2008

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

WORK SAFETY BILL 2008

EXPLANATORY STATEMENT

Presented by
Andrew Barr MLA
Minister for Industrial Relations

OVERVIEW

The Work Safety Bill 2008 (the Bill) will wholly replace the *Occupational Health and Safety Act 1989* (the OHS Act) with a modern set of work safety laws that reflect the realities of working and doing business in the Territory.

Almost twenty years ago the first Assembly enacted the *Occupational Health and Safety Act 1989*. While this early achievement has served the Territory well, it has become outdated. There is an urgent need to replace the ACT's occupational health and safety (OHS) legislation to address contemporary changes to work and employment arrangements and to address emerging risks such as occupational violence, bullying, stress and fatigue.

The Work Safety Bill 2008 addresses the deficiencies in the current Act and presents a modern regime intent on securing work safety for *all* workers. Every Canberra worker must feel confident they can go to work and come home safe and sound at the end of the day. At the same time, the duties must not hamper business but encourage organisations to consider work safety alongside other business risks.

The development of the Work Safety Bill 2008 has been an extensive process. Commencing in September 2005, the Occupational Health and Safety Council (OHS Council), at the request of the (then) Minister for Industrial Relations, undertook a review of the scope and structure of the *Occupational Health and Safety Act 1989* (the OHS Act). The OHS Council is a tripartite body, which consists of representatives from employee groups, employer groups and individuals.

The OHS Council made a wide range of recommendations relating to the OHS Act, including the repeal of the existing OHS Act and the development of new legislation.

This Bill is delivered at a time when all Governments across Australia have committed to work cooperatively to harmonise Occupational Health and safety laws. In February 2008, the Workplace Relations Ministers' Council agreed that the development of model legislation is the most effective way to achieve harmonisation of OHS laws. The Council of Australian Governments (COAG) has since signed an intergovernmental agreement for Occupational Health and Safety reform which formalises the commitment of the Commonwealth, States and Territories to adopting model OHS laws.

The ACT Government is strongly committed to this work. However, the current ACT legislation needs to be replaced now. Even though COAG has agreed to an accelerated implementation timetable for national uniformity of OHS laws, the timeframe is very optimistic. It is possible that the model legislation will be delayed beyond 2011, despite the best intentions of all parties. With the commitment to harmonisation in mind, the Bill reflects national work on harmonisation to date and will see the Territory better placed to implement the model national legislation when the time comes.

On 6 June 2008 an exposure draft of the Work Safety Bill 2008 was released for six weeks consultation with the Canberra community. A number of factors guided the development of the exposure draft including:

- the OHS Council's review of the scope and structure of the OHS Act (www.psm.act.gov.au/ohscouncil.htm);
- national work to date (through the Australian Safety and Compensation Council and the Council of Australian Governments) to harmonise and develop nationally consistent OHS principles (www.ascc.gov.au/ascc/HealthSafety/OHSstrategy/); and
- the new governance arrangements for the delivery of OHS regulatory functions through the Office of Regulatory Services.

The submissions received during the exposure draft consultation have informed the final Bill. The following is an overview of the key changes in the Bill.

Safety duties, scope and coverage

- *Coverage*: The Bill extends the scope and coverage of ACT's OHS laws to better capture contemporary work arrangements that go beyond the bounds of the traditional employment relationship. This includes coverage of all people who have a worker-like relationship, by replacing the outdated concept of 'employee' with a broad definition of 'worker' which includes employees, independent contractors, outworkers, apprentices, trainees and volunteers who work in employment-like settings. Visitors to the workplace will also be covered.

- *Expanded safety duties*: The safety duties are extended and clarified to ensure responsibility attaches to those who control the generation of risks and who are in a position to eliminate or minimise the risks. Duty holders are only responsible for matters over which they have control, and that duty holders only owe a duty to the extent of that control. The intended effect is that there will be no gaps in the coverage of safety duties but that responsibility is not assigned to anybody in a way that is disproportionate to their actual level of control.

  The principal duty holder is a "person conducting a business or undertaking". This includes employers, principals, head contractors and franchisees. Additional upstream duty holders such as building designers, designers, manufacturers, importers and suppliers of products used in the course of work are also covered.

- *Risk management principles and systematic safety management requirements*: Risk management principles have been integrated into the Bill. These principles require duty holders to eliminate or reduce risk as far as reasonably practicable, and to afford the highest level of protection that is appropriate for matters within their control. Priority is also afforded to the elimination of hazards and control of risk at the source through safe design of workplaces, systems and items used for work.

Worker Consultation

- The Bill places a general duty on all employers (broadly defined) to consult all workers on matters that may affect their health and safety. The duty to consult is based on a recognition and growing body of international evidence which

demonstrates that worker input and participation improves decision-making about work safety matters. The duty to consult will apply to all employers regardless of the number of workers they have.

- The legislation departs from an emphasis on the process of consultation to provide guidance on *what* meaningful consultation is and *when* employers should consult, as well as *how* employers can consult.

- The Bill provides choice and flexibility regarding how consultation can occur to enable an employer and their workers to adopt the consultative arrangement which they believe will best ensure effective and meaningful consultation without being too onerous on the business.

- Within the flexible framework, the Bill allows for use of the traditional workplace consultative tools such as the use of a health and safety committees (HSC) and/or a health and safety representatives (HSR), with provisions in relation to operation of HSRs and HSCs in regulations rather than primary legislation given their new status. However, the Bill will also allow organisations to instead adopt any other arrangements where the employer and the workers agree on a consultative framework.

- Information will be provided to industry, through codes of practice or other guidance material, on:
  - their roles and obligations under the new worker consultation arrangements;
  - tools to assist industry implement and maintain meaningful consultation;
  - a generic (optional) consultation policy for small business;
  - a generic (optional) consultation policy for medium/large business; and
  - the benefits of consultation and case studies highlighting how various employers undertake consultation.

Other matters

- *Private prosecution of offences*: An express right of private prosecution for unions and employer organisations along the lines of the common law position is proposed that:
  a. enables a prosecution to be commenced with the written consent of the secretary of a registered union or the chief executive of a registered employer orgainsation;
  b. extends the authority to prosecute safety duty offences in the Bill (with the ability to proscribe other offences – this will not include the industrial manslaughter offences in the *Crimes Act 1900*); and
  c. reserves the right of the Director of Public Prosecutions to intervene and take over or discontinue a private prosecution at any time.

- *Payment of Penalties*: While not specifically stated in the Bill, it is intended that an amount equivalent to penalties awarded under the work safety legislation will be dedicated to promote better work safety practices.

- *Enforcement and Compliance – General*: The Bill proposes updated provisions to reflect contemporary work practices and arrangements captured by the new legislation. The Bill enables the production of documents or information held at

locations other than those on which an alleged offence occurred (necessary in multi-site work arrangements such as those in the construction industry and franchisor and franchisee arrangements).

- *Enforcement and Compliance – the Public Sector*: The Bill strengthens the Public Sector enforcement and compliance provisions. While prosecution is not appropriate, all other enforcement and compliance tools (such as prohibition notices and improvement notices) will be used. The compliance focus will be on rectifying the situation quickly, then to 'name and shame' those agencies who fail to comply. The Bill will toughen reporting requirements and introduce appropriate review mechanisms.

- *Information Sharing*: The Bill facilitates the reasonable exchange of information obtained by inspectors with other law enforcement agencies for the purpose of ensuring worker or public safety.

- *Notification of Events/ Preservation of Site*: The Bill streamlines the requirements for the notification of accidents and events and ensures the preservation of sites following serious events or accidents.

- *Review Mechanism*: The specialist Review Authority (which has never been convened) will be replaced with a two tiered review mechanism, with the relevant chief executive as per the ACT's Administrative Arrangements or Minister as the initial reviewer and the Civil and Administrative Tribunal fulfilling the function of the external reviewer (the Civil and Administrative Tribunal will replace the Administrative Appeals Tribunal in 2009).

- *Codes of Practice*: The Bill gives Codes of Practice formal evidentiary status. This will enable courts to consider compliance with a code in order to establish whether a safety duty has been met.

- *Right to Refuse Dangerous Work*: The Bill grants workers a specific right to refuse work where they reasonably believe that there is a significant risk to their health or safety.

- *Corporate Officer Liability*: The Bill takes a balanced approach in adopting provisions that make directors and senior officers liable whee a corporation has been found to have breached the legislation. Unlike the NSW OHS legislation, for liability to attach to individual officers the prosecution must prove that the officer was reckless as to whether the breach would occur; was in a position to influence the conduct of the corporation; and failed to take reasonable steps to influence the conduct of the corporation.

- *Work Safety Council and Work Safety Commissioner*: The Bill largely reproduces the current provisions with modifications necessary to address the revised scope and structure of the Bill, mostly by replacing references to 'OHS' with 'work safety'.

Strict liability offences

The Bill has strict liability offences in clauses 30, 31, 32, 33, 34, 39, 41, 47, 48, 53, 55, 70, 72, 88, 89, 121, 122, 128, 135, 138, 144, 150, 159 and 181. The offences incorporating strict liability elements have been carefully considered during the Bill's development. The strict liability offences arise in a regulatory context where for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people who owe work safety duties such as employers, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.

Unless some knowledge or intention ought to be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time of committing the strict liability offences is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

Notes on Clauses

PART 1 PRELIMINARY

Part 1 sets out the preliminary matters for the Bill, it contains provisions that are standard across all ACT legislation.

Clause 1 - Name of Act

This clause provides that the name of the proposed legislation is the *Work Safety Act 2008*.

Clause 2 - Commencement

This clause provides that the legislation will commence on 1 July 2009 or a later date fixed by the Minister by written notice before 1 July 2009. The latest that the legislation will commence is 18 months after notification.

Clause 3 - Dictionary

This clause establishes that the dictionary at the end of the Bill is part of the Bill.

Clause 4 - Notes

This clause establishes that notes in the Bill are explanatory and not part of the Bill.

Clause 5 - Offences against Act—application of Criminal Code etc

This clause establishes that legislation applies in relation to offences against this Bill.

PART 2 OPERATION OF ACT

Division 2.1 Objects and important concepts

Division 2.1 sets out the objects, principles and important concepts for the Bill.

Clause 6 - Objects of Act

This clause sets out the objects of the Bill. The objects serve to describe the aims of the legislation for the Courts to take into account when interpreting the provisions. Subclause 6(1) sets out the six general objects for the legislation and subclause 6(2) sets out a general principle for how the legislation should be implemented and understood.

Clause 7 - Meaning of *work safety*

This clause defines *work safety* for the purpose of the Bill. This is a central term that underlines the operation of the Bill. Work safety means the health, safety and wellbeing of people in relation to work. Consistent with the *Occupational Health and Safety Act 1989* (OHS Act) it includes the physical and psychological wellbeing of

workers. This allows for the Bill to provide coverage for new and emerging risks such as occupational violence and bullying, stress and fatigue. The term 'work safety' is a contemporary phrase that reflects the expanded coverage of the Bill.

Clause 8 - Meaning of *risk*

This clause defines *risk* for the purpose of the Bill.

The purpose of the Bill is to secure and promote work safety by the appropriate management of risk. Underpinning the work safety duties in Part 3 is the requirement for the duty holders to ensure work safety by managing risk.

Risk takes on its ordinary meaning of 'exposure to the chance of injury or loss'. Risk can arise in two ways: the first is in how work is done, for example, an unsafe work practice or system; and the second is an act of omission, for example, non-provision of personal protective equipment, or lack of consultation.

Risk to *health* includes injury, illness or death.

Risk to *safety* includes a danger or hazard.

Risk to *wellbeing* includes undue stress, anxiety or discomfort.

Two examples are provided in the legislation in relation to risk. The first focuses on risk in relation to wellbeing and the second is in relation to health and safety.

Clause 9 - Meaning of *worker*

This clause defines *worker* for the purpose of the Bill as 'an individual who carries out work in relation to a business or undertaking, whether for reward or otherwise, under an arrangement with the person conducting the business or undertaking'.

The meaning of worker is central to the Bill as is one of the main devices through which the legislation achieves its broadened coverage, scope and application.

Currently, in general terms the OHS Act applies to employees. Contractors and other workers who are not employees are only captured as third parties at or near a workplace. In contrast, the Bill applies more even coverage to all types of workers.

It does not matter whether the individual gets paid for the work and as such includes volunteers. However, the definition intends only to capture those categories of volunteers who work in an employment–type setting.

