, Consequential and Transitional Provisions) Act 2005* and the *Australian Workplace Safety Standards Act 2005* (AWSS Act) took effect on 1 January 2006.

2.40. As expressed by the Chair of the ASCC, Mr Jerry Ellis in the NOHSC Annual Report 2005-2006⁴³ the key role of the ASCC, in continuing the work of its predecessor body, is to provide leadership and coordination of national efforts to prevent workplace death, injury and disease (as well as to improve workers compensation arrangements along with rehabilitation and return to work of injured employees). Mr Ellis sees the ASCC and its early work as presenting an excellent opportunity for governments,

⁴³ At p2.

employers and employees to lead a national approach to OSH (and for that matter workers compensation arrangements) and to achieve genuine policy reform. The Inquiry notes that that position and laudable objective, as expressed, sits consistently with the practical reality, as noted above, that any movement towards a comprehensive, or even substantial, national framework for OSH must inevitably rely on ongoing voluntary commitment by all jurisdictions concerned.

2.41. The national strategy as initially developed by the NOHSC, and continued in force and operation by the ASCC, remains of very real practical importance to the operation of OSH in Australia, whether by means of a “national framework” as such, or otherwise. It is thus appropriate to cite in full the five priorities, and nine areas for national action, as expressed by the national strategy.

2.42. The five priorities are to:

1. Reduce high incidence/severity risks, involving:
 - The better use of data and research to improve jurisdictions’ targeting of high risk situations;
 - Identification of national priority hazards, injuries, industries or occupations; and
 - More effective use of targeted enforcement and incentive;
2. Develop the capacity of business operators and workers to manage OSH effectively, involving:
 - The motivation and ability of employers to manage OSH risks and for workers to work more safely and participate in OSH consultations;
3. Prevent occupational disease more effectively, involving:
 - The development of the capacity of authorities, employers, workers and other interested parties to identify risks to occupational health and to take practical action to eliminate or otherwise control them.
4. Eliminate hazards at the design stage, involving:

- Building awareness and observance of this approach and giving people the practical skills to recognise design issues and ensure safe outcomes; and
5. Strengthen the capacity of government to influence OSH outcomes, involving:
- Sharpening the effectiveness of governments in securing better OSH outcomes (for example, through procurement procedures) and providing examples of good practice.
- 2.43. The nine areas for national action as expressed by the National Strategy are:
- (1) Comprehensive OSH data collection (including consistent definitions and timely reporting).
 - (2) A coordinated research effort (incorporating priorities, partnerships and communication).
 - (3) A nationally consistent regulatory framework.
 - (4) Strategic enforcement.
 - (5) Effective incentives.
 - (6) Compliance support.
 - (7) Practical guidance.
 - (8) OSH awareness.
 - (9) OSH skills development.
- 2.44. Two short observations are appropriate at this point. First, as is the case with many “strategic” or “policy” documents, the text, expressed at an inevitable level of generality, reads impressively. It may well serve to inspire and to generate optimism. The challenge is always to convert such lofty ideals and outcomes into practically meaningful strategies and policies adapted to day to day government operations. Secondly, the importance of the five priorities and nine areas for national action is such that they warrant regular monitoring for their observance by the Commission. Whilst the Inquiry accepts that there is an ongoing intention for this to occur, a relatively

formal, structured process by which those national targets are assessed in the context of the Commission's own Strategic Plan is nonetheless warranted. Much of the ongoing research will no doubt fall to be undertaken by the supporting infrastructures of the Commission itself and of WorkSafe. But a periodic consideration and assessment of relevant data by the governing body for OSH in a particular State is, in the Inquiry's view, imperative.

- 2.45. A review has been commenced of the *Occupational Safety and Health (Commonwealth Employment) Act 1991* (the Commonwealth OSH Act). The review is being conducted by the DEWR, in consultation with Comcare. In an Issues Paper published in March 2006, the Commonwealth review noted that the Commonwealth OSH Act has not undergone any systematic review since it commenced in 1991. Observing the trend (to which reference has been made in this Report) towards non-traditional working arrangements and the associated risks involved, together with challenges faced by employees through the frequent introduction of new technology, and increasing incidents of psychological injury and the aging of the workforce, the review aims to consider whether further amendments could be made to strengthen the legislation's focus on the prevention of injury as well as to ensure it remains contemporary and able to meet the needs of employers and employees at an enterprise level.
- 2.46. In 2004 the Commonwealth OSH Act was amended to emphasise a "focus on prevention and compliance" as well as to insert what the review described as a "strong new enforcement regime" based on criminal and civil sanctions for situations where duties are not met through less aggressive means of ensuring observance of OSH obligations.

Recommendations:

- R.2 The Commission for Occupational Safety and Health undertake a quarterly review of the progress being made in Western Australia in meeting the Australian Safety Compensation Council-endorsed national priorities and areas of action contained in the national strategy, measured and assessed in the context of the Commission's Strategic Plan 2006-2010.**

Victoria

- 2.47. As noted, the 2004 Maxwell Review of the *Occupational Health and Safety Act 1985* (Vic) (the Victorian OSH Act) was a substantial exercise, giving rise to a detailed two volume report and culminating in a range of important legislative amendments and executive changes in Victoria. The independent reviewer, Chris Maxwell QC (now his Honour Justice Maxwell, the President of the Victorian Court of Appeal), was supported by a substantial infrastructure, including Counsel Assisting, a Review Team comprising research and administrative assistants, and a Reference Group chaired by the Chair of the Victorian WorkCover Authority and comprising representatives from government, industry and the union movement. As the most recent substantial review of an occupational safety and health system in recent years, it is useful succinctly to canvass the range of issues considered by Mr Maxwell QC and the subject of important conclusions and recommendations accordingly.
- 2.48. From the starting point of acknowledging what he termed a “safety consensus”, that is a consensus of the paramount importance in the Victorian community about workplace health and safety and the basically sound nature of the overall legislative framework, Mr Maxwell QC recommended an overhaul of Part II of the Victorian OSH Act so that it better expressed the appropriate range of objectives, functions and powers of the Victorian WorkCover Authority concerning OSH (many of which had, previously, been found in different legislation, namely the *Accident Compensation Act 1985* (Vic)).
- 2.49. The Victorian Review then dealt with issues arising from the changing nature of work relationships, together with new and emerging risks such as stress and bullying, giving rise to a recommendation for legislative amendments to recognise the distinct *health* as opposed to *safety* risks that must be confronted in any healthy, physical and psychosocial work environment. The contemporary variations in work relationships, with the consequence that there is often more than one employer, or supplier of labour, in respect of a single workplace, led to recommendations for a clarification to the overlapping safety duties by reference to the respective degrees of control over the workplace. Indeed, the nature and precise meaning of “control” is a recurring issue of

some difficulty in contemporary OSH. That issue, among others, was the subject of consideration by Mr Maxwell QC concerning the previous test of “practicability” in the Victorian OSH Act as a limitation on the general safety duties that had been enacted post-Robens. Notably, Mr Maxwell QC recommended that the applicable test should be one of “reasonable practicability”, the consequence being an amended Victorian definition in terms now similar to the definition of “practicable” that has been in s.3 of the OSH Act for some time.

- 2.50. What the Maxwell Report termed “upstream” safety duties, concerning the responsibilities of designers, manufacturers, and suppliers of plant and substances, arose in the context of the third priority of the NOHSC previously referred to. That Commonwealth body has justified the priority nature of the focus on safe design as being one to attempt to eliminate potential hazards before they enter a workplace at all, thereby being a highly effective strategy of eliminating hazards at their very source. Thus the Victorian Review recommended clarification of those existing “upstream” duties, their extension to designers of packaging and suppliers of service, with a realistic limitation on the scope of the existing and new duties as being limited to those matters which are under the control (as defined) of the designer manufacturer or supplier as the case may be.
- 2.51. A final discrete area of examination by the Maxwell Report which warrants comment, also the subject of many representations to this Review, is that of the nature and obligation on workplace participants to consult regarding occupational safety and health. Against a recognition of universal agreement that employee participation is a necessary condition of the effective regulation of workplace safety, Mr Maxwell QC recommended that miscellaneous provisions previously requiring employers to consult with workers on particular matters be replaced, as had occurred in New South Wales, by a “general duty” of consultation.

Other Recent Australian Reviews

- 2.52. The *Occupational Health and Safety Act* 2000 (NSW) (the NSW OSH Act) which commenced in September 2001, reflected a significant modernisation of the OSH legislation of that State. In June 2005 a review of the NSW OSH Act was announced.

It undertook a consultative process, including the release of a Discussion Paper, which was not unlike the methods employed by the present Review. In a report delivered in May 2006, the review of the NSW OSH Act was generally positive and optimistic about the state of legislation and its administration in that State regarding OSH. It observed that there were no fundamental concerns with the legislation's objects, although there was scope for their clarification in some ways. There was also strong support for the general duty framework enacted in the NSW OSH Act, consistently with Australia-wide trends. Some treatment was undertaken of the role of WorkCover (for present purposes the NSW equivalent to WA's Commission) and ways in which that body might more effectively function. The NSW review also provided an enlightened treatment of the enforcement framework established by the NSW OSH Act and ways of effecting a better balance between advisory services and enforcement. Ultimately, the review of the NSW OSH Act recommended some 29 legislative amendments, with approximately a dozen further recommended "non-legislative strategies", essentially concerning executive measures that might usefully be taken in that State.

- 2.53. In Tasmania, a review of the *Workplace Health and Safety Act* 1995 (Tas) (the Tasmanian OSH Act) is presently underway. In a Discussion Paper issued in June 2006, that review identified a number of areas for particular attention in the provision of submission and contribution. Again, with considerable commonality with the kinds of issues that emerged prominently for this Review, particular emphasis was placed on the nature and role of the general duty-creating provisions, methodologies of hazard identification and management, the role and status of codes of practice, particular burdens faced by small businesses, and the significance of the National OHS Improvement Strategies.

CHAPTER 3. INDEPENDENT CONTRACTING AND THE ROLE OF OCCUPATIONAL SAFETY AND HEALTH

- 3.1. The material initiating this Inquiry referred to the emerging contemporary significance in occupational safety and health of the distinction between relationships of employment (contracts *of service*) and independent contracts (contracts *for services*). As is widely known, to characterise a particular relationship as being one of employment or, on the other hand, an independent contract, can have substantial consequences for the kinds of obligations imposed on the contracting parties. Frequently, the law will impose differing obligations in areas such as tortious liability for negligence, taxation, superannuation and workers' compensation. Occupational safety and health is one other such area.
- 3.2. As the common law of Australia evolved in the twentieth century, a prominent, if not the predominant, factor in characterising work relationships was that of the capacity of a putative employer to exercise *control* over the putative employee. Several High Court cases⁴⁴ emphasised that the relevant, and often overriding, question was whether ultimate authority over a person in performance of his or her work resided in the putative employer so that the former was subject to the orders and directions of the latter. Characterising the question in those terms is to be distinguished from the distinct but not unrelated question of whether in practice the work is *in fact* done subject to direction and/or control exercised through actual supervision.
- 3.3. Nevertheless what has become one of the most frequently cited cases in this area of employment law, *Stevens v Brodribb Sawmilling Co Pty Ltd*⁴⁵ came to exemplify the more contemporary approach to the task of characterisation of the relationship – one that treats the existence of capacity to control as merely one significant criterion amongst many. Other relevant criteria, to be accorded varying levels of weight depending upon the circumstances, can include:
- mode of remuneration;

⁴⁴ *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404; *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 402.

⁴⁵ (1986) 160 CLR 16 at 24, 35.

- the provision and maintenance of equipment;
- the nature of the obligation to work and, in particular whether it may be said to be specific to a particular task or role;
- the worker's role and position in, or relative to, the organisation of the putative employer;
- hours of work and provision for holidays;
- the deduction of income tax and other compulsory charges;
- the delegation of work by the putative employee; and
- the label prescribed by the parties themselves to the relationship.

3.4. Even more recently, the High Court in *Hollis v Vabu Pty Ltd*⁴⁶ observed that in more modern times, attempts to apply the control test had given rise to increasing difficulty. The joint judgment⁴⁷ noted that with the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the common law's formulation of the control test have largely disappeared. Moreover, with the advent into industry of professional people and other occupations performing services which, by their nature, could not be subject to supervision, the distinction between employee and independent contractors has often seemed to be a vague one. In a separate judgment, McHugh J⁴⁸ observed that the right to supervise or direct performance of a task cannot transform into a contract of service what is in substance an independent contract.

3.5. That the application of the relevant criteria to a given set of facts can give rise to subtle issues of judgment was graphically illustrated by litigation in the Western Australian Industrial Relations Commission which culminated in a 2-1 decision of the Industrial Appeal Court. In *Personnel Contracting Pty Ltd T/as Tricord Personnel v Construction Forestry*

⁴⁶ (2001) 207 CLR 21 at 40-41, 50.

⁴⁷ Ibid at 41.

⁴⁸ Ibid at 50; and see too *Queensland Station Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552.

*Mining and Energy Union of Workers*⁴⁹ a majority of the Court comprising Steytler J (as presiding Judge) and Simmonds J allowed an appeal from the Full Bench of the WAIRC, with the outcome that the judgment of the Commission at first instance – to the effect that certain applications were incompetent for want of jurisdiction – was restored. Commissioner Gregor, at first instance, had concluded that two men engaged as “contractors” by the appellant labour hire agency shared a relationship which was truly one of principal and independent contractor, rather than that of employer and employee. The judgments of the Industrial Appeal Court in *Personnel Contracting* commented on an earlier decision of the Industrial Appeal Court, *United Construction Pty Ltd v Birighitti*⁵⁰ in which a 2-1 majority split of members of the Court also occurred, albeit that Anderson J, who differed on the outcome of the appeal to Scott and Hasluck JJ, dissented as to a jurisdictional issue.

3.6. Reference to these authorities is important to illustrate the ongoing significance, and indeed complexity, of the perennial difficulties in characterising a relationship as being one of employment, as opposed to an independent contract. It is, however, unnecessary to deal further with the factual specifics of those two decisions in light of the most recent trends at Commonwealth level for legislative reform of the area, and this Review’s conclusions regarding those trends.

3.7. Before leaving recent activity in Western Australia on the subject, it is apt to note an amendment to s.7(1) of the *Industrial Relations Act 1979* (WA) effected by the *Labour Relations Reform Act 2002* (WA). Relevantly, that amending Act provided with effect from 8 September 2002 that the definition of “employer” for the purposes of the State IR Act aside from including, conventionally, persons, firms, companies and corporations employing one or more employees:

also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person.

3.8. In *Personnel Contracting*, Simmonds J (with whom Steytler J substantially agreed) suggested that the reference to “labour hire agencies” in the State IR Act’s definition of

⁴⁹ [2004] WASCA 312.

“employer” does not change the common law, nor indeed the conclusion of the majority otherwise arrived at on the appeal. His Honour opined that the legislative intent behind the amendment appeared to be that as indicated in the Minister’s second reading speech, that is “to ensure that the Commission has the power it properly requires” by making it “explicit that an employer also includes labour hire and group training organisations”.⁵¹

The Insertion of Part III Division 3 Into the OSH Act

3.9. The Laing Review made a recommendation on this issue of such significance to the scope of the OSH Act and to the subject now under consideration that it warrants quoting in full:

R:14 Notwithstanding any specific recommendations relevant to this issue, it is recommended the Act be amended to:

- Extend coverage to a range of alternative arrangements that may currently fall outside both the traditional employer/employee relationship and the principal/contractor arrangement provided for under the Act. In particular, the Act should apply employers’ obligations to persons who are employed under labour only arrangements and subject to the direction and control of employers or principals; and
- Clarify its intent and to make clear that an employer’s duties under s.19 apply to both labour hire firms and principals in relation to matters under the respective control⁵² of each party.

3.10. This recommendation was the culmination of an important discussion by Mr Laing⁵³ observing the consequences of that phenomenon against the background of the relevant legislative text as it then stood, Mr Laing observed, entirely correctly in this Inquiry’s view, that there were significant areas of uncertainty and complexity, leading to an outcome that “some persons at work may not have the level of protection to which they should be entitled”.

⁵⁰ [2003] WASCA 24.

⁵¹ [2004] WASCA 312 at [153].

⁵² The somewhat distinct context of capacity to exercise control as a factor affecting the imposition of duties under Part III of the OSH Act is dealt with elsewhere in this Report at 3.26-3.29, and 8.59.

⁵³ Laing Review at [344]-[365], concerning the undoubted increase (to which reference has earlier been made in this Report) in non-traditional forms of employment associated with the growth in contracting, sub-contracting, outsourcing and the like.

- 3.11. Noting, further, that a number of submissions had offered proposals for redressing those shortcomings, Mr Laing went on to suggest, with admirable insight:

A reasonable question arising from all the foregoing is perhaps why each category of person (employee, contractor, employee of contractor, etc) needs to be referred to at all when it is intended that all those in the workplace be protected. By specifying each category of person it leaves open the possibility for the creation of other (work) arrangements, which could be entered into in order to avoid the obligation. It seems the most effective course is to protect everyone and provide them with duties to protect themselves and others at the workplace. In that regard the employer might be specified as the co-coordinating agency or principal.⁵⁴

- 3.12. The obvious intent behind those conclusions and the associated recommendation 14 was translated into the legislative policy behind a new Division 3 inserted into Part III of the OSH Act, providing in terms for “certain workplace situations to be treated as employment”. The heading is somewhat misleading as to the effect of the amendment. Indeed, a number of submissions to the Inquiry that were critical of the apparent intent behind Part III, Division 3 of the potential operation of ss.23D-23F, appeared, likewise, to overstate the import of the new provisions. The applicable legislative text needs to be read in its entirety to be fully appreciated. However the essence of the insertion of ss.23D-23F is for s.19 to have effect where there are “contract work arrangements”⁵⁵, labour hire arrangements⁵⁶ and “labour arrangements in general”⁵⁷. The applicability of s.19 to those kinds of relationships is only “in relation to matters over which there is a relevant capacity to exercise control”. Moreover, further duties in the nature of those imposed on an employee under s.20 and an employer under s.23I(3) are imposed. In the case of s.23D the further duties of an employer under s.23G(2) (concerning the maintenance of safe living premises) apply.

- 3.13. Given that limited - but most pertinent - effect of ss.23D-23F, the Inquiry was somewhat concerned to note the definitional provisions in s.41A (for the purposes of Part V, dealing with inspectors) and s.47A (for the purposes of Part VI, dealing with improvement and prohibition notices) in the following terms:

⁵⁴ Laing Review at [361].

⁵⁵ Defined in s.23D(1) to be where a person (the “principal”) in the course of trade or business engages a contractor (“the contractor”) to carry out work for the principal.

⁵⁶ Defined in s.23F(2) to be where, under a labour hire arrangement (as separately defined in s.23F(3)) work is carried out for remuneration by a worker for a client of an agent (“the client”) in the course of the client’s trade or business.

⁵⁷ Defined in s.23E(1) to cover certain situations where neither s.23D nor s.23F is applicable but a “worker” for remuneration carries out work for another person – who has the power of direction and control in respect of the work in a similar manner to the power of an employer under a contract of employment (but there is in fact no contract of employment) in the course of trade or business.

In this Part –

“**employer**” and “**employee**” include a person taken to be an employer and an employee respectively by operation of ss.23D, 23E and 23F.

- 3.14. As explained, it is a misconception of those newly inserted sections that they operate so that certain persons may be “taken to be” either an employer or an employee. Rather, ss.23D-23F only operate so as to confer certain specific obligations on particular people consistently with the nature and effect of Part III.
- 3.15. Although it may not be that there is any particular vice in the definitions contained in s.41A and s.47A in their present form, it is preferable so as to avoid any misconception, whether at State or Commonwealth level concerning the operation of the newly expanded Part III, for ss.41A and 47A to be amended consistently with the actual operation of ss.23D-23F.

Recommendations:

R.3 It is recommended that the *Occupational Safety and Health Act 1984 (WA)* be amended so that the definition in ss.41A and 47A defines “employers” and “employees” to include people who, under ss.23D, 23E or 23F are treated as an employer, or employee respectively, for the limited purpose set out in those sections.

- 3.16. These new provisions, in the Inquiry’s respectful view, are skilfully drafted⁵⁸ so as to give effect to the manifest intention behind the pertinent parts of the Laing Review against a background of the ongoing development of the common law. All too often, one hears of criticisms (not necessarily well informed) that a legislative provision is “poorly drafted”. It is important that due credit be given for examples of effective drafting, particularly in difficult areas reflecting a complex interplay between law and policy. That some areas of possible confusion remain – as noted in the succeeding paragraphs - reflects the subtlety of this area of current OSH law and practice.
- 3.17. It is far too early to undertake any assessment of the operation of Part III, Division 3 of the OSH Act. The Inquiry is aware of few proceedings where any findings of fact concerning the new provisions have been made, nor any at all where an authoritative

⁵⁸ A proposed amendment to clarify the sections’ import by expressly adverting to s.19A, as well as s.19, does not detract from this observation.

interpretation has occurred. The Discussion Paper referred to two separate, but related, trials in the Magistrates Court relating to a workplace death in September 2002 which, although brought under statutory text that predated the amendments just referred to, were of relevance to the operation of the entirety of Part III in its present form. The Discussion Paper expressed, for several reasons, a reluctance to examine any issues of principle within the ambit of those proceedings, let alone comment on the outcome of the proceedings themselves. Leave has been granted for the decisions dismissing the charges to be appealed to the Supreme Court of Western Australia. The appeals are likely to be heard in early 2007. Plainly it would be inappropriate to traverse the merit of the cases, let alone attempt any prediction of the outcome of the appeals, pending their resolution. In addition, the sheer evidentiary detail of the two prosecutions would have significantly expanded this Report to enable even a concise commentary.

- 3.18. Hence this Inquiry rejects the proposal, advanced by one interested party, that it “review the current legal framework” particularly as manifested by certain provisions in Part III, so as to “ascertain the effectiveness of the sections with respect to ensuring that those who have the greatest control in the work site have the ultimate responsibility for safety”. The commentator suggested that the outcomes in one of the two prosecutions of September 2002 “demonstrates the unfairness of the situation in which workers, who hold a certificate of competency, are *held responsible* for an event of the nature exposed in that case” (emphasis added).
- 3.19. Aside from the inappropriateness of commenting on those proceedings, as noted, it is important that a dismissal of any given prosecution not be extrapolated beyond the outcome itself. A prosecution that does not result in a conviction cannot fairly be described as a “lost” prosecution. Factually, the outcome is likely to mean no more than that there was insufficient evidence to sustain findings of the requisite elements of any offence charged beyond reasonable doubt. In particular, a dismissal cannot be extrapolated to an affirmative finding which “holds” any person to be “responsible” for any given event. A magistrate’s decision may interpret certain provisions of the OSH Act in a way that asserts or implies findings of responsibility for workplace safety. In that somewhat limited sense, it could be said that a given prosecution might have the practical effect of attributing “responsibility” for certain *kinds* of hazard to

particular groups or categories of workplace participants. But a single magistrate's interpretation of the OSH Act is not binding on other members of the Magistrates Court and is, if erroneous in law, liable to be corrected on appeal. There is no meaningful concept of "precedent" arising from any interpretation that may occur during the course of a given prosecution in the Magistrates Court.

- 3.20. Thus, viewed in isolation from relevant developments occurring at Commonwealth level, the Inquiry has been resistant to any possible change to the relevant amendments to Part III of the OSH Act effected by the *Occupational Safety and Health Legislation Amendment and Repeal Act 2004*, or to any associated aspect of the Act's administration accordingly. To the contrary, it is the Inquiry's view that the amendments, and s.23D-23F in particular, are important and well expressed provisions which give effect to a particularly telling aspect of the Laing Review.
- 3.21. That said, it is unclear to the Inquiry why a provision in the nature of s.23D(5) and s.23E(5) was not included in s.23F. The effect of those subsections in the former two sections is, in essence, to prevent any attempt at the avoidance of obligations imposed by the general duty offence-creating provision of Part III by some arrangement or agreement which attempts to transfer matters under the control of the duty holder.⁵⁹ It is unclear why such an anti-avoidance measure is contained in s.23D, concerned with contract work arrangements and s.23E, concerning labour arrangements in general, yet is absent in s.23F, concerning labour hire arrangements. It may be that, given the nature of a labour hire arrangement relative to the other kinds of relationships in the former two provisions, there is less scope for such a purported agreement or arrangement to take effect, with the effect of the avoidance of general duty-type obligations, in the absence of a legislative preclusion. The safer course, however, is for a provision in the nature of ss.23D(5) and 23E(5) to be inserted in s.23F.
- 3.22. WorkSafe also submitted that two other aspects of the inclusion of ss.23D-23F, whilst not detracting from the likely operation of those provisions, may give rise to ancillary difficulties. First, it is suggested that the clause contained in s.23E(6) and s.23F(7), by

⁵⁹ See further as to the national trend in this regard, particularly as exemplified under the NSW OSH Act, Thompson, *Contractors: OHS Legal Obligations* (2006) 16 ANZ J Occup Health Safety 493.

reason of appearing in that location, and that location alone, of the OSH Act may give rise to unintended inferences being drawn. Those subsections provide:

This section applies despite anything to the contrary in, or any inconsistent provision of, an agreement, whether made orally or in writing.

3.23. The concern which has emerged is that, with explicit reference to any conceivable contracting out of responsibilities appearing only in those two sections of the OSH Act, it is foreseeable that there may be, by implication, the capacity lawfully to contract out of other obligations where such a provision is absent. WorkSafe expresses confidence that that was never the intent of Parliament. Thus, it is suggested, the repeal of ss.23E(6) and 23F(7) would remove the risk of such an inappropriate inference being drawn. Moreover, it is contended, because there is no tenable foundation for concluding on a construction of the entirety of the Act that a contracting out of OSH obligations is open, specific repeal would occasion no difficulty.

3.24. Secondly, it is observed that the provision common to s.23D(6), s.23E(7) and s.23F(8), namely that:

A purported waiver by a (contractor or worker, as the case may be) of a right that arises directly or indirectly under this section is void,

may simply be redundant, on the basis that there is in fact nothing capable of being waived by a contractor or worker that would affect the operation of the general duty-type obligations imposed by ss.23D-23F. Thus the essence of the concern is that the express reference of the concept of a “right” may give rise to the unintended drawing of inferences that the OSH Act somehow creates something in the nature of “individual rights” capable of being enforced.

3.25. Whilst the Inquiry has given serious consideration to these two concerns and appreciates the force behind them, the better and safer course is, in the absence of further consideration of the operation of the applicable amendments effected post-Laing, to recommend no additional change. The risks foreseen by WorkSafe, whilst real, are nevertheless slight. Further legislative amendment may well be open, but warrants ongoing monitoring and further consideration before being proposed. The

one recommendation that is made is designed to err on the side of expressly extending legislative coverage in a manner consistent with the Laing Review.

Recommendations:

R.4 It is recommended that the *Occupational Safety and Health Act 1984 (WA)* be amended to insert in s.23F a provision similar, or analogous in kind, to s.23D(5) and s.23E(5).

3.26. Some submissions, in dealing with the outcome of the prosecutions in the Magistrates Court, made related suggestions about the meaning of “control” in various provisions of Part III of the OSH Act. A few commentators extended their observations on the statutory term more generally.

3.27. Largely, suggestions were borne of a concern that the notion of “control” is incapable of any fixed meaning so as to provide suitably clear guidance to workplace participants in understanding their respective OSH rights and obligations. It is pertinent to note that, aside from the dismissed proceedings continuing on appeal, one matter relatively recently determined on appeal has involved consideration given by the Supreme Court of Western Australia to the nature of the concept of control. In *Morrison v De Bono*⁶⁰ an employee of a contractor had fallen from an unprotected edge of the second storey of a dwelling under construction, giving rise to a prosecution under s.22(1) and (5) of the OSH Act. It was alleged the defendant, being a person in control of a workplace, failed to take such measures as were practicable to ensure that persons at the workplace were not exposed to hazards and, by that failure, caused serious harm to the injured contractor. At trial, the presiding magistrate found that, because the defendant did not “have the power to direct the activities of the workers at the workplace” that defendant accordingly did not have “control” of the workplace where the injured person was working and, accordingly, an essential element of the offence was not established beyond a reasonable doubt.

3.28. However on appeal Le Miere J held that her Honour had erred in law in inappropriately confining her consideration to that relatively narrow issue of whether the defendant had such a “power” of “direction”. Rather, it was held on appeal, the

magistrate should have directed herself to the broader question of whether the defendant was able to take such measures as are practicable to ensure that persons who are at the workplace are not exposed to hazards. An affirmative answer to that question would have led to the conclusion that the defendant had the requisite “control” of the workplace. The appropriate legal direction which that trier of fact was required to undertake necessarily flowed from the proper construction of the legislative text of the OSH Act.

- 3.29. Implicit in *De Bono* and otherwise is that, although statutory context remains important, an application of the concept of “control” may ultimately fall for determination as a question of fact on the ordinary meaning of the term itself. That consequence sits consistently with the utilisation of the term in OSH legislation Australia-wide. The Inquiry is unsatisfied that there would be any value by way of certainty or clarity if there were attempts to paraphrase “control” beyond the way in which it is dealt with in various offence-creating contexts in the OSH Act as presently drawn.⁶¹

Developments at Commonwealth Level

- 3.30. Among the pre-election policies of the Howard Government in late 2004 was the proposed creation of a new Commonwealth *Independent Contractors Act* to “enshrine and protect the status of independent contractors” and, in particular, “to encourage independent contracting as a wholly legitimate form of work as part of a workplace relations framework that maximises choices for workers and businesses, whilst minimising regulatory constraints”.
- 3.31. The main area of reform, as proposed in a Discussion Paper⁶², was to see the proposed legislation as “the first step towards ... prevent(ing) the workplace relations system being used to undermine the status of independent contractors”. More specific areas of reform as proposed for discussion were described as follows:

⁶⁰ [2005] WASC 271.

⁶¹ Related conclusions are drawn in the context of “chains of responsibility” at 8.59.

⁶² Australian Government, Department of Employment and Workplace Relations, Discussion Paper: *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*, March 2005.

- (i) Preventing federal awards and agreements from containing clauses which restrict the use of independent contractors or labour hire workers, or which seek to put conditions on their engagement (for example, prescribing that they have the same conditions as employees);
- (ii) Protecting independent contracting arrangements (including “*Odco*” arrangements⁶³ as “commercial arrangements, not employment arrangements,” under the law;
- (iii) Addressing inappropriate State and Territory legislation which “deems” independent contractors to be employees for the purpose of workplace relations regulation, including by overriding that legislation where appropriate; and
- (iv) Ensuring that “sham” agreements are not legitimised and preventing State and Territory legislation from impacting negatively on labour hire and contracting arrangements.

3.32. The area of reform, as then publicised, of major interest to this Inquiry is the third: could it be argued that relevant provisions of the OSH Act insofar as they “deem” independent contractors to be employees - for the limited purpose of the imposition of certain OSH obligations - are in some way “inappropriate” and therefore in peril of being overridden by legislation of the Commonwealth Parliament? Indeed, in its Discussion Paper one question posed by the Commonwealth DEWR was: “Are there any State laws other than workplace relations laws (such as workers compensation, anti-discrimination or OSH laws) containing independent contract provisions which the Commonwealth should consider overruling?”

3.33. Running somewhat in parallel to the debate initiated by the Discussion Paper was the work of a House of Representatives Standing Committee on Employment, Workplace Relations and Workplace Participation in inquiring into and reporting on contracting and labour hire arrangements across Australia. On 17 August 2005 reports were tabled

⁶³ This is a reference to the kind of labour hire arrangement, found to constitute an independent contract, exhibited in litigation involving *Odco Pty Ltd*, culminating in a decision of the Full Court of the Federal Court in *Building Workers’ Industrial Union of Australia v Odco Pty Ltd* (1991) FCR 104.

of the Committee itself and two dissenting reports, one of ALP members of the Committee and one of Australian Democrat members of the Committee. Shortly thereafter, the themes advanced by the Commonwealth Government were developed in a speech delivered by the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP, to the Independent Contractors Association in Canberra on 7 September 2005 as encompassing the following steps:

- (a) The rise of the independent contractor promotes innovation, determination and personal responsibility which in turn lifts Australia's economic performance;
- (b) An efficient modern economy should have a dynamic mix of working arrangements with built-in flexibility;
- (c) The parties themselves should be left to determine the most appropriate form of the relationship;
- (d) Workplace relations laws should not intrude into areas of economic activity where they have no legitimate place;
- (e) The existing regulation of independent contracting across many of the States is a regulation of entrepreneurship; and
- (f) Limiting or denying business the choice of engaging the use of independent contractors to undertake particular functions could diminish productivity, international competitiveness and employment.

3.34. Propositions (a), (b), (c) and (f) are, in the Inquiry's view – whilst contestable and controversial, particularly in the present climate of industrial relations - valid and supportable. It is not the role of the present Review to examine their legitimacy - let alone their ultimate correctness - beyond that general observation. However it is propositions (d) and (e) that, for the purposes of the operation of occupational safety and health laws in Western Australia, warrant closer examination.

- 3.35. How does one measure the point at which a “workplace relations law” (which it may be assumed is a rubric at least capable of including an OSH law) truly does “intrude” into areas of economic activity? Moreover even if there is such an “intrusion” does it necessarily follow that there is “no legitimate place” for such laws that may regulate aspects of the relationship between independent contractor and principal? Similarly, even it be said that certain regulation of independent contracting constitutes a “regulation of entrepreneurship” does that fact provide a legitimate basis, in merit, for enacting laws of the Commonwealth Parliament to override certain laws of State Parliament?
- 3.36. These are important questions. If pursued by the Commonwealth Government in a manner consistent with the apparent intent of its policy, significant risks are posed to the complete and appropriate regulation of independent contractors and their principals so as to ensure a meaningful system of occupational safety and health in Western Australia. However the policy as presently implemented in the *Independent Contractors Bill 2006* (Cth) appears to have rather more benign consequences for Western Australia.
- 3.37. The Bill envisages an Act, the principal objects of which will be, pursuant to clause 3, to:
- (a) Protect the freedom of independent contractors to enter into services contracts⁶⁴; and
 - (b) Recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and
 - (c) Prevent interference with the terms of genuine independent contracting arrangements.

One of the ways in which the Act is intended to achieve those objects is by providing for certain rights, entitlements, obligations and liabilities of parties to services contracts by certain specified means *other than* laws of States and Territories that confer or impose rights, entitlements, obligations or liabilities *of a kind more commonly associated with employment relationships* (emphasis added). It is that qualification to the express objects of

⁶⁴ Defined in clause 5 to be, in substance, contracts for services to which an independent contractor is a party, that relate to the performance of work by the independent contractor and has the requisite constitutional connection. The latter concept involves one or more of several, by now familiar, concepts that tie the contract to a legitimate source of Commonwealth legislative power in the Commonwealth Constitution. The most frequently occurring

the proposed Act which has the potential to be implemented by means of the Commonwealth's broader policy imperatives.

