Risk Management and Consultation Systems: Developments and Disappointments in the New Occupational Health and Safety Legislation in New South Wales

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1. Introduction

In September 2001, a new regime for the regulation of occupational health and safety in New South Wales came into effect. The procedure for effectuation of change had been a two-stage one – on 26 June 2000 the *Occupational Health and Safety Act* received assent but was not proclaimed, and in October of that year, the draft of a Regulation to support the Act was released for public comment. In September 2001 (after several deferments), the 2000 Act was proclaimed and the *Occupational Health and Safety Regulation* 2001 was given force. The proclamation of the 2000 Act brought into effect repeals of pre-existing legislation, particularly the *Occupational Health and Safety Act* 1983, the *Construction Safety Act* 1912, Part 3 (the 'Health, Safety and Welfare' Part) of the *Shops and Industries Act* 1962, and all Regulations made under these several legislative instruments. While the content of the new parent Act does not, on its surface, differ much from the content of the 1983 Act, the *effect* of ss13 to 19 – when taken together with the 2001 Regulation – alters significantly the *nature* of occupational health and safety regulation in the state. This article examines and analyses the *nature* of the new regulatory scheme by concentration on the introduction of requirements for risk management systems, and on the amendments to provisions for employee participation.

2. Development of Occupational Health and Safety Regulation – A Brief Overview[1]

At the beginning of the 1970s, the New South Wales legislation on occupational health and safety (and the legislation of Britain and of all other Australian jurisdictions) was *specifications-standard* legislation. It was made up of an array of specific proscriptions and prescriptions, prohibiting certain methods of work,

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1 This section attempts a brief survey of some 30 years of legislative development, in a number of jurisdictions. It is written against the background of some 30 years of academic analysis of the development. That analysis incorporates a variety of views, with disagreements about aspects of the systems involved. I have attempted to produce a synthesis that will be 'more or less' acceptable to the participants in this academic debate. Obviously, where there is a vigorous debate, one cannot, with a synthesis, 'please all of the people all of the time'. Readers are referred to the writings of Breen Creighton, Neil Gunningham, Richard Johnstone, Michael Quinlan, as well as to my own writings (both as Brooks and Merritt) for the detailed analysis.

certain industrial processes and substances, and requiring the use of certain safeguards against established risks. In 1972, the seminal Robens Report[2] was submitted to the British Parliament, criticising the style and operation of the British legislation, and making recommendations for a new approach. Amongst the points of criticism were claims that the legislation was cumbersome, confusing, ad hoc, inherently out-of-date, inherently incomplete in its coverage of risk, reactive rather than proactive, static in focus, and directed predominantly to industrial injuries rather than to industrial diseases. The Report recommended the replacement of the mass of legislation with a new and streamlined legislative scheme, based on a new *philosophy* of regulation.

There were two basic components of this recommended scheme – that it should be largely *self*-regulation, and that it should proceed by way of *performance* standards, rather than specifications standards. As to performance standards, the Report recommended that the (single) new act should state a general standard of 'reasonable care', applying to all workplaces and to all persons involved there. There should be specific regulations only in relation to the most serious risks; for the rest, the specifics of what was involved in the taking of reasonable care should be identified in industry-formulated codes of practice. As to self-regulation, the Report envisaged that the general standard of care should be admonitory only and not enforceable by prosecution. The few specific regulations would remain enforceable, but promulgation of and adherence to industry codes of practice should also be voluntary.

The Report's criticisms of the then-existing legislation were undoubtedly well based,[3] but the appropriateness of the recommendations was questionable. Particularly questionable was the idea of self-regulation. However, that idea was never taken up to any substantial degree. In its adoption of the recommendations, the *Health and Safety at Work etc Act* of 1974, the British Parliament made the general duties enforceable. Additionally, it did not repeal the body of specific Acts and Regulations. Instead they remained in force, becoming particular but not exhaustive instances of what was required for compliance with the general duties of care. In that way, the scheme in operation following passage of the *Health and Safety at Work etc Act* was a hybrid of performance and specifications standards. In the two decades that followed, all Australian jurisdictions adopted the model established in Britain.[4]

The essence of a performance standard is that it prescribes outcomes rather than methods. The desired outcome is stated, and it is then for those bound by the standard to achieve the outcome by whatever method is most suitable to them. In relation to the 'new' occupational health and safety Acts, the 'outcome' was 'a

2 Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee* 1970-72 (Robens Report) (London: Her Majesty's Stationery Office, 1972).