For the Bill to apply the individual must carry out work under an arrangement with the person conducting the business or undertaking (note business or undertaking is defined in clause 11). The arrangement might consist of a written or oral contract. It is not sufficient that a person merely performs work for the legislation to apply to them in their capacity as a worker. There must be a mutual arrangement in place for the individual to carry out the work. For example, people who form a group to

participate in ‘Clean-up Australia Day’ are unlikely to be workers for the purposes of the legislation because they are not working for someone. However, a volunteer who answers phones for a telephone counselling service, who is rostered regularly and receives training on how to perform this task is likely to fall within the Bill’s definition of worker.

Unlike the current OHS Act, the Bill does not propose any discretion for the Minister to exempt any category of workers under the legislation.

Examples of workers are provided in the legislation and include: employees, independent contractors, outworkers, person doing a work experience placement and volunteers.

Clause 10 - Meaning of *employer*

This clause defines *employer* for the purpose of the Bill to include ‘a person who engages the worker to carry out work in the person’s business or undertaking’.

The definition is relevant to workplace arrangements (Part 4)and will used in the regulations. The meaning of employer in the Bill is broader than the common law meaning of employer which is a person who engages an individual under a contract of service. An employer includes a person who engages any worker (defined in clause 9) to carry out work in the person’s business or undertaking. Employer would include an employer in relation to an employee; a principal in relation to a contractor; a head contractor in relation to a subcontractor and a person who engages a volunteer or work experience student to carry out work.

Two examples in relation to employer are provided in the legislation: a principal contractor is an employer of a subcontractor and a host organisation is an employer of a labour hire worker.

Clause 11 - Meaning of *business or undertaking*

This clause defines *business or undertaking* for the purpose of the Bill to include ‘a not-for-profit business; and an activity conducted by a local, state or territory government’. This is to convey that ‘business or undertaking’ should be interpreted expansively.

The term appears in the principal safety duty in clause 21 that applies to a person conducting a business or undertaking and is also used throughout the Bill. People conducting a business or undertaking would include employers, the self-employed, principal contractors, sub-contractors, franchisors and principals of labour-hire firms.

Clause 12 - Meaning of *workplace*

This clause defines *workplace* for the purpose of the Bill as ‘a place where work is, has been, or is to be, carried out by or for someone conducting a business or undertaking’. This means that a reference to a workplace in the legislation can be to a past, present or planned future workplace.

Clause 13 - Meaning of *person in control*

This clause defines *person in control* in terms of premises, of plant and systems and for design, manufacture, import or supply of plant and systems. The definitions are relevant to the work safety duties contained in Part 3 and will also be used in the regulations.

The definition gives effect to an important principle underpinning the duties in the legislation, which is that responsibility should lie with those who control the generation of risks—through initiating and/or managing activities—and who are therefore in a position to eliminate or minimise risks. The responsibilities of duty holders are tied to matters over which they have control, and are owed to the extent that they have control.

Clause 14 – Meaning of *manages risk*

This clause specifies how a duty holder manages risk, which is by taking reasonably practicable steps:

- to identify risks;
- to eliminate risks;
- if it is not reasonably practicable to eliminate risks, to minimise those risks so far as is reasonably practicable, and
- to inform other duty holders about possible risks.

Duty holders must provide the highest level of protection that is reasonably practicable. Priority is to be given to the elimination of hazards and control of risks at the source through safe design of workplaces, systems and items used for work.

Risks to work safety should be eliminated or, if it is not reasonably practicable to do so, people must implement a systematic hierarchy-of-control approach to minimise as far as reasonably practicable the risks to health and safety. Subclause 14(2) sets out steps in the hierarchy of control to minimise risks, and mandates the order in which the steps should be followed until the risk is reduced as far as reasonably practicable.

Clause 15 - Meaning of *reasonably practicable steps*

Clause 15 provides meaning and guidance about what are ‘reasonably practicable steps’ to eliminate or minimise a risk. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, the following considerations apply:

- the seriousness of the risk which would includes the likelihood of the risk eventuating and the degree of injury or loss that would result;
- any ways of eliminating or reducing the risk;
- what the person concerned knows, or ought reasonably to know, about the hazard or risk and ways of eliminating or minimising the risk;
- the availability and suitability of ways to eliminate or reduce the hazard or risk, and

- the cost (includes burdens and disadvantages such as time spent and inconvenience) of eliminating or reducing the hazard or risk.

A regulation may also prescribe what are, or are not, reasonably practicable steps to eliminate or minimise a risk.

Division 2.2 Complying with Act

Division 2.2 sets out some important principles for complying with the legislation.

Clause 16 - Person may have more than 1 duty under Act

This clause provides that a person may have more than one duty.

The following example is included in the legislation: a manufacturer must comply with the duty to ensure a safe workplace (see clause 21 Duty—safe conduct of business or undertaking) and with the manufacturer's duties (see clause 25 Duties-person in control of manufacture).

Clause 17 - Person not relieved of duty because someone else also has same duty

The clause provides that a person is not relieved of a duty because someone else has the same duty. Each person must comply with their duties whether or not someone else may also be required to comply with the duty.

Where more than one person has a duty for a matter, then each person:

- retains responsibility for the duty in relation to the matter;
- must discharge the duty to the extent the matter is within their control, and
- must consult and cooperate with all other persons who have a duty for the matter, to the extent that it does not limit their ability to discharge their own duty.

However if one person performs the whole duty, all comply.

The following example is included: both an employer and a building owner have a duty to provide a safe work environment for the workers in a particular building. If the air conditioning breaks down and is fixed by the building owner, the duty has been complied with. There is no requirement for the employer to take further action.

Clause 18 - Codes of practice

This clause provides for the approval of codes of practice. Codes of practice provide practical guidance for the legislation

This clause provides that the Minister may, in writing, after consulting with the Work Safety Council, approve a code of practice for providing practical guidance under the legislation.

An approved code of practice may consist of a code, standard, rule, specification or provision relating to work safety and may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.

A code of practice approved under this clause is a disallowable instrument.

Clause 19 - Approved code of practice may be considered

This clause provides that in deciding whether a person has complied with a duty, a decision maker may consider whether a person has complied with an approved code of practice in relation to the duty. This means that while codes of practice do not have the same force of law as legislation or regulations, following a relevant code in relation to a risk or hazard will have persuasive value in considering whether a duty has been fulfilled.

Clause 20 - Relationship of regulations to approved codes of practice

This clause clarifies the relationship of regulations to approved codes of practice. An approved code of practice has no effect to the extent that it is inconsistent with a regulation. However, an approved code of practice is taken to be consistent with a regulation to the extent that it can operate concurrently with the regulation.

PART 3 WORK SAFETY DUTIES

Division 3.1 Duties to manage risk

Division 3.1 specifies the work safety duties for the Bill. Many features of these provisions appear in other jurisdictions' legislation. Generally the provisions outline who is a duty holder, what is the duty owed and how to comply with the duty. The Bill has been developed with a view to ensure that a duty is placed on everyone who has an influence on work safety including designers, manufacturers, importers and suppliers of plant, work systems and buildings intended to be used as workplaces.

The duties have been drafted to ensure responsibility attaches to those who control the generation of risks and who are in a position to eliminate or minimise risks. This is intended to ensure that duty holders are only responsible for matters over which they have control, and that duty holders only owe a duty to the extent of that control. The intended effect is that there are no gaps in the coverage of safety duties and that responsibility is not assigned to anybody in a way that is disproportionate to their actual level of control.

The Bill intends that the general duties of care are tied to the conduct of work wherever it occurs and are not limited to the confines of an actual 'workplace'. Likewise, the concept of business or undertaking is intended to capture all *activities* that are carried out in the course of conducting a business or enterprise. Again the concept is not confined to the physical boundary of a 'workplace'.

Clause 21 – Duty-safe conduct of business or undertaking

This clause sets out the principal work safety duty. The duty applies to a person conducting a business or undertaking. This includes employers, self-employed, municipal corporations, subcontractors and franchisors.

The person has a duty to ensure work safety by managing risk. The duty holder manages risk by taking reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

For example, a person operating a supermarket has a duty to ensure the health, safety and wellbeing of all of its workers by taking reasonably practicable steps to manage risk. This may involve developing a work safety policy and identifying and addressing risks such as manual handling and slips, trips and falls.

Subclause 21(3) outlines the matters a person must do in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Clause 22 – Duty-person in control of premises

This clause sets out the safety duty for a person in control of premises. A person in control of premises is defined in clause 13 to mean anyone who has control of the premises, including anyone with authority to make decisions about the management of the premises. Premises is defined very broadly in the Dictionary to include the whole or part of:

- a structure, building, aircraft, vehicle or vessel; or
- a place (whether enclosed or built on or not).

The person has a duty to ensure work safety in relation to the premises by managing risk. The duty holder manages risk by taking reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

For example, the owner of a shopping mall has a duty to ensure the health, safety and wellbeing of workers and patrons at the mall by taking reasonably practicable steps to manage risk. This would involve ensuring safe entry and exit routes within the complex. Concurrently, the person in control of an individual store premises in the mall has a duty to ensure safe entry and exit routes for those parts of the premises that they have control, for example, entry into the staff tearoom and amenities.

Subclause 22 (3) outlines the matters a person must do in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Clause 23 – Duty-person in control of plant or systems etc

This clause sets out the safety duty for a person in control of plant or system etc. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. A system is not defined but would take on its ordinary meaning and include a process, procedure, or method for undertaking work.

A person in control of plant or a system is defined in clause 13 to mean anyone who has control of the plant or system or the operation of the plant or system, including anyone with authority to make decisions about the plant or system or the operation of the plant or system.

The person has a duty to ensure work safety in relation to the plant or system by managing risk. The duty holder manages risk by taking reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

For example, a person operating a mechanic business has a duty to ensure the health, safety and wellbeing of workers in relation to machines and systems of work over which it has control. This may involve maintaining equipment in good working order

and repair and having a system for reporting faulty equipment and reviewing this system.

Another example is where the head franchisor of a hotdog chain mandates a system for cleaning hotdog machines in each franchise. The head franchisor has a duty to ensure the health, safety and wellbeing of workers who carry out the cleaning of the machines. This may involve ensuring the system is safe, providing guidance and training to those that use it and reviewing the system's effectiveness and safety.

Clause 23(3) outlines that the person's duty included maintaining the plant or system in a way that is consistent with work safety.

Clause 24 – Duty-person in control of design

This clause sets out the safety duty for a person in control of design. This is the first of the new 'upstream' duty holders reflecting the principle that responsibilities for work safety should also be allocated 'upstream' to those who design, produce and supply plant, workplaces and systems of work, in order to ensure that the risks emanating from these products are eliminated or controlled at the source.

The safety duty applies to a person in control of the design of plant or a structure that is used or could reasonably be expected to be used at work, as a workplace or at a workplace. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. Structure is also defined to include the whole or part of a building, whether permanent or temporary.

For example, the designer of a meat slicer has a duty to ensure the health, safety and wellbeing of workers who might operate the machine by taking all reasonably practicable steps to manage risk. This may involve ensuring the machine has safety guards to prevent injury and that guidance on how to safely operate the machine with the guarding is provided. The designer of an office building also has a duty to ensure the health, safety and wellbeing of workers and other patrons in relation to the design. This may involve ensuring the design of the office building encompasses safe entry and exit, adequate facilities and adequate environmental controls.

A person in control of the design of plant or a structure is defined in clause 13 to mean anyone who has control of the design of the plant or system, including anyone with authority to make decisions about the design.

The person has a duty to ensure work safety in relation to the plant or structure by managing risk. The duty holder manages risk by taking reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

Clause 25 – Duty-person in control of manufacture

This clause sets out the safety duty for a person in control of manufacture, of plant or a structure that is used or could be reasonably be expected to be used at work, as a

workplace or at a workplace. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. Structure is also defined to include the whole or part of a building, whether permanent or temporary.

A person in control of manufacture is defined in clause 13 to mean anyone who has control of the manufacture of the plant or structure, including anyone with authority to make decisions about manufacture.

For example, the manufacturer of a photocopier has a duty to ensure the health, safety and wellbeing of workers who might operate the machine by taking all reasonably practicable steps to manage risk. This may involve ensuring the photocopier is built to specification and using appropriate materials.

The person has a duty to ensure work safety in relation to the plant or structure by managing risk. The duty holder manages risk by taking reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

Clause 25(3) outlines the matters a person must do in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Clause 26 - Duties-person in control of import and supply

This clause sets out the safety duty for a person in control of import and supply of a plant or structure that is used or could be reasonably be expected to be used at work, as a workplace or at a workplace. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. Structure is also defined to include the whole or part of a building, whether permanent or temporary.