3.38. As has been noted in the introductory chapter of this Report, the modern approach to statutory interpretation in Australia does not just allow, but positively requires, consideration of statutory context at the outset, not merely at a point at which an ambiguity may be thought to arise. Again, the notion of "context" can be seen to overlap with, or exist independently of, the related notion of statutory purpose. Here, the statutory purpose insofar as is relevant to the present exercise is that expressed in clause 3 of the Independent Contractors Bill. The context may be said to comprise that purpose, as well as the broader policy background that has been outlined.

3.39. Bearing in mind those requirements of statutory construction, it is necessary to turn to the text of the Independent Contractors Bill that may have operative effect upon OSH in Western Australia. Clause 7 of the Bill, entitled "Exclusion of Certain State and Territory Laws", is of such paramount importance that it warrants quoting in full, rather than an attempt at paraphrasing. It provides:

1. Subject to subsection (2), the rights, entitlements, obligations and liabilities of a party to a services contract are not affected by a law of a State or Territory to the extent that the law would otherwise do one or more of the following:
 - (a) Take or deem a party to a services contract to be an employer or employee, or otherwise treat a party to a services contract as if the party were an employer or employee, for the purposes of a law that relates to one or more workplace relations matters (or provide a means for the party to the contract to be so taken, deemed or treated);
 - (b) Confer or impose rights, entitlements, obligations or liabilities on a party to a services contract in relation to matters that, in an employment relationship would be workplace relations matters (or provide a means for rights, entitlements, obligations or liabilities in relation to such matters to be conferred or imposed on a party to a services contract);
 - (c) Without limiting paragraphs (a) and (b) – provide for the whole or part of a services contract:
 - (i) to avoid, set aside or otherwise unenforceable; or

such source for independent contracts in Western Australia is a constitutional connection through at least one party to the contract being a constitutional corporation.

(ii) can be amended or varied, or to have effect as if it were amended or varied;

on an unfairness ground.

- 3.40. Clause 7(2) provides that subclause 7(1) does not apply to certain laws of a State or Territory, none of which can be said to encompass any relevant aspect of the operation of Part III of the OSH Act. Of particular significance is subclause 7(2)(c), which empowers the making of regulations so as to limit the exclusion that subclause 7(1) otherwise effects. The Inquiry is not aware of any proposal to include relevant portions of the OSH Act in such delegated legislation. That is important because, on the face of the *prima facie* exclusion effected by clause 7(1), the effect of, at least, s.23D of the OSH Act appears to be to “treat” its “parties” in one or more of the ways envisaged by paragraphs (a) and (b) of that exclusion. Whether an operation of that kind would constitute an “intrusion” into an area of economic activity is another question. Even if that were arguable, it would be difficult to assert that there was an absence of any “legitimate place” for a provision like s.23D.
- 3.41. Clause 8 of the Independent Contractors Bill, which explains the meaning of “workplace relations matters” for the purposes of that exclusion, provides in subclause 1 for a number of matters concerning various aspects of employment and working relationships, that are to bear that meaning. Subclause (2), however, provides for a variety of matters to *not* be “workplace relations matters”. Crucially, one such exclusion is, in subclause 8(2)(d), “occupational health and safety (including entry of a representative of a trade union for a purpose connected with occupational health and safety)”.
- 3.42. It is difficult to construe the combined meaning of clauses 7 and 8 as other than allowing the operation of Part III of the OSH Act to continue despite the exclusions otherwise effected. Even having regard to the statutory purpose and broader context behind the proposed enactment of the Bill, the Inquiry is unable to point to any tangible concern that warrants a response by the executive arm of the Western Australian Government. Conceivably, though, the policy imperatives of the Commonwealth Government may develop and expand. In particular, the Independent Contractors Bill as enacted, or as subsequently amended, could operate to restrict Part

III of the OSH Act in whole or in part. Should that contingency emerge, the Western Australian Government would be warranted in obtaining legal and other advice as a matter of urgency so as to fully appreciate any alternatives open to it to minimise the effects of such Commonwealth legislative change.

CHAPTER 4. IMPACTS OF WORKCHOICES LEGISLATION

- 4.1. The Report now turns to the broader and quite comprehensive recent enactments of the Commonwealth Parliament in the sphere of industrial relations. Although, as will be seen, only some of the legislation impacts directly on OSH at State level, it is difficult to sever OSH from the wider context and impact. To appreciate the background to the amendments, a short summary of the relevant history is appropriate.
- 4.2. The inclusion of s.51(xxxv) in the adoption and enactment of the Commonwealth Constitution conferred legislative power on the Commonwealth Parliament to legislate with respect to, in short, the conciliation and arbitration of interstate industrial disputes. Since 1904, Commonwealth legislation has applied that source of power to regulate certain aspects of industrial relations in Australia. Those aspects grounded in s.51(xxxv) have generally carried some kind of interstate dimension, although the concept of “interstatedness” came to be conceived very broadly, and at times even artificially.
- 4.3. Since the 1990s, successive federal governments have caused the Commonwealth Parliament to undertake substantial reforms of the labour market and of industrial relations accordingly. The 1993 Keating Labor Government increased and enhanced the capacity of workplace participants to make individual agreements, whilst maintaining a framework of conciliation and arbitration grounded in a safety net of award wages and conditions. Although under those initial reforms it was open to make employment agreements directly with employees rather than industrial organisations, such agreements were required to be collective in nature. A relatively complex procedural regime requiring, among other things, notification of unions, was imposed.
- 4.4. A “second wave” of reforms initiated by the Howard Liberal/National Party Coalition Government in 1996 sought to simplify and more readily enable agreement making,

including the making of agreements directly with employees. The award safety net previously introduced was confined to a limited set of “allowable matters” against a structural regime of “award simplification”. Provisions giving legislative effect to principles of freedom of association were also a major component of those reforms.

- 4.5. Despite those two “waves” of reforms, criticisms of the regime, particularly as enforced by the Australian Industrial Relations Commission and federal courts, continued. In 2000, a ministerial discussion paper issued by the then Minister for Workplace Relations, Peter Reith⁶⁵ canvassed what it saw as the complexity and inefficiency of the federal system. It proposed use of the corporations power of the Commonwealth Parliament as a means of minimising the duplication and waste said to be inherent in the operation of dual systems of industrial relations regulation.
- 4.6. It was more fully asserted of the earlier regime, from the perspective of certain employers’ interests, that⁶⁶:
- Arbitration power, rather than dealing genuinely with a safety net of minimum terms and conditions, was used in a “very interventionist way”;
 - Agreement-making was fraught with technical difficulties, especially when unions were provided with avenues to intervene in approval processes for collective employee agreements;
 - Freedom of association provisions became a “tool for unions to interfere with” the use of contractors within businesses;
 - Unfair dismissal outcomes were inconsistent and proceedings lengthy, costly and onerous;
 - The AIRC exercised its discretions over arbitration, exceptional matters and determination of expired agreements in a manner which was “at significant variance with the legislative intent”; and

⁶⁵ *Breaking the Gridlock: Towards a National Workplace Relations System*, October 2000.

⁶⁶ See Colvin et al, *An Introduction to the Industrial Relations Reforms* (LexisNexis 2006), 4-5.

- Unions began to “forum shop” between the federal and state systems, for example accessing rights to protected action under the federal system and reverting to arbitration rights under the state systems.

4.7. It is not the role of this Inquiry to comment on criticisms encompassing the entire industrial relations system in Australia. The perspective is illustrative, though, of the essential arguments for continued legislative reform. The case for additional and substantial legislative amendment was further enhanced by certain analyses from an economic perspective, which suggested that Australia’s relative economic performance and productivity had continued to decrease, notwithstanding certain improvements since economic reforms stretching back to 1983. A number of those studies asserted a link between relatively weak economic growth and perceived flaws in the systems of industrial relations⁶⁷.

The WorkChoices Policy and its Implementation

4.8. The Howard Government, prior to the last federal election, enunciated a policy covering most aspects of industrial relations styled “WorkChoices: A New Workplace Relations System”. In summary form, components of the policy included:

- Changing the means of setting minimum wages and conditions by the creation of a new body called the Australian Fair Pay Commission to determine wage rates contained within awards.
- Provision for guaranteed minimum conditions in legislation in what are described as “key areas”, namely annual leave, personal/carer’s leave, parental leave (including maternity leave) and maximum ordinary hours of work.
- Variation and, in the policy’s terms, “modernisation” of the overall means of award protection through the rationalisation of existing awards and classification structures by another new body called the Award Review Taskforce.

⁶⁷ Ibid at 5-6. It goes without saying, of course, that such a perspective provides but one – admittedly important – basis from which to argue for industrial relations reform.

- Variation, said to be in the interests of simplicity and clarity, in the making and approval of workplace agreements.
- Changing – that is largely limiting – the role of the AIRC said to be so that that body can “focus on its key responsibility – dispute resolution”.
- Changing unfair dismissal laws, importantly so as to exempt businesses who employ up to 100 employees from unfair (as opposed to unlawful) dismissal laws.
- Working towards a “national workplace relations system which unifies the present regimes in a ‘cooperative manner with the States’”.

4.9. Other more subject-specific changes have already been touched upon. Aside from policies concerning the building and construction industry, the status of independent contractors and the establishment of the Australian Safety and Compensation Council, the policy was one encompassing an exemption of small businesses from making redundancy payments and the removal of so called “industrial barriers” to the takeup of school-based and part-time apprentices. Importantly, and as will shortly be examined in some detail, the policy seeks to pursue what has been described as a “stalled legislative measure”, namely the provision for a single, national right of entry regime.

4.10. The primary legislation to implement these reforms passed by the Commonwealth Parliament, has been the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth). Generally termed the “WorkChoices legislation”, it effects considerable and quite complex amendments to the *Workplace Relations Act* 1996 (Cth). The legislation commenced operation on 27 March 2006. Save to note that, very generally, its terms sit consistently with the broad-based and multifaceted nature of the policy as just described⁶⁸ it is both impractical and inappropriate for this Review to attempt any examination and analysis of the WorkChoices legislation.

⁶⁸ The principal object of the Act, as enacted in s.3 is “to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by ...” (and a number of specific objects are then enacted). As will be noted, specific Parts of the legislation themselves contain particular statutory purposes.

- 4.11. The challenge by several States and certain unions to the constitutionality of WorkChoices legislation, which extensively amended the Workplace Relations Act, attracted considerable notoriety and public comment. At the heart of the challenge was a series of contentions that the invocation of s.51(xx) of the Commonwealth Constitution, the power to legislate with respect to what have become generally known as “constitutional corporations”⁶⁹, to source a so-called framework for cooperative workplace relations was constitutionally impermissible. In particular, it was asserted by the plaintiffs that s.51(xx) is limited to authorising laws with respect to the “external relationships” of constitutional corporations, excluding the “internal relationships” between such corporations and their actual or prospective employees.
- 4.12. In a decision delivered on 14 November 2006⁷⁰, the High Court of Australia, by a 5-2 majority, rejected those, and related, submissions. It upheld the reliance by the Commonwealth Parliament on the use of the legislative power with respect to constitutional corporations. The validity of the amendments to the Workplace Relations Act 1996 has thus been sustained in their entirety.
- 4.13. Some short additional observations on specific aspects of the challenge are warranted. The State of Western Australia challenged the constitutionality of s.16 of the Act as amended, which provides that the new legislation is intended to apply to the exclusion of various laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer (as defined). In particular, such laws include “State or Territory industrial laws” defined so as to include the State IR Act. The High Court considered, and rejected⁷¹, three challenges to s.16, namely that:
- Section 16 was not supported by any head of legislative power;
 - Section 16 constituted “a bare attempt to limit or exclude State legislative power, including future State laws which may be excluded by regulations made

⁶⁹ “Constitutional corporations” are generally those referred to in s.51(xx) of the Commonwealth Constitution, that is foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. By far the most practically important kind of a constitutional corporation is a trading corporation, being, generally, one that engages in trading activities of a substantial amount, or a not insignificant part or proportion of its operations: see eg. *Commonwealth v Tasmania* (the Tasmanian Dams case) (1983) 158 CLR 1. On occasion Commonwealth legislation may enact a broader definition: see eg. s.755(2).

⁷⁰ *New South Wales v Commonwealth* [2006] HCA 52.

⁷¹ *Ibid* at [350]-[377].

under the Act (as amended) rather than to comprehensively regulate a particular field of activity to the exclusion of any State law which also regulates that field of activity”; and

- The effect of section 16 was to impermissibly curtail, or interfere with, the capacity of the states to function as governments, contrary to the principle identified by the High Court in *Melbourne Corporation v Commonwealth*⁷² and recently confirmed and adapted in *Austin v Commonwealth*⁷³.

Rights of Entry

4.14. With respect to Division 5 of Part 15, concerned with right of entry for OHS purposes, the High Court considered, and rejected⁷⁴, a submission that those provisions have no application to rights of entry under the West Australian legislation prescribed by regulation 15.1 of Chapter 2 of the Regulations (that is ss.49G and 49I-49O of the State IR Act). The submission had been that those provisions (unlike, for example their Victorian counterparts) give rights of entry to certain officials of organisations registered under State law, and those organisations are not, and cannot be, registered under the regime enacted in Schedule 1 to the Act. In short, the High Court, whilst accepting that some provisions⁷⁵ sourcing the application of Part 15 may need to be construed in a manner so as to bring their operation within Commonwealth legislative power⁷⁶, discerned no overall absence of constitutional validity. At the risk of oversimplification, an applicable entry, where appropriate, may need to be one which has a direct effect on a constitutional corporation as an employer, or on a contractor who is engaged in the course of providing services to a constitutional corporation. These relatively subtle issues as to the laws’ operation do not materially impact on any conclusions reached for the purposes of the Inquiry.

⁷² (1947) 74 CLR 31. What has become known as the Melbourne Corporation doctrine, implied from the federal nature and structure of the Commonwealth Constitution, operates as a restriction upon Commonwealth legislative power so as to maintain the States’ existence as independent bodies politic: see particularly per Dixon J at 81-82.

⁷³ (2003) 215 CLR 185. The Melbourne Corporation doctrine retains its constitutional purpose and source; it has merely been reconceptualized by a majority of the High Court in *Austin* as a single, rather than dual, constitutional implication based on the continuing existence of the States and the prevention of impermissible degrees of impairment of States’ constitutional functions by the Commonwealth. The previously distinct “discrimination” limb of the doctrine has been subsumed within that more general conception.

⁷⁴ [2006] HCA at [279]-[287].

⁷⁵ Chiefly ss.755(1)(d)(iii), (e)(iii) and (f)(iii).

⁷⁶ See *Acts Interpretation Act* 1901 (Cth), s.15A; *Workplace Relations Act* 1996 (Cth), s.14.

- 4.15. It is that aspect of the new Commonwealth legislation – Part 15 dealing with right of entry - that has given rise to a spirited debate amongst contributors to the Review. Before proceeding to examine the specific text of Part 15 it is apt to summarise the effect of provisions in the *Industrial Relations Act 1979* (WA) (the State IR Act) dealing with the subject. Part II, Division 2G of the State IR Act deals with “right of entry and inspection by authorised representatives”. By force of the statute, it confers lawful authority on certain “authorised representatives” – that is people who hold a permit in force under Division 2G – to enter upon premises in circumstances that would otherwise amount to a trespass. One such source is s.49H, conferring power to enter premises where relevant employees work for the purpose of holding discussions at those premises with any of the relevant employees who wish to participate in those discussions. “Relevant employees” are defined so as to mean employees who are members, or eligible to be members, of the relevant organisation.
- 4.16. Section 49I of the State IR Act confers a right of entry different in nature, that is to enter, during working hours, any premises where relevant employees work for the purpose of investigating any suspected breaches of various State legislation including, relevantly, the OSH Act⁷⁷. Various related and ancillary powers are also conferred by virtue of s.49I. An authority remains in force under Division 2G unless it is revoked or suspended pursuant to s.49J. The WAIRC, constituted by a Commissioner, is empowered to revoke or suspend an authority if it is satisfied that a person to whom it was issued has –
- (a) acted in an improper manner in the exercise of any power conferred on the person by Division 2G; or
 - (b) intentionally and unduly hindered an employer or employees during their working time.
- 4.17. The new Part 15 of the Workplace Relations Act, by contrast, comprises a lengthy set of provisions enacting a regime for right of entry (within the constitutionally conferred legislative powers of the Commonwealth Parliament) seemingly with a degree of prescription considered appropriate to the Commonwealth Government’s stated policy

⁷⁷ Other relevant Acts are the State IR Act itself, the *Long Service Leave Act 1958* (WA), the *Minimum Conditions of Employment Act 1992*, the *Mines Safety and Inspection Act 1994*, as well as an award, order, industrial agreement or employer-employee agreement made under the State IR Act that applies to a relevant employee.

imperative. As with other important legislation summarised in this Report, the paraphrasing that the Inquiry offers is not to be taken as a substitute for close attention to the entirety of the legislative text.

4.18. The expressed object is important and likely to play an important ongoing role in the interpretation and application of Part 15. That object is to, in addition to the overall object of the Workplace Relations Act set out in s.3:

- (a) Establish a framework that balances:
 - (i) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial laws, industrial instruments and OHS laws; and
 - (ii) the right of occupiers of premises and employees to conduct their businesses without undue interference or harassment;
- (b) Ensure that permits to enter premises and inspect records are only held by persons who understand their rights and obligations under this Part and who are fit and proper persons to exercise those rights;
- (c) Ensure that occupiers of premises and employers understand their rights and obligations under this Part;
- (d) Ensure that permits are suspended or revoked where rights granted under this Part are misused.

4.19. Section 740 empowers the Registrar of the AIRC to issue a permit which, crucially, may include various conditions as empowered and envisaged by Part 15. A permit is not to be issued to an official unless the Registrar is satisfied that the official is a fit and proper person to hold the permit. In reaching that level of “satisfaction”, a range of matters provided for by s.742(2) is to be had regard to by a Registrar.

4.20. Section 747 empowers rights of entry to investigate breaches of certain Commonwealth industrial laws, as defined, and succeeding provisions create certain entitlements once such entry has taken place. Sections 755 and following, relevantly for present purposes, deal with entry for “OSH purposes”, within Division 5 of the Part, which has effect in relation to a right to enter premises under an OSH law (which, by virtue of the definition in s.737 and regulation 15.1, includes ss.49G and 49I-49O of the State IR Act insofar as those provisions empower entry for the purposes of investigating a breach of the OSH Act).

- 4.21. Sections 760 and following source a separate right of entry for permit holders to enter premises for the purposes of holding discussions with any eligible employees who wish to participate in those discussions. Again, related restrictions as are the case with earlier Divisions of Part 15, are applicable.
- 4.22. Division 7 of Part 15 enacts certain prohibitions concerning hindering or obstructing persons, or otherwise acting in an improper manner, whilst a permit holder is exercising or seeking to exercise his or her rights sourced in Part 15. Division 8 deals with enforcement of many of those prohibitions, whilst Division 9 confers important powers on the AIRC to make a variety of orders (including revocation or suspension of a permit or adding additional conditions on a permit's exercise) where it is satisfied that an organisation or any official of an organisation has "abused the rights" conferred by Part 15. A different kind of jurisdiction is conferred by s.772, namely an empowerment of the AIRC to make orders for the purpose of settling disputes about the operation of Part 15, having regard to fairness between the parties concerned (and, by implication, the express purposes of Part 15 itself).
- 4.23. Of major importance for the purposes of this Review is the restriction which Part 15 imposes on rights exercised under s.49I of the State IR Act. Those restrictions will apply in relation to any of the "OSH entries" within the scope of s.755. As noted, *most* of that impact will relate to entries of premises which are occupied or otherwise controlled by a constitutional corporation or, with lesser frequency, by the Commonwealth itself. Many business undertakings and operations within Western Australia will be *occupied or otherwise controlled by* a constitutional corporation. In most cases the question as to whether a corporation satisfies the applicable⁷⁸ test will be a relatively clear cut question of fact. A large majority of corporations of any significant size or business profile are likely to satisfy the test. By contrast, premises that are occupied or otherwise controlled by business associations such as a partnership or a trust, or by a State Government entity, will not fall within the scope of s.755 and hence the restrictions imposed by Part 15 itself. Section 755 – and hence Division 5 of Part 15 – will also apply where the right of entry *relates to certain conduct of* a constitutional corporation, or an employee or contract thereof. Yet another potential source of

application is where the exercise of the right of entry has a *direct effect on* any of those people. Highly reliable sources have provisionally estimated the impact of the WorkChoices legislation generally to affect approximately 60% of all workplaces within Western Australia⁷⁹. The impact of s.755 itself, in numerical terms, is likely to be in that vicinity.

4.24. Hence, and without attempting to be exclusive, the restrictions upon an official of an organisation who wishes to exercise a right under s.49I of the State IR Act, where Division 5 of Part 15 applies, will include:

- A permit under Part 15 will be required to be held (so that if, for example, the Registrar is of the view that the relevant official is not a “fit and proper person” as defined in s.742, any entry, even if *prima facie* permitted by s.49I, will not be lawful);
- Any entry must take place during working hours;
- Any conditions that apply to a permit will be required to be complied with for the entry to be lawful; and
- The permit holder is not to enter, or remain on, premises under an OHS law (such as s.49I) if he or she fails to comply with an “occupational health and safety requirement” that applies to the premises; and
- It will be open to the Commission to make various orders - including revoking or suspending a permit, if it is satisfied that, by virtue of entries sourced in Part 15, the permit holder has abused his or her rights - or otherwise to resolve disputes about the operation of Part 15.

4.25. A number of interested parties strongly expressed concerns about the likely or potential effect of Part 15 on the exercise of rights of entry for OSH purposes. Submissions representing union or employees’ interests were, without exception, critical of the potential operation of Part 15 and its imposition of restrictions on rights

⁷⁸ See footnote 69 above.

of entry sourced in the State IR Act. Many asserted that union involvement in OSH is essential, with the presence of unions and their representatives increasing the frequency and effectiveness of inspectorate activity, as well as generally contributing to the reduction of workplace hazards and risks. Most such submissions noted that the precise impact on the operation of s.49I was unclear in the limited period since the commencement of the WorkChoices amendments and in the absence of any authorities examining the meaning and impact of the respective statutory provisions.

- 4.26. The submissions of some unions tended to overlap with a more broadly based criticism of the policy behind the WorkChoices amendments and their likely impact on other terms and conditions of employment. The Inquiry is not critical of that tendency because it is appreciated that these issues are highly contentious. It can also be difficult to draw clear dividing lines between different aspects of industrial relations. Nonetheless it is important for the Review to take great care in not traversing beyond its statutory terms of reference in s.61 of the Act. It therefore passes no comment on the policy and operation of the WorkChoices amendments beyond relevant aspects of Part 15.
- 4.27. Most submissions of unions and employees' interests argued for the insertion of rights of entry provisions for OSH purposes in the OSH Act itself, rather than the State IR Act. Some noted the recent legislative activity in Queensland⁸⁰, New South Wales⁸¹ and Victoria⁸² to that effect, with one peak body specifically relying on amendments contained in the *Occupational Health and Safety Amendment Bill 2006* (NSW) as being a desirable model in that regard. A number of submissions also noted the more subtle issue of the absence of any clear statutory source of the right of entry of union representatives for discussion *about* OSH issues. It was argued that, whether or not relevant provisions ought be inserted in the OSH Act, the ambit of ss.49H and 49I ought be broadened so as to make unequivocally clear entitlements to enter for such a purpose.

⁷⁹ See Chief Commissioner Beech, *The WA State IR System After WorkChoices: What Now?*, Paper delivered at Workplace Reform Seminar, Perth, 4 April 2006.

⁸⁰ Qld OSH Act, Part 7A.

⁸¹ NSW OSH Act, ss.76-82.

⁸² Vic OSH Act, Part 8.

- 4.28. Employers' interests, for their part, generally urged caution and circumspection in the making of any recommendations that would alter the *status quo*, particularly pending further indications of the operation of Part 15. In response to the question posed in the Discussion Paper of whether there were, relevantly, any realistic threats to the operation and administration of the OSH Act, one peak body denied the suggestion emphatically, noting that the Commonwealth Government has not expressed an intention to assume total responsibility for occupational safety and health. That body, and others, asserted that there was no basis in policy for right of entry to be granted to third parties, including unions, for OSH issues. It was asserted that sufficient processes exist for internal resolution of issues through various workplace consultative mechanisms.
- 4.29. Concerns were expressed that involvement of a third party, other than where specifically mandated by the OSH Act in its present form, would have the potential to inflame and complicate issues rather than affording speedy resolutions. Another peak body expressed its position similarly, submitting that it was not appropriate to consider any changes to the right of entry provisions in Western Australian legislation until the scope and operation of the Workplace Relations Act are settled. That body noted the means for workplace resolution of an OSH issue in ss.24-26 of the Act⁸³ and the role of inspectors. It asserted that, to the extent that unions or employees had genuine concerns about safety that cannot be resolved with the employer, including disputes about rights of entry, then those concerns can, and should, be reported to relevant inspectors. (To that the Inquiry would add that the provisions empowering safety and health representatives and safety and health committees undeniably add to the range of existing structures presently within the OSH Act for the resolution of OSH issues.)
- 4.30. In the Inquiry's view, s.49I of the State IR Act is a very important provision which confers a significant, albeit qualified, right on union officials to enter premises for purposes relating to the operation of the OSH Act. Although there are recent precedents of union officials having exercised right of entry powers inappropriately and improperly, it would be unfair to draw any inferences, detrimental to the union movement generally and its representatives, about the use and enforcement of rights of

entry. The Commonwealth Parliament has recognised that potential for – and at times reality of – abuse of the powers and intrusive interference with business undertakings in its statutory purposes accompanying the enactment of Part 15. Can it be said that the conditions imposed by Part 15 are inappropriate or unfair? Does it resolve the balance *against* the interests of union officials in a disproportionate way? The Inquiry is far from satisfied that that is the case. To the contrary, union officials who exercise rights of entry for OSH purposes sensibly, fairly, and with due regard for the competing interests of employers and the occupiers of premises, ought experience no material impediment in the exercise of their rights by virtue of Part 15.

- 4.31. It is fully acknowledged, as many union interests emphasised, that there will be certain OSH purposes which require a quick response. Importantly, however, the requirement in Part 15 to give 24 hours written notice of an intention to exercise a right of entry is restricted to where the entry is to inspect employment records on the premises: s.757(1)(b). Thus entry for purposes such as investigating a suspected breach of an OSH law, or ancillary matters covered by s.49I(2)(c) of the Stat IR Act is not so conditioned. Moreover, the alternative structural components which are equipped and adapted to enable a quick response have been referred to in this chapter and elsewhere in the Report. No sufficient case has been made out for adding to those components in the interests of achieving a more effective operation of the OSH Act.
- 4.32. In particular, the Inquiry is not satisfied of any significant consequence in enacting the text of s.49I in the OSH Act rather than in the State IR Act. Inevitably, the provisions as re-enacted would become prescribed for the purposes of the definition in s.737 of the Workplace Relations Act and Part 15 Division 5 accordingly. The applicable restrictions, in circumstances where there is a pertinent constitutional connection, will surely remain. For entry on those workplaces that are unaffected by Part 15, again there will be no material consequence. Such an amendment is, in the Inquiry's view, highly unlikely to have anything more than a symbolic effect. Naturally, the predominant effect of Commonwealth legislation *vis-à-vis* State legislation, by virtue of s.109 of the Commonwealth Constitution⁸⁴, will remain regardless.

⁸³ See paragraphs 6.12ff.

⁸⁴ See footnote 30 above

- 4.33. If anything, in the Inquiry's view, the powers of the WAIRC to make appropriate orders in response to permit holders who exercise rights of entry inappropriately or improperly may be too limited. A case can probably be made for amending s.49J of the State IR Act to broaden the jurisdiction of the WAIRC, both in terms of the range of orders that can be made, and the circumstances that empower the WAIRC to act. It would be inappropriate to make recommendations on the ambit of Part II Division 2G of the State IR Act in the absence of full investigation of the Division's operation, unconfined to rights of entry merely for OSH purposes. At the very least, however, the Inquiry can foresee circumstances beyond the scope of s.49J(5) where a right of entry, exercised for an OSH purpose, may be contrary to the evident purpose of Part II Division 2G. For example, conduct not strictly "in the exercise of any power conferred on the person by" Division 2G, but nevertheless intimately connected with that power, may be disproportionately detrimental to an occupier's exercise of its lawful rights. Furthermore, fine arguments about what constitutes acting in an "improper" manner may deflect attention from whether, in substance, the kind of balance reflected in s.736(a) of the Workplace Relations Act has been unduly disturbed.

CHAPTER 5. OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

- 5.1. In submissions received by the Inquiry the single most hotly debated issue was the existence, role, and jurisdiction of the Occupational Safety and Health Tribunal (the Tribunal) created as a consequence of the Laing Review. Some submissions reflected what amounted to polar opposites. One peak employers' body, for example, asserted that the Tribunal was misconceived from the beginning and ought be disbanded. Another group was not opposed to the concept of *an* occupational safety and health tribunal in principle, however was strongly opposed to any such body being part of, or comprising persons who are appointed as members of, the WAIRC. (This argument goes to the broader and related contention that there is a "unique dichotomy" between industrial relations and OSH, which will be examined directly.)
- 5.2. Other employers' groups were more moderate, denying that there was any case for expansion of the Tribunal's present role. It was suggested that any extra tier of consultation, discussion or dispute resolution was unnecessary, would not enhance the objectives of the OSH Act, nor improve safety performance. Yet another body disputed that any "particular OSH technical expertise" was brought to the process of dispute resolution by the Tribunal. That group contended that the Magistrates Court remains the most appropriate independent body to carry out the function of an objective resolution of OSH disputes. Alternatively, some commentators suggested that the jurisdiction should be exercised by the State Administrative Tribunal, as indeed was alluded to by Mr Laing as a possibility in the pertinent recommendation.
- 5.3. Union and employees' interests, by contrast, lauded the establishment of the Tribunal and argued for an expansion of its jurisdiction. A number of unions argued for extension of the Tribunal's jurisdiction to enable it to determine issues relating to, for example, breaches of the Act or its delegated legislation, termination of employees who raise OSH issues, and disputes concerning provision of personal protective equipment and amenities. Another union emphasised the desirability of fast, cost effective resolution which, as a constituent body of the WAIRC, the present Tribunal seems ideally placed to provide, so it was argued.

- 5.4. A peak body supported its submission for an expansion of the Tribunal's jurisdiction by arguing for the desirability of resolving safety issues before they escalate into more serious disputes which may constitute actual statutory breaches. That body emphasised that *bona fide* "disputes" are not the same as "breaches". Given that WorkSafe's inspectorate is neither empowered to, nor trained to, deal with the more complex and multifaceted areas of some disputes, so it was argued, an independent, objective third party with appropriate coercive powers presented as the appropriate forum. Numerous union and employee representative bodies also noted the emergence of less tangible OSH disputes in the nature of stress, bullying, fatigue and work overload which present particular problems to be dealt with by the inspectorate. Those disputes being by their nature complex, and often overlapping workplace organisational issues, are best dealt with by a specialist tribunal located within the WAIRC, it was contended.
- 5.5. To evaluate these dramatically different arguments it is necessary to appreciate the foundation for the Tribunal's creation and the nature of the jurisdiction that it *does* presently exercise. Administrative tribunals come in an almost infinite range of varieties and structures. They deal with numerous subject matters and have a vast array of functions, powers and procedures. As components of the executive branch of government, they are inevitably subject to some form of judicial supervision. Consistently with a fundamental premise on which our system of government is grounded, the rule of law⁸⁵, practically all tribunals will be sourced in legislation which defines their jurisdiction and powers. The concept of a tribunal with some kind of inherent jurisdiction or powers to exercise "at large" is a misnomer. It follows that it will always be essential to carefully examine an administrative tribunal's empowering legislation to understand its role and the limits of its jurisdiction.
- 5.6. Mr Laing noted, with considerable force, that whilst the judicial arm of government remains the appropriate place for prosecutions to be heard and determined, there was a range of issues arising under the OSH Act in the nature of administrative review and appeals which were more naturally suited for an administrative tribunal. He observed

⁸⁵ Very recently the High Court has reaffirmed the importance of the rule of law being a fundamental assumption on which the Commonwealth Constitution is based: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403 at 413-414 per Gleeson CJ and Heydon J, citing the time honoured statement in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J.

that whilst the Magistrates Court has undoubted legal and other experience, it is not a specialist safety and health body, rendering it inappropriate for it to be empowered to deal with such administrative matters. Mr Laing concluded that the creation of a low cost, specialist safety and health tribunal, empowered to deal with administrative issues arising under the OSH Act, was a strong policy imperative. He accordingly recommended in the following terms:

R 65: It is recommended the Act be amended to provide for a specialist occupational safety and health tribunal to deal with all non-judicial matters. The Minister could appoint the tribunal as part of the State Administrative Appeals Tribunal recently announced by the Government or in the alternative the tribunal could be formed from the Western Australian Industrial Relations Commission after consultation with the Chief Industrial Commissioner. The tribunal should deal with occupational safety and health matters as a priority and have alternative duties when not functioning as the occupational safety and health tribunal.

5.7. Some commentators suggested that, properly construed, the intent behind Mr Laing's recommendation was for the Tribunal to have a broadly based or "general" jurisdiction to resolve disputes under the OSH Act. The Inquiry acknowledges that that is one possible way to read the recommendation in light of the preceding analysis⁸⁶ of Mr Laing. The better view, however, is that the intention was only for the new Tribunal to supersede the jurisdiction previously exercised by a Safety and Health Magistrate. Indeed, that is largely the jurisdiction that has been conferred to date. Part VIB deals with the Occupational Safety and Health Tribunal by empowering the WAIRC, sitting as the Tribunal as thus created, with jurisdiction to "hear and determine matters that may be referred for determination under" certain sections that are then referred to: s.51G. Jurisdiction is to be exercised by a Commissioner of the WAIRC with requisite qualifications, (s.51H) and certain provisions of the State IR Act concerning practice, procedure and appeals are rendered directly applicable: s.51I. For most of its exercises of jurisdiction, the Tribunal is specifically empowered to conciliate and is clothed with certain ancillary powers accordingly: s.51J.

5.8. Thus the nature of the Tribunal's jurisdiction is significantly more circumscribed than the more generalised power of the WAIRC, which the Tribunal is a component of.

⁸⁶ Laing Review [874]-[899].

Rather than having jurisdiction of a kind allowing it to “enquire into and deal with”⁸⁷ OSH disputes or matters, the defined areas of jurisdiction are, in essence:

- Determination of a dispute as to whether a person is entitled to any pay or benefit or the amount of such pay or benefit which are continued in operation by s.28 of the Act (s.28(2));
- Determination of any matter required to be determined under s.30 in relation to elections of safety and health representatives and committees (s.30(6));
- Resolution of disputes concerning the establishment of an election scheme for the purposes of s.30A(4);
- Resolution of questions relating to election of safety and health representatives (s.31(11));
- Determination of a claim for disqualification of a safety and health representative on one or more of certain specified grounds (s.34(1));
- Variation of the entitlements due to a safety and health representative beyond those prescribed in regulations for that purpose (s.35(3));
- Determination of claims of discrimination against safety and health representatives in relation to employment (contrary to s.35A) or in relation to a contract for services (contrary to s.35B) and the granting of one or more of the remedies provided for by s.35D (s.35C);
- Review of certain decisions and determinations by the WorkSafe Commissioner concerning safety and health committees (s.39G)⁸⁸; and
- The further review of improvement notices and prohibition notices by those not satisfied by the WorkSafe Commissioner’s decision on an internal review (s.51A(1)).