3 That is to say, those criticisms set out above. There were other criticisms in the Report which were of questionable validity.

4 In fact, the first "performance standard" occupational health and safety Act was in South Australia, and predated the British Act by two years. However, it was passed in 1972, some months after the tabling and publication of the Robens Report, and was obviously based on the Robens recommendations.

situation in which reasonable care for health and safety had been taken'. Clearly, this was a rather nebulous outcome, and made the establishment of compliance or non-compliance somewhat difficult. That this would be so was likely to have been a major reason for the rejection of the Robens recommendation that the majority of the old specific acts and regulations be repealed. However, given the nebulous character of the performance standard, the hybrid nature of the resulting scheme destroyed some of the positive features of the new approach. For a start, it meant that the body of legislation had not been streamlined, but rather increased. More significantly, it detracted from the proactive nature of the new scheme. The underlying idea of a performance standard is that it motivates the duty-bearers to conscious thought as to the best method (for them as individuals, in their own individual circumstances) to meet it. Where some of the elements of the method are already prescribed, the duty-bearers are not able to design their own 'best method'. And – even more seriously – they may lapse into a fatalistic reliance on the specified elements as fulfilling the overriding duty. In other words, the retention of the (incomplete) specifications standards could lead to a minimalist, 'lowest common denominator' approach.

Between the mid-1970s and the early 1990s, it became clear that the hybrid system was not producing the proactive approach by duty-bearers that the Robens Committee had sought to foster. To move to a pure performance standard was not a serious possibility, since it would leave many employers without guidance as to what achievement the standard required, while a pure specifications system had been seen to be inevitably incomplete. It was simply not feasible to specify all the details necessary to eliminate risk in all workplaces. Out of associated developments in management and industrial relations came a potential solution. What was essential to meeting a standard of 'the taking of reasonable care' was a system of identifying risks, devising measures to eliminate or reduce them, and monitoring the success of the measures devised. If employers were guided to the introduction and implementation of adequate *systems* of evaluation, they would have been assisted to the identification of the necessary measures of response – to the things necessary to be done to ensure that 'reasonable care' had been taken. And it would be a lot easier to legislate for the essential elements of an adequate evaluation system than to legislate with sufficient detail and comprehensiveness the measures of response. Such systems could be merely at the volition of management, but that would, as with the performance standard, impact almost solely on the larger and better-resourced enterprises. Thus, the relevant authorities moved to the idea of incorporating prescription of evaluation systems into the legislation.[5]

5 It is not part of my project here to present a critical analysis of the theory behind systems-standard regulation. My purpose is merely to evaluate a particular Australian exemplar of such regulation. Theoretical analysis can be found in Kaj Fricke (ed), *Systematic Occupational Health and Safety Management, Perspectives on an International Development* (2000), and – from a more specifically Australian perspective – in Neil Gunningham & Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (1999). For an evaluation of a European exemplar of systems-standard occupational health and safety regulation, see Adrian Brooks, 'Systems Standard and Performance Standard Regulation of Occupational Health and Safety: A Comparison of the European Union and Australian Approaches' (2001) 43 *JIR* 361.

In 1989, the European Parliament issued a Framework Directive,[6] requiring such *systems-standard* legislation to be passed in the member states.[7] In Australia, over the 1990s several jurisdictions also introduced systems-standard requirements into their legislation.[8] The *Occupational Health and Safety Act* 2000, taken with *the Occupational Health and Safety Regulation* 2001, represents the adoption of the systems-standard approach. The regime is still a hybrid, but a different hybrid. The list of acts, parts of acts, and regulations repealed by the schedules to the *Occupational Health and Safety Act* 2000, together with the content of the new Act and particularly of the Regulation, show that the new regime is predominantly a hybrid of performance and systems standards. To the extent that specifications standards still apply, it is through the chapters of the Regulation dealing with specific categories of hazard and indirectly through the approved Codes of Practice.