A person in control of import and supply is defined in clause 13 to mean anyone who has control of the import or supply of the plant or structure, including anyone with authority to make decisions about the import or supply. Subclause 26 (4) clarifies when a person is not in control of supply – fore example, when a person only has a financial interest in the item or has not taken actual possession of the item. This could include an auctioneer.

An example of where a person has control of import and supply includes a hire company that supplies compactors to a construction site who has a duty to ensure the health, safety and wellbeing of workers who might operate a compactor, or third parties that might be affected by its use, by taking all reasonably practicable steps to manage risk. This would involve ensuring the compactor is provided in a safe working condition, complies with Australian safe design standards and that regular maintenance has been carried out.

The person has a duty to ensure work safety in relation to the plant or structure by managing risk. The duty holder manages risk by taking reasonably practicable steps

to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

Subclause 26(3) outlines the matters a person must do in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Clause 27 – Duties-worker

This clause sets out the safety duty for workers. Workers have a duty not to expose themselves and others at the workplace to risk and to cooperate and obey instructions regarding work safety.

Clause 28 – Duty-at workplace

This clause sets out the safety duty for all people at a workplace. All people at a workplace have a duty not to expose others at the workplace to risk.

Division 3.2 Work safety risks—failure to comply with duties

Division 3.2 sets out the offences that apply for failing to comply with the safety duties in Division 3.

The prosecution must prove that the person failed to comply with a safety duty and the relevant fault element (if any) for the breach. In proving to the court that a person failed to comply with a safety duty, the prosecution must prove beyond all reasonable doubt that the duty holder failed to ensure work safety by failing to manage risk. This includes failing to take reasonably practicable steps to eliminate or, where appropriate, to minimise the risk.

The Bill does not propose absolute duties and does not reverse the onus of proof in relation to the safety duty offences.

This division has five offences. In each offence a person is required to comply with a safety duty. This is the first element of the offence and attracts absolute liability. As absolute liability applies to the requirement to comply with a safety duty, the defence of mistake of fact does not apply to this requirement. Therefore, the offender's ignorance about the existence of the duty is not relevant for the purposes of the offence.

The second element of the offence is that the person commits an offence if the person fails to comply with the safety duty. This element is a strict liability offence. The imposition of a fault element for this element of the offence would be inappropriate as it is inconsistent with the regulatory context and poses unjustified limitations on enforcement as the prosecution would need to prove that the person was aware of the safety duty and intentionally or recklessly failed to comply with the safety duty. In particular, it would be difficult to prove that a defendant intended to omit performance of a duty if the defendant was unaware that the duty existed. In an occupational

health and safety context duty holders are expected to be aware of their duties and obligations to their employees etc. This is a long-standing principle and is based on reasons of workers and public safety.

Strict liability is appropriate as it allows for the defence of reasonable mistake of fact under clause 36 of the Criminal Code. So, for example, if a person in control of plant checks the temperature gauge on a piece of machinery to ensure that it is safe and falls within the limits of accepted industry standards (or any regulations) but the gauge is faulty and the piece of machinery is showing no signs of overheating etc, the person is not liable for an offence that may result because there was a reasonable mistake of fact.

The third element of the offence provides that a person would only commit an offence if the failure to comply with the safety duty exposes another person to substantial risk of serious harm or causes serious harm. The prosecution must prove that the person was either reckless or negligent as to whether the failure would expose another to substantial risk of serious harm or cause serious harm. Accordingly, the offences remain as fault element offences.

Offences incorporating elements of strict liability are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale in this cause is that duty holders under the Bill, as opposed to members of the general public, are expected to be aware of their duties and obligations. The defendant's frame of mind in relation to the existence of, and compliance with, the safety duty is irrelevant. However, some knowledge or intention is required in order to justify the level of penalty for this particular offence. This is provided through the third element of the offence.

Clause 29 - Meaning of *safety duty*—div 3.2

This clause provides that in this division *safety duty* means a duty under division 3.1 (Duties to manage risk).

Clause 30 - Failure to comply with safety duty—general

This clause provides that a person commits an offence if the person has a safety duty; and that person fails to comply with the duty. Failing to comply with the duty is a strict liability offence.

The maximum penalty is 100 penalty units.

Clause 31 – Failure to comply with safety duty – negligent exposure to substantial risk of serious harm

This clause provides that a person commits an offence if the person has a safety duty and fails to comply with it and therefore *exposes* someone to a substantial risk of serious harm and the person is *negligent* about the failure. Failing to comply with the duty is a strict liability offence.

The maximum penalty is 1000 penalty units, 2 years imprisonment or both.

Clause 32 - Failure to comply with safety duty – reckless exposure to substantial risk of serious harm

This clause provides that a person commits an offence if the person has a safety duty and fails to comply with it and therefore *exposes* someone to a substantial risk of serious harm and the person is *reckless* about the failure. Failing to comply with the duty is a strict liability offence.

The maximum penalty is 1500 penalty units, 5 years imprisonment or both.

Clause 33 - Failure to comply with safety duty – negligently cause serious harm

This clause provides that a person commits an offence if the person has a safety duty and fails to comply with it and therefore *causes* serious harm to someone and the person is *negligent* about the failure. Failing to comply with the duty is a strict liability offence.

The maximum penalty is 1500 penalty units, 3 years imprisonment or both.

Clause 34 - Failure to comply with safety duty – recklessly cause serious harm

This clause provides that a person commits an offence if the person has a safety duty and fails to comply with it and therefore *causes* serious harm to someone and the person is *reckless* about the failure. Failing to comply with the duty is a strict liability offence.

The maximum penalty is 2000 penalty units, 7 years imprisonment or both.

Clause 35 - Alternative verdicts for failure to comply with safety duty

This clause provides for alternative verdicts if the court is not satisfied beyond reasonable doubt that the defendant is guilty of the offence before the court but is satisfied beyond reasonable doubt that the defendant is guilty of an alternative offence under the legislation

Division 3.3 Work safety risks—serious events

Clause 36 - Meaning of *serious event*—div 3.3

This clause defines a serious event as:

a) The death of a worker or another person;
b) An injury that results in incapacity for work for a period prescribed by regulation;
c) A serious injury to a person other than a worker;
d) A dangerous occurrence.

Several examples of serious injury are given in the legislation including: injury resulting in amputation; extensive burns; injury resulting in injured person being placed on life support; loss of consciousness because of exposure to dangerous substance or electric shock and injury requiring immediate medical treatment.

In order for a serious event to attach obligations to a business or undertaking under the legislation, the business or undertaking concerned must have *caused* the serious event in some way. It is not enough for the event merely to have happened at the premises of a business or undertaking.

Clause 37 - Meaning of *dangerous occurrence*

This clause defines dangerous occurrence as 1 or more of the following:

a) an occurrence involving imminent risk of the death of, or serious injury to, anyone;
b) an occurrence that endangers or is likely to endanger the work safety of people at a workplace, including—
    i) damage to a boiler, pressure vessel, plant, equipment or other thing;
    ii) damage to, or failure of, a load-bearing member or control device of a crane, hoist, conveyor, lift, escalator, moving walkway, plant, scaffolding, gear, amusement device or public stand;
    iii) an uncontrolled fire, uncontrolled explosion or escape of gas, a dangerous substance or steam;
c) anything else prescribed by regulation.

The following are included as examples in the legislation of an occurrence involving imminent risk or death or serious injury to anyone: major damage to plant, equipment, building or structure; imminent risk of uncontrolled explosion or uncontrolled fire; imminent risk of escape of gas, a dangerous substance or steam; entrapment of person in confined space; collapse of excavation

Clause 38 - Notice of serious events

This clause sets out that notice must be given, to the relevant chief executive as per the ACT's Administrative Arrangements, of a serious event at or near a workplace of the business or undertaking. The maximum penalty for failing to give this notice is

100 penalty units, imprisonment for 1 year or both. The clause also sets out that a regulation may prescribe the requirements for a notice.

Clause 39 – Records of serious events

This clause sets out the record keeping requirements for notifications of serious events. This is a strict liability offence with a maximum penalty of 10 penalty units.

Clause 40 – Reporting under other legislation

This clause eliminates the need for duplicate reporting under the legislation where a report has been made in relation to the same event under the *Dangerous Substance Act 2004.*

Clause 41 - Person in control to protect site of occurrence of serious event

This clause sets out the requirements for preserving the site where a serious event has occurred. The person in control must ensure that the site of the serious event is not entered or disturbed for 72 hours or until an inspector directs otherwise. An inspector may direct that the site no longer needs to be preserved before the 72 hour timeframe expires or may require the site to be preserved for longer.

This is a strict liability offence with a maximum penalty of 10 penalty units.

The site preservation requirements do not apply if the work safety of a person needs protection, if an injured person needs help or essential action is needed to make the site safe and prevent a further dangerous event.

Division 3.4 Work safety risks—other matters

Clause 42 – Workers' right to refuse

This clause grants a right to workers to refuse work if they reasonably believe that the work involves a significant risk to their health or safety. It is fundamental that all workers be able to exercise this right without being penalised by their employer in any way, including through pay reductions, termination of employment or contract, bullying, harassment, discrimination or being otherwise treated less favourably than other workers.

Clause 43 – Person in control not to discriminate

This clause provides protection to employees and workers from discrimination if they complain or propose to complain about a work safety matter, assist or propose to assist an investigation or have exercised their right to refuse dangerous work.

The clause includes an offence against a person in control of the relevant workplace if they prejudicially alter the worker's conditions of employment or engagement. The offence contains a reverse onus of proof provision whereby the defendant is required to establish that their decision to alter the worker's employment or engagement was

not motivated by the workers actions (in relation to the work safety complaint, assistance in the investigation or the exercise of the right to refuse dangerous work).

In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt (section 56, *Criminal Code 2002*; section 22(1), *Human Rights Act 2004*). Consistent with the presumption of innocence, the onus of proof should only be placed on the defendant in exceptional circumstances, such as where a particular element of an offence is within the peculiar knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove the element than for the defendant to establish it (see: *R v Johnstone* [2003] 1 W.L.R 1736; *R v Downey* [1992] 2 S.C.R. 965). A reverse presumption will be more readily justified where the burden on the defendant is evidential, and not legal (*R v Lambert* [2001] UKHL 37). The reverse presumption in this offence fits this exception to the general rule in that only the defendant is in a position to establish to the Court the reasons behind the action taken in subclause 43(1)(c), and the burden is an evidential one.

As mentioned above, the standard of proof on the defendant is an evidential burden (section 58(3), *Criminal Code 2002*). This means that, pursuant to section 58(7) of the *Criminal Code 2002*, the defendant has the burden of pointing to or adducing evidence which suggests that they did not take the action mentioned in subclause 43(1)(c) of the Bill because of the existence of a circumstance described in subclause 43(1)(b). If the defendant discharges this burden, the prosecution must then disprove beyond reasonable doubt that the defendant did not take the relevant action for the reason which the evidence that the defendant has adduced suggests they did.

Clause 44 – Interfering with safety equipment

This clause provides that it is an offence for anyone to interfere with the safety equipment at or near a workplace. The maximum penalty is 50 penalty units or imprisonment for six months or both.

Clause 45 – Person not to levy employees

This clause prohibits the levying of charges to employees in relation to anything done or provided to ensure work safety. Note that this prohibition only applies to *employees* and has not been extended to all workers. The maximum penalty is 50 penalty units or imprisonment for six months or both.

PART 4 WORKPLACE ARRANGEMENTS

Division 4.1 Duty of employer to consult

Division 4.1 establishes a general duty for employers to consult workers about work safety. The division applies to ‘employers’. Employer is defined in clause 10 broader than the common law meaning of employer which is ‘a person who engages an individual under a contract of service’. Employer is defined for the purpose of the legislation to include a person who engages a worker to carry out work in the person’s business or undertaking. Employer would include an employer in relation to an

employee; a principal in relation to a contractor; a head contractor in relation to a subcontractor and a person who engages a volunteer or work experience person to carry out work.

Clause 46 – Meaning of *worker consultation unit*

This clause provides that the ***worker consultation unit*** for an employer is all of the employer's workers or one of multiple consultation units formed under clause 48 and 49.

The worker consultation unit replaces the 'designated work group' (DWG) under the OHS Act.

Note that a worker consultation unit is not limited to employers who employ 10 or more employees, unlike a DWG. However, it is envisaged that in small workplaces the worker consultation unit would usually comprise all members of the workforce.

Clause 47 – Duty to consult

This clause places a duty on employers to consult, if reasonably practicable, all workers to allow workers to contribute to matters affecting their work safety.