⁸⁷ Compare *Industrial Relations Act* 1979 (WA) s.23(1).

⁸⁸ One interested government entity saw considerable importance in those powers reposed in the Commissioner and, in turn, in the Tribunal. It suggested that the diversity of businesses in size and in nature meant that fixed

It is the latter function – the further review of notices – that has been to date by far the most prevalent exercise of the Tribunal’s jurisdiction.

- 5.9. The strongly competing arguments on this subject encompass a range of related sub-issues that require evaluation. First, it would be a grave and highly disruptive step to accede to the invitation of a number of contributors and recommend the abolition of the Tribunal and its replacement with some other body which would undertake the exercise of jurisdiction presently conferred on the Tribunal. The necessary circumspection described in the introductory chapter to this Report is of particular significance here – it would require a compelling case to propose the abolition of an administrative tribunal, newly created and conferred with certain jurisdiction, powers and procedures, after a period of operation of approximately 18 months.

A “Unique Dichotomy”?

- 5.10. No submission denied the legitimacy of *a* tribunal to exercise, more or less, the kind of jurisdiction which has just been summarised. Properly understood, the submissions of numerous employers’ bodies oppose the *particular* Tribunal created as a component of the WAIRC as inappropriate - by reason of its nature, location within the overall tribunal structure of Western Australia, and associated symbolic effect - to undertake those tasks⁸⁹. That opposition, then, requires consideration of the related progression of arguments put by commentators that:

- There is indeed “a unique dichotomy” between industrial relations and OSH.
- OSH matters should be heard separately from industrial matters to ensure OSH decisions are not “unduly influenced” by an “industrial agenda”.
- The WAIRC does not enjoy a comparable level of regard in its functions, operation and outcomes to the judicial system, nor does it bring unique expertise to the process.

assumptions about the need for safety and health committees could not be justified. A flexible power to allow exemptions from the general processes was thus important, so it was contended.

⁸⁹ It is perhaps important to observe that a number of those contributors emphasised that their opposition was in no way concerned with the current composition of the Occupational Safety and Health Tribunal.

- There must be a “clear divide” between OSH and industrial relations so as to remove or prevent the former being used as an “industrial relations bargaining chip”. (This point was stressed by a body representative of the building and construction industry, which pointed to certain findings of the AIRC and other bodies concerning industrial action, ostensibly but not genuinely motivated by OSH, within that industry.)
- For these reasons, and otherwise, the Tribunal is in reality “seen as the Industrial Relations Commission”.

Not every interested party critical of the present Tribunal structure put its opposition in precisely this way, but this set of propositions fairly summarises the relevant arguments.

- 5.11. The Review accepts that, at a high level of generality, industrial relations and OSH are two different things. Industrial relations are about, literally, the relations between parties to work relationships, particularly at a macro or organised level. Occupational safety and health is about, at base, the reduction or minimisation of risks and hazards to safety and health at work. But the existence of employment and other work relationships provides the connection between the two basic concepts. Issues, and indeed disputes, about OSH can, and often do, become disputes at, within, or associated with a workplace. At what point such work related issues or disputes can sensibly be said to be part of “industrial relations” depends on matters of judgment and degree. What to one person is really an “employment issue” might be characterised by another as substantially an “industrial relations issue”.
- 5.12. In some situations, the matter may be simply a matter of labelling and carry no significance beyond the semantic. But the difference may have a very real practical import where issues arise as to what alternatives and means are open to resolve a given OSH (and hence employment) issue or dispute. Can, for example, the issue be sorted out by formal or informal collaboration and discussion at the workplace itself, perhaps by application of the requirements of s.24 of the OSH Act? Alternatively, is it necessary to utilise the services of a WorkSafe inspector pursuant to s.25 or otherwise, possibly with that inspector considering the issue of an improvement notice or

prohibition notice? For workplaces that involve safety and health representatives and/or safety and health committees do either or both of those functionaries have a meaningful role to play (including, in the former case, the possibility of the issue of a provisional improvement notice)? On a narrow view, all of those alternatives might be regarded as falling short of a point that can fairly be called “industrial relations”. But from a broader perspective, some or all of the possible alternatives may cross that line.

- 5.13. There is another important practical dimension, which in the Inquiry’s view is underappreciated and grossly underapplied in the resolution of OSH disputes in Western Australia (and quite possibly in Australia more generally). The vast majority of industrial instruments contain dispute resolution procedures which are at least generally applicable to, and in many cases specifically designed to deal with, OSH issues and disputes. Recent statutory regulation of industrial relations has dealt with dispute resolution procedures in a more prescriptive way. Without attempting an exhaustive review of the contemporary legislative treatment, the Inquiry notes that Part VID of the State IR Act, dealing with employer-employee agreements, provides in s.97UN-97UP, for the mandatory inclusion of dispute settlement procedures. Moreover the Workplace Relations Act, as amended by the WorkChoices legislation, provides for the mandatory inclusion of dispute settlement procedures in workplace agreements under that Act (s.353) and as part of the limited range of “allowable award matters” (s.513(1)(m) read with s.514). Part 13 of that Act deals discretely with dispute resolution procedures themselves, including a default model provision, which contains certain prescription as to content, including a basis for, ultimately, utilisation of specified limited powers of the AIRC.
- 5.14. Some submissions referred to the fact that dispute resolution procedures are honoured more in the breach than in the observance. In the Inquiry’s view, that is unquestionably the case. It is cause for real concern in the interests of meaningful, consultation-based resolution of OSH disputes. The subject warrants ongoing reflection on the part of all participants in OSH in Western Australia, including the Commission and WorkSafe itself.

- 5.15. Typically, dispute resolution procedures contain no magical content or complex pathway to the solving of problems about safety and health at the workplace. Rather, a procedure will provide for a logical progression of consultation through the hierarchy of a workplace or business undertaking. Usually, if that tiered structure has been traversed without resolution of the problem, there is capacity for any one of the disputing parties to refer the matter to a body or person which is thereby conferred with jurisdiction to arbitrate or otherwise literally “resolve” the issue. Despite the prevalence of that arbitral power as a final avenue to a solution, the Inquiry is aware of very, very few instances in recent years where such a means of OSH dispute resolution has been accessed.
- 5.16. Several significant propositions flow from the reality of dispute resolution procedures being included in many industrial instruments, but rarely pursued in either their terms or their spirit:
- (a) The fact that, in many such clauses, arbitral power is conferred on either the AIRC or WAIRC rather runs counter to the generalised statement that OSH and industrial relations should be “kept separate” or seen as a “unique dichotomy”.
 - (b) There exists a heavily under-utilised decision-making function of an objective tribunal with appropriate coercive powers, to provide a reasoned resolution to difficult problems about health and safety at the workplace.
 - (c) It follows that a major tool open to workplace participants in having their difficulties solved is effectively going to waste.
- 5.17. The Inquiry fully accepts that there are circumstances where unions have, if not invented then grossly exaggerated, OSH issues as contrivances to justify industrial action. It is probably fair to say such a phenomenon has been more prevalent in the building and construction industry than in other industries, at least in recent years. As with the similar point made about the improper use, or abuse, of rights of entry, it would be illogical and unfair to draw inferences, on the basis of those occurrences, detrimental to the entire union movement. Plainly, the use of OSH issues, or indeed

any false issues, as a contrivance in industrial relations is to be deprecated. Where such a strategy results in industrial action, particularly strike action, which is harmful to productivity and/or in breach of statute law or common law, it is to be positively condemned. However the *mere fact* that such abuses of the industrial relations system occur does not of itself justify any general thesis about the necessary separation of OSH and industrial relations.

- 5.18. Rather, what the phenomenon does point to is the desirability of appropriately qualified and equipped functionaries being empowered to detect such misuses, or abuses, and exercise their jurisdiction accordingly. Industrial Relations Commissioners are the appropriate functionaries to exercise that task. Many magistrates⁹⁰ may not have a particular background and/or expertise in industrial relations to bring to bear on such a potentially difficult and subtle exercise. Alternatively, if applicable jurisdiction were conferred on the State Administrative Tribunal, it would become practically necessary for members to be appointed to that body with the appropriate expertise and experience. Nothing would be gained above and beyond the exercise of this kind of jurisdiction by those presently equipped to do so. Members of the WAIRC and the AIRC (where that latter body is dealing with OSH issues pertinent to Western Australia) must be, and in the Inquiry's view undoubtedly will be, ever astute to detect the spurious use of OSH issues and arguments and separate them from the genuine.⁹¹
- 5.19. For these reasons, quite apart from any starting point of reluctance to abolish the Tribunal or alternatively to restrict its jurisdiction, the Inquiry is positively satisfied that an important and legitimate role remains for the Tribunal within the WAIRC.
- 5.20. Before turning to consider whether the conferral of jurisdiction on the Tribunal by s.51G(1) of the OSH Act ought be altered, it is appropriate to turn to three issues of, loosely, a "procedural" nature that emerged during the course of the Review.

⁹⁰ By force of s.51B of the OSH Act, all magistrates are now, by virtue of their basis appointment, "safety and health magistrates" and empowered to exercise the (relatively confined) jurisdiction conferred by s.51C of the OSH Act.

⁹¹ The Maxwell Report, at [869], succinctly dealt with the premise of "OSH as an industrial issue" in the following way: "Occupational health and safety is, by definition, an industrial issue, since it is necessarily concerned with the conditions of work. As one employer said to me, 'Health and safety is the first industrial issue I want to get right.'"

Conciliation Powers of the Tribunal

- 5.21. Section 51J of the OSH Act confers certain powers on the Tribunal where it considers that the issues involved may be resolved by conciliation. However, the section itself limits the areas of the Tribunal's jurisdiction in which conciliation may be attempted. No issue was raised regarding the nature or content of conciliation powers where they may be exercised. In the Inquiry's view they are sensible, appropriate and properly encapsulate an industrial tribunal's conciliatory function.
- 5.22. An issue that did emerge, however, is the absence of any reference in s.51J(1), providing for the circumstances where conciliation is available by the Tribunal, to the determination of the further review of an improvement notice or prohibition notice pursuant to s.51A. Thus that power, conferred on the Tribunal by s.51G(1), may only be exercised by the actual undertaking of a "review" by the tribunal member⁹² (loosely, an exercise of arbitral power). It is difficult to discern any basis in policy for this omission. Certainly, there is nothing in the Laing Report which provides any indication of a rationale for concluding that the various other kinds of jurisdiction to be exercised by the Tribunal *may* benefit from a process of conciliation before the "arbitral" function is exercised, whereas the review of notices is not properly in that category.
- 5.23. WorkSafe, for its part, contended that there was such a justification for an inability of the Tribunal to conciliate the review of improvement notices and prohibition notices. It contended that the *character* of those notices and the kind of dispute that is generated by a grievance about the outcome of an internal review, was different in nature from the various other kinds of disputes or referrals that the Tribunal is empowered to deal with. In particular, WorkSafe noted the potential for a notice, if confirmed, to provide a foundation for quasi-criminal liability and for an alleged breach to be the subject of prosecution and ultimate determination by a magistrates court. Hence, it argued, the "give and take" involved in conciliation is inappropriate "when deciding whether a breach has or has not occurred, or whether there was or was not an activity giving rise to a risk of imminent and serious injury or harm".

⁹² For discussion on the related point as to the meaning of a "review" of an improvement notice or prohibition notice see paragraphs 7.29-7.35.

- 5.24. Although WorkSafe’s argument does accurately state the character of a notice and the nature of consequences that may flow from its existence, the Inquiry is unpersuaded that there is any appropriate dichotomy between the power of review conferred by s.51A of the OSH Act and the remaining kinds of jurisdiction that may be exercised by the Tribunal as enacted in s.51G(1). Were the Tribunal empowered to hear and determine a prosecution strictly so called, there may be a material distinction to be drawn. However the Inquiry can foresee numerous ways in which a power of conciliation, whether by one or more of the means expressly enacted in s.51J, or otherwise⁹³ may assist in resolving issues in dispute. For example, a recipient of a notice may, despite having been through the internal review process, simply not properly understand the import of a notice and the consequences of non-compliance. Alternatively, there may be a tenable argument that the approach by WorkSafe and, ultimately the Commissioner herself, to a particular notice is ill-conceived, perhaps as a consequence of overlooking a material consideration. Yet again, the Tribunal might form a provisional view that to undertake a “review” in any meaningful sense will necessitate a lengthy and complex hearing that might be out of proportion to the significance of the issues at stake. These kinds of matters can be conveyed to the parties in the manner considered by the Tribunal to be appropriate. A resolution of the ultimate issue at stake may thus be effected without “deciding” on factual issues concerning the nature of a hazard, or of “breach”.
- 5.25. These are just some of the issues that might be identified and explored within the informal confines of a conciliation. As is the case with the undertaking of conciliation in the exercise of the jurisdiction of the WAIRC generally, observations of the Commissioner concerned are provisional and of no binding effect on the parties involved. The stage of “give and take” may or may not be reached. All discussions and suggestions are put on a without prejudice basis. Nothing in the content of the conciliation is admissible when the “arbitral” function is then undertaken⁹⁴. The WAIRC is empowered to undertake conciliation in numerous forms of the exercise of its jurisdiction, not simply its general power to “inquire into and deal with” a dispute

⁹³ The particular powers enacted in s.51J(2) and (3) are merely alternatives open to the Tribunal in undertaking what must be, as a matter of substance, “conciliation”.

⁹⁴ See, eg, *Thornander v Minister for Education* (1997) 77 WAIG 66.

relating to an “industrial matter”⁹⁵ or in dealing with claims of unfair dismissal and denied contractual benefits⁹⁶. For example, when a Full Bench exercises its jurisdiction to enforce provisions of the State IR Act or orders of the Commission (a function which, on one view, is quasi-prosecutorial in nature) the power does exist. It need not necessarily be used⁹⁷ and, if it is, it may not amount to any outcomes of substance. It is the potential for positive outcomes to be achieved and resolution of disputes to occur that is significant. The Inquiry considers that same potential would exist were s.51A inserted into s.51J(1).

Jurisdiction to Extend Time for Referrals Under Section 51A

- 5.26. Section 51A(1) empowers a person not satisfied with the Commissioner’s decision under s.51(6) of the Act to refer the matter in accordance with s.51A(2) to the Tribunal for further review. That latter subsection then provides that such a reference “may be made in the prescribed form within seven days of the issue of the notice under s.51(6)”. An issue that arose in recent proceedings before a Full Bench⁹⁸ of the WAIRC was whether s.51A(2), construed in context, means that a valid referral *must* be made within seven days of the issue of the requisite notice or whether, alternatively, the Tribunal possesses a jurisdiction to extend that time period.
- 5.27. The Full Bench (comprising Acting President Ritter and Commissioners Scott and Wood) concluded that there was no such discretionary power and that the seven day time “limit” was in effect “mandatory”⁹⁹. It is unprofitable to examine the reasoning of the Full Bench in any detail. It will bind the Tribunal in its exercise of the jurisdiction conferred by s.51A unless a separately constituted Full Bench arrives at a different conclusion or the decision in *Oceanic Cruises* is overturned by the Industrial Appeal Court. The question that arises as of some importance from a policy point of view is

⁹⁵ *Industrial Relations Act* 1979 (WA), s.23(1).

⁹⁶ *Industrial Relations Act* 1979 (WA), s.29(1)(b).

⁹⁷ Compare *Industrial Relations Act* 1979 (WA), s.84A(4)(b).

⁹⁸ *WorkSafe Western Australia Commissioner v Anthony and Sons Pty Ltd T/A Oceanic Cruises* (2006) 86 WAIG 2950 (Oceanic Cruises).

⁹⁹ As the High Court noted in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, the traditional mandatory/directory dichotomy in construing powers and duties conferred under statute has fallen into disfavour. The approach which better encapsulates the correct task of statutory interpretation is to enquire whether breach of a particular duty, obligation or right would give rise to invalidity, or merely some lesser consequence. That being noted as the position in strict law, there is usually little harm in general reference to certain duties and requirements as being, in substance, “mandatory”.

whether the OSH Act *should* confer a power on the Tribunal to extend the period of time of seven days contained in s.51A(2).

- 5.28. The Inquiry, noting that the WorkSafe Commissioner had argued for a strict construction of s.51A so as to deny any jurisdiction existing by implication, suggested in correspondence to WorkSafe that there were sound arguments, to say the least, for such power to be expressly provided in s.51A or elsewhere in the OSH Act. The Inquiry noted that it is *relatively* rare for a court or tribunal to lack any jurisdiction to extend time for referrals, applications or appeals where, practically speaking, there are no more available alternatives for appeal or review¹⁰⁰.
- 5.29. WorkSafe opposed any amendment to the OSH Act so as to confer a discretion on the Tribunal to extend time under s.51A. It pointed to the desirability of certainty and “closure” in the process of review of an improvement notice or prohibition notice. However, in the Inquiry’s view the absence of any ability to extend time under s.51A has the capacity to work very real injustice. There may well be circumstances (hopefully rare but nonetheless very real) where, for reasons beyond anyone’s control, the recipient of a notice does not actually become aware of the outcome of an internal review under s.51(6). Alternatively, an employer or manager may become aware of the outcome but have a very good explanation for why it was practically impossible to commence proceedings for further review within seven days of such notification. (The death of a family member is one such possibility.) True it is that the values of certainty and closure are legitimate. However it is possible to conceptualise limits on the Tribunal’s exercise of jurisdiction which pay considerable accord to those values. The best balance will be achieved if a Commissioner can be affirmatively satisfied of some particular injustice of the case were time not extended, and even then there exists an overriding discretion¹⁰¹.

¹⁰⁰ There exists the possibility that a decision of the Commission on internal review might be the subject of proceedings for prerogative relief in the Supreme Court. An applicant for such relief would probably have to show the presence of a jurisdictional error to obtain a remedy. The Supreme Court would not intervene merely on the basis of factual error or a different conclusion as to the merit of an improvement notice or prohibition notice.

¹⁰¹ Which would be exercised taking into account such considerations as emerge from the subject matter, scope and purpose of the legislation: see generally *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-42.

Proper “Parties” to Dispute Under Section 28

- 5.30. In *Thiess Pty Ltd v The Automotive Food Metals Engineering Printing and Kindred Union of Workers – Western Australian Branch*¹⁰² a Full Bench of the WAIRC (comprising Acting President Ritter and Commissioners Smith and Harrison) was concerned with the correctness of a declaration made by the Tribunal in proceedings which sought payment for certain employees who sought determination of their entitlements to pay or benefits where there had been a refusal to work. The employees concerned considered they had reasonable grounds to believe that to continue to work would expose them to a risk of imminent and serious injury. The statutory foundation for the employees’ claim and the purported referral of a dispute to the Tribunal arose under certain provisions of the MSI Act. Those provisions are relevantly indistinguishable from ss.26 and 28 of the OSH Act. Thus, although the decision of the Full Bench, in its terms, applies only to the meaning of present provision of the MSI Act, it is plainly directly applicable to analogous circumstances under the OSH Act. It is barely conceivable that a Full Bench would reach a different conclusion with respect to the related provisions in the OSH Act unless it were positively satisfied that the reasoning of the Full Bench in *Thiess Pty Ltd* was incorrect and should not be followed.
- 5.31. In summarising the effect of the decision, direct reference will be made to pertinent provisions of the OSH Act even though the reasons, in their terms, advert to the applicable provisions of the MSI Act. Where there is a dispute arising as to whether, in accordance with s.28(1) of the OSH Act, a person is entitled to any pay or benefit, or as to the amount of pay or benefit to which a person is entitled, that dispute may be referred by “any party to the dispute” to the Tribunal for determination. In *Thiess Pty Ltd*, unions representing the employees who were in dispute with their employers about pay or benefits, purported to refer that dispute to the Tribunal.
- 5.32. At first instance, the Tribunal found that such a referral had validly occurred, and that the Tribunal was therefore seized of jurisdiction to determine the dispute. However the employers of the employees in dispute challenged that determination and contended before the Full Bench that the word “party” in this statutory context bears its ordinary

meaning and should therefore be construed to mean “someone who is immediately concerned in” the transaction, or legal proceeding, which constitutes the dispute about pay and benefits. The employers also argued that although a union or “registered organisation” in the terms of pertinent sections of the State IR Act could represent an employee in a hearing before the Tribunal, that did not mean that such an organisation was a “party” to the dispute. They submitted that the Tribunal had erred in relying on s.60 and s.61 of the State IR Act (which confer corporate status upon an organisation upon registration and make the organisation and its members subject to the jurisdiction of the WAIRC and the Industrial Appeal Court) as providing any support for its conclusions about the validity of the referrals.

- 5.33. The Full Bench substantially accepted the contentions of the employers on the appeal. Taking into account a range of sources for the determination of statutory meaning (such as language, statutory purpose, context and consequences of a particular interpretation), it concluded that the word “party” in this setting means a putative employee or employer, but not an organisation representing the interests of members or potential members in a dispute. The manifest purpose of s.28(2), given its language and location in the overall context of the legislation, is that the parties, and only those parties, who are *directly affected* by such a dispute about pay and benefits may invoke the mechanism provided to resolve it.
- 5.34. The decision of the Full Bench in *Thiess Pty Ltd* did not proceed on appeal to the Industrial Appeal Court and must therefore be taken to represent the law to be applied by the Tribunal. Although no submissions were formally put to the Inquiry concerning whether a recommendation should be made to amend the legislation to alter the outcome arising from *Thiess Pty Ltd*, the question is nevertheless of some importance. Accordingly the Inquiry raised the issue with several interested parties and received some informal observations in response. All of those interested parties acknowledged that the issue is one that goes to the very core of the nature of a union as a collective body representing the interests of employees. Should a dispute of the kind covered by s.28 (and, perhaps, other related kinds of disputes concerning OSH in Western

¹⁰² (2006) 86 WAIG 2495. The appeal was heard at the same time as a related appeal in *O'Donnell Griffin Pty Ltd and Others v Communications Electrical Electronics Energy Information Postal Plumbing and Allied Workers Union of Australia*.

Australia) be within the capacity of a union, representing employees who are members, or eligible to be members, of that union? Given the role of the Tribunal and the way in which it exercises its jurisdiction, viewed against the background of the overall statutory objects and other context of the OSH Act, is there a strong enough argument to recommend legislative change?

- 5.35. In the absence of any compelling argument being put to the Inquiry, or one emerging on the Inquiry's own consideration of the issue, there is an insufficient basis for recommending any such legislative change. It might be that the interpretation of "party" in s.28(2) does give rise to difficulties and inconvenience in its operation. One such possible difficulty was referred to in the Full Bench's reasoning in *Thiess Pty Ltd* – namely that, where a number of employees are in dispute about entitlements under s.28(1), it may be necessary for all those individual employees to refer matters to the Tribunal, with consequences for the time, administration and other energy necessary to administer the applications. For the Full Bench, that issue of possible inconvenience was not of sufficient magnitude to dictate a construction of the relevant section other than that which the meaning of the language indicates. In the Inquiry's view, if certain "inconveniences" emerge with particular force, the position ought be reconsidered in subsequent statutory reviews. However no recommendation is made on this issue for the present.

Recommendations:

- R.5** The amendment of s.51J(1) of the *Occupational Safety and Health Act 1984 (WA)* to insert a reference to s.51A, thereby enabling the Tribunal to undertake conciliation on the further review of notices.
- R.6** The *Occupational Safety and Health Act 1984 (WA)* be amended so as to confer jurisdiction on the Tribunal to extend the time for the making of a reference for the further review of a notice under s.51A(1). Such a discretion to extend time may only be granted where the Tribunal is satisfied that it would be manifestly unjust not to allow an extension of time.
- R.7** The Inquiry recommends that the entitlement of "any party" to refer a dispute under s.28 of the *Occupational Safety and Health Act 1984 (WA)* (being one confined to parties directly affected by such a dispute) be monitored in its operation by the Commission for Occupational Safety and Health and by WorkSafe and be reconsidered in the next review of the Act's operations.

Scope of Jurisdiction of Tribunal

- 5.36. The competing, and often diametrically opposed, contentions about the very existence and role of the Occupational Safety and Health Tribunal inevitably overlapped with the more specific question of whether, assuming the Tribunal's ongoing existence, its jurisdiction should be altered. Those interests which oppose the Tribunal's existence tend to either expressly, or by necessary implication, likewise oppose any increase in the Tribunal's jurisdiction. However those interests which are supportive of the Tribunal's existence advocate an increase, in some cases a very substantial increase, in that jurisdiction.
- 5.37. The Chamber of Commerce and Industry, in addition to its arguments concerning the relationship between OSH and industrial relations, denied that there were any benefits in having an independent arbitrator equipped with jurisdiction to make appropriate orders or awards, or grant relief, should the justice of the case so required. It asserted that if an issue cannot be resolved within the four stage informal process (that is, consultation between employer and employee, workplace dispute mechanisms, a WorkSafe Inspector, and in turn the WorkSafe Commissioner) then the matter requires a sound and speedy decision, not ongoing consultation or mediation. It argued that the OSH Act has functioned for almost 20 years without the need for any such process being demonstrated. It contended that OSH should not be "further industrialised or complicated by the introduction of more complex judicial or industrial processes" of the kind raised for debate in the Discussion Paper. The Chamber of Minerals and Energy adopted a similar position, and also expressed the opinion that the OSH Act "should facilitate disputes being resolved where possible within the workplace".
- 5.38. Several union interests argued for an expansion of the Tribunal's jurisdiction to enable it to exercise jurisdiction approximating the WAIRC's general jurisdiction to "inquire into and deal with" an industrial dispute. UnionsWA and some individual unions contended that the Tribunal or a similar specialist tribunal ought hear a wide range of OSH matters *including* serious offences and breaches. Those bodies endorsed the appropriateness of the jurisdiction of the New South Wales Industrial Relations

Commission in Court Session being empowered to hear and determine those allegations¹⁰³.

- 5.39. WorkSafe, for its part, responded in some detail to the range of related questions posed in the Discussion Paper concerning the role of the Tribunal *per se* and, in particular the extent of its jurisdiction. It expressed reservations about increasing the jurisdiction or, as it put it in its formal submission to the Inquiry, “the extent of third party involvement in resolving issues at the workplace”. Aside from the point (which has already been acknowledged and which is a premise on which this analysis is based) that it may be premature to consider broadening the ambit at this point in the early stages of the Tribunal’s existence, WorkSafe asserted that “the issue resolution procedures under the OSH Act are well established and it is essential that any proposal to increase the role of the Tribunal does not adversely impact on these”. A similar point was made by the Chief Magistrate in formal correspondence to the Inquiry. His Honour expressed concern as to how any expansion of the Tribunal’s jurisdiction could be formulated and applied. Mr Heath opined that it was difficult to see how the Tribunal, exercising coercive powers unconstrained by the rules of evidence (as it undoubtedly does, the Inquiry acknowledges), might “interact with conventional enforcement by way of prosecution”.
- 5.40. In evaluating these competing claims it is necessary to return again to some of the provisions of the OSH Act which have already been mentioned in summary form. Part III Division 6 of the OSH Act evinces, clearly enough, an intent that pursuant to s.24 an employer shall attempt to resolve an OSH issue arising at his, her or its workplace with one or more of a safety health representative, a safety and health committee, or relevant employees, whatever is specified in the “relevant procedure” as agreed between the parties, or applying by default pursuant to regulation 2.6. (This Report elsewhere deals with what it regards as the limitations on the way in which s.24 provides for such a “relevant procedure” and a recommendation for its reform. That proposition does not, however, detract from the overall *nature* of the procedure as developed by Part III Division 6.)

¹⁰³ NSW OSH Act, eg. s.32B, 105(b), 127-129; *Industrial Relations Act* 1996 (NSW), s.197A.

- 5.41. The material effect of s.25 is to enable an employee to notify an inspector of any inability of the s.24 resolution process to resolve a dispute and of a risk of imminent and serious injury or harm to the health of any person. Upon being so notified, an inspector is empowered to, and is indeed obliged to, attend forthwith at the workplace and take such action (importantly, confined to action as the OSH Act itself empowers) as he or she considers appropriate, or determine that no such action is required to be taken. As acknowledged by WorkSafe in informal discussions during the course of the Inquiry, the most likely alternatives sourced in the Act for an inspector in such a situation are the issue of a prohibition or improvement notice or the recommendation of the commencement of a prosecution.
- 5.42. Section 26(1) empowers an employee to refuse to work where he or she has reasonable grounds to believe that to continue to work would expose him or her, or any other person to a risk of imminent or serious injury or harm to health. Further subsections of s.26 provide for relevant parts of the procedure of such a “refusal to work” entitlement. An assessment of such “reasonable grounds” takes into account, among other things, certain matters specified in subsection 26(1a). Importantly, and as has been referred to in another context, s.28 preserves an employee’s entitlement to the same pay and benefits upon a refusal to work pursuant to s.26. It is against this statutory framework that WorkSafe specifically opposes any expansion in the Tribunal’s jurisdiction where there is such a “risk of imminent and serious injury or harm” in the circumstances contemplated by ss.25 and 26, read together. It argues in favour of maintaining the right of reference to an inspector as an appropriate point of at least initial reference. WorkSafe emphasises the capacity of inspectors to respond quickly, attend the workplace concerned, and exercise appropriate expertise in dealing with serious matters.
- 5.43. By comparison, the essence of the competing concerns, as best the Inquiry can distil from the totality of the submissions on the point, is that there are certain kinds of OSH issues and disputes, indeed workplace hazards, which simply are not readily susceptible of resolution at the workplace, either because the hazard is unlikely to give rise to a finding of “imminent and serious” risk to safety or health, or for other reasons.

5.44. A major concern for the Inquiry, and a subject regularly debated in numerous submissions, is the means of dealing with what may, loosely, be termed “intangible” hazards arising at the workplace. Chapter 8 adverts to this subject more directly, but for present purposes those kinds of intangible hazards can be summarised to include, where applicable, bullying, stress and risks arising from excessive working hours. There are a number of recurring themes in the attempted resolution of disputes concerning these kinds of hazards. In particular, the hazards can be:

- Difficult to define and identify with precision, and all the more so to be the subject of evidence that is likely to be admissible should an arguable case for a prosecution be developed;
- Less likely than other more tangible kinds of hazards to give rise to prosecution action accordingly, and somewhat less likely to give rise to the issue of prohibition and improvement notices;
- Causative of, for those reasons and otherwise, workplace participants to have unrealistic, or downright incorrect, expectations about the proper role of WorkSafe.

5.45. The Inquiry is satisfied that, by reason of the increasing emergence of disputes concerning these kinds of hazards and their complications, there is a sufficient case for the expansion of the Tribunal’s jurisdiction. That expansion need not – to address one of WorkSafe’s concerns – “adversely impact on” other procedures for issue resolution. To the contrary, an enhanced role for the Tribunal, essentially as a forum of last resort, can be achieved in a way that is entirely consistent with the primary objective of workplace resolution of OSH issues and disputes. It is the very failure of that objective, in any given (hopefully infrequent) case that can be required as a jurisdictional prerequisite for the proposed kind of exercise of power by the Tribunal.

5.46. It would be a mistake, however, to define any such expansion by reference to particular *kinds* of hazards. It would, in the Inquiry’s view, cause practical difficulties, and be contrary to the purposes of the OSH Act, to single out certain hazards, or categories of hazards for differential treatment. The better approach is to incrementally expand the

jurisdiction of the Tribunal so as to empower it to deal with workplace hazards generally, but only upon satisfaction of certain appropriate criteria. Those criteria may be conceptualised so as to maintain the structure and integrity of all of the alternative means for resolution of workplace issues already contained in the OSH Act. Nor should the Inquiry's conclusion be taken to endorse, by implication, the proposition that some hazards are "not readily susceptible to resolution at the workplace". Indeed, the Inquiry is unconvinced of the correctness of a proposition of that level of generality.

- 5.47. The best balance will be achieved by empowering the Tribunal to inquire into and deal with an issue relating to occupational safety or health where the Tribunal itself is satisfied that reasonable and diligent attempts have been made by the party referring the issue to resolve the issue at the workplace and that the issue remains unresolved. Where the hazard is one contemplated by s.25, the Tribunal's power should only be enabled in a manner consistent with the exercise of the statutory task imposed on an inspector by that provisions.
- 5.48. The next question, and one of some difficulty, relates to the powers that ought be exercised by the Tribunal on such a referral. There appears to be no need for the powers to be particularly extensive or complex. Sufficient relief, in the Inquiry's view, will exist so long as the Tribunal is empowered to make recommendations to any of the parties to the issue or dispute and/or to WorkSafe itself, or to issue an improvement notice or prohibition notice if satisfied of criteria of the kind contained already in ss.48 and 49 respectively. A meaningful power for the Tribunal to engage in conciliation prior to, and ancillary to, any "arbitral" function would also be essential.
- 5.49. Lest it be thought that such a range of powers is inappropriately limited, the Inquiry is strongly of the view that many of the shortcomings in the present regime for resolution of intangible hazards may well be overcome by simply adding the Tribunal's functions to the armoury of means for dispute resolution. The Inquiry considers that to have the input of an independent tribunal, armed with appropriate coercive powers for exercise in an informal setting, and possessing expertise and experience in OSH, will be a major

asset to the dispute resolution process for those issues that are complicated, subtle, and difficult to measure.

5.50. Nor, in direct response to a concern of WorkSafe, will this empowerment of the Tribunal compromise the structure enacted by ss.25 and 26 of the OSH Act. To the contrary, it should reinforce that structure and provide a final source of relief in those cases where the primary alternatives for resolution have, for whatever reason, been unable to effect a resolution. Moreover, such powers sit conformably with the remedies available to the Tribunal and the distinct, but not unrelated, function of the further review of notices pursuant to Part VI of the Act. Ultimately, the Inquiry is firmly of the view that the proposed amendments will better give effect to the objects enacted in s.5(a)-(e) of the Act.

Recommendations:

R.8 The Tribunal be empowered to inquire into and deal with a matter, issue or dispute concerning occupational safety and health upon being satisfied that reasonable and diligent effects have been made by the party referring the matter, issue or dispute to resolve the issue at the workplace, but that it remains unresolved. Where the matter, issue or dispute gives rise to a risk of imminent and serious injury or harm, the Tribunal must be further satisfied that an inspector has been notified and has complied with s.25 of the Act, and that the matter, issue or dispute remains unresolved.

R.9 In dealing with such a matter, issue or dispute, the Tribunal should be empowered to:

- conciliate and make recommendations analogously to the powers contained in s.44 of the *Industrial Relations Act 1979 (WA)*
- issue an improvement or prohibition notice on satisfaction of the requisite “opinion” required by s.48(1) and s.49(1) respectively.

CHAPTER 6. CONSULTATION AND DISPUTE RESOLUTION

Does Western Australian legislation adequately provide for consultation?