3. *The* Occupational Health and Safety Act 2000

In any consideration of a substitute act, it is valuable to compare the statements of objectives of the old and the new. The objects of the *Occupational Health and Safety Act* 2000 are stated in s3:

(a) to secure and promote the health, safety and welfare of people at work;

(b) to protect people at a place of work against risks to health or safety arising out of the activities of persons at work;

(c) to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs;

(d) to provide for consultation and cooperation between employers and employees in achieving the objects of this Act;

(e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled;

(f) to develop and promote community awareness of occupational health and safety issues;

(g) to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices; and

(h) to protect people (whether or not at a place of work) against risks to health and safety arising from the use of plant that affects public safety.

The objects of the 1983 Act were, by s5:

6 Directive 1989/31.

7 In addition, a variety of systems-standard approaches have been taken elsewhere, such as the Scandinavian Internal Control scheme, and the National Cooperative Compliance Program in the US.

8 For example, *Occupational Health and Safety (Commonwealth Employment)(National Standards) Regulations. Workplace Health and Safety Act* 1995 (Qld), *Occupational Health, Safety and Welfare Regulations* (SA), *Work Health Act* 1986 (NT).

(a) to secure the health, safety and welfare of persons at work;

(b) to protect persons at a place of work (other than persons at work) against risks to health or safety arising out of the activities of persons at work;

(c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs; and

(d) to provide the means whereby the associated occupational health and safety legislation may be progressively replaced by comprehensive provisions made by or under this Act.

The two variants do not differ essentially. Paragraph (d) of the 1983 formulation has no equivalent in the 2000 Act – because the Act itself, by its Schedules, replaces the associated occupational health and safety legislation. Paragraph (h) of the 2000 formulation has no 1983 equivalent in the 'objects' section, but it is hard to imagine a situation in which people could be subject to risks from plant that affects public safety *except* in places of work;[9] as to such risks in places of work, they were covered by ss16 and 17 of the 1983 Act. Paragraph (g) of the 2000 version is also covered by the general duties of the 1983 Act. To 'take reasonable care' involves a response to new risks as they result from new technology. There is nothing in the 2000 Act that suggests that response to the risks caused by newly introduced processes should be at a *higher* level than that to risks already caused by prior technology. The standard remains one of 'reasonable care'. The introduction of new technology will increase the range of processes to which the standard relates; it does not, as the Act is expressed, increase the required level of response in relation to technological developments. Either the paragraph means that it is an object to respond to technological developments – which was already required by the general duties of the 1983 Act – or it means that it is an object to gradually increase the level of response to all risks, which is desirable, but requires a strengthening of what is involved in the idea of 'reasonable care'.[10]

Objects (a)–(c) of the 2000 Act vary little from objects (a)–(c) of the 1983 Act. The only change is in the phrases 'persons at work' and 'people at work', and it is difficult to see how this change produces a greater scope for the 2000 Act. The significant difference in the 2000 and 1983 objectives lies in paras (d)–(f) of the 2000 section. In relation to para (d), it does not produce a major difference in statutory outcome. But it is noticeable that although the 1983 Act, following the Robens Report recommendations, introduced a scheme for consultation and cooperation, this was not identified in the Act as an objective. It must be identified in the 2000 Act because it is integral to the object in the following paragraph – '(e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled'. This is the object that focuses on the systems

9 Any such plant – an escalator in a public building, an amusement device in a 'fun park' – is part of someone's 'place of work'.