Subclause 47(2) outlines the matters an employer must consult workers about in order to satisfy the duty to consult. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Failure to satisfy the duty to consult is a strict liability offence with a maximum penalty of 100 penalty units.

Clause 48 – Duty to consult-employer to establish worker consultation units

This clause only applies if it is not reasonably practicable for consultation to be undertaken with all of the employer's workers. It is envisaged that large businesses either with many-faceted work sites or undertaking work of a hazardous nature will more than likely establish multiple consultation units.

The clause also provides that if a worker asks the employer to establish 2 or more units in the interests of work safety then this clause will apply.

This clause requires an employer to establish 2 or more worker consultation units for the purpose of consultation. The worker consultation unit is more flexible than its predecessor DWG and can be formed with workers from one or more workplaces or workers from one or more employers.

Examples of a worker consultation unit include:

- the four employees at the local hairdresser comprising the total workforce who then talk about work safety issues at a regular staff meeting (as per paragraph 48(3)(a));

- all the different sub-contractors working at the same construction site who then have a morning tool box meeting (as per paragraph 48(3)(b));
- all the workers from different retail shops in the west wing of a large shopping mall, who then share a roving health and safety representative (again, as per paragraph 48(3)(b)); or
- the workers at the one consulting firm in three different locations (as per paragraph 48(3)(a)).

Failure to establish 2 or more worker consultation units under this clause is a strict liability offence with a maximum penalty of 50 penalty units.

Clause 49 – Worker consultation unit-how unit established

This clause sets out the requirements and considerations for establishing a worker consultation unit that best and most conveniently allows the work safety interests of workers to be represented and safeguarded.

Subclause 49(3) allows both the employer and workers to seek help to establish the worker consultation unit.

Clause 50 - Worker consultation unit—election

This clause provides that a regulation may prescribe the eligibility requirements for a person to be elected as a member of the Health and Safety Committee or a Health and Safety Representative for a worker consultation unit (where relevant) and anything else in relation to an election.

Clause 51 - Worker consultation unit-changes

This clause applies if in the interests of work safety, an employer wants to change a consultation unit or a worker gives the employer notice of a requested changed. The employer is required to consult with workers about making a change. The employer and workers may ask for assistance to help negotiate the change.

If the change requested by the worker is in the interests of work safety, the duties and penalties in clause 48 apply.

Clause 52 - Worker consultation unit-review

This clause requires the employer to review a worker consultation unit to consider the effectiveness of its operation, if there are workplace changes or if requested by a worker or health and safety representative or health and safety committee.

Clause 53 - Worker consultation unit-employer to keep records

This clause requires the employer to keep adequate records in relation to the worker consultation unit. The employer is also required to make the records available to workers, their representatives or an inspector.

This is a strict liability offence with a maximum penalty of 30 penalty units.

Clause 54 – Duty to consult-deciding how workers to be consulted

This clause requires the employer and the worker consultation unit to determine what forms of participation will be used for consulting. The intention is that the employer and workers collaborate on the best means of participation. Together they may decide to:

- elect a health and safety representation (HSR); or
- establish a health and safety committee (HSC); or
- another agreed method of consultation.

While the employer and workers *may* decide one or a combination of those mechanisms in subclause 54(2), they *must* decide on at least one of these forms of participation.

In some cases, a HSC may be appropriate in others an HSR. Often both could operate performing different but complementary roles. Or there may be some other means of participation that fulfils the employer's duty to consult. The intention of the Bill is that employers *must* meaningfully consult with their workers but *how* that consultation is arranged and undertaken is flexible.

Subclause 54(3) allows a majority of workers in a consultation unit to require that the employer must arrange for an HSR or HSC. These are long held devices in OHS and business and it is expected that they will remain a principal mechanism for consultation in most organisations.

Clause 55 – Duty to consult-chief executive may direct election of health and safety committee

This clause gives the relevant chief executive, as per the ACT's Administrative Arrangements, the power to require an employer to establish a HSC where the work being performed is hazardous and where an HSC will improve work safety.

This is a strict liability offence with a maximum penalty of 100 penalty units.

Clause 56 – Duty to consult-consulting workers

This clause establishes what constitutes meaningful consultation. The duty to consult will require a genuine effort from employers to consult workers. Employers must consult by sharing information and giving workers a reasonable opportunity to contribute and express opinions on work safety issues.

Subclause 56(2) requires an employer to consult workers using the agreed upon method established under clause 54. Not doing so is an offence with a maximum penalty of 50 penalty units.

Clause 57 – Dispute resolution-mechanism

This clause provides a mechanism to resolve disputes if they arise in relation to the establishment of worker consultation units and consultation methods. It provides that the relevant chief executive as per the ACT's Administrative Arrangements must arbitrate a dispute referred by the employer or worker in a consultation unit. The system of arbitration may be prescribed by regulation.

Division 4.2 Health and safety representative

Clause 58 – Health and safety representative-functions

This clause sets out the functions of a health and safety representative (HSR) for a worker consultation unit. The functions are:

a) to represent the worker consultation unit in relation to work safety;
b) to tell the workers' employer about potential risks and dangerous occurrences at any workplace where represented workers work; and
c) to tell the employer about work safety matters directly affecting the represented workers.

Other functions may be prescribed by regulation.

It is not intended that an HSR should undertake the role of the safety officer at a workplace. The primary function of an HSR is to represent workers in relation to work safety. In exercising a function, subclause58 (3) provides that the HSR may, in accordance with a regulation, do 1 or more of the following:

a) inspect all or part of a workplace where a represented worker works;
b) issue a provisional improvement notice for a place where a represented worker works; and
c) exercise emergency powers.

Subclause (4) provides that before issuing a provisional improvement notice or exercising an emergency power the HSR must take all reasonable steps to consult the employer to try to resolve the work safety matter first.

Clause 59 – Health and safety representative-protection from liability

This clause provides that an HSR cannot be held civilly or criminally liable for acts done in good faith in carrying out his or her functions under the Bill.

Division 4.3 Health and safety committee

Clause 60 – Health and safety committee-functions

This clause sets out the functions of a health and safety representative for a worker consultation unit. The functions are:

a) to facilitate cooperation between an employer and the employer's workers in relation to work safety;
b) to assist the employer to consult workers on proposing and developing changes to work or other policies, practices or procedures that may directly affect work safety;

c) to assist the employer to resolve work safety matters; and
d) to establish, review and publish procedures in relation to work safety.

A regulation may prescribe other functions for a health and safety committee.

Division 4.4 Authorised representatives—entry to workplace

Clause 61 - Definitions—div 4.4

This clause defines terms used in division 4.4

Clause 62 - Authorised representative

This clause provides that a registered organisation may, in writing, authorise a person for the purposes of this division.

Clause 63 Authorised representative—entry to workplace

This clause applies if an authorised representative of a registered organisation suspects on reasonable grounds that a contravention of this Bill may have happened, may be happening or is likely to happen at premises; and the premises are a workplace where members of the organisation (or people who are eligible to be members of the organisation) work.

Under those circumstances the authorised representative may enter the premises to investigate the contravention.

However, this clause does not authorise entry into a part of premises that is being used only for residential purposes.

Clause 64 Authorised representative—notice of entry

This clause provides that the authorised representative may enter the premises without notice provided that the authorised representative tells the occupier of the premises that the representative is on the premises as soon as reasonably practicable after entering the premises.

However, the authorised representative need not tell the occupier of the premises that the representative is on the premises if to do so would defeat the purpose for which the premises were entered, or the occupier had already been told in writing when the representative would enter the premises.

Clause 65 Authorised representative—production of authorisation

This clause provides that an authorised representative must not remain at premises entered under this part if the representative does not produce his or her authorisation for inspection when asked by the occupier.

Clause 66 Authorised representative—powers available on entry

This clause establishes the things that an authorised representative may do to investigate a suspected contravention of this Bill upon entering premises under clause 63.

Subclause 66(3) provides that if an authorised representative requires a person to produce documents for inspection the person has 14 days written notice to produce the documents.

Clause 67 Authorised representative—damage etc to be minimised

This clause provides that in the exercise, or purported exercise, of a function under this division, an authorised representative must take all reasonable steps to ensure that the representative causes as little inconvenience, detriment and damage as is practicable.

If an authorised representative damages anything in the exercise or purported exercise of a function under this division, the representative must give written notice of particulars of the damage to the person whom the representative believes on reasonable grounds is the owner of the thing.

Clause 68 Authorised representative—compensation for exercise of function

This clause provides that a person may claim compensation brought in a court of competent jurisdiction, from a registered organisation if the person suffers loss or expense because of the exercise, or purported exercise, of a function under this division by an authorised representative of the organisation.

Clause 69 Authorised representative—occupier to be told about findings

This clause provides that within 2 days of entering a premises an authorised representative must give the occupier and the relevant chief executive as per the ACT's Administrative Arrangements a written notice telling the occupier whether the representative believes that this Bill has been, or may have been, contravened at the premises.

Division 4.5 Authorised representative—offences

Clause 70 - Authorised representative—offences by registered organisations

This clause provides the circumstances under which registered organisations may commit offences such as authorising someone who isn't an employee or not giving notice of an authorisation.

An offence under this clause is a strict liability offences.

Clause 71 - Authorised representative—pretending

This clause provides that a person commits an offence if the person pretends that the person is an authorised representative.

The maximum penalty is 100 penalty units.

Clause 72 - Authorised representative—obstructing etc

This clause provides that a person commits an offence if the person obstructs, hinders, intimidates or resists a person in the exercise of his or her functions as an authorised representative and the person knows that the person is an authorised representative.

Strict liability applies to the circumstances that the authorised representative was exercising the representative's functions as an authorised representative. The maximum penalty is 50 penalty units.

PART 5 ENFORCEMENT POWERS

Division 5.1 General

This division deals with general powers of inspectors under the Bill. These powers are necessary to ensure that inspectors are able to monitor compliance with the legislation. These powers are similar to powers of inspectors under other regulatory schemes and are consistent with the powers of inspectors under the *Dangerous Substances Act 2004*.

Clause 73 - Definitions—pt 5

This clause defines terms used in Part 5.

Division 5.2 General powers of inspectors

Clause 74 – Power to enter premises

This clause contains a general power for inspectors to enter premises. It describes the circumstances in which the power to enter may be exercised, including entry with the consent of the occupier of premises and entry under warrant, and entry without consent or a warrant. It includes a power for an inspector to detain a vehicle, so that the vehicle may be searched.

Clause 75 – Premises that are vehicles

This clause gives the grounds under which an inspector may stop and detain a vehicle according to the power granted in clause 74. The inspector must not detain the vehicle for longer than is reasonably necessary to exercise the inspector's powers in relation to the vehicle.

Clause 76 – Production of identity card by inspectors

This clause requires an inspector to produce his or her identity card when asked to do so by the occupier of premises that he or she has entered. An inspector who does not produce his or her identity card must leave the premises.

Clause 77 – Consent to entry by inspectors

This clause sets the requirements for inspectors seeking the occupier's consent to enter premises under subclause 74 1(c). The inspector must produce an identity card and tell the occupier: the entry purpose; that anything seized may be used as evidence and that consent may be refused.

An occupier is considered to have given consent by signing a form setting out the details pertaining to the entry.

Clause 78 – General power of inspectors for premises

This clause provides inspectors with a number of discretionary powers which can be exercised when they have entered premises under this part. These powers enable inspectors to examine things, make copies, take samples, open packages or operate plant or equipment, take measurements, conduct tests, make records, seize items, ask questions, obtain information and ask another person at the premises for assistance in doing any of these things. These comprehensive powers are essential to ensure that inspectors can effectively monitor compliance with the Bill.

As with all discretions, the discretion afforded by this clause must be exercised in a manner consistent with the rights contained in the *Human Rights Act 2004.* Put differently, powers given to inspectors under this clause must not be exercised in a manner that would result in a breach or denial of a human right. (see: *Ghaidan v Godin-Mendoza* (2004) 2 AC 557). This obligation will be reinforced by the commencement of the commencement of section 40B to the *Human Rights Act* on 1 January 2009.

Similarly, consistent with the common law rule that legislation should not be construed in a manner that will authorise an abrogation of well-established common law rights, freedoms or privileges, the clause should not be taken to authorise inspectors to act in manner which would intrude upon a person's common law rights or freedoms (see: *Coco v The Queen* (1994) 179 CLR 427; Minister *of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273).

This will mean, for example, that an inspector would not be able to exercise the power in subclauses 78(i) and (j) to require a person to answer a question where the inspector is aware that the answer would tend to incriminate that person — if they purported to exercise the power in such a manner they would, in effect, be requiring the person to abrogate the privilege against self-incrimination in section 22(2) (i) of the *Human Rights Act.*

Clause 79 – General powers of inspectors for public premises

This clause ensures that an inspector can exercise in public places the same powers that are set out in clause 78, if the inspector reasonably suspects that the public place is also a workplace for the purposes of the Bill.