- 6.1. Workplace consultation has been regarded as an important component of contemporary OSH since at least the 1972 report of the Robens Committee. It said:¹⁰⁴

(T)he promotion of safety and health at work is first and foremost a matter of efficient management. But it is not a management prerogative. In this context more than most, real progress is possible without the full co-operation and commitment of all employees.

- 6.2. Under the OSH Act there is an initial reference to consultation in one of the express statutory objects, that contained in s.5(e). It is an object of the legislation:

To foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technology and development.

The Report will return to the formulation of that statutory object and the kind of language that is employed.

- 6.3. UnionsWA, supported by a number of individual unions, strongly contended that the substance of s.5(e) ought be expressed more assertively and expansively. Some unions claimed that employers with whom they dealt were particularly ill-equipped to consult properly, effectively, and at the times that genuinely required true consultation. Others representing the union movement spoke more generally, often with reference to developments occurring in other jurisdictions, about the need for actual “obligations” upon employers to consult. The nature and significance of legislatively imposed “obligations” is an important issue which this Report will come to directly. More specifically, UnionsWA, in both formal written submissions and in informal consultations with the Inquiry, argued for the importance of “mandated employee consultative rights” as warranting entrenchment through legislative amendment. It pointed to what it described as the disempowerment of employees as a result of WorkChoices changes federally, emerging trends in other Australian legislation, the need to create to greater harmony with the OSH Act and certain transformations

¹⁰⁴ Robens Report at 18.

overall in the Australian labour market, as justifying its position. In practical terms, it sought express obligations that require employers to consult employees and their representatives:

- During every stage of the risk management process;
- Before changes are made to any aspect of the work process or organisation that may have implications for OSH;
- When any changes are proposed to existing consultation arrangements; and
- In a manner properly documented, enabling demonstration (rather than merely assertion) that genuine efforts have been made to consult.

6.4. Normatively, the Inquiry is attracted to the submission put by UnionsWA and reinforced in similar terms by other individual unions. It notes that there was little opposition, and certainly none of any pronounced nature, when informal discussions canvassed potential changes in broad terms. However to approach the issue at a level of generality is unhelpful. It is necessary to consider a number of aspects of the unions' proposal in more depth, including:

- The extent to which the OSH Act in its present form provides for consultation;
- The meaning of "consultation" both as to the process it requires and the occasions in employer/employee relations when it ought to be employed;
- Distinguishing consultation *per se* from the somewhat more specific notion of *resolution* of issues and disputes; and
- Examining what might be meant, and required in practice, by some kind of "obligation" upon employers to consult.

Present Treatment in the OSH Act of Consultation

6.5. The Act presently provides for consultation to occur in the following material ways:

- The “general duty” imposed on employers (and others within the scope of s.19 by virtue of related provisions of Part III Division 3) includes a particular obligation to “consult and cooperate” with safety and health representatives, if any, and other employees at the workplace, regarding occupational safety and the workplace: s.19(1)(c).
- An employer is obliged to consult on matters relevant to the election of safety and health representatives with applicable delegates as the case requires. Failure to do so constitutes an offence: s.30(3a) and (7).
- The preceding obligation conforms with one of numerous functions imposed on a safety and health representative to - with a purpose of acting in the interests of safety and health at the workplace for which the representative is elected - “consult and cooperate” with his or her employer on all matters relating to the safety or health of persons in the workplace: s.33(1)(f).
- Similarly, where there is any safety and health representative for a workplace, there is an obligation upon an employer to consult with safety and health representatives on intended changes to:
 - the workplace; or
 - the plant or substances used at the workplace,
 where those changes may reasonably be expected to affect the safety or health of employees at the workplace, contravention of which constitutes an offence: s.35(1)(c) and (4).
- Consultation is a necessary precondition to the issue by a qualified representative of a provisional improvement notice¹⁰⁵: s.51AD(1)

6.6. Thus it would be a mistake to proceed on any assumption that there is only a minimal imposition of obligations upon an employer to consult. Nor can it be said that there is

¹⁰⁵ Section 51AD(4) enables the making of regulations which require a qualified representative, in specified circumstances, to consult with a person who holds a prescribed office in the department before issuing a provisional improvement notice. No such regulations have been made, however.

no material implementation at all of the statutory purpose as enacted in s.5(e). The Inquiry accepts, however, that to more fully give effect to that purpose – the importance of which appears at least generally accepted by all participants in OSH in this State - the statutory language ought be expressed more assertively.

- 6.7. The nature of some of those provisions, and the context in which they appear, are plainly indicative of a different meaning of “consult” and “consultation” to that with which the submissions to the Inquiry were primarily concerned. That latter, “essential” meaning is one concerned with full communication by participants in the workplace in all relevant aspects in the identification, minimisation and prevention of workplace hazards. However, the “consultation” contemplated by ss.30(3a) and (7) and 51AD is somewhat more confined.
- 6.8. The offence-creating provisions in s.19(1)(c) and s.35(1)(c) and (4) are significant and, on the Inquiry’s assessment, under appreciated by workplace participants in Western Australia. On the Inquiry’s researches, no prosecution has been commenced under those provisions. As is elsewhere indicated, however, no legitimate inference can be drawn, by reason of that fact alone, concerning the regard in which the offence-creating provisions are held, nor other aspects of WorkSafe’s administration of those duties.
- 6.9. One issue that does present itself to the Inquiry, however (and to this degree there is much force in applicable aspects of submissions of several union interests), is the absence of any express content as to:
 - (a) Literally, *what* is required to be done for there to be in any substantial sense “consultation” in a given case;
 - (b) Specifically what *kinds* of circumstances warrant consultation within the rubric of “occupational safety and health at the workplace”, the expression contained in s.19(1)(c) (ie. *when* does it need to happen?).
- 6.10. It is noted that the duty conferred on employers to consult with safety and health representatives by s.35(1)(c) carries some specificity as to the latter issue, or the particular circumstances *when* the obligation arises. That level of specificity is still,

however, rather too limited as to provide not only appropriate guidance to workplace participants but, more fundamentally, to give real and meaningful content to the concept of consultation as envisaged by the object enacted as s.5(e).

- 6.11. Those existing duties (and their offence-creating nature accordingly) do warrant legislative attention in at least the two ways described. But is there a case for the Western Australian Parliament to go further and broaden the scope of the obligations, whether with or without an accompanying quasi-criminal obligation? To address that important question it is necessary to consider in some more detail the two distinct but related concepts to which reference has already been made.

Resolution of OSH Issues at the Workplace

- 6.12. Section 24 of the OSH Act imposes important duties on employers and safety and health representatives to undertake certain procedures to attempt to resolve issues relating to occupational safety and health which arise at a workplace. The provision creates offences for contravention of those duties. Thus the normative force of the requirements imposed by s.24 is of a similar order to those duties and offence-creating provisions concerning consultation, to which reference has just been made.
- 6.13. An additional dimension to s.24 is its status as, in effect, a condition precedent to the operation of s.25 which provides for the notification, and attendance forthwith at a workplace accordingly, of an inspector in circumstances of the risk of imminent and serious injury or harm to health.
- 6.14. The obligation under s.24(1) upon an employer to attempt to resolve, at the workplace, an issue relating to OSH may be one requiring an attempted resolution by a safety and health representative, a safety and health committee, or the employees, at the given workplace. The involvement of one or more of those participants will depend on what is specified in the “relevant procedure”, the default for which is that contained in regulation 2.6. A procedure may be agreed as between the employer and the employees at a particular workplace so as to override that regulation. Although the Inquiry has not undertaken a detailed analysis of this issue, its sense is that the number of workplaces at which a specific procedure is agreed upon pursuant to s.24(2) is not high, and may

well be very low. This state of affairs is returned to in the drawing of conclusions in this area of the Review.

6.15. Regulation 2.6, in substance, requires the employer to meet (or communicate orally) with one or more of:

- a safety and health representative (where there is one in respect of the relevant workplace);
- the employees concerned; and/or
- a person authorised by the employees.

The default procedure is thus highly limited in its breadth and depth. There is no specification of, for example, what in substance is to occur at the “meeting” between the employer and the other participants of that “meeting”. In particular, there is no prescription about what ought occur to attempt to identify the applicable issues, understand their source and substance, and seek the most efficient resolution. Nor does the regulation address what is to happen if at the “meeting” no resolution takes place.

6.16. The picture is incomplete without reference, once again, to the reality of dispute resolution procedures that exist under numerous industrial instruments. As has been noted¹⁰⁶, procedures of this kind contained in awards, workplace agreements and other means of employment regulation vary. Some are drawn so as to deal specifically with disputes about occupational safety and health. Acknowledging those differences, the procedures are as a general rule significantly more prescriptive than that contained in regulation 2.6. In the Inquiry’s view, that is a desirable thing. As with the distinct but related concept of “consultation”, for the important ideal of “workplace resolution” to have any real force and meaning some level of prescriptive detail is surely appropriate.

6.17. Regardless of which procedure is applicable to the obligation upon an employer to attempt to resolve an issue under s.24(1), a distinct obligation exists on a safety and health representative to refer the issue to a safety and health committee, where one

¹⁰⁶ See further paragraphs 5.14-5.18.

exists, for that latter body to attempt to resolve the issue. Upon such a referral, it is a specified function of the safety and health committee concerned to “consider” the matter: s.40(2)(f). Similarly, for such a distinct attempt at workplace resolution to carry any real force, a greater level of legislative prescription is most desirable.

Risk Management

6.18. Regulation 3.1 imposes an obligation, through creating an offence, upon employers, main contractors, self-employed persons, persons having control of a workplace and persons having control of access to workplaces. Those people are obliged to, as far as practicable¹⁰⁷:

- (a) Identify each hazard¹⁰⁸ to which a person at the workplace is likely to be exposed;
- (b) Assess the risk of injury or harm to a person resulting from each hazard, if any, identified under paragraph (a); and
- (c) Consider the means by which the risk may be reduced.

6.19. It may immediately be observed that an obligation of this kind, although it might overlap with a more general obligation to “consult” and/or to resolve a particular OSH “issue” at the workplace, imposes a requirement of a rather more specific nature. The persons obliged to comply with regulation 3.1 could undertake the process (of identification, assessment of risk and consideration of means of reduction of risk, of likely hazards) in consultation with others, or they may choose not to do so. Those duty holders might also, in some cases or all cases, perceive one or more of the stages encompassed by regulation 3.1 as generating an “issue” with which the process commencing with s.24 of the OSH Act is concerned.

¹⁰⁷ “Practicable” being defined as “reasonably practicable” having regard, where the context permits, to a specified range of matters: s.3(1) of the OSH Act. See further paragraphs 8.32-8.35, 8.44.

¹⁰⁸ “Hazard” is defined in s.3(1) of the Act to, in relation to a person, mean anything that may result in injury to the person or harm to the health of the person. Interestingly, most other analogous provisions in different jurisdictions (in the case of Queensland, in its *Workplace Health and Safety Act 2000* and in other jurisdictions prescribed in Regulations) define the nature and type of hazards to which this kind of obligation applies in a specific and relatively detailed manner. That contrasts with the alternative approach of the general definition of “hazard” applying by default. The regimes of Tasmania and Northern Territory are in similar broad terms to Western Australia in this latter respect.

- 6.20. Regardless of whether there is any such overlap in fact, the obligation is a wide-ranging one and, in the Inquiry's view, an important one in giving effect to the statutory objects and overall spirit of the OSH Act. It is also compatible with the second national priority as now endorsed by the ASCC. Although regulation 3.1 was mentioned by interested parties only to a limited degree, the general impression gleaned by the Inquiry is that the obligation is underappreciated. Neither regulation 3.1, nor the OSH Act and Regulations elsewhere, descend to any detail about the means of risk assessment required for fulfilment of the obligation imposed by regulation 3.1. Other jurisdictions, by contrast, do elect to prescribe such detail, generally with assessment of risk involving the specific consideration of a probability of a hazard materialising, together with the potential consequences of certain outcomes.
- 6.21. Regulation 3.1 is not the only potentially relevant source of an obligation to undertake risk *assessment*, or even the arguably more rigorous task of a more ongoing risk *management*. It is perfectly feasible that the general offence-creating provision in s.19 may, in appropriate circumstances, impose a duty on employers (and others to whom liability is extended under Part III Division 3) analogous to this kind of obligation. Although risk assessment or risk management is not enacted in terms in any of paragraphs (a)-(e) of s.19(1), those particular obligations are expressly imposed as existing "without limiting the generality" of the basic duty.
- 6.22. Two respected academics in OSH in Australia, Elizabeth Bluff and Richard Johnstone, argue that there is an emerging trend in the enforcement of general duties, and interpretation by courts and tribunals of their ambit, which affirmatively applies those duties to the proactive management of risks¹⁰⁹. They refer to a line of authority, much of it emanating from Full Benches of the New South Wales Industrial Relations Commission to this effect, originating with observations by the Supreme Court of Victoria in *Holmes v Spence*¹¹⁰ that an employer's general duty requires an employer to take an active, imaginative and flexible approach to identify potential dangers.

¹⁰⁹ Bluff and Johnstone, *The Relationship Between "Reasonably Practicable" and Risk Management Regulation* (2005) 18 Australian Journal of Labour Law 197 at 212-219.

¹¹⁰ (1992) 5 VIR 119 at 123.

- 6.23. No Western Australian authority, at least of a superior court, appears to explicitly discern that kind of content within s.19 for the purposes of the OSH Act. However, it is difficult to refute that, as a matter of construction of the generality of the text of s.19 (viewed against its statutory purpose and context), such an interpretation is plainly open. Of course, that general duty is conditioned by the requirement of practicability, as defined in s.3(1) of the OSH Act¹¹¹. Interestingly, and unusually for a regulation descending to a relatively specific form of prescription consistently with the Robens-sourced philosophy, regulation 3.1 is likewise qualified. Dr Bluff and Professor Johnstone are critical of the use of “practicable” (amounting to, by virtue of the statutory definition, “reasonably practicable”) as being inappropriate and providing an unnecessary complication¹¹². They argue that it would be preferable simply to require duty holders, after identifying all reasonably foreseeable hazards, to then assess the particular risk associated with each identified hazard.
- 6.24. That argument is plainly a valid one but an even more fundamental question arises: is there any meaningful role for regulation 3.1 at all in light of the capacity of s.19 to cover that kind of obligation on an employer or other analogous party to a work relationship? Even if there be such a role, ought regulation 3.1 descend to more prescriptive detail¹¹³, given the conventional role for Regulations made under the OSH Act?
- 6.25. In the absence of this issue arising with any prominence, or being argued with any real force, in submissions put to the Inquiry, there is an insufficient case to make recommendations for legislative amendment. The duties remain in existence, and are very real alternatives for WorkSafe to pursue in enforcement of the Act and Regulations. With greater and more concerted publication of the nature of obligations to identify, assess and minimise workplace hazards, the issues of the nature and extent of legislative coverage may emerge with sharper focus.
- 6.26. In conclusion on the issue of workplace consultation and related obligations, the legislation in its present form does materially provide for applicable obligations, often

¹¹¹ See further paragraphs 8.32-8.35 and 8.44.

¹¹² Bluff and Johnstone, *supra* at 230.

underpinned by offence-creating provisions. Viewed in totality, however, the obligations do not sit as coherently as they might, against a background of a clearly expressed statutory purpose, and in some cases with appropriate prescriptive detail. Those shortcomings ought be redressed with as succinct a series of legislative amendments as possible. By way of administrative measures, a concerted and enhanced approach at both Commission and WorkSafe level to informing workplace participants about the nature and scope of these obligations, and their importance, can only assist in the minimisation of workplace hazards. All of the statutory objects would be thereby enhanced, consistently with the second and the fifth of the ASCC's national priorities.

- 6.27. Given the nature of the offence-creating provisions already contained in the legislation, the Inquiry is unsatisfied that any amendments are needed so as to positively increase the level of proscription. In particular, the Inquiry rejects the creation of the broad-based offence of “failing to consult” in a form similar to the New South Wales Act¹¹⁴. In the absence of a cogent case having been put that the present provisions are too limited, are being enforced without satisfactory outcomes, or otherwise need supplementing, the Inquiry is unsatisfied that change is required.
- 6.28. To take the issue one further step, it would, in the Inquiry's view, be counter-productive to the generation of a consultative and collaborative spirit for employers and other duty holders to be in peril of civil liability should any of these norms, as proposed to be reinforced and enhanced, remain unsatisfied. For the sake of clarity and certainty, it would be desirable to insert a statement in the OSH Act manifesting an intent that no civil liability is intended to be created accordingly.¹¹⁵
- 6.29. The somewhat vexed question of the obligation to consult as a precondition to the issue of a provisional improvement notice (PIN) under s.51AD of the Act remains. The Inquiry is satisfied that there is potential for ambiguity as to what the word

¹¹³ For consideration of another level of prescription that may be open, see Winder and Makin, *The Hierarchy of Controls: Inflexible Dogma or Flexible Decision-Making?* (2006) 22 ANZ J Occup Health Safety 3.

¹¹⁴ NSW OSH Act, s.13. One alternative for future consideration, however, is the arrangement of the concept of consultation in a form similar to Part 2, Division 2, of that Act. Aside from the conferral of the duty by way of an offence-creating provision, the Division enacts the *nature* of consultation, *when* it is required, and *how* it is to be undertaken.

¹¹⁵ A cause of action for breach of statutory duty may be inferred from the nature and purpose of a statutory scheme applying the principles identified in *O'Connor v SP Bray Ltd* (1937) 56 CLR 464. Such inferences were occasionally

“consult” in subsection 51AD(1) may mean in any given situation where a qualified representative is considering the issuance of a PIN. An obstructive employer, resistant to the issue of a PIN, may seek to artificially extend the “consultation” process so as to contend that the precondition has not been met. Alternatively, it may be argued, even where a PIN has issued, that it is of no binding effect because no “consultation” as a matter of substance has occurred so as to empower a *valid* issue of a notice.

- 6.30. However to increase the amount of prescription required in such a consultative process, beyond the natural sense of the word presently employed in s.51AD(1) would, in the Inquiry’s view, unnecessarily complicate what is designed to be a relatively simple and readily manageable process which adds to the armoury of potential enforcement actions. Additionally the Inquiry is particularly circumspect about recommending any change to the provisions of Part VI Division 2, which have only been operative for a relatively short period of time. Thus, although it is possible that the issue may continue to prove a troublesome one, with no ready solution, the best course, on balance, is to recommend no legislative change. WorkSafe and other interested parties are, however, encouraged to continue to monitor this issue. Applicable decision-makers (namely the Tribunal, the Commissioner, and the Magistrates Court where appropriate) will be astute to deal with arguments based on the satisfaction of “consultation” in s.51AD. By virtue of their expertise and objectivity they are well equipped to detect spurious arguments and distinguish them from the legitimate.

drawn from “industrial safety” legislation in Anglo-Australian jurisdictions from the mid-nineteenth century. Precedents are almost non-existent post-Robens, however.

Recommendations:

The Inquiry recommends:

- R.10 That s.5(e) of the *Occupational Safety and Health Act 1984 (WA)* be amended to express as a statutory object the encouragement and promotion of consultation and cooperation between participants at the workplace, with the remaining components of the present section 5(e) being contained in a separate statutory object.
- R.11 The insertion of a discrete statutory object in section 5, being to require the resolution of occupational safety and health issues, so far as reasonably practicable at the workplace.
- R.12 The insertion in the *Occupational Safety and Health Act 1984 (WA)* of a provision to the effect that nothing in the statutory objects concerning consultation and resolution of issues at the workplace is intended to provide any basis for civil liability in the event that those purposes are unsatisfied.
- R.13 Regulation 2.6 be amended so as to provide for a default “relevant procedure” for the purposes of s.24(2) of the *Occupational Safety and Health Act 1984 (WA)* containing a meaningful and appropriate level of prescription, with guidance being obtained from examples of dispute resolution procedures commonly found in industrial instruments.
- R.14 The insertion of a provision expanding on the nature of consultation for the purposes of s.19(1)(c) as applying whenever an employer, or other like duty holder, is involved in any of the following aspects relating to the performance of work:
- any of the steps contained in regulation 3.1;
 - either of the matters referred to in s.35(1)(c);
 - undertaking any monitoring of safety conditions or health conditions at the workplace; and
 - such other matters as may be prescribed.
- R.15 The Commission for Occupational Safety and Health and WorkSafe, both independently and in collaboration with each other, develop measures for the publication of obligations on workplace participants concerning consultation, workplace resolution of issues, and risk assessment and seek to educate the workforce as to those three distinct but related matters as effectively as possible.

CHAPTER 7. SPECIFIC ISSUES PERTAINING TO ENFORCEMENT

- 7.1. A number of topics were canvassed during the work of the Inquiry which, although discrete, can be conveniently grouped together under the category of issues having some connection with the role of WorkSafe as the authority empowered to enforce the OSH legislation in Western Australia.

- 7.2. As a precursor to dealing with those issues in turn, it is apt to note that the Inquiry benefited greatly from a series of discussions with a range of employees of WorkSafe, from the WorkSafe Commissioner, Nina Lyhne, herself, to other senior employees Gail McGowan, Wendy Clarkson and Bjorn Gillgren, to a number of inspectors. Most of the consultations occurred orally, but the canvassing of some issues was conducted or followed up in writing. The Inquiry was impressed with the intelligence, dedication and motivation of the WorkSafe employees. The content of what they had to offer to the Inquiry was interesting and valuable. Comments were delivered with a sensitivity to the range of difficult issues involved in legislation for occupational safety and health and the administration of that legislation. It was clear to the Inquiry that the employees of WorkSafe are driven by a desire to achieve the objects of the OSH Act in a manner as fair and just to all interested parties as possible. Naturally, there are variations in how different individuals consider that objective can best be met.

- 7.3. Of the representatives of the inspectorate interviewed, a range of approaches, styles and personalities was encountered. That is to be seen as a positive, particularly taking into account the fact that inspectors will be sourced from a range of professional and educational backgrounds. On occasions, it seems that difficulties are encountered where particular industry representatives perceive (rightly or wrongly) that certain inspectors lack either the basic knowledge, the sensitivity or the acumen to properly deal with the industry concerned. There is the potential for that problem to arise in a number of areas of enforcement. The problem can be a very real one where, within an industry, particular perceptions develop about the attitude or mindset of certain inspectors, and that set of perceptions develops, even snowballs, within an industry. Such an occurrence can have a quite detrimental effect on the effectiveness of an

inspectorate's activities and the overall statutory purposes of governing legislation. The detriment may be out of proportion to any genuine shortcomings.

- 7.4. It is important to record, additionally, that members of the WorkSafe inspectorate were universally positive about the WorkSafe Commissioner herself. Complimentary comments about Ms Lyhne included that she “has a flexible and adaptable mind” and that she “actually practises, rather than simply talks about, having a genuine open door policy”. One senior inspector described Ms Lyhne as “one of the new generation of CEOs who offer a real contemporary approach and manner of thinking”. Another said that she is “keen to confront difficult problems and address them at the outset, and not just avoid them”.
- 7.5. To those observations the Inquiry adds its gratitude to WorkSafe for its ongoing commitment to, and assistance with, the work of the Inquiry. It is not necessarily an easy task for a public sector organisation to submit to review of any aspects of its operations. However WorkSafe achieved an appropriate balance of efficient, pleasant assistance whilst maintaining an appropriately firm stance on issues within the scope of s.61(1) that affected it, even where the Inquiry offered provisional assessments which were contrary to WorkSafe's own preferred position.

Enforcement Activity as Reflected in “Numbers”

- 7.6. The Inquiry has not considered there to be a sufficient need to examine in any detail statistics and data reflecting enforcement activities since the Laing Report. To do so would have required a disproportionate amount of time and resources, relative to the kinds of issues that emerged during the consultation process. Nor was the exercise a “performance review” of WorkSafe in any real sense.
- 7.7. Some observations of contributors do need to be addressed, however. One industry representative body asserted that figures reflected increases in the issuing of improvement notices and prohibition notices under Part IV of the Act that were uncalled for. The criticism went on the claim that because WorkSafe (or even DOCEP more broadly) are “self supporting” or “financed by fines” the jobs of inspectors depend on “numbers”. It was claimed that there are at least perceived, if not actual,

“targets” that need to be met in the numbers of improvement notices that are issued. Another group was very critical of recent figures reflecting a decrease in numbers of prosecutions brought. It was claimed that it seems prosecutions are not taken “unless there is a death”.

7.8. WorkSafe rejected both of those claims when specifically invited to respond to them for the purposes of the Review. It emphasised that it is neither “self supporting” nor “financed by its fines” nor are targets set for the issue of notices. It noted that prosecutions and the issuing of notices are particular means of a range of options available to WorkSafe to promote compliance with OSH law. Whilst recognising that a prosecution which achieves a conviction can be of considerable value in an educative or deterrent sense, WorkSafe operates in accordance with its published Enforcement and Prosecution Policies. The Inquiry has considered the text of those formal policies and considers it unnecessary to traverse their detail¹¹⁶. It is always open to have alternative views as to the content and emphasis of a policy concerning the enforcement of regulatory activity. Nothing would be gained, in the Inquiry’s view, by embarking on a process that effectively second guesses the present policies and canvasses option for their fine-tuning. The Inquiry is satisfied that the Enforcement Policy and Prosecution Policy (the latter subject to one significant qualification, to be addressed) are appropriately drawn and applied.

7.9. WorkSafe acknowledged that there was a decrease in prosecutions in 2005/2006 compared with the preceding year. However, as the following table demonstrates, the raw numbers (for whatever significance one might attempt to draw from them) do vary from year to year:

¹¹⁶ Compare Laing Report at [558]-[567].

Table of Complaints Signed

Year	Number of Complaints ¹¹⁷
1999 – 2000	37
2000 – 2001	50
2001 – 2002	29
2002 – 2003	43
2003 – 2004	65
2004 – 2005	64
2005 – 2006	37

Of the 37 new prosecutions initiated in the last financial year, only four were in relation to a fatality, two of which were in relation to the same fatality. A further 14 were in the category of what may be loosely termed “proactive” prosecutions, that is where no injury or fatality had occurred.

7.10. WorkSafe emphasised that a fuller consideration of enforcement activity from its operations directorate business plan for 2005-06 provided a more complete picture. The plan depicted that that financial year had shown:

- An 8% increase in so called “reactive” investigations coupled with a 5% decrease in “proactive” investigations. In an overall sense, the figure of investigations put forward as a nominal estimate for its business plan aligned closely with the actual figure achieved.
- There was a 13% reduction against the predicted number of available field staff as a consequence of maternity leave, resignations and retirements, which in turn impacted on overall enforcement ratios.
- All national priority projects and proactive team projects were progressed within agreed timeframes.

- There was a significant increase in the number of verbal directions issued, coupled with a very marginal actual decrease in the number of improvement notices issued.
- There was a significant decrease in the number of prohibition notices issued.

7.11. In the Inquiry’s view, it is altogether too superficial an approach to an assessment of the performance of a regulatory authority to view enforcement statistics in isolation and draw conclusions therefrom. Whilst acknowledging that the Inquiry (given its structure and context against the background of the scope of the Laing Review) has elected to take a limited approach to this issue, there is no basis to conclude that these criticisms of WorkSafe’s performance are justified.

Capacity to Bring Prosecutions

7.12. Section 52(1) of the OSH Act provides that:

Proceedings for an offence against this Act may be instituted by any person authorised in that behalf by the Commissioner.

7.13. A relatively prominent issue that emerged in the Inquiry’s consultations was whether that provision ought be amended to enable a broader range of persons to bring enforcement proceedings. Most frequently, the argument was pressed that unions ought be permitted to formally enforce the Act, as is the case in other jurisdictions, most notably New South Wales.¹¹⁸

7.14. Although the competing arguments were put at some length by various interested parties, they are fairly well rehearsed and can accordingly be succinctly summarised. In favour of the power being expanded, it is argued that alleged breaches of the legislation often come to the attention of the relevant union involved with the workplace in question, which will often be better informed on the issue than representatives of government, and therefore in an educated position to undertake proceedings. It is said that with finite resources available to WorkSafe, it may not always be in a position to

¹¹⁷ A complaint is formally brought into existence when it is signed by a complainant empowered to do so by s.52(1), as opposed to any later stage, such as filing, service, or initial return date, when the court processes are engaged. It is against this yardstick that totals of “prosecutions” are counted.

¹¹⁸ NSW OSH Act, s.106(1)(d).

undertake an action and that hence, or otherwise, there may be delays in the commencement of proceedings, whereas a union will often be in a position to act more quickly. Reference is made to the powers in other jurisdictions (the New South Wales model being the most favoured by the proponents of this view) as having been a positive step which enhances the statutory objects underpinning OSH legislation. Some unions advocated an ancillary provision to such a power which allowed for fines or other penalties to be paid in whole or in part to the union commencing proceedings. In response to arguments put to the contrary, it was said that there was no evidence to suggest that either the power *per se* or the capacity for fines and penalties to be paid to a union, had been improperly or inappropriately exercised.

- 7.15. The opposition to those submissions revolved around the concept of enforcement activity being a task intrinsically suited to government. It was so submitted by many bodies, mostly employers' representatives, but also WorkSafe itself and entities such as the Occupational Health Society of Australia (WA Branch). Emphasis was placed on the capacity of a government regulator to objectively assess the evidence and apply appropriate criteria before a decision to prosecute is reached as one of a range of enforcement alternatives. For a body with an interest in the outcome to be empowered to take such action inevitably compromises that decision making process, even if it could be said the body was acting in good faith and to the best of its ability. No subjection of public accountability (ultimately sourced in the Anglo-Australian Westminster system of government) applies to private prosecutors. Consistency in enforcement is best achieved by retaining the prosecuting role within the one functionary.
- 7.16. In the Inquiry's view, the arguments against any expansion of the power in s.52(1) fairly strongly outweigh those in favour of it. There is no tenable case to suggest that the role of WorkSafe in enforcing OSH legislation in Western Australia is being undertaken other than professionally, sensitively and properly. There will always be scope for disagreement as to particular decisions regarding enforcement. Such is to be expected in any healthy democracy. To expand the category of person empowered to

bring prosecutions is unnecessary in furtherance of the statutory objects of the legislation or, for that matter, the goals and aspirations formulated at national level.¹¹⁹

- 7.17. One union advanced the distinct, although not unrelated, submission that the obligation contained in s.23I of the OSH Act to notify the Commissioner of, broadly speaking, deaths or certain injuries or diseases at a workplace ought be extended. It was said that that obligation ought be to *also* notify any relevant industrial organisation of which the deceased or injured person is a member. The impetus for the proposal was a concern by the union (sourced in several instances cited in its submission) that senior management has been unable to resolve, or is even disinterested in, certain OSH issues.
- 7.18. No sufficiently strong or clear case has been made out for an amendment to s.23I, however. Concerns of the kind registered by proponent of the submission can always be communicated to WorkSafe. The process of workplace resolution of OSH issues specified in Part III Division 6 of the OSH Act should be applied in the first instance. The additions proposed by the Inquiry in Chapter 6 are designed to enhance the respective obligations on workplace participants. Those statutory routes are preferable to a broadening of s.23I.

Jurisdiction for Trial of Various Offences

- 7.19. One of the few recommendations of the Laing Report which has not been implemented by the government of Western Australia was that the Act be amended to provide for serious breaches to be heard as indictable offences by superior courts.¹²⁰
- 7.20. The issue was further pursued by the Inquiry, to some extent at its own volition, for it appeared that there was at least an arguable case that many OSH prosecutions, particularly where a fatality or very serious injury is involved and/or alleging a contravention of one of the general duty provisions, are of a complexity and import which generally goes beyond that dealt with in magistrates courts. The Discussion Paper invited comment on the potential for some OSH prosecutions to be tried in the District Court, or elsewhere, accordingly. Some contributors endorsed that idea. They argued that the range of legal and evidentiary issues were such that, quite simply, a

¹¹⁹ The Maxwell Report reached a similar conclusion: see at [1731]-[1742].

forum at a higher level within the court hierarchy would be better equipped to deal with such allegations, whether contested on a not guilty plea or dealt with through sentencing submissions on a guilty plea. The Chief Magistrate, in formal correspondence with the Inquiry, emphasised that, although the applicable legislation is complex, it was not beyond the ability of magistrates. He asserted that a jury would have greater difficulty in understanding the complexity of the legislation and the parties would not have the benefit of reasons for decisions. That latter point, in particular, is in the Inquiry's view a very weighty one.

- 7.21. WorkSafe's response to the Discussion Paper on this issue observed that "it is arguable whether or not evidentially complex prosecutions would be more likely to be successful if they were taken to a higher court". However, that could not be a satisfactory premise for a recommendation of the kind put forward for comment. "Success" in regulatory enforcement has only a limited correlation with the obtaining of convictions. Moreover, any change in legislative policy concerning jurisdiction of trial could only be fairly based on an assessment of what would be appropriate for better decision-making within the criminal justice system. It should not be driven out of any desire, whether in whole or in part, to obtain more convictions.
- 7.22. Although the subject warrants ongoing consideration in future reviews, the Inquiry is not satisfied that a sufficient case has been made out to again recommend legislative amendment in this regard.

Improvement Notices, Prohibition Notices and Their Review

- 7.23. Part VI, Division 1 of the OSH Act confers power on inspectors to issue improvement notices and prohibition notices. It provides for their review by the Commissioner (referred to here for simplicity as "internal review") and further review of such notices by the Tribunal. An improvement notice or prohibition notice has a binding effect on the person to whom it is issued; a failure to comply with its terms, or do as it directs, constitutes an offence.

- 7.24. An improvement notice may be issued where an inspector is of the opinion that any person is contravening any provision of the Act or has contravened such provision in circumstances that make it likely that the contravention will continue or be repeated. The improvement notice will require the person to remedy the contravention, or likely contravention, or any associated matters or activities.
- 7.25. A prohibition notice, by contrast, may be issued where an inspector is of the opinion that an activity that is occurring or may occur at a workplace involves or will involve a risk of imminent and serious injury or harm to the health of any person. The effect of the notice is that there is a prohibition on carrying on the relevant activity until an inspector is satisfied that the matters which give, or will give rise, to the risk are remedied. Where an improvement notice is challenged and proceeds on review, its effect is suspended, whereas a prohibition notice (unsurprisingly, given its nature) continues in effect notwithstanding that it may be proceeding on review.
- 7.26. The regime for improvement notices and prohibition notices is a very important component of WorkSafe’s armoury of alternatives available to enforce the OSH legislation. In particular, any capacity retained by an administrative authority to *restrain* certain action is a most powerful regulatory tool. No interested person or group submitted that Part VI Division 1 should be repealed or amended in any substantial way. Some concerns were expressed, however, concerning particular aspects of the process.
- 7.27. Certain industry groups contended that the precondition for the issue of notices, being the existence of an “opinion” of an inspector concerning certain matters, was unsatisfactory. It was argued that such a requirement lent itself to subjectivity and, particularly where inspectors were not well versed in technical aspects of an industry, or lacked appropriate sensitivity for its operations, there was a real risk that such “opinions” may be ill-conceived or downright “wrong”. Although no submission went so far as to claim that any inspectors were motivated by bad faith or improper purpose, it was suggested that an apparent “target” to achieve certain figures affected the integrity of the process of enforcement of Part VI Division 1.