10 I am using the concept of 'reasonable care' as a shorthand device. The general duties sections of the 1983 and 2000 Acts speak of an obligation to 'ensure'. But under s53 of the 1983 Act and under s28 of the 2000 Act, it is a defence that it was not reasonably practicable to comply with the obligation to 'ensure'. Taking obligation with defence, the situation under both Acts produces a duty to take 'reasonable care'.

standard, and employee involvement is central to the procedure adopted. However, it must be noted from the start that this is not a 'new' object – consultation and cooperation, and identification, assessment and control of risks were intrinsic though implicit obligations of the old Act. One cannot take reasonable care without assessing risks and reacting to them, and in that assessment consultation with employees is obviously essential. As with the duties established by the Act and the Regulation, the objects section merely spells out more clearly what is involved. As to para (f) – to promote community awareness – to an extent this is merely a 'motherhood statement'. And it is something that, even without such an express statement, the WorkCover Authority has attempted, over many years. Possibly, para (f) could forestall criticisms of WorkCover initiatives as being outside their remit. I doubt that is so (in the sense of necessary), but it may depend on the cost of the initiatives decided on. Effectively then, the objects of the old and new Acts are essentially the same. The task now is to ascertain how the new Act attempts to put into place the scheme objectified.

A. General Duties – 1983 and 2000

It is important to stress at the outset that the general duties are no different in content. What the 2000 Act has done, in the 'new' ss13 to 16, and in the Regulations made thereunder, is to specify some of the matters necessary for fulfilment of those duties.

The general duty of the employer under the 2000 Act is in s8. This corresponds to s15 and s16(1) of the 1983 Act. Leaving aside minor changes to terminology (largely merely eliminating the use of gender-specific pronouns), the employer's duty appears to remain the same. There is a potential change in putting the former s15(2) into s8(1). Section 15(2) itemised matters that would amount to a breach of the general duty in s15(1). Section 8(1) states that:

> An employer must ensure the health, safety and welfare at work of all the employees of the employer.
>
> That duty extends (without limitation) to the following:...

The change seems to be directed to avoiding the result in cases like *Chugg v Pacific Dunlop Ltd* [11] and *Boral Gas (NSW) Pty Ltd v Magill*,[12] whereby an information detailing a failure to take care involving the several paragraphs of s15(2) was duplicitous, though under either a s15 or s8 layout, that problem seems to have been dealt with elsewhere (in s31).[13] Section 9 corresponds to the old s16(2).

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11 [1988] VR 411; (1990) 170 CLR 249.

12 (1995) 37 NSWLR 150.

13 (i) More than one contravention of a provision of Division 1 by a person that arise out of the same factual circumstances may be charged as a single offence or as separate offences.
(ii) This section does not authorise contraventions of two or more of those provisions to be charged as a single offence.
(iii) A single penalty only may be imposed in respect of more than one contravention of any such provision that is charged as a single offence.

B. Duty to Consult

The general duties in the 2000 Act are rearranged, but this does not affect the content. The significant change as to 'duties' is the appearance of Division 2, Duty to Consult. Even within that Division, earlier provisions are reproduced. However, s13 had no express equivalent in the old Act.

> An employer must consult, in accordance with this Division, with the employees of the employer to enable the employees to contribute to the making of decisions affecting their health, safety and welfare at work...

By s14, 'consultation' requires:

(a) the sharing of relevant information about occupational health, safety and welfare with employees, and

(b) that employees be given the opportunity to express their views and to contribute in a timely fashion to the resolution of occupational health, safety and welfare issues at their place of work, and

(c) that the views of employees are valued and taken into account by the employer.

Without more, ss13 and 14 would not be particularly noteworthy. Admittedly, consultation was not previously presented as a *duty*, at least until a health and safety committee had been established at the employees' request. But, taken alone, ss13 and 14 have merely a vaguely pious air, insufficient to support a claim that the 2000 Act introduces a system-standard approach to occupational health and safety regulation. The necessity of an established *system* of evaluation and monitoring of risks is made clear by s15 which indicates *when* the consultation obligated by s13 is required:

(a) when risks to health and safety arising from work *are assessed* or when the assessment of those risks *is reviewed*, and

(b) when decisions are made about *the measures to be taken* to eliminate or control those risks, and

(c) when introducing or altering the procedures for *monitoring* those risks (including *health surveillance* procedures), and

(d) when decisions are made about the *adequacy of facilities* for the welfare of employees, and

(e) when changes that may affect health, safety or welfare are proposed to the premises where persons work, to the systems or methods of work or to the plant or substances used for work, and

(f) when decisions are made about the procedures for consultation under this Division, and

(g) in any other case prescribed by the regulations. [Emphasis added.]