Clause 80 – Offence-contravention of requirement by inspector

This clause provides that it is an offence if a person does not comply with a requirement made by an inspector exercising his or her powers under clause 78 (i) or (j) which make requirements of the occupier, or anyone at the premises – see previous discussion above about the exercise of this discretion.

The maximum penalty is 50 penalty units.

Clause 81 – Power to take action to prevent imminent risk

This clause gives an inspector the power to take direct action to remove or mitigate an imminent risk of serious harm to a person. In exercising the power under this provision, an inspector can take or direct any reasonable action necessary to prevent, remove or minimise the risk and where possible, should consult with the occupier of the premises.

Clause 82 – Report about action to prevent imminent risk

This clause requires an inspector to report on action taken under clause 81 and to provide a copy of that report to the occupier of the premises and to the relevant chief executive as per the ACT's Administrative Arrangements.

Clause 83 – Recovery of Territory's costs for action to prevent imminent risk

Where an inspector takes direct action under clause 81, this clause provides that the Territory's costs associated with that action can be recovered from the employers at the workplace, the owners and lessees of the premises and/or the person who caused the risk. Costs are not payable by a person if someone else's actions were responsible for causing the risk, or if the risk could not reasonably have been prevented.

Clause 84 – Power of entry etc in relation to serious event

This clause gives an inspector powers to enter premises if the inspector has reasonable grounds to believe a dangerous occurrence has happened, is happening or is about to happen at those premises (a dangerous occurrence is defined in clause 37). The purpose of this provision is to ensure that inspectors can readily gain access to premises in these circumstances, so the occurrence can be properly investigated, the premises can be made safe and any evidence relating to the dangerous occurrence can be secured.

Clause 85 – Power to seize things

This clause gives an inspector the power to seize things on premises that he or she has entered under this part of the Bill. An inspector can seize items that the inspector is satisfied are connected with any offences against the legislation that are related to the

inspector's reasons for entering the premises. An inspector can also seize any things covered by a warrant. An inspector also has the power to seize things if the inspector is reasonably satisfied that the seizure is necessary to stop the thing from being concealed, lost or destroyed, or used to commit an offence.

Clause 86 – Action in relation to seized thing

This clause provides that it is an offence to interfere with something that has been seized by an inspector under clause 85, without the inspector's approval. This is particularly important to ensure that a person does not interfere with a seized item that cannot be removed from the place of seizure. This is a strict liability offence, to ensure that people cannot frustrate a seizure or investigation. The maximum penalty is 100 penalty units.

Clause 87 – Power to destroy unsafe things

This clause gives an inspector the power to order the destruction or disposal of items that are inspected or seized under this part of the Bill, if he or she is reasonably satisfied the item poses a risk to health and safety. The inspector can give directions about the way in which the destruction or disposal is to be carried out.

The Territory's costs associated with the destruction or disposal can be recovered from the person responsible for the item. Without such a provision, the costs that the Territory would incur in safely storing such items would be considerable. Some items are so inherently dangerous that they cannot be safely used or stored and destruction is the only feasible option.

Clause 88 – Power to require name and address

This clause provides that an inspector can require a person to provide their name and address if that person is reasonably suspected of involvement in the commission of an offence. The inspector must provide and record the reasons for the request. It is a strict liability offence not to comply with the request under this provision, or to provide false information. The maximum penalty is 10 penalty units.

Clause 89 – Power to require production of authorisation

This clause empowers inspectors to require a person that is involved in something that requires authorisation to do that thing, to produce the authority for inspection. The inspector must provide and record the reasons for the request. This power can be seen as analogous to the power that police officers have to request motorists to produce a current drivers' license.

It is an offence to fail to produce an authority when requested to do so. An example of an authorisation that an inspector may require a person to produce is a certificate of competency for scaffolding work required under the Occupation Health and Safety (Certification of Plant Users and Operators) Regulations 2000.

Division 5.3 Search warrants

This division contains provisions dealing with search warrants. These provisions are similar to search warrant provisions contained in other regulatory legislation. They explain the process for applying for a search warrant, the actions that search warrants may authorise, power search warrants are to be executed, how searches are to be conducted and associated matters.

Clause 90 – Warrants generally

This clause explains that an inspector can apply to a magistrate for a search warrant. Search warrants can be issued if a magistrate is satisfied that there is likely to be evidence of an offence under the legislation. A warrant issued by a magistrate must contain details such as the items that it applies to, the offence that it relates to, the actions that it authorises and the period for which it remains in force.

Clause 91 – Warrants-application made other than in person

This clause sets out the methods by which an application for a search warrant may be made to a magistrate if the inspector is not able to make the application in person. This provision is included to cover situations where search warrants are needed urgently, for example because it is thought that evidence might be lost or destroyed if the search is not carried out promptly. The methods that may be used include phone, fax, radio or other form of communication. This clause also includes procedural provisions for recording applications for warrants and the terms of any warrant issued as a result.

Clause 92 – Search warrants-announcement before entry

This clause includes a general requirement that an inspector must announce that he or she is authorised to enter premises before he or she seeks entry under the warrant. This requirement may not apply if the inspector believes on reasonable grounds that immediate entry is necessary for reasons of safety or to preserve evidential material at the premises.

Clause 93 – Details of search warrant to be given to occupier etc

This clause requires an inspector to give details of a search warrant to the occupier of the premises to be searched, or to his or her representative. The occupier must also be given a written statement of his or her rights and obligations.

Clause 94 – Occupier entitled to be present during search etc

This clause makes it clear that an occupier of premises, or his or her representative, is generally entitled to be present during a search. This right is not absolute – a person can be excluded if his or her presence would impede the search, or if he or she is under arrest and being present at the search might interfere with the objectives of the search.

Clause 95 – Moving things to another place for examination or processing under search warrant

This clause enables an item found at the premises to be moved elsewhere for examination or processing in order to decide whether the item can be seized under the search warrant. There must be reasonable grounds for believing the item is covered by the search warrant, and it must be significantly more practicable to examine or process the item elsewhere.

This provision is necessary because it is not always immediately apparent whether an item comes within the terms of a search warrant, and in these circumstances it is desirable to have a clear legal basis for moving items found on premises. The occupier of premises, or his or her representative, is entitled to observe while the item is examined or processed at the other location.

Clause 96 – Use of electronic equipment at premises

This clause authorises the use of electronic equipment on premises that are being searched to access relevant data, providing the inspector reasonably believes the data is relevant to the search warrant and the equipment can be operated without damaging it. This clause also contains provisions for copying data, removing devices from the premises, seizing equipment and data storage devices and transferring data into documentary form.

Clause 97 – Person with knowledge of computer to assist access etc

This clause provides that an inspector can apply to a magistrate for an order that a person (for example, someone familiar with the electronic equipment or data system) provide assistance to the inspector to access data, copy the data or convert the data into documentary form.

Subclause 97 (2) sets out the criteria for making an order of this type. It is an offence not to comply with an order under this clause. The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Clause 98– Securing electronic equipment

This clause also deals with electronic equipment at premises. It enables an inspector to take steps to secure electronic equipment at premises while expert assistance is being sought to assist with the operation of the equipment.

Clause 99 – Copies of seized things to be provided

This clause requires inspectors to provide, on request, copies of any documents, films, computer files or other reproducible items that have been seized to the occupier of premises, or his or her representative. This obligation does not extend to things seized under clause 96 (Use of electronic equipment at premises), or if the person would commit an offence by possessing that material.

Division 5.4 Return of forfeiture of things seized

This division deals with the return and forfeiture of things seized under this part of the Bill.

Clause 100 – Receipt for things seized

This clause explains that an inspector must give a receipt for any items seized to the person from whom they were taken. This provision is necessary so that seized items can be returned to the correct person, when they become available to be returned.

Clause 101– Access to things seized

This clause provides a right of access to documents or other things that are seized under this part of the Bill. The right of access applies to any person who would be entitled to inspect the item if it had not been seized.

Clause 102 – Return of things seized

This clause deals with the return of seized items. A thing seized must be returned to its owner or reasonable compensation paid to the owner, unless:

a) a prosecution for an offence in connection with the thing is begun within 1 year and the thing is requires as evidence; or

b) an application for the forfeiture of the seized thing is made to a court under the Confiscation of Criminal Assets Act 2003 or another Territory law within 1 year.

Clause 102 does not apply if the thing poses a risk to work safety, if possession by the owner would be an offence or if the relevant chief executive as per the ACT's Administrative Arrangements believes that use of the thing at the premises where it was seized would result in an offence against this legislation.

Clause 103 – Application for order disallowing seizure

This clause provides that a person claiming to be entitled to a thing seized has 12 months to apply to the Magistrates Court for its return.

Clause 104 – Order for return of seized thing

This clause sets out the grounds on which the Magistrates Court can order the return of a seized item. Among other matters, these grounds include where the Court is not satisfied that there is an offence to which the seized item relates or the Court is satisfied that that there are exceptional circumstances to justify disallowing the seizure. If the seized item cannot be returned, or if it has suffered a loss in value since it was seized, the Magistrates Court can also order the Territory to pay reasonable compensation.

Clause 105 – Adjournment pending hearing of other proceedings

This clause enables the Magistrates Court to adjourn an application to disallow the seizure, while other legal proceedings occur, if the seized item is evidence in those proceedings.

Clause 106 – Forfeiture of seized things

This clause deals with the forfeiture of things that have been seized under this part of the Bill. It explains that if a forfeited item has not been returned, destroyed or otherwise disposed of, and no application has been made to disallow its seizure, the item is forfeited to the Territory and it may be sold, destroyed or otherwise disposed of as directed by the relevant chief executive as per the ACT's Administrative Arrangements.

Clause 107 – Return of forfeited things

This clause enables the relevant chief executive as per the ACT's Administrative Arrangements to return something that has been forfeited under clause 106, providing it is returnable, for example, not destroyed. The relevant chief executive can return the item if he or she is satisfied that the item is not connected to an offence.

Clause 108 – Cost of disposal of things forfeited

This clause explains that where the Territory incurs costs in disposing of a forfeited item and a person who was the owner of that item has been convicted or found guilty of an offence in relation to that item, the Territory can recover those costs from that person.

Division 5.5 Taking and analysing samples

This division contains powers dealing with taking samples and analysing samples from premises. The purpose of this division is to ensure that inspectors are able to obtain access to material for analysis.

Clause 109 - Inspector may buy samples without complying with div 5.5

This clause removes any doubt that an inspector can buy a sample of a substance so that it can be analysed for the purposes of routine monitoring. In such cases, the inspector is not required to follow the process for obtaining samples under this part of the legislation.

Clause 110 – Occupier etc to be told sample to be analysed

This clause explains the procedure to be followed when an inspector wishes to take a sample from premises where a dangerous substance is handled. It obliges the inspector to disclose his or her intention to have the sample analysed.

Clause 111 – Payment for samples

This clause requires the inspector to pay, or offer to pay, the prescribed amount for a sample which he or she intends to take. If there is no prescribed amount, the market rate is payable.

Clause 112 – Samples from packaged substances

This clause explains how samples can be taken from packaged substances. If a package contains smaller packs, the inspector can take one or more of the smaller packs and need not purchase the whole of the package.

Clause 113 – Procedures for dividing samples

This clause sets out the procedure to be followed after a sample is taken. The sample must be divided into three parts, and marked and sealed accordingly. One part must be given to the person in charge of the premises from where the sample is taken, one part must be retained by the inspector for analysis, and the remaining part must be retained for future comparisons with the other two parts. The purpose of this provision is to ensure that disputes about the analysis results can be readily resolved.

Clause 114 – Exceptions to s 113

This clause explains that the procedure described in clause 113 will not apply in certain circumstances, for example, if dividing it would impede accurate analysis. In these circumstances, the inspector can take as many samples as necessary for the purpose of accurate analysis.

Clause 115 – Certificates of analysis by authorised analysts

This clause explains that the analysis may only be carried out by an authorised analyst, or by a person who is supervised by an authorised analyst. The authorised analyst is required to give the relevant chief executive as per the ACT's Administrative Arrangements, a certificate about the analysis that complies with the requirements set out in this clause.

The clause also provides for the appointment of authorised analysts. The certificate will have specific evidentiary value under clause 213 of the Bill.

Division 5.6 Other enforcement provisions

This division contains other general provisions dealing with enforcement powers.