7.28. From a strictly “legal” point of view, it may be noted that the concept of an “opinion” in s.48(1) and s.49(1) cannot be read entirely literally. Its meaning is influenced by the subject matter, scope and purpose of the legislation. Thus, for example, a purported “opinion” that was materially affected by a matter entirely irrelevant to the statutory purposes of the OSH Act, or the context in which Part VI Division 1 appears, would amount to an error in the administrative process of issuing a notice. It would be strongly arguable that such an error would give rise to the invalidity of the notice. There are other examples of possible errors in the process of issuing notices that could be cited. If, for example, there were in existence a policy or set of guidelines for the issuance of improvement notices which were followed inflexibly, without regard to the merits of an individual case, a similar argument might be employed. Again, the issue of a notice without complying with the principles of procedural fairness for the benefit of the recipient may fall into the same category.

Nature of the Review Process

7.29. However it is unnecessary to consider those matters in any more detail. That is because, given the regime under the Act for the internal review and further review of notices, it is unlikely that there would ever be cause to pursue such legal arguments, let alone actually litigate in a superior court. At both of those stages of review, the Commissioner and in turn the Tribunal become empowered to “inquire into the circumstances relating to” the notice concerned. Having undertaken such an inquiry, the Commissioner or Tribunal is then empowered to affirm the notice, affirm the notice with such modifications as seem appropriate, or cancel the notice. The notice then has effect or, as the case may be, ceases to have effect accordingly.

7.30. Sometimes difficult issues arise, where an administrative process confers a power of “review” on an office holder, as to the precise character of the review process that is entailed. The differences are not merely semantic; they can be of considerable importance to the extent of the powers of the office holder and resulting effects on duties, obligations and rights of the people concerned. Although minds may differ on the characterisation of the powers of internal review and further review contained in Part VI Division 1 the preferable interpretation, in the Inquiry’s view, is that each of

those powers involves a rehearing *de novo*¹²¹. This means that the Commissioner on internal review, and the Tribunal in turn on further review, each stands in the shoes of the original decision maker, that is the inspector who has issued the notice. The Commissioner and Tribunal respectively exercise a discretion to issue a notice, issue a notice with modifications, or cancel the notice, unconstrained by the material before earlier decision-makers or the conceptual approaches that have previously been taken.

- 7.31. One important consequence of such an interpretation of the nature of the review process is that, in “affirming the notice with such modifications as seem appropriate” the Commissioner or the Tribunal is not confined to “modification” in any limited sense. If, for example, it is found on review that a notice should remain in force concerning a particular hazard at a workplace, but on the basis of a finding concerning the contravention of a different legislative provision to that specified in the notice, such a “modification” is entirely legitimate. Similarly, if the means by which it is assessed that a particular activity involves a risk of imminent and serious injury is achieved through a different route to that of an earlier decision maker, such a modification, likewise, may be reflected in the notice as affirmed. It goes without saying that a valid exercise of the power of review will require any alternative conceptualisations for the notice to be put to the parties concerned, allowing them a reasonable opportunity to be heard on any new bases for the notice to be affirmed.
- 7.32. The Inquiry understands that the Commissioner, at least, has been proceeding on a narrower interpretation of the nature of her power, seemingly on the basis of legal advice. If, as the Inquiry perceives may be the case, that interpretation is premised on a view about the nature of the “opinion” that must be formed for the issue of the notice in the first place, that would be an insufficient reason for construing the powers of review so narrowly. It is the nature of the task on review which is of overriding importance to identifying the limits of the office holder’s powers. Because the reviewer exercises the power to issue a notice afresh, the consequences just expressed necessarily follow. Out of an abundance of caution, however it may be prudent to

¹²¹ The basic principles to a characterisation of powers of this kind were synthesised by the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202-204 and *Builders Licensing Board v Sperway Constructions* (1976) 135 CLR 616 at 621-622.

amend the range of powers open to the Commissioner and, in turn, the Tribunal so as to avoid any possible doubt.

- 7.33. The Review has already recommended that the Tribunal, in exercise of its proposed expanded jurisdiction, be empowered to issue an improvement notice or prohibition notice. The rationale for that recommendation, concerning the remedies open to the Tribunal in “inquiring into and dealing with” an OSH issue in certain circumstances where specified preconditions are met, sits consistently with this analysis.
- 7.34. Concerns expressed by industry groups about the issuing of improvement and prohibition notices, based on what at least may appear to be ill-informed opinions, ought not be taken lightly. It is important to the administration of Part VI Division 1, and the OSH Act in its entirety, that there be confidence in its processes, particularly where there is a direct impact on the rights and obligations of workplace participants. WorkSafe emphasised to the Inquiry that it will continue to work constructively with various industry sectors to improve the overall understanding of legislative requirements, how compliance is encouraged, and various means by which the law is enforced. To that the Inquiry adds its own encouragement and stresses the related concern of certain industries that production or business operations may be halted pending the review of a *prohibition* notice.
- 7.35. Some interests, in pressing another related concern, appeared to underappreciate the position concerning the suspension of *improvement* notices whilst they proceed on review. The Inquiry is satisfied that the dichotomy between improvement notices and prohibition notices reflects an appropriate balance. It is unpersuaded there is even an arguable case for the amendment of the provisions concerning their substantive operation. There is no reason to suggest that WorkSafe or the Tribunal underestimate the force of a prohibition notice, for all parties concerned, from the time it is issued. However regular reminders of the significance of these matters for all industry participants may be timely.

Other Procedural Concerns

- 7.36. Some submissions to the Inquiry regarding particular examples of internal review, and/or further review by the Tribunal, disclosed several procedural issues. Some of the procedural issues overlap with the observations that have already been expressed. Others are encompassed by the discussion which follows. It is unnecessary to examine the merits of the particular matters themselves.
- 7.37. A general question raised by WorkSafe as to the implications of “invalid notices” for the review processes, and whether s.51(5) and s.51A(5) might better deal with such circumstances is, in effect, covered by the preceding analysis. The significance of an arguably “invalid notice” must be considered in light of the fact that each of the review processes involves a rehearing *de novo* (or, at the very least, in the Inquiry’s view that is what the processes should involve). Thus if an “invalidity” is perceived either by the Commissioner or in turn by the Tribunal, whether it be of a relatively technical nature or going to a more substantial issue concerning the grounds of the issue of the notice, such an error is capable of being corrected, provided that the requisite opinion under s.48(1), or s.49(1) as the case may be, may still be formed. As noted, the character of the opinion may be different, as may be the pathway taken in assessing the nature of the workplace hazard and the way in which the Act operates so as to satisfy the precondition under either of those subsections.
- 7.38. Finally, it is apt to note that issuing an improvement notice or a prohibition notice remains discretionary where the requisite opinion is formed. That is clear from the text of ss.48(1) and 49(1) viewed in their context of the OSH Act. It would be unprofitable to attempt to catalogue the kinds of situations where, despite the formation of the requisite opinion, a notice might nevertheless *not* issue in the decision maker’s discretion. One example, however, may be where the decision maker is of the view that an alternative and preferable means of enforcement of the Act or resolution of the OSH issue is available. In cases where an opinion has been reached on review that an activity involves or will involve a risk of imminent and serious injury or harm, those circumstances are likely to be relatively rare.

- 7.39. A distinct issue arose concerning the nature of the respective roles of the Commissioner and the Tribunal to “inquire into the circumstances relating to the notice” on a review. Consistently with the character of those reviews as rehearings *de novo*, the power to so “inquire” is a broad one which encompasses the doing of anything or the consideration of anything that would be relevant to the tasks of properly forming an opinion and exercising a discretion to issue a notice, under ss.48(1) or 49(1). The scope of what may be relevant to the “inquiry” in any given case will, again, be influenced by the subject matter of the inquiry and the purpose, text and context of the OSH legislation. Importantly, however, no requirement can be implied that any inquiry must go any further than may be necessary to determine a particular review.
- 7.40. Frequently, an internal review by the Commissioner deals with a request for an extension of time within which to comply with a requirement of a notice. WorkSafe notes that in 2005-06 there were 1,036 extensions of time granted, in most cases there being no objection raised to the request for an extension. In those kinds of situations, there is no impediment imposed by the OSH Act to the “inquiry” being limited to the Commissioner obtaining the views of the parties and informing herself to the degree she considers necessary (which may well only be a limited degree) to grant the extension of time. It is not a tenable construction of Part VI Division 1 that the “inquiry” needs to be more extensive or time consuming just for the sake of it. Out of an abundance of caution, however, it is as well to amend the OSH Act to expressly empower the Commissioner and the Tribunal to grant extensions of time for compliance.
- 7.41. Similarly, to meet the final issue raised by interested parties regarding the review processes, it would be expedient, in the Inquiry’s view, to allow the Commissioner and the Tribunal to make orders by consent on the internal review or further review of a notice without embarking on any “inquiry” into the circumstances. Such a power may not strictly be necessary but its insertion should avoid any scope for confusion and enable a faster, more efficient review process where that is warranted in the circumstances. That outcome can only enhance the statutory objectives.

- 7.42. A concluding observation and associated recommendation may be made concerning the discrete subject of the service of improvement notices. Whilst ss.48 and 49 of the OSH Act provide for a notice to “issue” where the necessary preconditions have been made, there is no express requirement for service. It is, therefore, open to some doubt as to whether the general provision in s.3(2) of the OSH Act¹²² necessarily is confined in its operation only to things to be served on, or done in relation to, an *employer* in relation to a workplace or matter related thereto. Without proceeding to expand on other alternative constructions, the interpretation advanced is, at least, one that might be arrived at should the issue be subject to challenge. That would have the consequence that s.3(2) could not be relied upon to serve a notice on, for example, a principal or main contractor.
- 7.43. In some circumstances, s.76 of the *Interpretation Act* 1984 (WA) and/or s.109X of the *Corporations Act* 2001 (Cth) may be relied upon. It is undesirable, however, that any possible hiatus exist in this regard. The better, safer, and most likely uncontentious course is for there to be an amendment to s.3(2) so as to extend its application beyond simply deemed service on an employer in relation to a workplace (or a matter related to a workplace) so as to encompass others upon whom a duty is owed under the legislation.

¹²² Section 3(2) relevantly provides that “Anything that, under the OSH Act, is required to be served on, or otherwise done in relation to, an employer in relation to a workplace or a matter related to a workplace, is deemed to have been so served or done if it is served on, or done in relation to, a person at the workplace who has or reasonably appears to have responsibility for the management or control of the workplace.”

Recommendations:

- R.16** Part VI Division 1 of the *Occupational Safety and Health Act 1984 (WA)* be amended to provide that:
- The powers of the Commissioner on internal review and the Tribunal on further review extend to the making of any decision open to previous decision-makers, on the entirety of material before the reviewer.
 - The Commissioner and the Tribunal each be empowered to order an extension of time for compliance with a notice on the basis of such inquiry (if any at all) into the circumstances relating to the notice as they see fit.
 - The Commissioner and the Tribunal be empowered to issue orders with the consent of the parties to a review, whether before, during, or after any inquiry has been undertaken.
- R.17** WorkSafe maintain and develop its work in consulting with affected or concerned industries about the nature and operation of the enforcement powers in Part VI Division 1 of the Act.
- R.18** Section 3(2) of the *Occupational Safety and Health Act 1984 (WA)* be amended to extend the operation of that deeming provision so as to encompass service on other duty holders where a document or thing may require service.

Provisional Improvement Notices

- 7.44. As a response to recommendations 52 and 53 of the Laing Report, Division 2 was inserted into Part VI of the OSH Act to enable the issue of provisional improvement notices (PINs) by certain safety and health representatives. In short, the new provisions empower a qualified representative (as defined) to issue a PIN in circumstances that are analogous to the issue of an improvement notice by an inspector. What is required is the opinion of the representative that there is a contravention of a provision of the Act, or has been such a contravention in circumstances that make it likely that the contravention will continue or be repeated, with reasonable grounds for that opinion. A recipient of a PIN is entitled to apply in writing for a review of the PIN, upon which the PIN ceases to have effect. The process of review from that point is in substance the same as if an improvement notice had been issued.

- 7.45. The rationale for enabling qualified safety and health representatives to issue PINs and for them to have a binding force (subject to the powers of review) accordingly, aroused significant comment amongst a number of interested parties. A number of employers' interests maintained the position that they had held prior to the Laing Review, namely being opposed to the concept of PINs outright, or at least for the regime operating in the coercive way that it presently does. Some bodies, although advocating overall restraint in the recommendation of further legislative change nevertheless submitted that Part VI Division 2 should be repealed accordingly. Others were more restrained, suggesting that there was no basis, in the limited time since the provisions had been operative, to determine the effect of the regime and the powers that had been accorded to qualified representatives accordingly. One body, however, suggested, based on its anecdotal information from the industry in which it works, that many safety and health representatives do not fully understand the scope or the extent of their rights and responsibilities. Accordingly, it is said, those representatives are not confident to implement their powers to issue PINs, nor in their abilities to carry out their role more generally. A third employers' representative body maintained that there is no proven basis to extend or expand the current regime for PINs beyond their current limitations. That body also submitted that "the proposition that a person other than a WorkSafe inspector be given authority to issue an infringement notice is inimical to the employer/employee relationship and is open to misuse".
- 7.46. Unions and other employee representatives, however, generally embraced the regime enacted by Part VI Division 2 and made some initial observations about some of the difficulties in the provisions' application. Concern expressed by unions about discrimination or other detrimental treatment of safety and health representatives in undertaking their roles concerning the potential issue of PINs was reiterated. That issue is really a specific manifestation of a broader range of concerns about discrimination and detrimental treatment of employees and potential employees. This important topic is dealt with directly.
- 7.47. Another issue concerning the meaning of the term "consult" as a precondition to the issue of a PIN has already been dealt with in the context of consultation more generally. For the reasons advanced in that portion of the Report, the Inquiry is not

satisfied that a case has been made for further legislative change, although the issue does warrant ongoing consideration.

7.48. Among the other issues of concern raised regarding the initial operation of Part VI Division 2 by particular union interests are:

- The technicalities of a PIN can be overly complex, such as the requirement to identify the correct employer as a matter of law. It is contended that where a notice is deficient only by reason of a technicality of this kind, an employer should not be able to seek review when the substance of the notice suffers from no deficiency.
- There ought be a legislated mechanism for a safety and health representative to refer an alleged non-compliance with a PIN by the due date to WorkSafe. This may require no more than a prescribed form, it is suggested.
- Where a person to whom a PIN has been issued seeks to exercise the right of review, there should be a requirement to notify the relevant safety and health representative that a review has been sought, so that that latter person is aware of the automatic suspension of the PIN pending the review.
- What is said to be implicit in s.51H ought be made more explicit – namely that where a PIN is under review the requirement of inquiry into the circumstances relating to the notice ought include a consultation with the representative who issued the PIN, and in due course advice to that person of the outcome of the review.

7.49. UnionsWA endorsed those concerns generally and went further, suggesting that a review of the procedural issues associated with writing and the administration of the PIN system should be undertaken to ensure the system is operating effectively and meeting its objectives. It also invited consideration as to whether health and safety representatives ought be empowered to issue penalty notices or “infringements” in the limited circumstances where a duty holder has not complied with a PIN. It suggested that a review of the operation of such provisions in other jurisdictions might assist in forming a view on the appropriateness of such a provision.

- 7.50. More specifically, WorkSafe queried whether the potential for misuse, even abuse, of the power under Part VI, Division 2 was of such concern that the Act ought be amended to empower the disqualification (or taking of less extreme action) against any representative concerned. In the Inquiry's view, whilst those alternatives may present as appropriate for a future statutory review, it is premature to undertake such significant tasks as components of the present exercise. The Inquiry is cautious about recommending any significant change to the regime for the issue and operation of PINs given the limited period of its operation. No doubt the regime will be monitored as comprehensively as resources permit.
- 7.51. There is some force in certain specific concerns that have been raised nonetheless. It is noted that WorkSafe has issued guidelines concerning provisional improvement notices, to be read in conjunction with WorkSafe's policy for the notices' review. Those documents are sound and reflect commendable work in distilling the relevant legislative text and the practicalities of the operation of Part VI Division 2 into a meaningful, practically helpful form. It may well be of assistance, in the Inquiry's view, for a form to be prescribed for the formal referral by a safety and health representative (or indeed other person concerned) of the alleged non-compliance with a PIN. This is to be distinguished, of course, from the very different process, for which a form is in existence, of the review of the PIN itself by an inspector pursuant to s.51AH.
- 7.52. It is unnecessary, on the Inquiry's assessment, for there to be any legislative amendment to take account of the other specific concerns that have been raised. As is the case with the process of "inquiry" on review of improvement notices and prohibition notices, the role of an inspector under s.51AH(5) is a broad one which effectively places him or her in a position of considering whether to form an opinion for the purposes of s.48(1) and issue an improvement notice accordingly. It is to be expected that, where the substance behind a PIN is affirmed by an inspector on inquiry, a technical deficiency such as the incorrect naming of an employer would rarely be a reason for the inspector to decline to "affirm the notice with modifications" pursuant to s.51AH(5)(d). Indeed, where the inspector is affirmatively satisfied of a contravention that justifies the formation of an opinion on reasonable grounds pursuant to s.48(1), there will be scope for the notice to be "affirmed with

modifications” even if a different conceptual basis is identified to that originally held by the representative. The observations previously made about the nature of the review process as being in substance a rehearing *de novo* are applicable here. Again, the principles of procedural fairness may require new factual or conceptual bases for a notice to be clearly identified and for parties affected to be properly heard on the foundation for the modified notice accordingly.

- 7.53. The Inquiry considers that in the vast majority of cases, a review of a PIN by an inspector, and the associated inquiry into the relevant circumstances, will involve communication with the safety and health representative who has issued the PIN. But it would be undesirable to impose too rigid a requirement on precisely what is to be undertaken here. For example, there may well be situations where it is impractical, or even unnecessary, for the representative to be literally present at the workplace where most or all of the “inquiry” is being undertaken. Moreover it will generally be good practice to notify the representative of the existence of the review and the consequent suspension of the operation of the notice. But once more, legislative prescription of these matters is undesirable and may lead to undue inflexibility. Of overriding importance will be for the inspector to proceed to the heart of the review and the associated inquiry in as quick a manner as possible without any sacrifice of fairness or expediency.

Discrimination or Detrimental Treatment of Employees

- 7.54. Another of the very few recommendations of the Laing Report that was not implemented by the Western Australian Government was the following:

It is recommended s.56 of the Act be amended to provide that where the facts of an alleged discrimination are proved, the onus of proof rests with the defendant to satisfy the court that legitimate actions of the employee in relation to occupational safety and health were not the dominant or substantial reason for the discrimination.

- 7.55. It was maintained – in many cases most assertively – by a number of union interests that, despite the presence of s.56 (concerning employees or prospective employees generally) and s.35A (specifically concerning safety and health representatives), incidents and fears of detrimental treatment of employees for reasons connected with the enforcement of the OSH Act remained a very real issue. One submission went so

far as to assert that WorkSafe has adopted a policy position of “not investigating” allegations of this character. WorkSafe strongly refuted such a claim and the Inquiry is entirely unsatisfied that it has any foundation. It may be that certain inferences are drawn that where there is insufficient evidence to proceed with a prosecution under s.56 or s.35A (for whatever reason) there is “therefore” a lack of will or preparedness to take enforcement action. But such inferences will not necessarily carry any logical force, and are in any event without foundation.

- 7.56. There can be no doubt that the policy reflected by ss.56 and 35A is a very important one that must be understood by all workplace participants in Western Australia to be a vital premise for the effective operation of occupational safety and health. Additionally, the policy reflects a basic tenet of fairness in employment. For an employer to *harm* an employee or potential employee (in any of the ways comprehended by that broad concept) because that person has simply played a role in the OSH structure set up by the OSH Act, is a grave example of how the natural imbalance of power to an employment (or other workplace) relationship may be exploited. Having heard in person from those union representatives who are concerned about the prevalence of that occurring, the Inquiry is satisfied of the legitimacy of that risk. There is, accordingly, a problem that needs to be addressed.
- 7.57. There are really two alternatives that present to the Inquiry. The first is, consistently with Mr Laing’s recommendation, to press again for what in effect amounts to a reversal of the onus of proof of one of the necessary elements to prove an offence of the kind enacted by ss.56 and 35A. There are precedents for this in the legislation of other jurisdictions¹²³. The Inquiry is unpersuaded that the nature of the problem warrants a response as significant to the operation of the system of proof for quasi-criminal offences as such an amendment would create.
- 7.58. The second alternative is, particularly in light of other recommendations that have been made concerning the Tribunal, the preferable one. There is value in conferring additional, limited jurisdiction on the Tribunal to inquire into and deal with an allegation of such discriminatory or detrimental treatment (broadly of the kind

¹²³ See, eg. NSW OSH Act, s.23(2).

presently envisaged by ss.56 and 35A) and empowering the Tribunal to grant an appropriate remedy accordingly. This has the consequence that there are, in effect, two means of enforcement of an allegation of this kind of discriminatory or detrimental treatment. Where there exists admissible evidence that may satisfy a court to the requisite criminal standard of a breach, an employer sits in peril of a conviction being entered and a penalty imposed accordingly. Where, however, there is an allegation of that character despite (for whatever reason) an absence of evidence capable of so satisfying a court, the Tribunal ought be empowered in exercise of its coercive powers, including that of conciliation, to resolve the matter, and if necessary grant a remedy, in a less formal environment. The nature of the remedy the Tribunal should be empowered to grant should be:

- (a) Where an actual dismissal is proved to the satisfaction of the Tribunal, reinstatement or re-employment of the employee or compensation, capped at an appropriate limit; or
- (b) Where detriment of a kind falling short of dismissal is demonstrated to the satisfaction of the Tribunal, a monetary remedy that is tailored to put the employee in the position as if the wrong had not occurred.

Relief of that kind sits conformably with the kinds of orders the WAIRC is able to grant in the broader exercise of its employment-related jurisdiction.

Recommendations:

R.19 The *Occupational Safety and Health Act 1984 (WA)* be amended to empower the Occupational Safety and Health Tribunal to inquire into and deal with allegations of discriminatory and detrimental treatment of employees and potential employees for reasons connected with the operation of the Act and its statutory purposes. The power of the Tribunal ought include conciliation and the granting of remedies to reinstate, re-employ, employ, engage and to pay compensation capped consistently with analogous limits under the *Industrial Relations Act 1979 (WA)*.

Composition of Commission

7.59. Mindful of s.61(1)(c) and (d), this Report has commented favourably on the ongoing role and functions of the Commission, particularly its entrenched tripartite structure.

As one qualification to the general consensus regarding the composition of the Commission however, some contentions of the Safety Institute of Australia (WA Branch) (SIA) warrant addressing.

- 7.60. The SIA offered a significant contribution to the Inquiry on a range of issues. Presently representing a membership of about 2,000 nationally and 350 in WA, it aims for its WA membership of “safety and health practitioners” to reach as high as 1,500 and for its magazine *Australian Safety Matters* to reach a circulation of up to 15,000. At least as far as the WA Branch is concerned there is an ongoing desire for it to bring together various other organisations such as the Occupational Health Society, Industrial Foundation for Accident Prevention (IFAP), and groups representing ergonomists and occupational hygienists under the one umbrella.
- 7.61. The SIA contends, as it has to previous statutory reviews, that the Commission for Occupational Safety and Health, beyond its traditionally tripartite conceptualisation, needs to reflect the “safety profession” if there is to be an appropriate balance in its composition, particularly for it to successfully “sell” its ideas into business and the broader community. The safety profession can achieve that imperative, it is argued, because it is comprised largely of persons who “drive and guide the application of safety among our business and community”.
- 7.62. The Inquiry has considered this suggestion carefully and sees some merit in it. Many regulating organisations include formal membership of, and conceptualise an ongoing role for, representative professional bodies. It is foreseeable that value could be added to the work of the Commission through a legislatively recognised role for the SIA. The difficulty lies, however, in the disparate forms of representative body that presently exist within OSH in Western Australia. Whilst the SIA certainly aspires to have that predominant representative role, it cannot be said that it has yet attained such a status. A range of historical and other reasons probably explains that phenomenon. It has not been feasible for the Inquiry, as presently constituted, to examine those issues in any depth. The reality remains, however, that in the absence of a consensus as to a single representative body as maintaining the interests of any identifiable group of OSH

professionals, a sufficient case has not yet been made out for the recommendation of legislative amendment regarding the composition of the Commission.

7.63. A related submission was made from an industry participant associated with, but not representative of, the SIA that the OSH Act ought “recognise the role of the safety and health practitioner and require such a person to be competent.” Again, the Inquiry considers this is an ideal that ought be steadily maintained and kept under active consideration. It is open to debate whether it is best pursued through legislative direction or otherwise. However in the absence of any consensus as to precisely how one conceptualises and defines a “safety and health practitioner” any potential amendment would be an exercise in generality, if not confusion. Accordingly no recommendation is made in that regard.

7.64. Although only addressed by a small number of interested parties, the broader question of the ongoing composition of the Commission also warrants assessment. Importantly, the Strategic Plan 2006-2010 of the Commission recognises as its first objective to:

Through strong leadership, maintain the focus, visibility and relevance of the Commission.

Various sub-strategies are expressed consistently with that overall objective. Of particular significance for present purposes is Strategy 1.4 which is to “maintain and promote effective tripartite relationships and decision-making on safety and health in the workplace”. Consistently with those ideals, the Chair of the Commission acknowledged to the Inquiry that it could be argued that the composition of the Commission, as provided for in s.6(2) of the OSH Act, reflects a conception dating from the era of the Robens Report of a centralised industrial relations system and relatively high union membership rates (certainly considerably higher than in the present era). Whilst maintaining a commitment to tripartism (and understandably so given its successful and venerable history in this State) Mr Cooke was receptive to the possibility of legislative change to broaden the membership base of the Commission.

7.65. The few commentators who canvassed the subject at all were quite strident in observing that certain industries and sectors receive a disproportionate recognition within the Commission’s membership. Some, by reference to yardsticks such as the

issuing of improvement notices, the nature of prosecutions, or the ratios of allocations of WorkSafe inspectors to particular industries, submitted, with some force, that a proportionate and appropriate legislative recognition necessitated amendment to s.6. This type of concern overlapped with certain submissions made concerning the nature and effective influence of advisory committees, formally appointed by the Minister pursuant to s.15 of the OSH Act to assist the Commission in the performance of its functions and duties. One group spoke positively about the functions performed by the advisory committee relevant to its own industry, but observed that that was an unsatisfactory substitute for direct Commission representation. Another, agricultural based, group was highly critical about the decision “of WorkSafe” to “downgrade” the Agricultural Industry Safety Advisory Committee (AISAC) representing its constituency to the status of merely an unfunded advisory group. It submitted that that decision “is to be immediately reversed”, perceiving, in effect, that the agricultural sector was discriminated against by not being afforded the same rights as other industries and sectors. It maintained that, in light of such preferential treatment, “WorkSafe cannot expect the same level of compliance from the agricultural sector”.

- 7.66. WorkSafe, in a written submission to the Inquiry, stated that the Commission *itself*, as opposed to WorkSafe, when developing its Strategic Plan for 2006-1010 reviewed all of its existing advisory committees and determined on balance that the AISAC had reached a stage where issues being raised and debated related more directly to the operational activities of WorkSafe rather than to the policy and advisory role of the Commission. That conclusion led to the decision to disband the advisory committee as such, although WorkSafe, in recognising that the committee had become a valuable forum for sharing ideas and “networking”, continued to host a forum for that purpose under the title of a newly constituted Agricultural Industry Safety Group which met for the first time in March 2006. That new group being a conceptualisation of WorkSafe, no funds were available extending to the payment of sitting fees or other reimbursement of expenses. WorkSafe took the view - and maintains - that for groups of that nature which do not have the status of advisory committees *per se* for the purposes of s.15, it would be inequitable to make an *ad hoc* decision to meet expenses.

- 7.67. The Inquiry is unable to conclude that the decision of the Commission to disband the AISAC was inappropriate or improper, or that there is any other sufficient reason to recommend its reversal. Indeed, it would take an extremely strong case, on the material available to a statutory review of this kind, to justify a recommendation of that nature, concerning a specific operational decision. The heart of the concerns expressed by representatives of the agricultural sector relate to matters of communication and the formation of stronger relationships between WorkSafe, other representatives of government, and workplace participants concerned with agricultural and related services. The Agricultural Industry Safety Group, together with WorkSafe’s collaboration with the Farmsafe WA Alliance¹²⁴ must remain the foundation for additional, ongoing work in enhancing those relationships. The Inquiry is confident that there is sufficient goodwill on the part of all concerned for continued good work in communication to improve the overall quality of those relationships.
- 7.68. More generally, the Inquiry has taken the view that, whilst it is not in a position to recommend legislative amendment to s.6(2) of the Act itself, any potential case for that amendment, and the particular changes to the composition that are warranted, should be a project for consideration by the Commission itself, consistently with the parameters marked by its Strategic Plan, within the next 12 months. Without wishing to fetter the range of considerations that might be taken into account in that task, some of the pertinent factors would appear to be:
- identification of those industries and sectors which are accorded disproportionate attention by WorkSafe, whether by reason of the criteria referred to or otherwise;
 - whether representation through advisory committees (or, conceivably, groups of a lesser status) is sufficient for those industries and sectors to be fully heard concerning matters of importance to OSH;
 - the legitimacy of so called “expert members” playing an enhanced role at Commission level, particularly in the areas of occupational health and disease,

¹²⁴ To which further reference is made in a slightly different context: see at paragraphs 8.48-8.49.

scientific research, and the identification and reduction of intangible hazards;
and

- interests of efficiency and expediency in the Commission's exercise of its functions.

7.69. The potential for re-evaluation of the Commission's composition overlaps with another important issue, namely an appropriate process for the review of the *Occupational Safety and Health Regulations 1996* and the ongoing assessment of the need for new or revised Regulations. The former subject is of itself a strategy contained in the Commission's Strategic Plan, within the overall objective of "insuring a relevant legislative framework". The latter, related subject falls within the scope of another strategy, to "monitor and recommend changes to existing Regulations where appropriate". This topic is considered in fuller detail in Chapter 8, in the context of issues concerning legislative content.

Recommendations:

R.20 The Commission for Occupational Safety and Health review its own composition in the course of the next 12 months, consistently with its Strategic Plan 2006-2010 and the parameters identified in this Report, with the objective of making a recommendation to the Minister on the appropriateness of any amendments to s.6(2) of the *Occupational Safety and Health Act 1984 (WA)* accordingly.

CHAPTER 8. MISCELLANEOUS ISSUES CONCERNING LEGISLATIVE CONTENT

- 8.1. It is possible that a statutory review under s.61 might examine and analyse every provision of the OSH Act and report accordingly. One could even attempt separately to canvass as many of the Regulations, and for that matter, codes of practice and guidance notes as possible. But the former task would be considerable and the latter scarcely feasible or practicable, at least without a very large supporting infrastructure. It has never been the conception of this Review to attempt those tasks. Nor, in light of the scale of the Laing Review, was it even considered appropriate to examine, one by one, the most important components of the OSH Act, whether ordered by way of subject matter, legislative division, or by some other means. Rather, consistently with the overall approach to the exercise, a balance has been sought to be achieved between the proper performance of the statutory task imposed by s.61 and a suitably selective approach.
- 8.2. Certain issues of legislative coverage emerged prominently during the course of the Review. Some of those were of a general or conceptual nature; others were specific to certain subject matters and/or industries. This chapter identifies and canvasses those issues, at times with some related observations about issues of enduring importance to legislative coverage overall. Given that purpose, this chapter does not purport to be detailed, let alone comprehensive in its scope. To do so would have taken longer and required greater devotion of resources, perhaps of marginal overall benefit to the administration of occupational safety and health in Western Australia.

Nature and Extent of Legislative Content

- 8.3. As noted, WorkSafe itself, at the outset of the Review, raised a “strategic issue” warranting particular consideration: the nature of the legislative mix and balance currently contained within the current OSH Act and its subsidiary legislation. It observed that the quantity and depth of prescription in the Regulations, together with the amount of what may loosely be termed quasi-legislative content of the various codes of practice, arguably create a certain incompatibility or “mismatch” with the

general duty legislative obligations which, by their very nature, are capable of covering all workplace hazards.

- 8.4. WorkSafe thus invited the Inquiry to give consideration to the prospect of reducing the emphasis on Regulations made under s.60 of the Act, with the associated issue of whether that requires any change to the status of codes of practice. It acknowledged the reality that the amount and associated complication of overall legislative content gives rise to a regulatory burden that for many businesses is difficult to understand and fully comprehend, let alone ensure compliance with all potentially applicable legislative obligations. As WorkSafe itself noted, the advantages and disadvantages of a body of prescriptive regulations are relatively easy to martial. On the one hand regulations *may* take a long time to develop (notwithstanding that the orthodox legislative process does not need to be invoked), technical details can possibly become outdated and provisions may be difficult to revoke, once made. Moreover, with rapidly changing technology and the ever expanding diversity of working environments, circumstances may arise where better and safer options become available which are unable to be implemented because of the constraints imposed by particular prescriptive requirements. It may also be argued that prescriptive regulations can act as a deterrent for industries developing and promulgating their own solutions to hazards, whether through industry codes of practice or otherwise.
- 8.5. On the other hand prescriptive regulations can set a clear standard to be followed and are relatively easy to enforce, in contradistinction to some of the complications that attend the understanding and enforcement of the section 19-related general duties. The value of prescriptive regulations may be more pronounced in some industries, or in the minimisation of certain kinds of workplace hazards, than others. UnionsWA specifically associated itself with these kinds of advantages and, by implication, advocated caution in any revised approach to delegated legislation which may reduce the amount and scope of the present Regulations.
- 8.6. By contrast, a number of employers' representatives emphasised the difficulties faced by employers and other businesses in understanding and coping with the "regulatory burden". Formal representations by small business, and other less formal indications to

the Inquiry often emphasised these difficulties as one of the single most important issues confronting contemporary OSH administration. With that the Inquiry is in general agreement. Whether those difficulties, of themselves, justify a revised approach to the method of regulation, or the mix between different forms of legislative content is another question. The CCI, for its part, endorsed the conclusions of the Commonwealth Government Taskforce on Reducing Regulatory Burdens on Business¹²⁵ both in its own right, and as enunciating a set of guiding principles which, it submits, the Commission should remain cognisant of in developing any new regulatory material. It calls for a review of the existing Regulations, contending that that Commission should establish a “regulatory reform process based upon reducing the regulatory burden and providing a flexible approach to achieving safety outcomes”.