The manner of consultation is open – as a result of para (c) of s16. That section provides for consultation 'by any one or more of the following means':

(a) ...with an occupational health and safety committee or committees established by the employer and employees for the place of work or the employer's undertaking...;

(b) with an occupational health and safety representative or representatives elected by the employees to represent them...;

(c) in accordance with other arrangements agreed by the employer and the employees.[14]

Section 19 provides for regulations to make further provision with respect to consultation, in particular 'for or with respect to':

(a) negotiations between employers and employees (or persons acting on their behalf) with respect to consultation arrangements, and

(b) the establishment, composition, procedure and functions of OHS committees, and

(c) the election and functions of OHS representatives, and

(d) the powers of members of OHS committees and of OHS representations with respect to inspections of the place of work and the obtaining of information relating to the place of work and other things in relation to the place of work, and

(e) the training of members of OHS committees and of OHS representatives.

It is difficult to see the necessity of this section, given the general power in s33 for the making of regulations with respect to any matter necessary or convenient to be prescribed for giving effect to the objects of the Act.

C. Regulations as to Risk Management

The *Occupational Health and Safety Regulation* 2001 gives pride of place to requirements directed at 'risk management' – the identification and evaluation of risks, the elimination or control of risks identified, the monitoring and review of the effectiveness of the measures for elimination or control. Chapter 2 of the Regulation, entitled 'Places of Work – Risk Management and other matters', states the requirements applying to all hazards in all workplaces. The systems requirements are of a 'performance standard' type in that they state the outcomes to be achieved – they require 'systems' of risk management, but do not specify any *particular* system. Up to a point, this is inevitable. There are infinite variations possible. However, in adopting this approach, the Regulation legislates an awareness of risk management procedures that, to my mind, is absent in many employers at the small and medium-size business level. That means that such employers will need to contract for the production of a risk management system appropriate to their enterprise.

By cl 9(1), the employer must take reasonable care to identify any foreseeable hazard arising from the conduct of the undertaking that has the potential to harm

14 The addition to the available methods of employee participation, of health and safety representatives and of 'other arrangements agreed...' is discussed later at 110–112.

the health or safety of any employee or any other person legally[15] at the place of work. In cl 9(2), a number of sources of hazards are particularised (without limiting the generality of subcl (1)): the premises, practices and systems of work, plant, hazardous substances, asbestos, manual handling and over-use injuries, the layout and condition of the place of work, the physical working environment, and workplace violence. By subcl (3), the employer is to ensure effective procedures for the ongoing identification of hazards.

Clause 10 requires the employer to assess the risk that any identified hazard will result in harm to the health and safety of employees and any other persons legally at the place of work. In the draft Regulation, this assessment was expressed to involve evaluation of the likelihood and likely severity of any injury or illness, review of relevant health and safety information, identification of the factors contributing to the risk, identification of the actions necessary to eliminate or control the risk, and identification of records necessary to be kept to ensure the elimination or control of the risk. The Regulation given effect in September 2001 has no such itemisation of the matters involved in assessment of risk. This might seem to result in a diminution of the standard required of employers. However, many (if not most) of these particular aspects of assessment will still be required as being essential to the assessment generally stipulated in cl 10(1). By cl 12, the risk assessment is to be reviewed whenever there is evidence it is no longer valid, whenever an injury or illness results from a hazard to which the assessment relates, and whenever a significant change is proposed to the place or processes to which the assessment relates.

The final major step is in cl 11 – the employer is to eliminate or, where that is not reasonably practicable, control any risk identified and assessed. The meaning of 'controlling' a risk where elimination is not reasonably practicable is set out in cl 5. It is an obligation to take certain measures, in the order specified, or a combination of those measures, to minimise the risk as far as reasonably practicable:

(a) first, substituting the hazard giving rise to the risk with a hazard that gives rise to a lesser risk;
(b) secondly, isolating the hazard from the person put at risk;
(c) thirdly, minimising the risk by engineering means;
(d) fourthly, minimising the risk by administrative means (for example, by adopting safe working practices, or providing appropriate training, instruction or information); and
(e) fifthly, using personal protective equipment.