Clause 116 – Damage etc to be minimised

This clause requires inspectors to take all reasonable steps to minimise inconvenience, detriment and damage when exercising powers or functions under the legislation. If damage does occur, the inspector must notify the owner of the thing has damaged.

Clause 117 – Compensation for exercise of function by inspector

This clause enables a person to claim compensation from the Territory for any loss or expenses arising from the exercise, or purported exercise of functions under this part of the Bill. Any court of competent jurisdiction can decide applications for compensation.

PART 6 COMPLIANCE MEASURES

Division 6.1 Interpretation-pt 6

Clause 118 – Meaning of responsible person-pt 6

This clause contains a definition of *responsible person* that applies to all of Part 6.

Division 6.2 Information and documents

Clause 119 – Chief executive may require answers to questions and production of documents

This clause provides powers for the relevant chief executive as per the ACT's Administrative Arrangements to require information and documents to be provided to ensure compliance with the Bill. The purpose is to ensure that the chief executive can obtain information to determine whether there is compliance with the Bill and what enforcement action, if any, may be necessary to ensure that people comply with the legislation.

Clause 120 – Compliance with notice to produce

This clause provides that the relevant chief executive as per the ACT's Administrative Arrangements can obtain information from people by requiring them to answer questions and produce documents within a reasonable time, where the chief executive reasonably believes that a person may have breached the Bill. The purpose of a request under this clause is to enable the chief executive to determine whether the person has complied with the legislation.

Clause 121 - Failure to attend before chief executive or produce documents

This clause provides that it is an offence for a person not to attend and answer questions before the relevant chief executive as per the ACT's Administrative Arrangements as required by clause 119. It is also an offence to fail to produce the documents required under clause 119. The maximum penalty for both offences is 50 penalty units.

Clause 122 – Attendance before chief executive-offences

This clause makes it an offence to fail to attend before the relevant chief executive as per the ACT's Administrative Arrangements to answer questions or to produce a document. This clause is necessary to ensure that people comply with requests from the chief executive. Note that under clause 119, a person can only be required to attend before the chief executive at a reasonable time.

This clause also contains offences related to appearances before the chief executive. Under this clause, it is an offence to fail to answer a question or to stay at the meeting with the chief executive as reasonably required by the chief executive. This is to ensure that people cannot avoid their obligations to provide information to the chief

executive by attending and then refusing to answer any questions or leaving again immediately.

Clause 123 – Privileges against self incrimination and exposure to civil penalties

This clause deals with the privilege against self incrimination and exposure to civil liability of people who have been required to answer questions and produce documents to an inspector. The effect of this clause is that common law privileges against self-incrimination and exposure to the imposition of a civil penalty do not apply to allow a person to refuse to answer questions or produce documents.

However, any information, document or other thing obtained under this part of the Bill cannot be used against the person in civil or criminal proceedings (apart from criminal proceedings under this part of the Bill or provisions in the *Crimes Act 1900* dealing with false swearing).

Division 6.3 Compliance agreements

Division 6.3 deals with compliance agreements. These are agreements entered into between an inspector and a *relevant responsible person* (defined in clause 124 and referred to in this part of the Bill as a relevant responsible person) where the inspector has reasonable grounds to believe that a contravention of the legislation has occurred, is occurring or may occur. A compliance agreement is a useful mechanism to rectify potentially dangerous situations in a cooperative fashion without resorting to criminal sanctions.

Clause 124 – Meaning of relevant responsible person-div 6.3

This clause contains a definition of *relevant responsible person* for the purposes this Division of the Bill.

Clause 125 – Inspector may seek compliance agreement

This clause explains the circumstances in which an inspector may seek to enter into a compliance agreement with a relevant responsible person. It also sets out the matters that the compliance agreement must contain, including the measures that the relevant responsible person or anybody else is to take, and the time within which the measures must be taken, in order to make sure there is effective compliance with the legislation.

Clause 126 – Term of compliance agreement

This clause explains when a compliance agreement comes into force, and when it expires. This provision is necessary so that all parties to the compliance agreement can be certain when the obligations it creates have legal effect, and to provide certainty as to the time in which any specific remedial action must be taken.

Clause 127 – Compliance agreement not admission of fault etc

This clause puts beyond any doubt that a compliance agreement is not an admission of fault by the relevant responsible person. This provision also makes it clear that evidence that a compliance agreement has been made, or evidence about the matters it contains, is not admissible in legal proceedings or disciplinary action relating to the alleged contravention of the legislation that gave rise to the compliance agreement.

The purpose of this provision is to ensure that people are not deterred from entering into compliance agreements because of a fear that their entry into such agreements could be used against them in later proceedings. This approach is consistent with quality assurance measures in place across a wide variety of industry sectors, and is intended to help the Territory authorities to work cooperatively with industry to identify potentially risky situations, develop strategies to reduce risk and prevent harm.

Clause 128 – Notification and display of compliance agreements

This clause explains that it is an offence if a relevant responsible person fails to inform everyone whose activities would be affected by the compliance agreement about the terms of that agreement by informing them that the agreement has been entered into, giving a copy of the agreement to other people in control of the relevant premises, and displaying a copy of the agreement in a prominent place at the premises affected by the agreement.

The purpose of these offences is to ensure that a relevant responsible person makes sure that the existence and contents of a compliance agreement are brought to the attention of all relevant people.

Clause 129 – Compliance agreement not to be moved

This clause makes it an offence to move, alter, damage, to deface or cover a copy of a compliance agreement that has been displayed in the premises to which the compliance agreement relates. This provision recognises the importance of ensuring that people in premises covered by a compliance agreement have ready access to documentation setting out the obligations under that agreement.

Division 6.4 Improvement notices

This division deals with improvement notices. An improvement notice is another useful alternative to commencing criminal proceedings, and provides a mechanism for ensuring future compliance with the Bill by giving the person on whom it is served specific details about the steps that need to be taken in order to comply with the legislation. Improvement notices are another way in which the Bill allows regulatory authorities to work cooperatively with people in industry to optimise safety.

Clause 130 – Meaning of relevant responsible person div 6.4

This clause contains the definition relevant to Division 6.4 of the Bill.

Clause 131 – Giving improvement notices

This clause deals with giving improvement notices to responsible people. An improvement notice can be given if an inspector believes, on reasonable grounds, that anyone at the premises has contravened, is contravening, or is likely to contravene the legislation. In these circumstances, the purpose of serving an improvement notice is to ensure that the contravention is not repeated, does not continue, or does not occur.

Clause 132 – Contents of improvement notices

This clause sets out the matters that an improvement notice given to a responsible person can require that person to do. The notice must also explain why the inspector believes the notice is necessary, and how long the person is given to comply with the improvement notice.

Clause 133 – Scope of improvement notices

This clause provides further guidance on the scope of improvement notices, and makes it clear that an improvement notice can apply to premises, plant or systems, or an activity or circumstance at the workplace.

The clause does not limit what an improvement notice for a workplace may relate to. So, for example, an improvement notice on a piece of machinery could specify that it prohibits *any* use of that piece of machinery, including beyond the workplace where the machinery was located when the notice was placed.

Clause 134 – Extension of time for compliance with improvement notices

This clause explains that the period for compliance can be extended with the concurrence of the inspector, or at the inspector's own initiative, before the time limit originally set by the improvement notice has expired. This means that the person to whom the improvement notice was given cannot wait until after the compliance period has expired before seeking an extension.

Clause 135 – Notification and display of improvement notices

This clause contains offences relating to informing people about improvement notices. The purpose of this provision is to ensure that responsible people make sure that everyone who is affected by a notice is informed about the notice, so that they can discharge their safety duties and otherwise comply with the legislation. The maximum penalty is 20 penalty units.

Clause 136 – Improvement notice not to be removed etc

Under this clause, it is an offence to remove, alter, damage or deface an improvement notice or a copy of an improvement notice. The maximum penalty is 20 penalty units.

Clause 137 – Revocation of improvement notice on compliance

This clause provides that an inspector can revoke an improvement notice when he or she is satisfied that the relevant responsible person has complied (or otherwise ensured compliance) with the notice.

Clause 138 – Contravention of improvement notice

This clause makes it an offence to fail to comply with an improvement notice. As there are potentially severe consequences in terms of harm to people if the person does not comply with the notice, this is a strict liability offence. However, it should be noted that an offence is only committed if a person fails to take all reasonable steps to comply with an improvement notice.

The maximum penalty is 100 penalty units.

Division 6.5 Prohibition notices

This division deals with prohibition notices. Prohibition notices are another mechanism that can be used by inspectors to facilitate compliance with the legislation without having to bring criminal proceedings against a person who contravenes the legislation. Prohibition notices have more serious consequences and could, for example, stop work indefinitely at premises where a breach of the Bill is resulting in a serious risk to the health and safety of people.

An inspector may issue a prohibition notice to prohibit the use of premises, plant or systems or to ensure an item or premises is not disturbed.

Clause 139 – Definitions-div 6.5

This clause contains definitions for this Division of the Bill.

Clause 140 – Giving prohibition notices

This clause provides that an inspector can issue a prohibition notice to a responsible person for a workplace. A prohibition notice can be served where an inspector believes that there may be a contravention of the legislation, and the order is necessary to prevent or minimise serious harm, or to allow inspection or other monitoring of the premises, or to allow for the investigation of an accident. The purpose of a prohibition notice is to stop certain actions occurring at the premises to avoid serious harm, or to allow further investigation by the inspector.

Clause 141 – Contents of prohibition notices

This clause sets out the matters that a prohibition notice must contain, including the measures that must be taken to ensure compliance with the legislation and the right of the responsible person to seek reinspection of the situation or circumstances that caused the notice to be given. The notice must also specify a reasonable period which in the inspector's judgement is necessary to carry out the inspection, testing, and monitoring of anything at the workplace, or to investigate an accident or incident at the workplace.

Clause 142 – Scope of prohibition notices

This clause provides further detail about the scope of prohibition notices, including the actions or matters that a prohibition notice can cover.

Clause 143 – Extension of time for inspection etc

This clause explains that if a prohibition notice states a time for carrying out the inspection, testing, and monitoring of anything at the workplace, or investigating an accident or incident at the workplace, the inspector can extend that time on their own initiative or at the request of the responsible person, providing the extension is sought before the time limit expires.

Clause 144 – Notification and display of prohibition notices

This clause provides that it is an offence not to tell others at the premises about the notice and steps that need to be taken under the notice, or to fail to display a copy of the notice in a prominent place at the premises.

This is a strict liability offence with a maximum penalty of 20 penalty units.

Clause 145 – Prohibition notice not to be removed

This clause makes it an offence to remove, alter, damage, deface or cover a copy of a prohibition notice displayed at premises. The maximum penalty is 20 penalty units.

Clause 146 – Ending of prohibition notices for contravention of Act etc

This clause describes when a prohibition notice ceases to have effect.

Clause 147 – Request for reinspection

This clause enables a responsible person subject to a prohibition notice to ask the relevant chief executive as per the ACT's Administrative Arrangements, to have the circumstances or situation reinspected, with a view to revoking the notice.

Clause 148 – Revocation on reinspection

This clause explains that a prohibition notice can be revoked following reinspection if the inspector is satisfied that there has been compliance with the notice. The clause ensures that a request for a reinspection is responded to promptly, by revoking the notice if a reinspection is not made within 2 business days after the request is made.

Clause 149 – Ending of prohibition notices given on inspection etc

This clause provides that a prohibition notice is ended at the end of the period specified for carrying out the inspection, testing, and monitoring of anything at the workplace, or investigating an accident or incident at the workplace.

Clause 150 – Contravention of prohibition notices

This clause establishes an offence for a person who fails to comply with a prohibition notice. As there may be very serious safety consequences as a result of not complying with a prohibition notice, this is a strict liability offence.

However, it should be noted that an offence is only committed if a person fails to take all reasonable steps to comply with a prohibition notice. The maximum penalty is 200 penalty units.

Clause 151 – Request for compensation for prohibition notice; and
Clause 152 – Compensation for prohibition notice

These clauses create a right for people who are bound by a prohibition notice and suffer loss or expense as a consequence, to seek compensation if there were insufficient grounds for the prohibition notice. Applications for compensation are made to the Minister, who must consider applications and provide reasons for any decision about the application.

If an application for compensation is not decided within 28 days, the Minister is deemed to have refused the application. It should be noted that applicants who are aggrieved by a decision under this clause have judicial review rights under the *Administrative Decisions (Judicial Review) Act 1989*.