- 8.7. The CCI acknowledged that prescriptive regulations are effective in minimising certain workplace hazards. These hazards often materialise in areas requiring very specific standards, such as human exposure levels to toxic substances. It argued, with some force, that prescriptive approaches are less effective where regulatory control is not absolute. It expressed concerns that prescriptive regulation can readily become outdated, all the more so with rapid growth of technology, improved productivity processes and the establishment of new markets and services. Outdated laws have the potential to be impractical and detrimental to the effective advancement of government policy, as well as industry productivity. Thus, for the CCI, the “challenge for government” in reducing that regulatory burden “is to ensure flexible regulatory regimes that achieve desirable and economic social outcomes whilst creating a sense of not being over-regulated”.
- 8.8. Most commentators were at the very least broadly supportive of the rationale for codes of practice as providing a useful tool to assist workplace participants in understanding and meeting legislative requirements. No interested party advocated the wholesale abolition of their existence. However beyond that corridor of agreement, positions diverged considerably. Union interests advocated the enhancement of the normative force of codes of practice, so that an offence is actually committed, at least in some circumstances, where a code’s standards of conduct are not met. However those

¹²⁵ Report to the Prime Minister and the Treasurer, Canberra, January 2006.

employers' interests who commented on this issue either expressly or by implication opposed such a change. The focus of their submissions tended to be on emphasising the risk, and in some situations, the reality, of codes of practice departing from the purpose they are designed to perform. Many documents, it was argued, are too detailed, difficult for industry participants to understand, and sometimes less than helpfully drafted.

- 8.9. The Discussion Paper dealt in some detail with the text of s.57 of the OSH Act and difficulties it perceived in its interpretation and operation. No interested party contested that analysis and a number expressly supported or adopted it. The Inquiry has, generally speaking, confirmed its provisional views on that subject as summarised in the Discussion Paper. The conclusions it reaches and the recommendations that follow are addressed directly.
- 8.10. The Inquiry's conclusions about the nature and balance of regulatory material in Western Australia is influenced by the entirety of the material it has had regard to in the present Review. Of overriding importance is the Inquiry's strong impression that, generally speaking, occupational safety and health in Western Australia is in a sound state, with cause for ongoing optimism. Moreover, no interested party has presented any sufficiently strong case for significant change to the regulatory mix or approach. Nor has any trend for change emerged from other Australian jurisdictions. Even if such a strong affirmative case were presented, it would need to be carefully evaluated to justify significant, additional legislative change in the post-Laing environment. Those difficulties which the Inquiry accepts are prevalent as a consequence of the present legislative environment are best addressed by executive measures and other means, rather than legislative amendment.
- 8.11. Thus, subject to two qualifications, the Inquiry is satisfied that the present combination of general duty-based (and hence related broad offence-creating) provisions in the OSH Act, prescriptive offence-creating provisions in the Regulations, and the supporting assistance provided by codes of practice (and for that matter guidance notes) is sensible and appropriate. It continues the basic, and by now orthodox, approach to OSH regulation conceptualised and implemented since the Robens

Report. It contemplates that the legislative function of government (whether through the parliamentary process or the capacity of the executive to make delegated legislation) is as flexible and responsive as is realistically possible. And it further contemplates that, given the range and complexity of workplace hazards that may now be confronted in Western Australian workplaces, it is necessary for the executive arm of government to provide meaningful assistance in understanding and meeting those obligations.

- 8.12. The first qualification is that it is appropriate for the Regulations to be formally examined, both as to their present content, and the process by which new or varied regulations are to be recommended for being made pursuant to s.60 of the Act. This task is intrinsically suited to the Commission and forms part of its ongoing vision as outlined in its Strategic Plan. As noted, although it is within the scope of s.61 for this Inquiry to examine and make recommendations about any or all of the Regulations themselves, that would plainly have been an impracticable task for this Inquiry as presently conceptualised. A “piecemeal” approach of examining only some provisions would have generated difficulties of its own. Hence the Inquiry has elected to review only those Regulations that directly relate to a particular concept otherwise under consideration.
- 8.13. Without wishing to fetter the task of the Commission, considerations that may be relevant and useful to an all-encompassing review of the Regulations include:
- assessing the legitimacy or need for particular regulations to be expressly tied to Australian Standards (a role seriously doubted by several inspectors who spoke to the Inquiry);
 - the degree to which prescriptive regulation is appropriate (if at all) for certain subject matters and kinds of hazards in light of the ongoing operation of duties conferred by Part III;
 - any available figures and other data indicating frequency of attention to regulations (perhaps grouped by division and subdivision) in the enforcement activities of WorkSafe;

- comments from affected industries and representative bodies; and
- evidentiary and other practical difficulties in conceptualising and bringing prosecutions for legislative breach.

Of course, regulations can, and frequently do, deal with matters ancillary to the actual content of standards and norms of behaviour. Provisions enabling proof in special cases, or otherwise providing procedural assistance, remain an ongoing possibility.

- 8.14. If there was one area of *relative* inefficiency that emerged to the Inquiry's satisfaction regarding the work of the Commission, it is the undesirable amount of time that can be taken in the ongoing consultation that occurs within the Commission itself, including its advisory committees and other sub-groups, as a necessary consequence of the tripartite process. This Report has elsewhere recommended that the Commission's composition be reviewed as an important short-term exercise for the Commission itself. Even more directly, it is open to the Commission to become somewhat more flexible in the means by which it assesses Regulations and codes of practice. Several commentators pressed for more extensive input from industries directly affected by existing, and particularly proposed new, delegated legislation.
- 8.15. Rather than, as a matter of course, initiating specific sub-committees, themselves reflecting the tripartite composition, the better, more flexible course of superior contemporary relevance, would be the *ad hoc* creation of something in the nature of "industry reference groups" to advise not only on the *content* of delegated legislation but the anterior question of whether any change is required at all. It is not envisaged that the process of selecting and initiating an industry reference group needs to be lengthy or complicated. The liaison of groups with the Commission should be as speedy and expedient as the nature of each task of consideration of existing or new delegated legislation allows.
- 8.16. The second qualification itself comprises two aspects, concerning codes of practice. Consistently with the basic conclusions that have been reached regarding the appropriateness of the regulatory mix for OSH in Western Australia, the Inquiry is firmly of the view that codes of practice should retain their status as being designed to

provide genuine “practical guidance” to industry participants in meeting legislative obligations. The Inquiry is unsatisfied that there is any particularly strong case to enhance their normative force or legal status. In particular, the alternative of enacting provisions of the kinds in force in South Australia and the Commonwealth¹²⁶ would only serve to complicate and disturb the satisfactory balance that has been achieved in this State. Equally, the Victorian model, which essentially effects the opposite purpose of enabling a defence to a prosecution to be established through demonstration of compliance with a code provision, is rejected¹²⁷. There was, however, a consistently expressed call for renewed attempts to make codes of practice even more accessible to workplace participants. That is not to say that the codes are badly drawn – to the contrary, in the Inquiry’s view they usually reflect most creditable efforts to convert difficult matters into language which is as straightforward as possible. However, the best attempts by the Commission to explore other means of drafting codes to provide “practical guidance” are encouraged.

- 8.17. The following views of the Inquiry (expressed in provisional terms in the Discussion Paper) about the meaning and effect of the statutory text of s.57 of the OSH Act are confirmed. Subsection 57(1) empowers the Minister to, upon the recommendation of the WorkSafe Commission, approve any code of practice for the purpose of providing practical guidance to relevant persons that are subject to a duty under Part III of the OSH Act. (It follows that, were a document purportedly approved by the Minister as a code of practice in the absence of such a purpose, it would lack the statutory source essential to its validity.) It may be open, although no formal recommendation is made in this regard, to contemplate expanding the kinds of duties, which may warrant “practical guidance” and hence the approval of a code of practice, within the reach of s.57(1). Consideration might be given, for example, to whether the “practical guidance” with which codes of practice are ultimately concerned might usefully cover *any* duty or

¹²⁶ Section 63A of the SA OSH Act provides: “Where in proceedings for an offence against this Act it is proved that the defendant failed to observe a provision of an approved Code of Practice dealing with the matter in respect of which the offence is alleged to have been committed, the defendant is, in the absence of proof to the contrary, to be taken to have failed to exercise the standard of care required by this Act”. Section 71 of the Cth OSH Act is to similar effect, albeit enacted in greater detail.

¹²⁷ Section 152 of the Vic OSH Act provides in substance that if a compliance code (or Regulations) makes provision with respect to a duty imposed by the Act or Regulations and a person complies with the compliance code (or Regulations) then the person is taken to have complied with the Act or Regulations in relation to that duty.

obligation under the OSH Act or the Regulations (not merely those sourced in Part III).

- 8.18. Subsections 57(3)-(6) appropriately deal with formal aspects of the quasi-legislative process of the making and approval of codes of practice. No recommendation is made concerning the content of those provisions. Subsection 57(7) provides that a person is not liable to any civil or criminal proceedings by reason only that the person has not complied with a provision of a code of practice. That provision, too, is appropriate. It sits conformably with the purpose of a code of practice as providing “practical guidance” to persons who are subject to a relevant duty. One would not expect a document designed to guide people, in a practical way, in how to comply with existing legal obligations to distinctly source a discrete kind of legal liability.
- 8.19. However, the Inquiry has considerable difficulty understanding any sensible rationale for the operation of subsection 57(2). It enacts the matters that a code of practice may consist of, namely “any code, standard, rule, specification or provision relating to occupational safety or health”. It may also incorporate by reference any other such document (by which, presumably, it is envisaged that such a document might itself comprise one or more of those norms of conduct expressly referred to in subsection 57(2) itself). It is all but impossible, in the Inquiry’s view, to reconcile what subsection (2) enacts as open to be contained in a code of practice with its statutory purpose (in s.57(1)) and the limitations on its effect (in s.57(7)). Although one submission alluded to what it understood as the “*intention*” behind the provision, the *meaning* of the text as enacted is what manifests the practical difficulty here. The concepts of any “code, standard, rule, specification or provision” relating to occupational safety or health suggest, of their very nature, something in the nature of a prescriptive norm of conduct. Even allowing for some differences in shades of meaning, those concepts therefore imply some kind of consequence at law in the event of a breach. As a secondary difficulty, opinions might legitimately differ as to what constitutes, for example, a “standard” or a “rule” for provision in a code of practice. It could well be that one member of the Commission may view the nature of such a concept quite differently to another member of the Commission, perhaps without the source and nature of the different perspectives being fully explored prior to ministerial approval.

8.20. The difficulties in meaningfully construing s.57(2) are reinforced when one has regard to the form of language which is typically to be found in codes of practice approved by the Minister upon the recommendation of the Commission. As WorkSafe itself noted in formal submissions to the Inquiry, they are typically written in a manner that does not lend itself to enforcement through prosecution. The language is often non-mandatory, with the guidance provided in many of the codes reflecting, literally, “good practice” rather than minimum standards. Numerous components of the various codes of practice do not contain sufficient specificity to justify an approach of enforcement, or a preconception that “compliance” is what is sought. They may, in any given case, also traverse beyond the parameters of the OSH Act generally, as well as the matters enacted in the Schedule to the Act which are capable of being the subject of regulations¹²⁸.

8.21. Subsection 57(2) ought to be repealed. It does not, in the Inquiry’s view, add anything of value to the nature and effect of a code of practice in s.57 otherwise. To the contrary, it serves to confuse and confound.

8.22. Distinct difficulties arise with the present wording of subsection 57(8). It is in the following terms:

Where it is alleged in a proceeding under this Act that a person has contravened a provision of this Act or the regulations in relation to which a code of practice was in effect at the time of the alleged contravention –

- (a) the code of practice is admissible in evidence in that proceeding; and
- (b) demonstration that the person complied with the provision of the Act or regulations whether or not by observing that provision of the code of practice is a satisfactory defence.

8.23. In a limited sense, there is practical value in a statutory provision enabling the admissibility of a document of the nature of a code of practice. It is unnecessary for

¹²⁸ As the Discussion Paper noted, there are examples of codes of practice expressing views on areas of the law going well beyond the prescriptive norms of OSH in Western Australia. A striking illustration was *Violence, Aggression and Bullying: A Draft Code of Practice for Prevention and Management*. That draft Code at 35-36, purported to identify certain components of the principles of natural justice as applicable to the determination of any allegation of workplace bullying (or even, on one reading of the text, the mere *investigation* of an allegation). There is considerable risk in attempting to paraphrase the principles of natural justice, identify at a level of generality when they may apply, or to stipulate their content in any given setting. The task should not be attempted without obtaining properly instructed legal advice. Let alone should it be asserted more universally that “natural justice is generally considered to include” a catalogue of specified “rights”. However, the code of practice, as finalised, retains that text at 30-31.

defended trials to have time taken up with arid arguments as to the admissibility of a code of practice under the *Evidence Act* 1906 (WA) or the common law. But the question is begged – for what purposes might a code of practice be *relevant* to a given allegation of a contravention of the Act or Regulations? If, by definition, the code of practice is made for the purpose of providing (merely) practical guidance, there will be limited circumstances where it will assist in demonstrating whether or not the elements of the offence are established. Even if, contrary to the preceding recommendation of the Inquiry, a code of practice did contain one or more prescriptive forms of conduct, the matter can still be highly complicated. The actual content of a code of practice (even if, which the Inquiry positively disfavours, it contains any given “standard” or “rule”) is unlikely to marry up with existing *legislative* standards or norms, being conceptualised for different purposes and drafted accordingly. The most likely way in which relevance would be established to a Magistrates Court’s satisfaction concerns the state of knowledge (arguably within a particular industry) relevant to facts in issue about “practicability”. But s.57(8)(a) is capable of being construed to have a much wider operation, namely that it *necessarily* carries some relevance irrespective of the factual issues on which a prosecution is contested.

- 8.24. Those uncertainties are compounded by what appears to be envisaged by s.57(8)(b). The provision proceeds on the false premise that a defendant will attempt to set up a “defence” that the provision of the Act or Regulations, as charged, was “complied with”, thereby attempting to prove or “demonstrate” certain factual matters. However, in the absence of a clear and unequivocal statutory provision¹²⁹ to the contrary, a defendant will never need to meet such a standard, it being necessary for the prosecution to satisfy the onus upon it to prove, beyond a reasonable doubt, the constituent elements of the offence charged. To contemplate such a defence “being established”, as one possibility, “by” observing a provision of a code of practice (a document which, by definition, is merely designed to provide “practical guidance”) serves only to exacerbate the misconception. Hence the only meaningful function of s.57(8) might be to establish the admissibility of a code of practice where relevant. However, it may well be that that effect is achieved by s.53(3)(a), in light of the

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For examples of such provisions, see the Regulations cited at paragraph 8.75.

function of a court to admit only that evidence which is relevant to any proceeding before it.

Recommendations:

It is recommended that:

- R.21** s.57(2) of the *Occupational Safety and Health Act 1984 (WA)* be repealed.
- R.22** s.57(8) of the *Occupational Safety and Health Act 1984 (WA)* be either repealed or, at the very least substantially amended, so as to restrict its operation to provide that where a court is satisfied that a code of practice is relevant, the code of practice is admissible in evidence in that proceeding.
- R.23** the Occupational Safety and Health Commission review, as a priority, its structures for:
- assessing the need for, and content of, the present Regulations and any new Regulations (before undertaking a review of the Regulations themselves); and
 - assessing the need for, and in due course drafting of, codes of practice.

8.25. There is a final, and important, point to be made about “regulatory burden”, particularly in the way it may impact on small to medium sized businesses. The conclusion the Inquiry has reached about the appropriateness of the “regulatory mix” of general duties, prescriptive Regulations and other forms of delegated legislation and means of guidance, has a significant consequence for the amount of regulatory material that those businesses may be required to understand and respond to. There can be no question, on the material before the Inquiry, that that task can be a very difficult one for many employers and workplace participants across the range of industries and sectors in Western Australia. It is a legitimate and proper role of government to provide an appropriate measure of assistance to those businesses in meeting this burden.

8.26. To this end, the ThinkSafe Small Business Program¹³⁰ has, on initial assessments, been a highly promising exercise which warrants ongoing attention and development. From relatively modest financial means and conceptualisations, the Program on initial

¹³⁰ Broadly speaking, the Program targets businesses employing less than 20 people in certain identified high risk industry sectors that have significant rates of lost time through injury and disease. It involves the engagement of an independent OSH consultant to visit the participating business, conduct a safety assessment and prepare a simple

evaluations has been very positively received. An independent assessment undertaken by a private market research group in mid-2006 reflected most encouraging indications as to the worth of the program and its early impact on participants. For example, of a random survey of 200 businesses who participated in the Program:

- 95% agreed that the consultant providing assistance to the business had a good understanding of small business;
- 99% of respondents agreed that the consultant consulted in a language that was easy to understand;
- 94% agreed that practical solutions were provided to improving workplace safety;
- 90% agreed that the consultant recommended changes that were relevant to the respondent's business;
- 91% of respondents indicated that they had made improvements to OSH within their business since the consultant's visit and assistance (The primary reason why 9% of respondents had not made any improvements were associated with a lack of time and/or a perception that improvements or changes as recommended, were not necessary. However, such limitations were only mentioned by 3% or less of overall respondents to the survey.);
- 89% of respondents indicated that since the consultant's visit they had invested money and/or time in order to improve OSH within their business;
- 95% of all respondents specified that they were likely to recommend the ThinkSafe Small Business Assistance Program to other small businesses; and
- Only 3% of respondents expressed an overall dissatisfaction with the Programme, that limited dissatisfaction appearing to be associated with delays in applying and obtaining feedback and in relation to the consultant's performance.

safety action plan. Details concerning the nature and content of the assistance provided can be accessed through the

- 8.27. That initial evaluation speaks for itself and strongly supports an enhancing of the Program, given the importance of this kind of assistance to appropriate workplace participants. Informal discussions the Inquiry has undertaken with the Small Business Development Corporation have revealed that it is highly supportive of the Program and keen to offer whatever assistance may be feasible to develop its objectives, particularly in collaboration with WorkSafe itself.

Recommendations:

- R.23 Funding and other resourcing for the ThinkSafe Small Business Assistance Program be reviewed to meet the reasonable requirements of WorkSafe to assist in minimising the significant regulatory burden on small to medium-sized businesses in understanding and complying with their OSH obligations.**

Issues Concerning Section 19

- 8.28. Unsurprisingly, no contributor to the Review directly advocated any amendment to s.19 of the OSH Act. Some submissions, however, indirectly touched on the operation of s.19 insofar as they claimed that insufficient account is taken of the carelessness (or, as some put it, “stupidity”) of some employees, in the prosecution of employers or other duty holders within Part III.
- 8.29. It is unnecessary to traverse the substantial body of law relating to the interpretation and operation of s.19. Some concise observations are appropriate, however, to illustrate in broad terms the kinds of issues that can arise in practice. As construed at least in Western Australia¹³¹, s.19(1) creates a *single offence*, and it is not legitimate to charge a defendant on the basis that paragraphs (a) – (e) define and prescribe separate substantive duties, the contravention of which gives rise to separate offences. Thus non-compliance with one or more of the paragraphs of s.19(1) gives rise to a single contravention of that general duty. It always remains possible, however, that more than one identifiable act or omission may be identified in a given situation, transaction, or course of conduct at a workplace so that multiple charges may be brought. There has

WorkSafe website.

¹³¹ *Meiklejohn v Central Norseman Gold Corporation Ltd* (1998) 19 WAR 298. Although in this decision the Full Court of the Supreme Court of Western Australia (Walsh, Anderson and Owen JJ) construed s.30B(1) of the then *Mines Regulation*

been no suggestion that the interpretation of s.19 in that manner occasions any difficulty to WorkSafe in its administration of the OSH Act consistently with the statutory objects.

- 8.30. Since, at least, *Interstruct Pty Ltd v Wakelam* (1990) 3 WAR 100, it has been clear that the onus lies on the prosecution to show that, as far as was reasonably practicable (taking into account the matters contained in the applicable definition in s.3(1)) there was an omission to provide and maintain a working environment in which employees (or others within the scope of s.19) are not exposed to hazards. In other words, s.19 is not to be construed so as to impose the onus of demonstrating an absence of “practicability” upon the person charged. Although such a limited reversal of the onus of proof has been enacted in some other jurisdictions there was no explicit argument for such an amendment to occur in Western Australia. Quite to the contrary, WorkSafe accepted the appropriateness and fairness of the enforcement of general duties operating in that manner.
- 8.31. It will usually be appropriate, in the bringing of a charge under s.19 (and probably other general duty offence-creating provisions as well) for the prosecution to descend to particulars, often in quite some detail. Particularisation can be a difficult and subtle exercise in many areas of litigation. The bringing of charges of breaches of these quasi-criminal provisions is no exception. A complainant is generally bound by his or her pleadings, and it is not open to seek a conviction, at least without amendment, by reference to evidence which goes outside the parameters marked by those particulars, or which is otherwise incapable of establishing the allegation as pleaded¹³². Again, no change to that legal position was advocated. WorkSafe by implication, acknowledged the nature of the obligations imposed on it and accepted the appropriateness of those strictures as one of the necessary consequences of the proof of prosecutions to the criminal standard.

Act 1946 (WA), that provision was in the same terms to s.19 of the OSH Act. It is scarcely conceivable that any different result would obtain under the latter provision.

¹³² *Interstruct*, supra; *Bunnings Forest Products Pty Ltd v Shepherd*, unreported, Supreme Court of WA, Full Court 5 May 1998, Library no. 980235.

8.32. A body of authority¹³³ reflects that the effect of general duty provisions such as s.19 with the qualification of what is “reasonably practicable” has the consequence that duty holders are required to adopt an active, forward-looking approach to identifying potential dangers and to assessing the severity and likelihood of risks arising. It follows from the factors to be taken into account in assessing “reasonable practicability” that the obligations to determine suitable preventative measures and to implement those measures, may, in practice, be relatively strict unless the cost, time and burden of doing so are plainly disproportionate to the nature and severity of the risk assessed. Consistently with related principles in the common law of negligence, the prospect of human fault, error, or simple inadvertence will be relevant, and may need to be taken account of in assessing and preventing or minimising risk, and thus avoiding statutory breach. As Justice Steytler, now the President of the Western Australian Court of Appeal, has observed by reference to the similarly worded s.9 of the *Mines Safety and Inspection Act* 1994 (WA), the requirement of a duty holder to, so far as is practicable, provide a safe working environment:

imposes a duty, personal to the employer, *not only* to do what is reasonably practicable for the purposes of attaining that objective in the course of *its own* activities but to *ensure*, where that is reasonably practicable, that reasonable care is taken *by subcontractors* whose assistance is necessary in circumstances in which their failure to take such care might expose employees of the employer to hazards¹³⁴ (emphasis added).

8.33. It may well be, therefore, that a duty holder may personally lack certain expertise about how best to address a given hazard at the workplace. Hence the requirement of a “practicable” measure may amount to one that necessitates engaging or seeking advice from someone who has the necessary expertise, and (again within the limits of “practicability”) implementing that advice.

8.34. The pivotal importance of the qualification of practicability, expressed throughout the Part III duties, is underappreciated by some industry participants. In the forensic environment of a defended trial, admissible evidence, often of a quite detailed and complex kind, will frequently need to be led by prosecution and defence alike concerning the factors required to be taken into account pursuant to the definition in

¹³³ Summarised in Bluff and Johnstone, *The Relationship Between “Reasonably Practicable” and Risk Management Regulation* (2005) 18 Australian Journal of Labour Law 197, 209-211.

s.3(1). In the day to day reality of managing for effective OSH, those factors likewise arise for regular and careful consideration. Employee inadvertence is but one of those factors. As in the common law of negligence, reasonable employers are expected to take account of all foreseeable risks. In clear cases that warrant prosecution, employees who are careless about their own safety, or that of others, are in peril of conviction under s.20 of the OSH Act. But it is unhelpful, even positively misleading, to attempt to paraphrase the nature of the general duties at a high level of abstraction.

8.35. The scope of similar definitions of “practicable” or “reasonably practicable” has arisen for consideration in other recent statutory reviews Australia-wide¹³⁵. No sufficient cause has been shown to this Inquiry for any recommendation that the definition in s.3(1) of the OSH Act be amended. It may be, however, that some possible ambiguity could arise as to the question of “state of knowledge” in paragraph (b) of the definition. *What* is to be had regard to, where the context permits, is that knowledge concerning the injury or harm to health that may be involved, the risk of that injury or harm occurring, and means of removing or mitigating the risk or potential injury. But *whose* knowledge is contemplated here? Self evidently it could not be simply the state of knowledge of the person charged, or the effect of the practicability requirement could thereby be easily defeated. On present authority, the relevant “state” of knowledge is that of persons generally who are engaged in the relevant field of activity.¹³⁶ It may well be open to legitimate debate, however, whether the preferable way to ask the question, from a policy point of view, concerns knowledge generally within the relevant industry, or perhaps a well informed subset thereof, or conceivably the world at large. The issue warrants ongoing monitoring and may merit further consideration at the time of the next statutory review.

8.36. As noted in the Discussion Paper there are numerous other references to the word “practicable” in the OSH Act where, plainly, the appropriate meaning is other than that meaning provided by the definition in s.3(1). Provisions where the word is used where a different meaning appears to be appropriate include ss.4(5), 4A(1)(b), 13(10),

¹³⁴ *Hammersley Iron v Robertson*, unreported Supreme Court of WA, 2 October 1998, Library no. 980573, endorsed in *Connector Drilling v Equigold NL* [2003] WASCA 78 at [10] per Malcolm CJ and [37] per Wheeler J.

¹³⁵ See Maxwell Report at [393]-[443].

¹³⁶ *Morrison v De Bono* [2005] WASCA 271 at [22], and the authorities therein cited.

14(3), 15(5), 42A(3), 45(2) and (2a), 46(1), 50A(6), 51A(4), 51AC(4), 51AD(2)(b), 51AH(5), 51J(4)(a) and (b), and 61(2).

- 8.37. The Inquiry is satisfied that no material difficulty arises in the interpretation and operation of the OSH Act by virtue of these different uses, and potential meanings, of the word “practicable”. As s.3(1) itself indicates, the definitions there enacted are to apply “unless the contrary intention appears”. It would be an unnecessarily intricate drafting exercise to attempt to enact different meanings for “practicable” in the sections referred to, without any sufficient case being made out to do so.

Submissions of Agriculture/Farming Interests

- 8.38. Several representative bodies from the agriculture and farming sectors put submissions of some length to the Inquiry. Some advanced issues that have previously been canvassed elsewhere. Others were too abstract or general in nature to be able to evaluate in any meaningful way. One commentator, for example, asserted that “in reality the Act has been drawn to cover too many problems and it would be much better for all concerned if it was broader and the Commissioner ... has more discretionary powers and of course is prepared to use them”. Other proposals were simply misconceived, such as “any person who is served an improvement notice needs to have the right to appeal to an independent appeals tribunal external to WorkSafe”.
- 8.39. Nevertheless a number of serious and important issues addressing the scope of legislative coverage were raised by representatives of the agriculture sector that warrant the Inquiry’s attention. The most significant of these, in the Inquiry’s view, concerned the scope and potential operation of s.23 of the Act and related provisions in the Regulations. Section 23 imposes important duties on people that design, manufacture, import or supply any plant for use at a workplace. In substance, those persons are to *so far as is practicable* –
- (a) Ensure that the design and construction of the plant is such that persons who properly install, maintain or use the plant are not in doing so exposed to hazards;

- (b) Test and examine, or arrange for the testing and examination of, the plant so as to ensure that its design and construction are as mentioned in paragraph (a); and
- (c) Ensure that adequate information in respect of certain matters concerning dangers associated with the plant specifications and proper maintenance, are provided when the plant is supplied and thereafter wherever requested.

8.40. Duties of a similar kind are imposed on people who erect or install plant for use at a workplace, manufacture, import or supply any substance for use at a workplace or design or construct any building or structure for use at a workplace. To understand the full import of s.23 regard needs to be had to its entire text. However the necessary flavour is indicated by the summary that has been provided. Part 4 Division 3 of the Regulations imposes certain related, yet somewhat more specific, duties applying to “plant” (as defined) largely concerned with identification of hazards and assessing and addressing risks in relation to plant.

8.41. It was the contention of interests from the agricultural industry that these provisions had the real potential to work injustice, imposing obligations on participants within the industry which are disproportionate and unnecessary to achieve the objects of the legislation. Several examples were put to the Inquiry of manufacturers and suppliers being required to take certain steps prior to the distribution or other dealing with certain items that were onerous, even trivial. One striking illustration, it was put, was a recent phenomenon whereby suppliers became so absorbed with the need (reinforced to them by WorkSafe inspectors) to ensure that warning stickers, decals and instruction manuals were provided with certain plant that it was consuming ridiculous amounts of their professional time. The concerns were exacerbated by difficulties related by business operators and employers in their dealings with WorkSafe inspectors. Numerous examples were cited of apparent confusion and lack of understanding arising from difficult conversations about the import of the legislation or what it required in certain situations. Although somewhat related to the primary point about the operation of the legislation, this is in truth a distinct issue more directly concerned with aspects of the legislation’s enforcement, to which reference has been made.

- 8.42. Having carefully considered the legislative text of s.23 and the analogous prescriptive regulations 4.23-4.37, the Inquiry is unconvinced that, properly understood, the provisions achieve any unfairness or effect the balance of OSH obligations in an inappropriate way. They reflect now well established norms Australia-wide¹³⁷. Indeed, they sit entirely in conformity with the fourth national priority of “eliminating hazards at the design stage”. It is clear from a consideration of accompanying material of the ASCC and its predecessor, that “design” in this context is not to be construed in any narrow sense. Nor, having regard to the objects of the OSH Act and the need to construe the Part III duties beneficially to those whom the duties are designed to protect, would any restricted application be legitimate.
- 8.43. That said, the summary provided above of s.23 consciously emphasised the qualifier “so far as is practicable”. As is the case with the other Part 3 Robens-inspired duties, that requirement - imposing an onus on the prosecution where an offence is alleged - comprehends the process of inquiry that the definition of “practicable” in s.3(1) entails. The circumstances of its application will be numerous, almost infinite.
- 8.44. It will be difficult for a prosecution to establish that a manufacturer or supplier has contravened s.23 by failing to provide certain information, or test and examine plant regarding its design and construction, in situations where it cannot *reasonably* be said that those obligations might be imposed. Every process of alleging statutory breach must necessarily take into account the considerations referred to in the definition of “practicable”. Those considerations merit repeating once again in this context, given the force with which the point has been put to the Inquiry. Regard must be had, on a determination of reasonable practicability, to where the context permits:
- (a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;
 - (b) the state of knowledge about –
 - (i) the injury or harm to health referred to in paragraph (a);

¹³⁷ The Maxwell Report examined these kinds of obligations – as it termed them “upstream duties” – before recommending their continuation and some fine tuning of the Vic OSH Act accordingly: [789]-[863].

- (ii) the risk of that injury or harm to health occurring; and
 - (iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health; and
- (c) the availability, suitability, and cost of the means referred to in (b)(iii).

8.45. Hence, contrary to the extent to which the point was put by one commentator, the OSH Act does *not* “go as far as saying that washing or cleaning by a dealer makes him liable”. Nor do any of the more prescriptive requirements of Part 4 Division 3 of the Regulations (some of which are also limited by a qualification of “practicability”). The Inquiry accepts that in hard cases it may be difficult to predict with certainty whether a certain obligation, perhaps one suggested by WorkSafe inspectors, seriously arises on the proper interpretation of s.23. But it is difficult to conceive of an obligation being imposed by the legislation upon a dealer or supplier, undertaking a limited adding of value to an item of plant, that goes beyond the state of knowledge that it may reasonably be expected to have of the plant’s design and its potential to expose people to hazards. To simply advert to “liability” at a general or abstract level will rarely be illuminating.

8.46. Reasonable opinion about the operation of s.23 may differ. Sometimes a difference of view may play itself out through the issue of improvement notices or prohibition notices. In those cases, the process for internal review and further review will operate in the orthodox way (as perhaps has been underappreciated by at least one industry representative group, in light of the submission extracted at paragraph 8.38 above). It is at this point that the difficulties concerning the interrelationship between members of the agriculture and farming industry, and WorkSafe inspectors, become particularly important. The Inquiry reiterates its recommendation about the value of productive consultation at senior levels, and between inspectors and workplace participants, in this regard. Substantial efforts already undertaken by WorkSafe through education campaigns, mailouts, seminars and workshops merit enhancement and further development.

- 8.47. One representative body sought the creation of an “OSH Interpretation Group for Agriculture”. However the Inquiry is concerned that the utility of such a body might be limited, particularly if its role were structured around consideration of legislation at a level of generality. Even if it were feasible for an “Interpretation Group” to have regard to the specifics of a workplace hazard, or particular incident, the precise nature and admissibility of any actual evidence, appropriate for placing before the Magistrates Court or the Tribunal, would be imperative. Plainly no interpretation by an *ad hoc* reference body could bind any court or tribunal.
- 8.48. It was separately proposed that the composition of OSH administration be conceived so as to comprise a three-fold structure of the Commission, WorkSafe and the Farmsafe Alliance¹³⁸. The latter, as reconceived, would be charged with education and training for the agricultural industry and would be responsible to that industry, acting independently from the Commission and WorkSafe. The Inquiry is left with no doubt about the good work already being undertaken by the Farmsafe WA Alliance. However major - and formal - structural change of the kind proposed is not warranted, in the Inquiry’s view. Even if there were a case for that degree of differential treatment to be accorded one industry (which the Inquiry does not accept) such an alteration would require comprehensive consideration of the effects and consequences for the numerous other structures and processes enacted by the OSH Act.
- 8.49. That is not to deny that the genuine difficulties experienced within the agricultural sector warrant enhanced attention. There is a fine balance to be struck between proper recognition of these sorts of problems and inappropriate “discrimination” in favour of these sectors at the expense of others. The Inquiry is satisfied, however, that a sound case exists for increased funding to enable WorkSafe to assist the agricultural sector so as to better meet *all* of the statutory purposes in s.5(a)-(g) of the OSH Act.

¹³⁸ Presently the Farmsafe WA Alliance is a peak network concerned with the effective improvement of the health and safety of the agricultural community. One important initiative it delivers and administers in collaboration with other representative groups is the Farm Safety Strategy, a program that aims to increase the number of rural enterprises

“Chains of Responsibility” and “Control”

- 8.50. As noted, the materials associated with the initiation of the Inquiry highlighted the concept of a chain of responsibility for commercial vehicle operations as being a matter of particular significance to the present and future administration of OSH in Western Australia. Specific reference was made to present alternatives for regulating the important workplace hazard of fatigue for drivers, particularly in the long distance trucking industry. The subject is currently dealt with in Part 3 Division 10 of the Regulations which, generally speaking, applies to certain drivers of “commercial vehicles” (as defined).
- 8.51. Intrinsic to the present regime is the enactment of a “commercial vehicle operating standard” which requires each commercial vehicle driver to, as far as practicable, have certain breaks and non-work time from driving calculated in a variety of ways depending on the applicable periods of driving. Central to the standard is the regular requirement of at least seven hours of “non-work time” (as defined) in any 24 hour period. Both commercial vehicle drivers themselves and responsible persons at a workplace are required to comply with that standard. There is also a requirement for a responsible person at the workplace to ensure that a “Driver Fatigue Management Plan” is developed and kept current for every commercial vehicle driver. Such a plan is a written document setting out requirements and procedures relating to the scheduling of trips, the rostering of drivers, establishing a driver’s fitness to work and related matters. Ancillary requirements of record keeping are also imposed.
- 8.52. This important subject has been under active consideration at both federal level and in New South Wales in recent years. Recognising the range of circumstances where workplace participants may contribute to conditions that pose hazards, often with extremely serious if not fatal effects, the National Transport Commission expressed the concern through the conclusion that:

“... all who exercise control over conduct which affects compliance, have responsibility, and should be made accountable for failure to discharge that responsibility.”¹³⁹

with a safety and health action plan in place. WorkSafe provides funding to the Alliance to enable and promote that Strategy as the Alliance sees fit, subject to certain financial guidelines and audit requirements.