15 The qualification of being 'legally' at the place of work did not appear in the draft of the Regulation released for comment in October 2000, nor is it a qualification to the general duties in the 2000 Act (and in the 1983 Act). What the inclusion of the word 'legally' does is to eliminate any duty of employers in relation to the safety of 'trespassers'. Obviously, the main focus of duties of care, and of assessment of risk, is the employees, contractors, and clients of the enterprise. Risks to 'trespassers' in the form of thieves and similar intruders are not of particular import, in that the occasions of risk are unlikely to occur. Given that, one wonders why it was necessary to make a specific change to the formula. Is it paranoid to connect this change to recent limitations on union rights of entry into workplaces?

Clauses 9 and 12 set out the essential outcomes from a system of risk management:[16] identification, assessment and review, implementation of methods of elimination or control. The other clauses in the Chapter specify certain 'ancillary' features of a complying system: the employer must ensure that employees receive necessary induction training and necessary information about all risks in the place of work, must provide necessary supervision, necessary personal protective equipment. The employer must obtain all information necessary for fulfilment of his/her obligations. The employer must ensure emergency arrangements for evacuation of the premises, emergency communications and medical treatment. The employer must provide and maintain appropriate amenities, defined as facilities for the welfare or personal hygiene needs of employees. The employer must provide adequate first aid facilities and – where there are more than 25 persons employed at the place of work – trained first aid personnel. Clause 20(4)–(7) specifies details of what is 'adequate' in first aid facilities in various types and sizes of workplaces.

The obligations in Chapter 2 are all expressed as applying to employers.[17] However, by the definition in cl 3, 'employer' in Chapter 2 includes a self-employed person. Where the self-employed person is conducting his/her undertaking in his/her own premises, the duties of identification and assessment of hazards will apply as extensively as to an 'employer' proper. Where the self-employed person is carrying out work in the premises of another, it will obviously not be possible for the self-employed person to establish and maintain as extensive a system of risk-management. And in such cases, the employer in control of the premises has obligations of risk-management relating to the self-employed person while he/she is at the employer's place of work.

D. Practicability and Risk Management

It is significant that the Regulation is, although couched as a performance standard, strict on its wording as regards outcomes. For example, by cl 11(1)–(2):

> (1) ...an employer *must eliminate* any reasonably foreseeable risk to the health or safety of:
>
> (a) any employee of the employer, or
>
> (b) any other person at the employer's place of work,
>
> or both...
>
> (2) If it is not reasonably practicable to eliminate the risk, the employer *must control* the risk. [Emphasis added.]

This is subject to the defence in s28 (formerly s53) that it was not reasonably practicable to comply. In the draft version, the Regulation was similarly strict in

16 Additional and specific requirements concerning risk management are set out in the chapters of the Regulation concerned with particular categories of hazard – such as Chapter 5 'Plant', Chapter 6 'Hazardous Substances', Chapter 7 'Hazardous Processes', and so on.

17 A number of the additional requirements referred to in the previous footnote apply to persons other than employers – such as persons in control of premises, designers of plant, principal contractors in construction work.

relation to identification of hazards: an employer 'must identify any foreseeable hazard...', subject again to the overall defence of impracticability in s28. The point of altering the formulation in relation to identification of hazards – expressing practicability as part of the duty, rather than impracticability as a defence – is not immediately clear.[18] How could it be 'impracticable' to identify a 'foreseeable hazard'? The legal interpretation of foreseeability in this country is that the 'thing' is recognisable as a genuine possibility, and not something far-fetched and fanciful, by the 'reasonable and prudent' person in the circumstances of the duty-bearer. Thus, the hazard would be seen as a genuine possibility by the reasonable and prudent employer in the industry in question. Using 'practicable' in its everyday sense, it would seem that the only thing that would make it *im*practicable for an employer to identify a foreseeable hazard would be that he/she was not reasonable and prudent. "I didn't recognise it as a risk because I'm too stupid!"