Division 6.6 Enforceable undertakings

This division contains provisions dealing with enforceable safety undertakings. Safety undertakings are another mechanism for ensuring compliance with the legislation without resorting to prosecution for criminal offences. Where it is alleged that there has been a contravention of the legislation, a person may give a written undertaking that they will comply with the legislation.

Safety undertakings oblige a person to fulfil assurances that he or she makes about future behaviour in relation to work safety. The safety undertaking is enforceable through the Courts.

Clause 153 – Definitions-div 6.6

This clause contains definitions for Division 6.6.

Clause 154 – Making of safety undertakings

This clause sets out the process for making safety undertakings where the relevant chief executive as per the ACT's Administrative Arrangements, has alleged that there has been a contravention of the Bill. A person can give the chief executive a written undertaking to comply with the legislation. This undertaking is the safety undertaking. A safety undertaking must set out the details of the alleged contravention and one or more undertakings that relate to the alleged contravention.

Clause 155 – Acceptance of safety undertaking

This clause explains that if the relevant chief executive as per the ACT's Administrative Arrangements decides to accept a safety undertaking, he or she must give a written notice of that acceptance to the person who made the undertaking.

Clause 156 – Withdrawal from or amendment of enforceable undertaking

This clause describes how a safety undertaking can be amended, and how the person who made the undertaking may withdraw from it if the relevant chief executive as per the ACT's Administrative Arrangements agrees.

Clause 157 – Term of enforceable undertaking

This clause explains when an enforceable undertaking commences, and when it terminates.

Clause 158 – Safety undertaking not admission of fault etc

This clause makes it clear that a safety undertaking is not an admission of fault.

Clause 159 – Contravention of enforceable undertakings

This clause explains what happens if an enforceable safety undertaking is contravened. In such cases, the relevant chief executive as per the ACT's Administrative Arrangements can apply for an order to require the person to comply with the undertaking (or to ensure that it is complied with).

An application under this clause is made to the Magistrates Court. The court can also order the person to pay an amount that represents the value of the benefit derived from the contravention of the undertaking, or to compensate someone for loss or damage resulting from the contravention of the undertaking.

It is a strict liability offence not to take reasonable steps to comply with an order made by the court under this clause. The maximum penalty is 200 penalty units.

Division 6.7 Injunctions

This division contains powers to seek injunctions to restrain a contravention of the legislation. The purpose of this Division is to provide a quick, legally enforceable mechanism to prevent conduct that would amount to a breach of the Bill.

Clause 160 – Injunctions to restrain offences against Act

This clause allows any interested person to apply to the Magistrates Court for an injunction to restrain a person from contravening the legislation (this can include an injunction that stops a person from doing something or an injunction that requires a person to do something).

It is not necessary for the court to be satisfied that there is a likelihood of harm to people in order to grant an injunction under this clause. Likewise, the court need not be satisfied that there is a breach of the legislation, or that such a breach is likely. The

Magistrates Court can grant an interim injunction while it decides whether or not to grant permanent injunction under this clause.

Clause 161 – Enforcement of injunctions

This clause explains that the Magistrates Court can enforce interim and permanent injunctions made under this part of the legislation.

Clause 162 – Amendment or discharge of injunctions

This clause ensures the Magistrates Court has power to amend or discharge injunctions that it makes under this part.

Clause 163 – Interim injunctions-undertakings about damages

This clause makes it clear that when the relevant chief executive as per the ACT's Administrative Arrangements, applies for an injunction to restrain a breach of the legislation, the chief executive cannot be required by the court to give an undertaking about costs or damages.

This clause also allows the chief executive to make an undertaking as to costs or damages if another person, apart from the chief executive, would be required to give such an undertaking in relation to an injunction.

Clause 164 – Magistrates Court's other powers not limited

This clause makes it clear that the powers given to the Magistrates Court under this Division do not affect any of that Court's other powers. This clause provides that applications for injunction can be made without requiring the applicant to give notice to the person against whom the injunction is sought.

Division 6.8 Public sector workplace compliance measures

The purpose of the public sector compliance measures is to focus compliance on rectifying the situation quickly. This is because the Government is expected to set a high standard and be a model employer. Agencies that fail to comply would be 'named and shamed'. With the exception of prosecution, all other enforcement and compliance tools outlined above (such as prohibition notices and improvement notices) apply to the public sector.

In addition, public sector agencies would be required to report on compliance action through annual reports. Failure to comply with the more serious offences may also require tabling of reports in the Legislative Assembly.

Clause 165 - Meaning of *public sector workplace*—div 6.8

This clause contains definitions for this division of the Bill.

Clause 163 - Reporting certain failures to comply in public sector workplaces

This clause applies if the relevant chief executive as per the ACT's Administrative Arrangements is satisfied on reasonable grounds that a person in control of a public sector workplace has failed to comply with 1 or more of the following:

a) a compliance agreement;
b) an enforceable undertaking;
c) an improvement notice;
d) a prohibition notice.

The chief executive must give the Minister a report about the failure and the Minister must present the report to the Legislative Assembly within 5 sitting days after the day the Minister receives the report.

Clause 167 - Notice of failure to comply with safety duty in public sector workplace

This clause applies if the relevant chief executive as per the ACT's Administrative Arrangements (the *notifying chief executive*) believes on reasonable grounds that there has been a failure to comply with a safety duty at a public sector workplace.

The notifying chief executive must:

a) prepare a report (the *proposed report*) setting out the grounds for the belief that there has been a failure to comply with the safety duty at the public sector workplace; and
b) give the chief executive (the *responsible chief executive*) responsible for the workplace;
   (i) a copy of the proposed report; and
   (ii) written notice that the responsible chief executive may, within 10 working days after the day the responsible chief executive receives the notice, give the notifying chief executive written comments on the proposed report.

Clause 168 - Notice of failure to comply—no failure found

This clause provides that after considering the reports required under clause 167, if no failure to comply with a safety duty is found, the notifying chief executive must give written notice to the responsible chief executive that no further action will be taken.

Clause 169 - Notice of failure to comply—failure addressed

This clause provides that after considering the reports required under clause 167, if a failure to comply with a safety duty is found and even though appropriate steps have been taken to address the failure, the notifying chief executive must give written notice to the responsible chief executive that if the failure is sufficiently serious, a copy of the report will be given to the Minister.

If the Minister is given a report under this clause the Minister must present the report to the Legislative Assembly within 5 sitting days after the day the Minister receives the report.

Clause 170 - Notice of failure to comply—failure not addressed

This clause provides that after consideration of the reports required under clause 167, If a failure to comply with a safety duty is found and appropriate steps have not been taken to address the failure, the notifying chief executive must revise the report if appropriate and give a copy of the report (whether revised or not) to the Minister.

If the Minister is given a report under this clause the Minister must present the report to the Legislative Assembly within 5 sitting days after the day the Minister receives the report.

Clause 171 - Notice of noncompliance—annual report

This clause applies if a person in control of a public sector workplace commits an offence against this Bill; and the offence is an infringement notice offence.

An authorised person for the infringement notice offence may give a notice of noncompliance to the chief executive (the *responsible chief executive*) responsible for the public sector workplace and the responsible chief executive must include in the chief executive's annual report a statement of the number of notices of noncompliance given to the chief executive and a brief description of the matter to which each notice related.

Clause 172 - Annual report—additional compliance information

This clause provides that a chief executive (the *responsible chief executive*) responsible for a public sector workplace must include in the responsible chief executive's annual report information on any of the following that happened at or in relation to the workplace:

a) a report under clause 166;
b) the issuing of an improvement notice or a prohibition notice;
c) a notice under clause 167;
d) a notice under clause 170.

PART 7 ADMINISTRATIVE REVIEW OF DECISIONS

The OHS Act established a specialist Review Authority to conduct external reviews of certain decisions. The Review Authority has never been convened. Part 7 replaces the Review Authority with a standardised two tiered review mechanism. Depending on the decision, the chief executive or minister is the initial reviewer and the Civil and Administrative Tribunal will fulfil the function of the external reviewer.

Clause 173 - Definitions—pt 7

This clause contains the definitions for part 7 of the Bill.

Clause 174 - Application—pt 7

This clause provides that this part applies to a decision (a *reviewable decision*) made by the Minister, the relevant chief executive as per the ACT's Administrative Arrangements or an inspector under this Bill and prescribed by regulation.

Clause 175 - Notice of reviewable decisions

This clause provides that if the Minister, relevant chief executive as per the ACT's Administrative Arrangements or inspector (the *decision-maker*) makes a reviewable decision, the decision-maker must give written notice of the decision to each person prescribed by regulation for the decision and their rights of review.

Clause 176 - Internal review of certain decisions

This clause applies if a regulation declares that a reviewable decision is a decision that is subject to internal review (an *internally reviewable decision*). A person whose interests are affected by an internally reviewable decision may apply in writing to the relevant chief executive as per the ACT's Administrative Arrangements for internal review of the decision, however the chief executive must arrange for someone else (the *internal reviewer*) to review the decision.

However, this clause does not apply to a reviewable decision made personally by the Minister or the chief executive.

Clause 177 - Applications for internal review

This clause provides that an application for internal review of an internally reviewable decision must be made within 28 days after the day when the applicant is told about the decision by the decision-maker; or any longer period allowed by the internal reviewer, whether before or after the end of the 28-day period.

Clause 178 - Internal review

This clause provides that the internal reviewer must review the internally reviewable decision, and confirm, vary or revoke the decision, within 5 business days after the decision-maker receives the application for internal review of the decision.

If the decision is not varied or revoked within the 5-day period, the decision is taken to have been confirmed by the internal reviewer. As soon as practicable after reviewing the decision, the internal reviewer must give written notice of the decision on the internal review to the applicant.

Clause 17 - Review of decisions by ACAT

This clause provides that a person may apply to the ACAT for review of a decision made by an internal reviewer; or a reviewable decision, other than an internally reviewable decision.

PART 8 ADMINISTRATION

Part 8 sets out the administrative matters for the Bill. These matters are generally standardised across ACT legislation.

Clause 180 - Inspectors

This clause explains who is an inspector for the purposes of the Bill. An inspector includes the commissioner, and public servants who have been appointed as an inspector by the relevant chief executive as per the ACT's Administrative Arrangements.

Clause 181 – Identity cards

This clause deals with identity cards that must be issued to public servants who are appointed as inspectors, and explains the matters that must be stated on the identity card. A person who ceases to be an inspector must return the identity card as soon as practicable. It is an offence not to return an identity card as required by this provision.

This is a strict liability offence with a maximum penalty of 10 penalty units.

Clause 182 – Protection of officials from liability

This clause protects officials from civil liability under the Bill when they do something, or fail to do something, honestly and without negligence. In these circumstances the civil liability that would have attached to the individual officer will attach to the Territory.

Clause 183 – Ministerial directions to chief executive

This clause provides that the Minister may, in writing, give directions to the relevant chief executive as per the ACT's Administrative Arrangements in relation to the exercise of the chief executive's functions, either generally or in relation to a particular matter.

The chief executive must comply with a direction given under this clause and the Minister must present a copy of any direction to the Legislative Assembly within 6 sitting days after the day it is given to the chief executive.

PART 9 WORK SAFETY COUNCIL

Part 9 establishes the Work Safety Council. The OHS Act established the Occupational Health and Safety Council. The Work Safety Council is essentially the same body with a new name. The provisions have largely been reproduced.

Division 9.1 Establishment, functions and powers

This division contains provisions which establish the council and detail its functions and powers.

Clause 184 - Establishment

This clause establishes the Work Safety Council.

Clause 185 - Functions

This clause lists the functions of the Council. Broadly the Council is required to advise the Minister on matters relating to work safety legislation and workers compensation legislation. The Minister may also refer matters to the Council in relation these two areas. Other functions may be prescribed by regulation.

Subclause 185(2) lists other matters on which the Council may advise the Minister including:

a) Approval of codes of practice under clause 18 of the Bill;
b) The promotion of work safety; and
c) The operation of this Bill, the *Workers compensation Act 1951* and the *Dangerous Substances Act 2004*;

Division 9.2 Constitution and meetings

This division is a procedural division. It outlines how the council will be constituted and how meetings will be scheduled and run.

Clause 186 - Membership

This clause concerns the membership of Council. The Council has 13 members:

a) Four members representing the interest of employees;
b) Four members representing the interests of employers';
c) Four members appointed by the Minister; and
d) The Work Safety Commissioner.

Members are appointed by the Minister except for the Commissioner who is an ex-officio member and is appointed by the Executive under clause 200.

Clause 187 – Terms of appointment

This clause confirms that Council members are part time appointees and that the maximum term of appointment is three years.