¹³⁹ National Road Transport Commission, *Options for Regulation of the Road Freight Industry*, September 2001.

- 8.53. Although perhaps of some assistance in highlighting the breadth and depth of the problem, a statement in such broad conclusionary terms is of little assistance in defining legislative obligations and duties with any precision. Indeed it begs the very important questions as to what the nature and limits of a person's "responsibility" may be and the manner in which such a person may be made "accountable" for any failure to discharge that responsibility. The question of "control" is another concept of variable meaning to which more reference will be made directly. That said, the draft model legislation released in November 2006¹⁴⁰ reflects a desirable level of prescriptive detail which goes considerably beyond those levels of generality.
- 8.54. In March 2005 the New South Wales Government embarked on a process of consultation to attempt to arrive at regulations which created obligations and imposed liability in a more precise and equitable manner¹⁴¹. The ensuing discussion and conclusion of the New South Wales Government culminated in the creation of the *Occupational Safety and Health (Long Distance Truck Driver Fatigue) Regulations* (NSW) which now form part of the *Occupational Health and Safety Regulations 2001* (NSW) at regulations 81A-81F. Those regulations, in the Inquiry's view, represent a sensible and balanced attempt to attribute responsibility in a way that reflects the nature and importance of the workplace risk and its consequences, in light of the capacity that certain workplace participants have to control and minimise those hazards. It represents another example of effective legislative drafting for which due credit is appropriate.
- 8.55. The entire text of the New South Wales Regulations concerning long distance truck driver fatigue ought be considered for its full force and effect. However some short observations are apposite. The provisions impose a duty on employers to assess and manage the risk of driver fatigue. If it is not reasonably practicable for an employer to eliminate the risk, it is obliged to take steps to control the risk. However the obligation only exists to the extent that an employer's activities actually contribute to that risk. A related obligation is placed on head carriers and certain consigners and consignees of freight who enter into a contract with a self-employed carrier for the transportation of long distance freight. Further, consignors and consignees with more than 200

¹⁴⁰ Accessible by following relevant links at www.ntc.gov.au.

¹⁴¹ *Fatigue Management in the Long Distance Road Freight Industry*, WorkCover New South Wales, Consultation Paper March 2005.

employees in industries such as retailing, wholesaling and transport services also have a responsibility to ensure that they do not impose unreasonable deadlines for freight deliveries. They are accordingly precluded from entering a contract with a carrier unless they are actually satisfied that drivers' delivery timetables are reasonable, and that they are covered by a Fatigue Management Plan. A Fatigue Management Plan is similarly conceptualised to that in Part 3 Division 10 of the WA Regulations, although it encompasses slightly more components and criteria. WorkCover NSW is given the power under the NSW Regulations to investigate whether trip schedules, driver rosters, inadequate training for drivers on fatigue issue or loading schedules have contributed to incidents involving long haul trucks.

- 8.56. The New South Wales model, in the Inquiry's view, ought be carefully considered in any expansion of the treatment of this subject in the Western Australian Regulations. WorkSafe, in formal submissions to the Inquiry, queried whether regulation 81C of the New South Wales Regulations, prescribing requirements assessed on the foundation of "reasonableness", imposed too vague a standard. However assessments of reasonableness are commonplace in Australian courts, and have been for a considerable period of time. As with the common law of negligence, courts customarily form assessments concerning what a reasonable person would do, taking into account relevant factual and contextual circumstances. In civil proceedings, findings are made on the balance of probabilities in application of the "reasonable person" standard. There is no reason in principle, in the Inquiry's view, why a similar standard cannot properly attribute responsibility for this kind of subject matter, and enable findings to be made to the requisite criminal standard, that is beyond reasonable doubt.
- 8.57. The question does arise, however, whether the regime as enacted at ss.81C-81E of the New South Wales Regulations can sit compatibly with a "commercial vehicle operating standard" of the kind presently contained in regulation 3.132. It may well be that a choice needs to be made between what, in a very general sense, might be called a "chain of responsibility" approach as opposed to the more prescriptive technique of determining quantifiable standards of appropriate risk and giving legislative effect to them. Some kind of merger of those two techniques may serve to confuse rather than simplify. Furthermore, the position Australia-wide regarding this kind of prescriptive

legislation remains in a highly dynamic state. As noted, model draft legislation released shortly before the finalisation of this Report offers another alternative. On balance, the Inquiry expresses a preference for the current NSW model over the existing WA regime. No doubt close consideration will be given to whether the proposed national model, in whole or in part, may be the superior version which warrants enactment.

8.58. It is important to be wary about utilising the general concept of “chain of responsibility” without real precision as to the nature of the applicable hazard, the kinds of obligations that are sought to be imposed, and the nature of responsibility that may flow from a breach. The confusion that can flow from a discussion in general terms, without the best efforts to attend to the required level of particularity, is evident in the concerns expressed about the conclusions of the National Transport Commission concerning driver fatigue. If one refers to a “chain of responsibility” to reflect no more than the overall objective to recognise that there are different workplace participants with different roles, each of which *may* necessitate legislative obligation, there is little vice in the use of the label. But the concept can only be a starting point and indicator to more precise inquiry and, where appropriate, legislative prescription.

8.59. As noted, the Inquiry has been unpersuaded that any legislative amendment is required to the related legislative term “control”. To the contrary, indications emanating from the Commonwealth level suggest that “control” is a concept intrinsic to templates for national harmonisation.

8.60. A final issue relevant to the road transport industry, although narrower in ambit than the more nuanced questions of legislative coverage just adverted to, was also raised in the materials for the commencement of the Inquiry. The Auditor General of Western Australia, in Report No. 4 of 2005, *Regulation of Heavy Vehicles*, observed that:

WorkSafe is developing a comprehensive approach to enforcing fatigue management regulations. However its capacity to fully enforce the regulations is reduced by its lack of authority to stop vehicle operators for inspection.

8.61. WorkSafe, in formal submissions to the Inquiry, said that it did not regard it as necessary that it be given such coercive powers. It pointed to the quality of its

collaborative relationships with other relevant agencies (most pertinently the Police Service and Main Road Department) and its concerns about the safety and security of its inspectors were such a power to be implemented. Discussions with individual inspectors with knowledge and experience in the area were somewhat inconclusive, with those officers acknowledging the competing arguments for and against. Likewise, communications with the Office of the Auditor General, whilst reflecting the overall conclusion reached by that office in its report, accepted that if WorkSafe itself did not see sufficient need for legislative amendment, that ought be accorded considerable weight.

- 8.62. Initially, the Inquiry was attracted to the view that there would be no detriment in recommending an amendment to the legislation so as to *enable* WorkSafe inspectors to stop vehicle operators for inspection. It could then be a matter for the WorkSafe Commissioner as to whether she wishes her inspectors to *utilise* that power or continue with present cooperative arrangements. It would be expected that certain administrative alternatives would be open to minimise the legitimate concerns of WorkSafe regarding safety and security. That still remains an option if it is perceived by the Western Australian Government and, ultimately, Parliament that that need for coercive powers is substantial enough. On balance, however, the Inquiry has determined not to make a formal recommendation in this regard. It would take a strong affirmative case to justify such a recommendation against the positive wishes of the agency concerned. It is always open to review the subject should WorkSafe's needs change.

Intangible Hazards

- 8.63. One important theme, already alluded to, emerged with abundant clarity from the totality of material accumulated by the Inquiry. It concerns the difficulty of legislative interpretation, enforcement, and practical alternatives available to reduce hazards of an intangible kind in contemporary OSH in Western Australia. Labels can be unhelpful, even positively misleading, but the recurring "categories" that emerged during commentary and discussion were those of bullying, stress and work overload. A body

of contemporary literature¹⁴² canvasses difficulties associated with these intangible hazards of the following kind:

- (a) The nature of the very risk to injury or health may be difficult, and in extreme cases impossible, to describe both qualitatively and quantitatively;
- (b) What one person perceives as a genuine workplace hazard of an intangible kind, another will perceive as no more than a legitimate issue of “management” or something that ought not be the subject of legislative proscription;
- (c) Even where a hazard can be identified with precision and a case alleging breach of a legislative standard may be conceptualised, the gathering of evidence which may be presented in admissible form can be particularly challenging and complicated.
- (d) Complainants and other witnesses often have unrealistic or downright incorrect expectations about the role that WorkSafe itself and its inspectors ought play.

8.64. Some interested parties provided the Inquiry with substantial detail regarding particular examples of alleged bullying and, from those examples, sought to draw certain conclusions and invite particular recommendations to be made by the Inquiry. However, the Inquiry must necessarily be wary about drawing such conclusions without the available time and resources to speak with individual complainants in detail about their experiences. Even if that had been an option available to the Inquiry, it would have been necessary to attempt to gauge the competing positions of other workplace participants concerned with those allegations. The scale of the task would have been unmanageable. Even if such a fact-finding role had been feasible, the Inquiry would be cautious about recommending change simply on the basis of selected individual cases. It is doubtful, in any event, whether such an individualised assessment would have detracted from the overall force of the conclusions that have been reached.

¹⁴² Examples include Kelly, *Review of Workplace Bullying: Strengthening Approaches to a Complex Phenomenon* (2005) 21 ANZ J Occup Health Safety s.51; Breslin, *Workplace Bullying: How Effective is the Victorian Regulatory Framework?* (2005) 21 ANZ J Occup Health Safety 147; Smith, *Harassment and Bullying in the Workplace* (2005) 11 ELB 1; Thornton, *Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?* (2004) 17 Aust Journal of Labour Law 161.

- 8.65. Initially, the Inquiry was minded to deal with the issues attending “intangible hazards” in quite some detail. On further consideration, however, its views developed. The reality of the position, on which there was minimal dispute, could be reduced to a number of short propositions. Some hazards, more than others, are difficult to conceptualise and quantify. That is hardly surprising, given the diversity of work environments, borne of modern technology, changing work practices and non-traditional forms of employment. Yet it is difficult to justify legislating by way of the general duty provisions in Part III of the Act for intangible hazards in a different manner *vis-à-vis* more tangible or “traditional” workplace hazards. If there were a ready model - involving specific prescription - that could be discerned, it would be the role of the Regulations to enact that model. But no such acceptable answer was provided by any of the interested parties, nor is any apparent to the Inquiry. One commentator did propose that specific regulations be drafted in a dedicated “Psychological Hazards” section in Part 3 of the Regulations. That prescription, it was suggested, would require workplaces to establish, in consultation with their workforce, an anti-bullying policy supported by negotiated procedures to manage “psychological hazards in the workplace”. It was also proposed that the Regulations should require an employer, where the bully is not the employer, to investigate an allegation of bullying within a reasonable time frame with the view to implementing remedial steps to have the bullying behaviours cease.
- 8.66. Highly commendable as those suggestions are as a concerted effort to provide a practical solution to a difficult problem in contemporary OSH, the Inquiry is unconvinced that a specific treatment of that kind would be of any great assistance to workplace participants. The kind of standards proposed are, more or less, present in other aspects of the Regulations themselves. It may be possible, where available evidence was cogent enough, to enforce obligations of that kind through a conceptualisation of the s.19-based general duties. But there is an even broader problem: in difficult cases of bullying (or, perhaps to a lesser degree, workplace stress) among the major causes of the difficulties are likely to be a lack of insight, or absence of sufficient will, on the part of the alleged perpetrator to identify and address any and all genuine workplace hazards. No amount of prescriptive regulatory detail specifying

particular procedures and/or requirements to “investigate” is likely to generate positive outcomes in those kinds of circumstances.

- 8.67. There is a related limitation, in the Inquiry’s view, in the practical guidance provided by the Commission in its applicable code of practice.¹⁴³ That code of practice provides sensible, logical suggestions to workplaces in identifying the different kinds of bullying and suggesting possible techniques for its prevention and responding to particular incidents. There is a recognition of the subtleties of conceptualising and minimising intangible hazards of this kind, particularly where they might reasonably be said to overlap with legitimate “managerial” issues and concerns. But for those businesses where the risks are slight, and/or where there is appropriate goodwill and commitment on the part of management to occupational safety, the code of practice may add limited value. Employers and duty holders will probably be well advanced towards compliance of their own volition. By contrast, in workplaces where there *is* a potential for bullying-related hazards to arise, employers and other workplace participants may be unlikely to even read the applicable code of practice, let alone seriously address its content. (None of these concerns should be construed as critical of the work undertaken in preparing this code of practice nor any of the other similar instruments endorsed by the Commission.)
- 8.68. The best form of legislative response, in the Inquiry’s view, is to empower an objective decision maker with the ability to receive complaints about such intangible hazards, assist the parties to understand the issues and achieve a conciliated resolution, and if necessary to arbitrate to an outcome within appropriate jurisdictional limits. The Occupational Safety and Health Tribunal is the natural and logical source of such role and jurisdiction. To be sure, an appropriate balance between the Act’s imperatives of consultation, workplace resolution, and risk identification and management needs to be recognised. Any enhanced role for the Tribunal ought not detract from the primacy of those objectives and their ongoing implementation. Accordingly, the Report’s specific treatment of the appropriate powers of the Tribunal fashions some appropriate recommendations in this regard¹⁴⁴.

¹⁴³ Code of Practice 2006, *Violence, Aggression and Bullying at Work*: see particularly, at 20-33.

¹⁴⁴ See paragraphs 5.36-5.50 and Recommendations 8 and 9.

- 8.69. It came to the attention of the Inquiry that the Equal Opportunity Commissioner, Ms Yvonne Henderson, in announcing the review of the Act which enables her functions, the *Equal Opportunity Act 1984 (WA)*, raised for discussion and submission whether the role of that Commission ought more fully include a capacity to respond to complaints of bullying in the workplace¹⁴⁵. Broadly that Act empowers the Commissioner and related office holders to examine and provide certain relief in respect of direct¹⁴⁶ or indirect¹⁴⁷ discrimination, including the somewhat more specific concept of victimisation. Grounds of unlawful discrimination covered under that empowering legislation include age, family responsibility or status, gender, impairment, political conviction, pregnancy, race, sexual harassment and sexual orientation. Clearly enough, some instances of workplace bullying may, simultaneously, give rise to unlawful discrimination on one or more of the proscribed grounds. In other cases, particularly where the alleged bullying is more difficult to identify and subtle in its imposition, there will not necessarily be any such overlap. The Inquiry endorses this particular aspect of the review of the Equal Opportunity Act and commends the close collaboration of relevant State Government agencies should any legislative amendments to that Act ensue.
- 8.70. Finally, it is apt to note that the observations and consequent recommendations of the Inquiry regarding intangible hazards ought not be taken to, by implication, suggest any want of confidence in the capacity of WorkSafe to investigate these issues, nor respond to them within its present range of enforcement alternatives. Some commentators expressed scepticism as to whether WorkSafe's policy of investigating intangible hazards, particularly complaints of bullying, may be too narrow. It appears that that concern may have its source in part of a set of guidelines contained under WorkSafe's *Workplace Bullying Complaints Procedure*. That procedure, albeit for internal use only, on one reading suggests that where a complainant is no longer employed at the relevant workplace, WorkSafe may be constrained in taking action, unless more than one employee has raised concerns and a pattern of behaviour can be established. Upon

¹⁴⁵ See, eg, Equal Opportunity Commission Media Statement 28 September 2006; Equal Opportunity Commission Newsletter *Discrimination Matters* September 2006.

¹⁴⁶ Direct discrimination, occurs where a person is treated less favourably than another person, in the same or similar circumstances, on one or more of the grounds and in one of the areas of public life covered by the Act.

¹⁴⁷ Indirect discrimination occurs when an apparently neutral rule has a negative effect on a substantially higher proportion of people with a certain attribute or characteristic, which rule is unreasonable in all of the circumstances.

investigation, it was sufficiently clear to the Inquiry that those guidelines were not being read within WorkSafe as precluding an investigation where an individual raising concerns of bullying has left the workplace concerned. Ultimately, WorkSafe will always be guided by the need to obtain sufficient admissible evidence to establish a *prima facie* case of a statutory breach, and the criteria otherwise contained in its Enforcement Policy and Prosecution Policy. Guidelines are recognised to be precisely that – a framework of broad principles to assist in the decision making process. No wise enforcement agency will ever apply any guidelines or policy inflexibly, or without regard to the merits of a particular case.

Issues Concerning Health and Disease

8.71. Several commentators, from both government and private interests, as well as a group of interested and concerned occupational physicians, emphasised the ongoing importance of the *health* aspect of “occupational safety and health” in Western Australia. They urged that there not be a disproportionate focus on *safety* at the expense of matters concerned with health and the related concern of occupational disease. With that general proposition the Inquiry is in entire agreement. In addition to the most basic conception of the legislation’s purpose by way of its short and long title, the specific objects as enacted in s.5(a) and (c) address the concepts of “health” and “hygienic work environment”. Moreover, the central notion of “hazards” expressly referred to in s.5(b) and (d), as well as being a recurring concept throughout the legislation, is defined in s.3(1) to mean anything that may result in injury to a person or, significantly, “harm to the health of” a person. Where appropriate, statutory obligations must be interpreted liberally to give effect to the objects in s.5 and the overall protective purpose of legislation. And as recorded, the third of the five nationally identified priorities is the “prevention of occupational *disease* more effectively, involving the development of the capacity of authorities, employers, worker and other interested parties to identify risks to occupational *health* and to take practical action to eliminate or otherwise control them” (emphasis added).

8.72. It has not been realistic for the Review as presently constituted to pursue in detail the numerous ways in which the ongoing pursuit of a health and disease based emphasis

on OSH might be maintained and renewed. It is clear to the Inquiry, however, that important individuals at the levels of both the Commission and WorkSafe are conscious of the dual significance signalled by the statutory objects of the OSH Act reinforced by the national priority identified. The Inquiry commends continued, and if need be imaginative, attention to the addressing of occupational health accordingly.

- 8.73. One particular issue which may be broadly placed under the category of occupational health warrants addressing. A number of interested parties connected with the health industry made strong submissions to the Inquiry about aspects of the legislative treatment in the Regulations concerning the proscriptions on environmental tobacco smoke (ETS) in the workplace¹⁴⁸.
- 8.74. The subject has been recently pursued by the Government of Western Australia through legislation addressing the now universally recognised risk to health from ETS through the *Tobacco Products Control Act 2006* (WA) and associated delegated legislation. The effect of these new laws is that, from 31 July 2006, there is a prohibition on smoking in all “enclosed public places” (as defined) including – importantly – those within licensed premises. The sole exception to this regime remains the Burswood Casino’s International Room. The Department of Health is responsible for the administration of these laws, with environmental health officers attached to local governments undertaking related enforcement activities. There is no direct role for WorkSafe in that enforcement, although naturally it continues to play a role in the enforcement of the regime under Part 3 Division 3 subdivision 2 of the OSH Regulations. The latter regime applies concurrently with the new public health-sourced regime.
- 8.75. Central to the regime are the concepts of an “enclosed workplace” and a “designated smoking area”. In short, prohibitions are imposed on persons at enclosed workplaces be they employers, self-employed persons or employees from smoking in an enclosed workplace, as so defined. Certain defences¹⁴⁹ provide for limited circumstances where a person does not commit an offence under Regulation 3.44B. The most significant of

¹⁴⁸ The topic was also the subject of detailed consideration in the Allanson Review.

¹⁴⁹ These defences contained in regulations 3.44C-3.44E are true defences in that, by the text of the provisions, an onus is placed on the defendant to satisfy a court of the defence claimed.

those (and, for some, still controversial) is that a person does not commit an offence if the following cumulative requirements are established:

- (a) The person smokes *in* a “designated smoking area” (as defined);
- (b) The person is *not working at the time* he or she smokes; and
- (c) In the case of an employer, *no employee is working* in the designated area when the employer is smoking (emphasis added).

8.76. Plainly, an “enclosed public place” is capable of simultaneously being an “enclosed workplace” with the effect that, in addition to the standards and proscriptions as recently enacted, there continues to be a prohibition on employers, employees and self-employed persons smoking in such “enclosed workplaces”. Indeed, even at the International Room at the Burswood Casino, the only permissive effect of the applicable exception is that *patrons* will continue to be allowed to smoke. Additionally, respective duty holders upon whom responsibilities are imposed by ss.19, 21 and 22 of the OSH Act continue to be bound thereby. The Inquiry has not undertaken any detailed comparison of the operation of those Part III-based general duties together with the proscriptive regulations concerning ETS, in light of the recent legislative changes effected by the Tobacco Products Control Act and associated Regulations. It would be desirable in the Inquiry’s view if, within the new regime for the consideration of variations to the Regulations by the Commission, that were an early topic for examination. It may be, for example, that the concept of a “designated smoking area” will have a decreased utility in light of the new provisions and the apparently ongoing policy imperatives of the Western Australian Government regarding ETS.

8.77. Interested parties also contended for the removal of the qualification in item 8 of WorkSafe’s Prosecution Policy that prosecutions concerning exposure to ETS only take place upon the approval of the WorkSafe Commissioner (with that approval only to be provided if consistent with legal advice from the Attorney General). The history behind that qualification appears to be well understood. It is sourced in the acknowledged difficulties that were confronted in conceptualising a prosecution and martialling a sufficient body of admissible evidence to satisfy the elements of a

requisite offence beyond reasonable doubt. Those concerns, in the Inquiry's view, to the extent that they remain relevant and practically real, can simply be accommodated in the ordinary course of the executive decision to prosecute. The Inquiry urges close consideration of the removal of item 8 of the Prosecution Policy accordingly.

Short Matters Concerning Inspectors

- 8.78. A number of shortly stated, but potentially significant, issues arose during the course of the Inquiry concerning aspects of inspectors' powers. They may be concisely dealt with. First, the capacity for the appointment of restricted inspectors under s.42A of the OSH Act appears inappropriately restricted to an appointment of any person employed in the Public Service under Part 3 of the *Public Sector Management Act* 1994 (WA) (PSMA). Of course, there may be public officers within Western Australia whose employment or engagement is sourced otherwise than under that latter legislation. For example, persons whom the Commissioner desires to appoint as restricted inspectors might be employed under specific enabling legislation, rather than the more general Part 3 of the PSMA. Further or alternatively, those employees may be part of the broader Public Sector, rather than the specific subset of the Public Sector which is the Public Service as constituted under s.34 of the PSMA. For the avoidance of doubt, the Inquiry envisages that "environmental health officers", as contemplated by ss.27-30 of the *Health Act* 1911 (WA) to be appointed by local governments, would be within the scope of a newly expanded s.42A of the OSH Act.
- 8.79. Secondly, in light of difficulties raised by WorkSafe, there appears to be a genuine need for inspectors to be empowered to tape record answers given to interviews as part of the armoury of powers conferred by s.43(1) of the OSH Act. It is at least arguable that that provision, as presently construed, might not extend to that kind of investigative power. Moreover, pursuant to s.5 of the *Surveillance Devices Act* 1988 (WA), it is an offence to record private conversations to which a person is a party, except in certain specified circumstances. One circumstance where an offence will not be committed is where the conversation is recorded by a "law enforcement officer" in certain circumstances. It would be desirable if a WorkSafe inspector were so defined where exercising his or her powers pursuant to the OSH Act.

- 8.80. Thirdly, legitimate difficulties have been identified with the operation of s.45(4) of the OSH Act in imposing certain requirements on an inspector who takes photographs or makes sketches or recordings of, in respect of, a workplace to “forthwith notify any relevant employer and any relevant safety and health representative” of certain matters. Any breach of that section ought not *of itself* and *necessarily* give rise to any consequence of invalidity concerning the powers otherwise exercised.¹⁵⁰ An argument for rejection of the evidence so obtained should fall to be determined in application of the principles enunciated by the High Court in *Bunning v Cross*¹⁵¹. Nonetheless, it is the Inquiry’s view that the obligations imposed by s.45(4) are unnecessarily onerous. It is appropriate that they be amended so that, in a temporal sense, the obligation is not necessarily one to be undertaken “forthwith”. Moreover the requirement to notify not merely any relevant employer (defined in accordance with s.41A) but, furthermore, *any* relevant safety and health representative appears to be disproportionate in all the circumstances.
- 8.81. Fourthly, WorkSafe suggested that it would be appropriate for the OSH Act to clarify that an inspector’s power may, where appropriate, be exercised in respect of witnesses, or other investigative matters, outside Western Australia. In terms of legislative *capacity*, there is no doubt that the overall legislative power of the Western Australian Parliament enables such extraterritorial operation of the OSH Act to take place¹⁵². Distinctly from that constitutional issue, any given legislative enactment needs to reflect a statutory intent that such extraterritorial operation be open. For the avoidance of doubt, that intent ought be manifest explicitly.

¹⁵⁰ See *Project Blue Sky v Australian Broadcasting Authority* (1994) 194 CLR 355.
¹⁵¹ (1978) 141 CLR 54.

¹⁵² That general legislative power is one to legislate for the “peace, order, and good Government” of Western Australia: s.2(1) *Constitution Act* 1889 (WA). The High Court has made clear that that plenary power encompasses the capacity to enact laws having extraterritorial operation that carry a relevant connection between the circumstances on which the legislation operates, and the enacting State. Even a “remote and general connection”, liberally construed, will suffice: *Union Steamship Co v King* (1988) 166 CLR 1 at 14.

Recommendations:

R.24 It is recommended that the *Occupational Safety and Health Act 1984 (WA)* be amended to:

- Amend s.42A to enable the appointment of any person employed or engaged in the Public Sector of Western Australia to be a restricted inspector, rather than in the Public Service under Part 3 of the *Public Sector Management Act 1994*.
- Amend the power in s.43(1)(l) to expressly enable the tape recording of answers given under the power therein contained.
- Expressly provide that a WorkSafe inspector is a “law enforcement officer” for the purposes of the *Surveillance Devices Act 1988 (WA)*.
- Amend s.45(4) so as to require the notification “as soon as practical” rather than “forthwith” of any relevant employer (as defined) and not, additionally, any relevant safety and health representative.
- Insert a provision in Part V to expressly provide that any of the powers of inspectors conferred by that Part is capable of being exercised in a place outside Western Australia for the purposes of the OSH Act.

Information Sharing

8.82. The complex issue of information sharing in contemporary public administration arose from time to time during the course of the Inquiry. Such are the difficulties inherent in the subject¹⁵³ that the Inquiry considered it unprofitable and a disproportionate use of its resources in the time available to pursue the issue beyond the relatively superficial. Other recent administrative inquiries have commented on the complexities¹⁵⁴. It is to be noted, however, that a specific amendment was made to the *Workers Compensation and Injury Management Act 1981*¹⁵⁵ to require WorkCover WA to comply with written requests made by the Chief Executive Officer responsible for the administration of the

¹⁵³ Present State Government policy enunciates, as an “interim arrangement”, an aspiration to achieve the best possible balance between competing public and individual interests: *Policy Framework and Standards for Information Sharing Between Government Agencies*, Premier’s Circular 2003/05.

¹⁵⁴ The Gordon Inquiry into the response by government agencies to complaints of family violence and child abuse in Aboriginal communities found that a lack of information sharing between agencies in relation to family violence and child abuse resulted in considerable impediments to service delivery: Gordon et al *Putting the Picture Together*, Department of Premier and Cabinet, Western Australia, 2002 at 452. The response of the Western Australian Government identified the need for a legislative solution to this complex problem, particularly so as to ensure compatibility with applicable statutory obligations concerning privacy, as well as the improvement of data collection and collation: *Putting People First – WA State Government’s Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities*, at 29-30.

¹⁵⁵ By the insertion of s.100B in 2005.

OSH Act for the disclosure of information. Examples came to the attention of the Inquiry where a reciprocal empowerment would be appropriate, that is one expressly enabling WorkCover to disclose certain information or data to WorkCover WA. For example, it may arise that personal details such as the name and address of a person killed or seriously injured in a workplace incident may be advantageous to the compliance with obligations under workers compensation legislation.

- 8.83. The Inquiry is circumspect about recommending any legislative amendment concerning disclosure of information without having had the reasonable opportunity to pay close attention to other legislation touching upon areas such as freedom of information, privacy, and data protection. The safer course in the immediate term is for the Inquiry to express its endorsement of such information sharing between WorkSafe and WorkCover as can sensibly provide mutual assistance between those two agencies in discharging their statutory roles and functions. The Inquiry has no doubt that the highly pragmatic, practically minded people employed at senior management in both organisations will work together to achieve those goals.

Section 61 Itself – “Reviewing the Reviewing Provision”?

- 8.84. As has been noted, some interested parties (generally those representing employers’ interests) were sceptical as to the need for another statutory review, by force of s.61, to be occurring so soon after the completion of the Laing Review and the implementation of its recommendations. The Inquiry pursued the implications of this view to a limited degree in some informal discussions. There was some weak to moderate adoption of the notion that s.61, in requiring a statutory review every five years after the commencement of the OSH Act’s operations, was too prescriptive and that the provision could be improved by introducing a measure of flexibility.
- 8.85. However in the absence of the issue being comprehensively debated, it would be inappropriate to recommend any change in this regard. Rather, what the experience of the present Inquiry has demonstrated is that the nature of OSH in Western Australia places it in a relatively unique position regarding legislative coverage and administration by the executive arm of government. If one were permitted to speculate about the legislative “intent” behind s.61 it may have been borne out of a perception and

prediction that that dynamic content of the subject matter required regular monitoring and assessment of the operation of the Act and its delegated legislation. Ultimately the Inquiry is not satisfied that there is a sufficiently strong case for s.61 to be amended, whether as to the frequency with which a statutory review is required, or otherwise.

Final Matters

8.86. It will rarely be feasible, in any review of this kind, to attempt to address every single issue specific to a particular industry, sector or kind of work that may be of relevance, and quite possibly very real importance, in OSH in Western Australia. Being necessarily selective, the Inquiry has been obliged simply to note the potential significance of some such areas and leave their ongoing consideration by components of the present structure of OSH legislation and its enforcement. Particular issues which came to the Inquiry's attention, and which may warrant short-term attention at first instance by the Commission itself or through one of its constituent authorities, are the:

- challenges facing the education system in Western Australia, particularly concerning violent children and/or those suffering from particular disabilities, and the unique kinds of workplace hazards thereby presented.
- nature and role of the aviation industry and whether it warrants particular attention, especially in light of its capacity to present regulatory issues that cross State boundaries within Australia's federation.
- enhanced workplace risks faced by actually or potentially vulnerable workers, whether the vulnerability arises by way of the workers' youth, disabilities, inability to express themselves clearly in the English language, or otherwise. It may well be that, in the present socio-political environment, a particular source of vulnerability arises from the circumstances faced by workers who are not Australian citizens and retain lawful authority to remain in the country only for so long as they have a valid visa granted under the *Migration Act* 1958 (Cth). All workers present in Western Australia, irrespective of their particular circumstances, are entitled to a basic level of protection from occupational hazards.

APPENDIX A

Summary of Implementations of Laing Review of November 2002 as at November 2006

Recommendation	Status
GENERAL DUTIES	
R:1 It is recommended the Act be amended to include a requirement to identify hazards, assess the risk associated with those hazards and reduce or control such risks as a duty of employers, self-employed persons and persons in control of workplaces.	Act amended. Drafting instructions for Regulations with Parliamentary Counsel, but possible conceptual difficulties with amendment as proposed.
R:2 It is recommended the Commission consider and recommend options for improving the assistance given to, and the encouragement of, employers to observe their duties through systematic safety and health planning and consultation.	Ongoing implementation through various measures: eg the ThinkSafe Small Business Program.
R:3 It is recommended, consistent with the recommendations of the Commission, the Act be amended to include a limited duty of employers to provide safe accommodation, subject to the criteria: <ul style="list-style-type: none"> • accommodation should be essential to the performance of the work and the employee is required to live there; • if a separate tenancy agreement or some other legal instrument applies, the new provision of the Act should not apply; and • no practicable alternative accommodation is provided or available. 	Implemented.
R:4 It is recommended s.19(4) of the Act be redrafted, in order to: <ul style="list-style-type: none"> • ensure the provision can be readily understood by parties in the workplace; • clarify the meaning of "control"; • ensure the provision can be applied to agencies of the Crown; and • maintain the current exclusion of private persons. 	Implemented.
R:5 It is recommended the Commission develop a code of practice or guidance note covering the duties of principals and contractors. This should include guidelines for establishing safety requirements in contracts.	COSH General Duty of Care Guidance Note amended; plus Labour Hire bulletin issued.
R:6 It is recommended the Act be amended to require an employer to advise an employee of the action proposed to be taken in respect of any hazard or injury reported by the employee under s.20.	Implemented.
R:7 It is recommended s.21 of the Act be amended to: <ul style="list-style-type: none"> • clarify those duties that apply to self-employed persons only, those that apply to employers only and those that apply to both; and • specify the duty of employers and self-employed persons to protect non-employees from adverse consequences of work so that it extends to all aspects of work including systems of work and hazards arising after direct work activity has ceased. The application of 	Implemented.

	Recommendation	Status
	the section should be restricted to workplace initiated safety and health matters.	
R:8	It is recommended the Act be amended to require where practicable and reasonable, workplace visitors to comply with the directions of the employer or the person in control of the workplace in relation to securing occupational safety and health.	Implemented.
R:9	It is recommended that s.22 of the Act be amended to require employers and self-employed persons to inform those persons in control of workplaces of each situation that constitutes a hazard and which is the responsibility of the person in control of the workplace to remedy.	Implemented.
R:10	It is recommended the Commission develop a code of practice on the duties of architects, engineers and designers. The code should address the separate responsibilities of designers and constructors.	Under development.
R:11	It is recommended that in addition to the penalties applied, s.23(1) of the Act be amended to provide that manufacturers, etc be made responsible for the repair, removal or alteration of reasonably foreseeable hazards in plant supplied to a workplace.	Not actioned – State Government did not support.
R:12	<p>It is recommended the Commission consider the means of amending s.23 to:</p> <ul style="list-style-type: none"> • include "items" within its scope; • include a requirement to consider the handling of plant, substances and items in addition to the existing criteria of installation, maintenance and use; and • ensure consistent standards are applied where possible between locally made and imported equipment. 	In progress.
	COVERAGE OF THE ACT	
R:13	It is recommended the Act be amended to provide power for regulations that place duties on the owners of plant used at a workplace.	Implemented.
R:14	<p>Notwithstanding any specific recommendations relevant to this issue, it is recommended the Act be amended to:</p> <ul style="list-style-type: none"> • extend coverage to a range of alternative arrangements that may currently fall outside both the traditional employer/employee relationship and the principal/contractor arrangement provided for under the Act. In particular, the Act should apply employers' obligations to persons who are employed under labour only arrangements and subject to the direction and control of employers or principals; and • clarify its intent and to make clear that an employer's duties under s.19 apply to both labour hire firms and principals in relation to matters under the respective control of each party. 	Implemented.
R:15	It is recommended the Act be amended, at the earliest opportunity, to provide coverage for Police Officers.	Implemented.
R:16	It is recommended the definition of "self-employed person" in the Act be amended so that where the context permits it includes a corporate entity.	Implemented.
R:17	<p>It is recommended the Act be amended to provide for:</p> <ul style="list-style-type: none"> • prosecution of State Government departments and agencies for breaches of the Act; and • the issuing of improvement and prohibition notices to State Government departments and agencies.) 	Implemented.