Clause 188 – Appointment of chair and deputy chair

This clause requires the Minister when making appointments to nominate someone who will chair meetings. A deputy chair must also be appointed at the same time.

Clause 189 - Leave

This clause specifies that the Council chair will be given leave at the Minister's discretion and may wish to do so on a proviso. Likewise, the Council may grant leave to any other member, but may also wish to impose conditions on a period of leave.

Clause 190 – Disclosure of interest

This clause is a conflict of interest provision. It details that should a member have a financial or other interest in a matter being put to Council that will prevent them from engaging with the issue impartially, the member must disclose the type of conflict to their Council colleagues as soon as they become aware that it exists. Unless Council decides otherwise, that member should step out of the room and not take part in the discussion on the matter nor the decision making process.

Subclause 190(4) lists the types of conflicting situations that may arise. The extent of the conflict must be recorded in the minutes of the meeting.

Clause 191 – reporting of disclosed council interest to Minister

This clause stipulates that where a conflict of the kind in clause 190 exists and is disclosed, the Council chair must write to the Minister within three months of the disclosure reporting the disclosed conflict and any action taken by Council. Further reporting at the end of the financial year is also required.

Clause 192 – Ending of appointment of council member

This clause details how Council member appointments may be terminated.

Clause 193 – Calling meetings

This clause concerns how meetings will be called.

Clause 194 – Presiding member at council meetings

This clause determines who will supervise each Council meeting in the absence of the Chair.

Clause 195 – Quorum at council meetings

This clause deems that seven members present constitutes a quorum at council meetings. However, the seven must be representative of the appointments under clause 186. The clause gives detail as to how a legitimate quorum is established.

Clause 196 – Voting at council meetings

This clause asks that all members aside from the Council chair should vote at meetings. A simple majority of votes at a council meeting will decide an issue. Where votes are even, the chair (or acting chair, be they deputy or otherwise) casts the deciding vote.

Clause 197 – Conduct of council meeting etc

This clause outlines that Council members will determine what conduct is acceptable at Council meetings, however minutes must be taken and recorded.

The clause provides that members views can be put to meetings in their absence and that Council decisions can be made out of session.

Clause 198 – Protection of council members from liability

This clause protects council members from any personal civil liability for anything done in good faith when acting as a Council member and instead passes that liability on to the Territory.

Division 9.3 Advisory committees

This division allows the Work Safety Council or responsible Minister to convene advisory sub-committees as they require.

Clause 199 - Establishment

This clause gives council the power to establish an advisory committee to help fulfil their responsibilities under the legislation. The Minister may also direct the council to establish an advisory committee. The advisory committee will determine it's own procedures.

PART 10 WORK SAFETY COMMISSIONER

This part concerns the establishment and functions of the work safety commissioner and how the Minister is permitted to direct the activities of this position.

Clause 200 – Appointment of commissioner

This clause requires the Executive to appoint a Work Safety Commissioner. The maximum term of appointment is seven years.

Clause 201 - Functions

This clause outlines the functions of the commissioner as detailed under the legislation and other Territory laws. The commissioner's role is not determined by the relevant chief executive as per the ACT's Administrative Arrangements. However the Commissioner's obligation this clause include:

a) to make people aware that they have work safety and related duties, and why;
b) to research work safety;
c) to develop and promote work safety awareness, acceptance and education programs; and
d) to advise the Minister on work safety and related issues.

Clause 202 - Retirement

This clause provides for the retirement of the commissioner where the relevant chief executive as per the ACT's Administrative Arrangements and Commissioner agree

that the Commissioner's physical or mental state does not allow them to exercise their functions properly.

Clause 203 – Removal of commissioner
Clause 204– Suspension and removal of commissioner

These two clauses cover misconduct or other cases where the commissioner fails to perform his duties adequately. They constitute the exclusive conditions under which the commissioner may be removed or suspended from office.

Clause 203 allows the Executive to remove the Commissioner from office for various reasons including failing to perform his/her duties for more than two consecutive weeks or more than a month in total during any twelve month period. The Legislative Assembly may also ask the Executive to remove the commissioner from office because he/she is physically or mentally incapable of performing his or her duties.

Clause 204 allows the Executive to suspend the Commissioner if they have reason to believe that the Commissioner has engaged in questionable conduct, or is suffering from a physical or mental condition which renders the Commissioner incapable of performing his/her duties adequately.

Clause 205 – Ministerial directions to commissioner

This clause permits the Minister to ask the Commissioner in writing to perform his/her duties in a certain way. The Minister's directions must be tabled in the Legislative Assembly within five sitting days of being passed to the Commissioner. The Commissioner is obliged to act on the Minister's advice.

Clause 206 - Staff

This clause clarifies that the commissioner's staff are employed under the *Public Sector Management Act 1994*.

Clause 207 – Delegation by commissioner

This clause allows the Commissioner to pass on any of the activities he/she has a duty to perform as Commissioner to one of his/her staff (according to the provisions laid out in part 19.4 of the *Legislation Act 2001*).

PART 11 CHIEF EXECUTIVE AND COMMISSIONER REPORTS

Clause 208 - Chief executive's annual report

This clause provides that a report prepared by the relevant chief executive as per the ACT's Administrative Arrangements under the *Annual Reports (Government Agencies) Act 2004* for a financial year must include a copy of any direction given under clause 183 (Ministerial directions to chief executive) during the year; and a

statement about action taken during the year to give effect to any direction given (whether before or during the year) under that clause.

Clause 209 - Additional reports by chief executive

This clause provides that in March of each year, the relevant chief executive as per the ACT's Administrative Arrangements must prepare and give to the Minister a report on the operation of occupational work safety matters for which the chief executive is responsible under this Bill for the first half of the financial year.

The Minister must present the report to the Legislative Assembly within 6 sitting days after the day the Minister receives the report.

Clause 210 - Commissioner's half-yearly reports

This clause provides that the Commissioner must, as soon as practicable after the end of each half-year, prepare and give to the Minister a report on the Commissioner's operations during that half-year.

A report prepared under this clause must include a copy of any ministerial direction under clause 205 during the half-year; and a statement about action taken during the half-year to give effect to any direction given (whether before or during the half-year) under that clause.

The Minister must present the report prepared under this clause to the Legislative Assembly within 6 sitting days after the day the Minister receives the report.

PART 12 INFORMATION AND EVIDENCE

Part 12 deals with the protection of information obtained under the legislation and evidentiary presumptions in proceedings for offences against the Bill.

Clause 211 - Use of protected information

This clause reproduces the secrecy provision in the OHS Act but enables the sharing of information between inspectors who exercise functions under different Acts, for example the *Workers Compensation Act 1951* and the *Dangerous Substances Act 2004*. Relevant acts will be prescribed by regulation.

The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Clause 212 - Presumptions about substances

This clause provides that in a proceeding for an offence against this Bill, a sample of a substance is considered to be representative of all of the substance until the contrary is proved.

Clause 213 - Evidence of analysts

This clause provides that a certificate of the results of an analysis is admissible in a proceeding for an offence against this Bill, and is evidence of the facts stated in it, if a copy of the certificate is served by the party who obtained the analysis on the other party to the proceeding at least 14 days before the day of the hearing.

Clause 214 - Power of court to order further analysis

This clause applies if the court before which a person is being prosecuted for an offence against this Bill is satisfied that there is a disagreement between the evidence of the analysts for the parties to the proceeding.

The court may order that the part or parts of a sample under clause 113 (Procedures for dividing samples) be sent by the relevant chief executive as per the ACT's Administrative Arrangements, to an independent analyst. The order may require the sample to be sent to a particular analyst or to an analyst agreed to by the parties.

Clause 215 - Appointment of authorised analysts

This clause provides that the relevant chief executive as per the ACT's Administrative Arrangements may appoint a person as an authorised analyst for this Bill.

Clause 216 - Notice of code approvals

This clause requires the chief executive to publish information about the approval of codes of practice (under clause 18) such as the date the approval takes effect and the location where copies may be purchased or inspected.

PART 13 PROCEEDINGS AND LIABILITY

Part 13 deals with proceeding and liability matters for offences against the legislation.

Clause 217 – Acts and omissions of representatives

This clause deals with the acts and omission of representatives.

Clause 218 – Private prosecutions of offences

This clause creates an express right of private prosecutions for unions and employer organisations along the lines of the common law position that:

d. enables a prosecution to be commenced with the written consent of the secretary of a registered union or the chief executive of a registered employer organisation;
e. extends the authority to prosecute safety duty offences in the Bill (with the ability to proscribe other offences – this does not include the industrial manslaughter offences in the *Crimes Act 1900*); and
f. reserves the right of the Director of Public Prosecutions to intervene and take over or discontinue a private prosecution at any time.

In the ACT the decision to prosecute ordinarily rests with the Director of Public Prosecutions, on advice from the regulator. However, under the common law citizens are able to commence prosecutions in the ACT. A citizen is able to prosecute a summary offence (i.e. an offence punishable by imprisonment for one year or less) until completion. However, a citizen may only prosecute an indictable offence during the committal stage and if the matter is referred to trial the Director of Public Prosecutions must elect to take over or the matter is discontinued.

This statutory right provided by this clause is in addition to the common law right that currently allows anyone to commence prosecutions on these terms.

Subclause 218 (3) provides that the Director of Public Prosecutions may take over a prosecution at any time, with or without the consent. If the Director of Public Prosecutions takes over the proceeding, the Director may continue to conduct the proceeding on behalf of his or her own office or continue on behalf of the beginning organisation or stop the proceedings altogether.

If the Director of Public Prosecutions is considering, or takes over a proceeding the beginning organisation is required to hand over all information they have in relation to the proceedings such as witness statements and any other information the Director requires.

Clause 219 – Criminal liability of corporation officers

This clause deals with criminal liability of corporation officers. The proposed officer liability provision exists in other ACT (e.g. the *Dangerous Substances Act 2004*) and interstate legislation. It is an extension of the corporate criminal responsibility provisions in the *Criminal Code 2002* and only applies in specific circumstances, where the officer:

a) was reckless as to whether the breach would occur;
b) was in a position to influence the conduct of the corporation; and
c) failed to take reasonable steps to influence the conduct of the corporation.

All elements of the offence must be proved beyond all reasonable doubt. For recklessness, the officer must have been aware of a substantial risk that the breach would occur and having regard to the circumstances known to the officer, it was unjustifiable to take the risk.

Subclause 219(4**)** also provides additional requirements for the Court to consider in deciding whether the officer took (or failed to take) reasonable steps to prevent the contravention.

Clause 220 – Publication by chief executive of convictions etc
Clause 221 – Court-directed publicity for offences

These clauses reproduce the current OHS Act provisions in relation to the publication of convictions, otherwise known as ‘naming and shaming’ provisions. These provisions enable the relevant chief executive as per the ACT’s Administrative Arrangements to publish details of convictions and findings of guilt for breaches of the legislation, and the courts to order persons convicted or found guilty to publish a

statement in relation to the offence. These measures are designed to provide a further disincentive to commit an offence against the Bill.

Clause 222 - Remedial orders by courts for offences

This clause provides that the Court may order a convicted person to appropriately rectify the situation if asked by the prosecutor.

Clause 223 – Court may order costs and expenses

This clause contains a standard provision about the order of costs and expenses in proceedings against the legislation.

Clause 224 - Court may order forfeiture

This clause provides that a court that convicts a person, or finds a person guilty, of an offence under the legislation may order the forfeiture to the Territory of anything that was used in the commission of the offence.

Clause 225 - Civil liability not affected

This clause provides that nothing in this Bill is to be taken to give a right of action in any civil proceeding in relation to any contravention of any provision of this Bill or to give a defence to an action in any civil proceeding or affect a right of action in any civil proceeding.

PART 14 MISCELLANEOUS

Part 14 deals with some standard miscellaneous matters for the exposure draft.

Clause 226 – Electronic service

This clause provides that a notice under the legislation may be made via email. However people are encouraged to request receipts for any notices made in electronic form.

Clause 227 – Contracting out prohibited

This clause reproduces the current prohibition on contracted out obligations under the legislation. A fundamental principle in work safety law is that duties of care and obligations cannot be delegated. Further, agreements cannot purport to limit or remove a duty held in relation to work safety matters.

Clause 228 – Determination of fees

This clause enables the Minister to determine fees for the Bill.

Clause 229– Approved forms

This clause enables the Minister to approve forms.

Clause 230 – Regulation-making power

This clause is the regulation making power. The maximum penalty for offences contained in the regulations has been increased from 10 to 20 penalty units.

The Minister is required to consult the Work Safety Council on the content of regulations before they are made.

Dictionary

The Dictionary defines terms used in the Bill.