Recommendation	Status
<p>POLICIES, TRAINING, PERFORMANCE</p> <p>R:18 It is recommended the Commission:</p> <ul style="list-style-type: none"> develop and issue guidance or advisory notes incorporating information and advice on the preparation of workplace safety and health policies and the management of priority safety issues for businesses of all sizes; and develop strategies for promotion of the benefits of effective occupational safety and health management systems. 	<p>Implemented in part.</p>
<p>R:19 It is recommended the Commission develop guidance material on best practice approaches to occupational safety and health training including induction training.</p>	<p>National Code of Practice on Induction Training released for public comment.</p>
<p>R:20 It is recommended the Commission review the adequacy of the existing approach to the approval of training providers.</p>	<p>Implemented.</p>
<p>R:21 It is recommended the Commission develop strategies aimed at promoting the effective reporting of occupational safety and health performance by companies and Government agencies, including within Annual Reports.</p>	<p>Implemented – national guidelines issued.</p>
<p>ISSUE RESOLUTION</p>	
<p>R:22 It is recommended that the Commission be directed to develop appropriate substitutes for s.28A of the Act with a view to the introduction of more suitable and effective provisions.</p>	<p>S.28A retained.</p>
<p>R:23 It is recommended disputes over entitlements under s.28 be resolved in the Occupational Safety and Health Tribunal.</p>	<p>Implemented.</p>
<p>R:24 It is recommended that the Commission investigate and develop recommendations to Government to remove the use of occupational safety and health as a bargaining instrument in relation to other industrial claims.</p>	<p>No action.</p>
<p>ACCIDENT NOTIFICATION</p>	
<p>R:25 It is recommended WorkSafe and WorkCover WA revise their data sharing agreement to facilitate the use of data for operational purposes and to ensure WorkSafe receives adequate and timely advice of the incidence of serious injuries and diseases while observing WorkCover's confidentiality obligations.</p>	<p>Continued alternative progress undertaken.</p>
<p>R:26 It is recommended the Act be amended:</p> <ul style="list-style-type: none"> to require the notification of fatalities and specified injuries occurring to non-employees at a workplace by the person in control of the workplace; and in relation to accident notification requirements, to stipulate a defined time period within which notification must occur. 	<p>Implemented.</p>
<p>R:27 It is recommended that r.2.4(1)(e) of the Regulations be amended to make clear the date on which the employer's obligation to notify absences from work of greater than 10 days commences.</p>	<p>No action.</p>
<p>R:28 It is recommended that the Workers Compensation and Rehabilitation Act 1981 be amended as necessary to provide protection for injured employees dismissed contrary to s.84AA of that Act in accordance with the recommendations contained in the Report on the Implementation of the Labor Party Direction Statement in Relation to Workers' Compensation (Guthrie Report).</p>	<p>Outside scope of OSH Act.</p>

Recommendation	Status
<p>COMPETENCY CERTIFICATION & MAINTENANCE REPORTING</p>	
<p>R:29 It is recommended WorkSafe review its processes for competency assessment and ensure sufficient allocation of resources so as to ensure the integrity of competency certification. The review should ensure all necessary audit and quality control mechanisms are in place to identify and remove assessors who do not fulfil their assessment obligations.</p>	<p>Process reviewed, with audit function enhanced. Revised National Standard released for public comment, then declared for operation from 1 July 2007. Instructions to Parliamentary Counsel for drafting amendments to Part 6 of the Regulations.</p>
<p>R:30 It is recommended the Regulations be amended to require competent persons to report to the WorkSafe Western Australia Commissioner the outcomes of inspections of high hazard plant and equipment where recommended corrective work has not been carried out or where major faults are noted at the time of inspection which may lead to plant failure.</p>	<p>Not implemented.</p>
<p>PENALTIES AND SANCTIONS</p>	
<p>R:31 It is recommended the Act be amended to provide for serious breaches of the <i>Occupational Safety and Health Act 1984</i> to be heard as indictable offences by superior courts.</p>	<p>Implemented.</p>
<p>R:32 It is recommended the Act be amended to more clearly establish the accountability of corporations, their directors and senior officers for the occupational safety and health of employees.</p>	<p>Implemented.</p>
<p>R:33 If the liability of corporate directors and senior officers is not extended, it is recommended s.55 be amended to make clear the same maximum penalty as would apply to a body corporate applies to a person convicted under s.55 of the Act.</p>	<p>Implemented.</p>
<p>R:34 It is recommended the Act be amended to provide for negligent senior officers of corporations to be held accountable for the death or serious injury of employees. Offences would apply where a corporation owes a duty of care to the deceased or injured person, where senior officers have breached their duty of care and the breach amounts to gross negligence. In the event that investigation procedures under the Criminal Code and/or amendment of the Criminal Code provide an effective alternative process, this recommendation should lapse.</p>	<p>Implemented.</p>
<p>R:35 It is recommended the maximum penalties in the Act be increased to reflect penalty levels in other jurisdictions and community expectations. These should include imprisonment for serious offences involving gross negligence resulting in serious injury or death.</p>	<p>Implemented.</p>
<p>R:36 It is recommended the Commission and WorkSafe pursue the development and application of sentencing guidelines for offences under the <i>Occupational Safety and Health Act 1984</i>. If necessary, specific provision should be made in the Act for sentencing guidelines to be issued by an appropriate authority.</p>	<p>Raised with Attorney General and Chief Magistrate.</p>
<p>R:37 It is recommended the Act be amended to provide for alternative non-monetary penalties, aimed directly at improving occupational safety and health, for lesser offences under the Act.</p>	<p>Implemented.</p>
<p>R:38 It is recommended the WorkSafe Prosecution Policy be revised and to formalise the current practice whereby the reasons for each decision in respect of prosecutions are confirmed in writing.</p>	<p>In progress.</p>

Recommendation	Status
R:39 It is recommended WorkSafe develop policy and processes for the investigation and prosecution of breaches of the Act related to the health of employees.	In progress.
R:40 It is recommended the Act be amended to provide for a mandatory on-the-spot fine (subject to an appeal mechanism) for the offence at s.48(4) of failing to comply with an Improvement Notice by the due date. The imposition of the fine should not remove the obligation to comply with the notice nor preclude prosecution if warranted.	Not implemented.
ELECTION OF SAFETY AND HEALTH REPRESENTATIVES	
<p>R:41 It is recommended the Act be amended to:</p> <ul style="list-style-type: none"> • provide a simplified election process for safety and health representatives; • move the default (minimum) provisions for the election of safety and health representatives to the Regulations; • enable the WorkSafe Western Australia Commissioner to approve alternative arrangements for the election of safety and health representatives where the Commissioner is satisfied there is genuine agreement between an employer and employees; and • provide that any disputes in relation to elections be resolved by the WorkSafe Western Australia Commissioner with appeal to the Occupational Safety and Health Tribunal. 	Implemented in principle.
<p>R:42 It is recommended Regulations concerning the election of safety and health representatives:</p> <ul style="list-style-type: none"> • enable employers and employees to agree upon a workplace specific approach to casual vacancies as part of the consultation phase occurring prior to an election under s.30(3a); • provide for the filling of casual safety and health representative vacancies; and • establish a default procedure for the filling of casual safety and health representative vacancies. 	Implemented in principle.
R:43 It is recommended that as appropriate the Act or Regulations be amended to establish that responsibility for notification to the WorkSafe Western Australia Commissioner of a person's election as a safety and health representative rests with the person conducting the election.	Implemented.
R:44 It is recommended that after necessary consultation, the Act or Regulations be amended as appropriate or necessary to ensure that the WorkSafe Western Australia Commissioner is informed when a person ceases to hold the position of safety and health representative.	Not actioned – no effective means of addressing.
R:45 It is recommended that the relevant union conduct the election of safety and health representatives where there is at least one member and the majority of employees request the union to conduct the election.	Implemented.
R:46 It is recommended s.56 of the Act be amended to provide that where the facts of an alleged discrimination are proved, the onus of proof rests with the defendant to satisfy the Court that legitimate actions of the employee in relation to occupational safety and health were not the dominant or substantial reason for the discrimination.	Not actioned – Govt did not support.
<p>R:47 It is recommended the Act be amended to provide, in cases where discrimination is proved, for the Court to have the power to order the defendant to:</p> <ul style="list-style-type: none"> • pay the employee a specified sum as a reimbursement for lost wages and salaries; and/or 	Implemented.

Recommendation	Status
<ul style="list-style-type: none"> reinstated dismissed employees to their previous position or a similar position. 	
<p>R:48 It is recommended the Commission consider further amendments under the Act to extend the protection against discrimination on safety and health grounds to non-employees in the workplace.</p>	Implemented.
<p>R:49 It is recommended s.56(1)(d) of the Act be amended to include the WorkSafe Western Australia Commissioner and relevant officers of the Department amongst those to whom an employee may complain in relation to discrimination.</p>	Implemented.
<p>COMPOSITION OF SAFETY AND HEALTH COMMITTEES</p>	
<p>R:50 It is recommended the Act be amended to:</p>	Implemented.
<ul style="list-style-type: none"> provide a simplified process for the establishment of safety and health committees; and move default (minimum) provisions for the establishment and operation of safety and health committees into the Regulations. 	
<p>R:51 It is recommended Regulations concerning the establishment of safety and health committees provide:</p>	Implemented.
<ul style="list-style-type: none"> the composition of safety and health committees to be as agreed by the employer, safety and health representatives and interested employees; and disputes arising from the consultation of the parties shall be referred to the WorkSafe Western Australia Commissioner for resolution with appeal to the Occupational Safety and Health Tribunal. 	
<p>PROVISIONAL IMPROVEMENT NOTICES (OR SAFETY ALERTS)</p>	
<p>R:52 It is recommended the Act be amended to provide for elected safety and health representatives who have received a particular level of training, assessment and certification to be authorised to issue Safety Alerts (or Cautions) in relation to equipment or processes where the safety and health representative is of the opinion that a contravention of the Act or Regulations is occurring or that the operation or characteristics of the equipment or process has developed an additional risk. No other person would be authorised to remove the Safety Alert without the agreement of the safety and health representative or WorkSafe Inspector.</p>	Implemented.
<p>R:53 It is recommended in relation to Safety Alerts the Act provide that:</p> <ul style="list-style-type: none"> only elected safety and health representatives who have been assessed as competent following completion of a Commission accredited introductory training course, to have the authority to issue Safety Alerts; safety and health representatives would not have the right to issue the Safety Alert until the employer has been consulted and has refused to remedy the alleged defect, breach of the Act or Regulations; safety and health representatives should be required, where practicable, to consult with another safety and health representative or appropriate person before issuing a Safety Alert; employers to be able seek a review of a Safety Alert by an Inspector if the employer disagrees with the Alert; safety and health representatives would have the right to notify WorkSafe if an Alert remains unresolved within the time specified or after a suitable period (perhaps 3 months) whichever is the later, and sanctions would apply to safety and health representatives who misuse the power to issue Safety Alerts. 	Implemented in principle.
<p>R:54 It is recommended that the provisions concerning Safety Alerts would expire after five years unless confirmed after a further review.</p>	Implemented through Government policy decision.

Recommendation	Status
<p>SAFETY AND HEALTH REPRESENTATIVE TRAINING</p>	
<p>R:55 It is recommended the Commission revise its accreditation criteria for introductory training courses for safety and health representatives to provide for optional assessment of the competency of course participants. It is also recommended that the Commission review existing training arrangements to establish whether these optimise training or whether further change is required.</p>	<p>Implemented.</p>
<p>R:56 It is recommended the Commission apply its accreditation criteria for introductory safety and health representative training so as to provide for:</p> <ul style="list-style-type: none"> • flexibility in the delivery and content of courses while ensuring maximum benefits for safety and health representatives; • joint training for safety and health representatives, managers and supervisors; and • competency-based training. 	<p>Implemented with exception of competency-based training.</p>
<p>R:57 It is recommended s.35 of the Act and/or r.2.2 of the Regulations be amended to require an employer to meet the reasonable costs of enrolment or attendance fees associated with the introductory training of a safety and health representative.</p>	<p>Implemented.</p>
<p>R:58 It is recommended the Commission also review r.2.2 to determine whether any changes are necessary to the payment entitlements of safety and health representatives attending accredited introductory and post-introductory training, including in relation to attendance at training when rostered off work.</p>	<p>In progress – likely to be dealt with through executive measures rather than amendment to Regulations.</p>
<p>OTHER LEGISLATION</p>	
<p>R:59 It is recommended the capacity of the Commission to contribute to policy development on legislation dealing with occupational safety and health be extended through the prescribing of all relevant statutes (including the Petroleum Safety Act 1999) (WA) for the purposes of s.14(1)(b).</p>	<p>Not implemented.</p>
<p>R:60 It is recommended the Timber Industry Regulation Act 1926 be repealed as soon as possible.</p>	<p>Implemented.</p>
<p>R:61 It is recommended responsibility for the Explosives and Dangerous Goods Act 1961 be transferred to the Minister for Consumer and Employment Protection.</p>	<p>Implemented.</p>
<p>R:62 It is recommended the Explosives and Dangerous Goods Division of the Department of Mineral and Petroleum Resources be transferred to the Department of Consumer and Employment Protection as a dedicated and specialist division. (p199)</p>	<p>Under review.</p>
<p>R:63 It is recommended that the objectives, general duties and processes common to all industry groups should fall under the Occupational Safety and Health Act 1984 and that relevant provisions be transferred from the Mines Safety and Health Act 1994 for that purpose and towards the eventual amalgamation of the legislation into a single statute. Specific residual and speciality operations of Mines Safety and Inspection Act 1994 should be continued. This recommendation should be concluded in conjunction with relevant recommendations of the Report of the Review of the Mines Safety and Inspection Act 1994 and as outlined in Part 8 of this Report.</p>	<p>Implemented in principle.</p>

Recommendation	Status
CONSTRUCTION INDUSTRY	
R:64 It is recommended the WorkSafe Commission, through its Construction Industry Safety Advisory Committee, develop options for legislative change to address the unique requirements of the construction industry in respect of occupational safety and health.	In progress – drafting instructions with Parliamentary Counsel.
SAFETY AND HEALTH TRIBUNAL (JURISDICTION)	
R:65 It is recommended the Act be amended to provide for a specialist Occupational Safety and Health Tribunal to deal with all non-judicial matters. The Minister could appoint the Tribunal as part of the State Administrative Appeals Tribunal recently announced by the Government or in the alternative the tribunal could be formed from the Western Australian Industrial Relations Commission after consultation with the Chief Industrial Commissioner. The Tribunal should deal with occupational safety and health matters as a priority and have alternative duties when not functioning as the Occupational Safety and Health Tribunal.	Implemented.
AUSTRALIAN STANDARDS	
R:66 It is recommended the Commission and WorkSafe implement the Labour Ministers' agreement to reduce the number of Australian Standards referenced in the Regulations. It should minimise unnecessary reference material and make essential material freely available to the community or at minimum cost so that there is no misunderstanding of the existing minimum requirements.	In progress.
DATA SOURCES	
R:67 It is recommended WorkSafe commit to the production and publication of statistical information on the incidence and characteristics of occupational safety and health in Western Australia.	Implemented.
R:68 It is recommended WorkSafe and WorkCover WA jointly develop a program for the publication of occupational safety and health statistical information.	In progress.
EDUCATION & COMMUNITY AWARENESS	
R:69 It is recommended the Commission take an active role in the development of research, in particular in relation to identifying and developing effective means for establishing or calculating the incidence and impact of workplace injury and ill health beyond the data sources now available. Health issues should be regarded as a priority.	Progressed at national level.
R:70 It is recommended WorkSafe review and update the SafetyLine information services including the SafetyLine magazine and SafetyLine Online Internet service with a view to ensuring they remain effective and authoritative sources of information on occupational safety and health in Western Australia.	In progress.
R:71 It is recommended WorkSafe develop an Information Plan dealing with the development and dissemination of occupational safety and health information. The Information Plan should provide for: <ul style="list-style-type: none"> • the establishment and promotion of a high profile information service to assist the public to access information on safety and health 	In progress.

Recommendation	Status
<ul style="list-style-type: none"> obligations and supporting material; the continued production of codes of practice and guidance notes having regard to the desirability of using "plain English"; and WorkSafe to continue existing services including distribution of information in print and on the Internet. 	
COMMISSION	
R:72 It is recommended the Commission be continued and maintain its role in improving occupational safety and health in Western Australia	Implemented.
R:73 It is recommended the Government review the financial assistance provided to Commission members and consider more equitable alternatives.	Implemented.
<p>R:74 It is recommended s.6(1) of the Act be amended to:</p> <ul style="list-style-type: none"> rename the WorkSafe Western Australia Commission as the "Commission for Occupational Safety and Health"; and/or "Occupational Safety and Health Commission"; and provide that the Commission may use, and operate under the name, "WorkSafe Western Australia Commission" or similar. 	Implemented.
R:75 It is recommended s.6(2)(d)(iii) of the Act be amended to make clear that the Minister is entitled to consult parties in addition to UnionsWA and the Chamber of Commerce and Industry of WA in nominating the expert members of the Commission.	Implemented.
R:76 It is recommended the Minister alter the terms of office of expert members of the Commission so that one expert position becomes available for appointment each year over a three-year cycle.	Implemented in principle.
R:77 It is recommended the Commission report to the Minister on the desirability of having the Commission Chair or other independent person chair meetings of advisory committees when these are formed.	Not implemented. (Tripartite agreement that current arrangements are adequate, noting that implementation of recommendation would create an onerous workload.)
R:78 It is recommended Commission advisory committees and working parties, where relevant, have broader representation from organisations and individual experts beyond those represented on the Commission.	Not implemented. Tripartite agreement that this already occurs.
R:79 It is recommended the Act be amended to require UnionsWA and the Chamber of Commerce of WA to include at least one person with experience in the mining industry amongst their nominees to the Commission. Such nomination should be made after advice is received from the mining unions and the Chamber of Minerals and Energy respectively.	Implemented.
<p>R:80 Contingent upon implementation of Recommendation 63, it is recommended the Act be amended to provide for a Mining Industry Safety Advisory Committee to be established as a permanent advisory committee to the Commission. The Committee should:</p> <ul style="list-style-type: none"> support the Commission as the pre-eminent body for occupational safety and health in the mining industry; have a similar structure to the Commission and include members able to effectively represent their constituency and at least two members being members of the Commission; have an independent chairperson; and continue to advise the Minister responsible for mining safety and health on matters specific to the mining industry. 	Implemented.

Recommendation	Status
R:81 It is recommended the Commission continue to be funded and supported at least at its present level with additional funds provided for further research.	Implemented.
WORKSAFE	
R:82 It is recommended Departmental administrative structures related to occupational safety and health be reviewed in two years to establish whether arrangements introduced in July 2001 have been effective and what, if any, further change needs be made to support effective administration of occupational safety and health in Western Australia.	Matter for State Government.
R:83 It is recommended WorkSafe implement further inspection activity. These should include strategies based on programmed "routine" inspections of workplaces selected according to geographic, industry or hazard priorities. Statistically generated program inspections and local area blitzes based on specific hazards should be undertaken regularly.	Implemented.
R:84 It is recommended the number of active WorkSafe inspectors be increased. The increased resources should be used to support a higher level of workplace inspections.	Implemented.
R:85 It is recommended WorkSafe undertake the employment of "trainee" or "graduate" inspectors.	Implemented.
INSPECTORS' POWERS	
R:86 It is recommended s.43 of the Act be amended to provide for a specific power of an inspector to provide information and advice.	Implemented.
R:87 It is recommended s.43(1) of the Act be amended to: <ul style="list-style-type: none"> • remove any implication that an inspector cannot interview persons he or she "finds" at a workplace after such persons have left the workplace; and • provide an inspector with the power to interview any person an inspector has reason to believe can provide information relevant to the inspector's investigation. 	Implemented.
R:88 It is recommended that the two-year time period specified in s.43(1)(k) be amended to three years to be consistent with the time period for commencing proceedings for an offence against the Act.	Implemented.
R:89 It is recommended the Act be amended to provide that either the inspector or the person being interviewed may, at any time, including after the interview has commenced, require the interview be conducted in private.	Implemented.
R:90 It is recommended the Act be amended to provide that an inspector has the power to identify, by any reasonable means, persons who fail to provide their name and address when requested under s.43(1)(m).	Implemented.
R:91 It is recommended s.45 of the Act be amended to provide that, where there is more than one employer in relation to a workplace, the inspector is required to take reasonable steps to notify each employer with employees at the workplace and relevant to the inspector's activity, of the inspector's presence.	Implemented.
R:92 It is recommended s.47(2) of the Act be amended to specify the protection against self-incrimination that applies in relation to a company in circumstances where a director of the company is compelled to answer questions or provide information.	Implemented.

Recommendation	Status
R:93 It is recommended the Act be amended to clarify that "information" provided as required under the Act includes documents and is therefore protected where it is self-incriminating by virtue of s.47(2).	Implemented.
SUPPLEMENTARY INSPECTORS	
R:94 It is recommended the Act be amended to enable: <ul style="list-style-type: none"> the WorkSafe Western Australia Commissioner to appoint a person holding a position or appointment under a statute to be an honorary or supplemental inspector; and at the Commissioner's discretion, to cancel any such appointment; and an honorary or supplemental inspector, in respect of the State, or the area of the State for which he or she is appointed, be provided such of the powers conferred by or under the Occupational Safety and Health Act 1984 on an inspector as are specified in the instrument of appointment. 	In progress.
R:95 It is recommended a review of the operation of provisions relating to honorary or supplemental inspectors should take place within five years of their commencement.	Implemented through State Government policy decision.
WORKSAFE'S COMPLAINTS POLICY	
R:96 It is recommended WorkSafe establish a complaints policy providing for a transparent process for dealing with complaints against inspectors or other staff members.	Implemented.
NOTICES	
R:97 It is recommended the Act be amended to require the display of any modification to an improvement or prohibition notice as a consequence of a review, until the notice, as amended, has been complied with.	Implemented.
R:98 It is recommended the Act be amended to give the WorkSafe Western Australia Commissioner the power to cancel a notice. Written reasons should accompany each cancellation.	Implemented.
R:99 It is recommended WorkSafe ensure that all Improvement Notices are complied with or dealt with by review.	Implemented.
OSH PROFESSIONALS	
R:100 It is recommended WorkSafe develop improved communication strategies to ensure better contact with occupational professionals.	In progress.
DEFINITIONS AND LEGAL PROCEEDINGS	
R:101 It is recommended a definition of "import" be included in the Act to make its meaning clear. This definition should extend to the bringing of plant or substances into the jurisdiction of the State, whether or not from overseas.	Implemented.
R:102 It is recommended the definition of "supply" in the Act be amended to clarify whether activities such as conducting an auction and selling a business are included.	Implemented.

Recommendation	Status
R:103 It is recommended s.53(b) of the Act be amended to replace the existing averment in relation to an employer with two separate averments. The first being an averment that a particular person was an employer and secondly that an averment that a particular person was an employer of "particular persons".	Implemented.
R:104 It is recommended s.53 of the Act be amended to include provisions enabling averments that: <ul style="list-style-type: none"> • a particular document is a code of practice as defined under s.3 of the Act; • a particular document is an "Australian Standard"; and • a complainant has authority to prosecute. 	Implemented.
R:105 It is recommended that "Australian Standard" be defined in s.3 of the Act.	Implemented.
MISCELLANEOUS	
R:106 It is recommended gender references be removed from the Act in accordance with modern expression.	Implemented.
R:107 It is recommended legislative action be taken to address the anomalies arising from the enactment of s.33(2) of the Acts Amendment (Occupational Health, Safety and Welfare) Bill 1987.	Implemented.

APPENDIX B

SUMMARY OF RECOMMENDATIONS

- R1. The *Occupational Safety and Health Act* 1984 (WA) be amended to remove the reference to the *Mining Act* 1978 in s.4(2).
- R2. The Commission for Occupational Safety and Health undertake a quarterly review of the progress being made in Western Australia in meeting the Australian Safety Compensation Council-endorsed national priorities and areas of action contained in the national strategy, measured and assessed in the context of the Commission's Strategic Plan 2006-2010.
- R3. The *Occupational Safety and Health Act* 1984 (WA) be amended so that the definitions in ss.41A and 47A define "employers" and "employees" to include people who, under ss.23D, 23E or 23F are treated as an employer, or employee respectively, for the purpose set out in those sections.
- R4. The *Occupational Safety and Health Act* 1984 (WA) be amended to insert in s.23F a provision similar, or analogous in kind, to s.23D(5) and s.23E(5).
- R5. Section 51J(1) of the *Occupational Safety and Health Act* 1984 (WA) be amended to insert a reference to s.51A, thereby enabling the Tribunal to undertake conciliation on the further review of notices.
- R6. The *Occupational Safety and Health Act* 1984 (WA) be amended so as to confer jurisdiction on the Tribunal to extend the time for the making of a reference for the further review of a notice under s.51A(1). Such a discretion to extend time may only be granted where the Tribunal is satisfied that it would be manifestly unjust not to allow an extension of time.
- R7. The entitlement of "any party" to refer a dispute under s.28 of the *Occupational Safety and Health Act* 1984 (WA) (being confined to parties directly affected by such a dispute) be monitored in its operation by the Commission for Occupational Safety and Health and by WorkSafe and be reconsidered in the next review of the Act's operations.
- R8. The Tribunal be empowered to inquire into and deal with a matter, issue or dispute concerning occupational safety and health upon being satisfied that reasonable and diligent efforts have been made by the party referring the matter, issue or dispute to resolve the issue at the workplace, but that it remains unresolved. Where the matter issue or dispute gives rise to a risk of imminent and serious injury or harm, the Tribunal must be further satisfied that an inspector has been notified and has complied with s.25 of the Act, and that the matter, issue or dispute remains unresolved.

- R9. In dealing with such a matter, issue or dispute, the Tribunal should be empowered to:
- conciliate and make recommendations analogously to the powers contained in s.44 of the *Industrial Relations Act* 1979 (WA)
 - issue an improvement or prohibition notice on satisfaction of the requisite “opinion required by s.48(1) and s.49(1) respectively.
- R10. Section 5(e) of the *Occupational Safety and Health Act* 1984 (WA) be amended to express as a statutory object the encouragement and promotion of consultation and cooperation between participants at the workplace, with the remaining components of the present section 5(e) being contained in a separate statutory object.
- R11. There be inserted a discrete statutory object in section 5 to require the resolution of occupational safety and health issues, so far as reasonably practicable, at the workplace.
- R12. A provision be inserted to the effect that nothing in the statutory objects concerning consultation and resolution of issues at the workplace is intended to provide any basis for civil liability in the event that those objects are unsatisfied.
- R13. Regulation 2.6 be amended so as to provide for a default “relevant procedure” for the purposes of s.24(2) of the Act containing a meaningful and appropriate level of prescription, with guidance being obtained from examples of dispute resolution procedures commonly found in industrial instruments.
- R14. A provision be inserted expanding on the nature of consultation for the purposes of s.19(1)(c) as applying whenever an employer, or other like duty holder, is involved in any of the following aspects relating to the performance of work:
- any of the steps contained in regulation 3.1;
 - either of the matters referred to in s.35(1)(c);
 - undertaking any monitoring of safety conditions or health conditions at the workplace; and
 - such other matters as may be prescribed.
- R15. The Commission for Occupational Safety and Health and WorkSafe, both independently and in collaboration with each other, develop measures for the publication of obligations on workplace participants concerning consultation, workplace resolution of issues, and risk assessment and seek to educate the workforce as to those three distinct matters as effectively as possible.
- R16. Part VI Division 1 of the *Occupational Safety and Health Act* 1984 (WA) be amended to provide that:
- The powers of the Commissioner on internal review and the Tribunal on further review extend to the making of any decision open to previous decision-makers, on the entirety of material before the reviewer.

- The Commissioner and the Tribunal each be empowered to order an extension of time for compliance with a notice on the basis of such inquiry (if any at all) into the circumstances relating to the notice as they see fit.
 - The Commissioner and the Tribunal be empowered to issue orders with the consent of the parties to a review, whether before, during, or after any inquiry has been undertaken.
- R17. WorkSafe maintain and develop its work in consulting with affected or concerned industries about the nature and operation of the enforcement powers in Part VI Division 1 of the Act.
- R18. Section 3(2) of the *Occupational Safety and Health Act* 1984 (WA) be amended to extend the operation of that deeming provision so as to encompass service on other duty holders where a document or thing may require service.
- R19. The *Occupational Safety and Health Act* 1984 (WA) be amended to empower the Occupational Safety and Health Tribunal to inquire into and deal with allegations of discriminatory and detrimental treatment of employees and potential employees for reasons connected with the operation of the Act and its statutory purposes. The power of the Tribunal ought include conciliation and the granting of remedies to reinstate, re-employ, employ, engage and to pay compensation capped consistently with analogous limits under the *Industrial Relations Act* 1979 (WA).
- R20. The Commission for Occupational Safety and Health review its own composition in the course the next 12 months, consistently with its Strategic Plan 2006-2010 and the parameters identified in this Report, with the objective of making a recommendation to the Minister on the appropriateness of any amendments to s.6(2) of the *Occupational Safety and Health Act* 1984 (WA) accordingly.
- R21. Section 57(2) be repealed.
- R22. Section 57(8) be either repealed or, at the very least substantially amended so as to restrict its operation to that where a court is satisfied that a code of practice is relevant, the code of practice is admissible in evidence in that proceeding.
- R23. The Occupational Safety and Health Commission review, as a priority, its structures for:
- Assessing the need for, and content of, the present Regulations and any new Regulations (before undertaking a review of the Regulations themselves); and
 - Assessing the need for, and in due course drafting of, codes of practice.
- R24. Funding and other resourcing for the ThinkSafe Small Business Assistance Programme be reviewed to meet the reasonable requirements of WorkSafe to assist in minimising the significant regulatory burden on small to medium-sized businesses in understanding and complying with their OSH obligations.

R25. The *Occupational Safety and Health Act 1984* (WA) be amended to:

- Amend s.42A to enable the appointment of any person employed or engaged in the Public Sector of Western Australia to be a restricted inspector, rather than in the Public Service under Part 3 of the *Public Sector Management Act 1994*.
- Amend the power in s.43(1)(l) to expressly enable the tape recording of answers given under the power therein contained.
- Expressly provide that a WorkSafe inspector is a “law enforcement officer” for the purposes of the *Surveillance Devices Act 1988* (WA).
- Amend s.45(4) so as to require the notification “as soon as practical” rather than “forthwith” of any relevant employer (as defined) and not, additionally, any relevant safety and health representative.
- Insert a provision in Part V to expressly provide that any of the powers of inspectors conferred by that Part is capable of being exercised in a place outside Western Australia for the purposes of the OSH Act.

APPENDIX C

LIST OF FREQUENTLY RECURRING ABBREVIATIONS

AIRC	Australian Industrial Relations Commission
ASCC	Australian Safety and Compensation Council
Cth OSH Act	<i>Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)</i>
MSIG	Mine Safety Improvement Group
OSH	occupational safety and health
OSH Act	<i>Occupational Safety and Health Act 1984 (WA)</i>
NOHSC	National Occupational Health and Safety Commission
NSW OSH Act	<i>Occupational Health and Safety Act 2000 (NSW)</i>
regulations	delegated legislation, generically speaking
Regulations	<i>Occupational Safety and Health Regulations 1996 (WA)</i>
Report	the report of this Review
Review/Inquiry	this statutory review (terms used interchangeably)
SA OSH Act	<i>Occupational Health Safety and Welfare Act 1986 (SA)</i>
SIA	Safety Institute of Australia
State IR Act	<i>Industrial Relations Act 1979 (WA)</i>
Vic OSH Act	<i>Occupational Health and Safety Act 2004 (Vic)</i>
WAIRC	Western Australian Industrial Relations Commission
WorkChoices	the policies of the Commonwealth Government for reform of Australia's industrial relations system
WorkChoices legislation	<i>Workplace Relations Amendment (Work Choices) Act 2005 (Cth)</i>

APPENDIX D

LIST OF CONTRIBUTORS

1.	Occupational Safety & Health Commission
2.	Mr Tony Cooke, Chair of the Occupational Safety and Health Commission
3.	WorkSafe WA
4.	UnionsWA
5.	Chamber of Commerce and Industry Western Australia
6.	Chamber of Minerals and Energy Western Australia
7.	Chief Commissioner Tony Beech, Western Australian Industrial Relations Commission
8.	Commissioner Stephanie Mayman, Western Australian Industrial Relations Commission
9.	Mr Steven Heath, Chief Magistrate
10.	Western Australian Farmers Federation
11.	Department of Health
12.	WA Country Health Service
13.	WorkCover WA
14.	Department of Industry and Resources
15.	Small Business Development Corporation
16.	Disability Services Commission
17.	Australian Manufacturing Workers' Union
18.	Construction Forestry Mining and Energy Union of Workers
19.	Liquor, Hospitality and Miscellaneous Union, WA Branch
20.	State School Teachers Union of WA
21.	WA Police Union of Workers
22.	Western Australia Police
23.	Master Builders Association of Western Australia
24.	Occupational Health Society of Australia (WA Branch) Inc

25.	Department of Education
26.	Department of Premier and Cabinet
27.	Office of the Auditor General
28.	Water Corporation
29.	Farm Machinery Dealers Association of WA
30.	Housing Industry Association
31.	Royal Australian Institute of Architects
32.	Western Power
33.	Australian Council on Smoking and Health
34.	The Cancer Council of WA
35.	Safety Institute of Australia (WA Division)
36.	Industrial Foundation for Accident Prevention
37.	Dr Andrew Harper
38.	Dr John Suthers
39.	Mr A.A. Lewis
40.	CR Management Systems
41.	Monadelphous Group Ltd
42.	Recruitment & Consulting Services Association
43.	Environmental Health Association (Australia) Inc
44.	Western Australian Fruit Growers Association Inc
45.	Western Australian Fishing Industry Council
46.	Honda Australia Motorcycles & Power Equipment Pty Ltd
47.	Kawasaki Australia Pty Ltd
48.	Suzuki Australia Pty Ltd
49.	Yamaha Motor Australia Pty Ltd
50.	Polaris Sales Australia Pty Ltd
51.	Bombardier Recreational Products Pty Ltd

52.	Mr Terry Howell
53.	Shire of Bridgetown-Greenbushes
54.	John Deere Limited
55.	CFMEU Mining & Energy Division WA District
56.	Communications Electrical Plumbing Union
57.	Finance Sector Union of Australia
58.	Motor Trade Association of WA
59.	Safety First Risk Management
60.	Australian Building & Construction Commissioner
61.	RiskCover
62.	Dr KC Wan
63.	Mr Geoff Taylor
64.	Mr Geoff Bull