However, 'practicable' also has an established sense in the law relating to personal injury, as developed by the identification of what are 'practicable precautions' which could have been taken. A precaution against a risk of injury is not 'practicable' if it involves inordinate expense (in relation to the particular process), if it interferes inordinately with the process, or if it involves separate and equal or greater risks. The only one of these three instances of impracticability that could have any relevance to identification of hazards is the first – that the identification is inordinately expensive. This brings the matter back full circle to the 'I'm too stupid' defence,[19] because it would be only stupid employers who would be unable themselves to identify foreseeable hazards if they cared to look for them, and thus only stupid employers who would need to contract for the services of expert risk assessors! However, the real problem is not *stupidity*, but ignorance – and they are not of necessity the same thing. Many people, which therefore includes many employers, are *ignorant* of hazards simply because they have never been told of them and have neverbeen exposed to them. Whether or not it is stupid or merely ignorant to smoke while filling one's petrol tank depends on whether one has ever been told or has ever read that petrol gives off highly flammable vapours. Nevertheless, it would be surprising to have even ignorance as a defence in a statutory system based at its core on the common law duty to ensure reasonable care is taken. And even if the three-fold common law meaning of 'practicable' could be applied to the elimination of risks, it could surely not be a defence to the obligation to control them, since that obligation has its own in-built qualification of 'reasonably practicable'.

If ignorance, or even stupidity, does not give access to a defence of impractibility, then the implication of Chapter 2 of the Regulation for small and

18 The alteration does impact on the respective tasks of prosecution and defence in the event of a charge being laid. However, the New South Wales trend since 1983, in contrast to the formulations of other jurisdictions, has been to put the onus of establishing practicable/ impracticable on the defence. The reasoning behind reversing that trend in relation to *identification* remains to be manifested.

19 This paragraph uses 'defence' to indicate both 'defence proper', as in a calling in aid of s28, and 'defence in fact', as in a refutation of a charge that one has failed to take 'reasonable care'.

even medium-sized businesses is the need to contract with 'experts' to have appropriate risk management systems devised for them. The success of the requirements as to such systems thus depends on a comparison of the penalties available with the cost of the 'experts'. The maximum penalty for breach of cl 9–12 of the Regulation is, by cl 3(2), 250 penalty units – as at the date of writing $27,500. That in itself is a substantial 'slug' for a small business. Additionally, failure to have a system would involve contemporaneous breaches of a number of clauses of the Regulation – at least cls 9–12, and probably 13, 14 and 16.[20] So the potential cost for noncompliance ranges between $27,500 and $176,000. It would seem likely that, in relation to small enterprises, risk management consultants' fees for design of a system would be significantly less than the amount of potential fines. Nevertheless, there is an arguable value here in the production of some guidance notes on systems, or in the availability of free or subsidised advice to small and medium-sized businesses. 'User pays' is a principle that can be taken much too far. Moreover, in this case the ultimate 'user' is the community – which pays the underlying costs of workplace injury and disease. It would be preferable to pay to eliminate injury and disease rather than to compensate them! In this respect, it is worth noting that the Spanish *Ley de Prevención de Riesgos Laborales*,[21] also a 'systems standard' Act, provides that the 'prevention services' required of employers, which involve the obligations of risk management systems, be audited for adequacy, but allows that employers unable to set up their own systems may contract for them and specifically authorises contracts for that purpose with the Mutuas de Accidentes de Trabajo.[22] These are the workers' compensation insurers under the Spanish system, and they are non-profit organisations. Any excess of premiums over pay-outs is used for research into the causes and control of occupational injuries and diseases. Clearly then, the Mutuas would contract their services at a reasonable price, appropriate to the size and complexity of the businesses involved.[23]

As mentioned earlier,[24] it is through s15 of the Act, which states when consultation is to take place, that the Act itself specifically flags the requirement

20 The maximum penalty for breach of clause 14 is a Level 3 penalty of 100 penalty units – at time of writing $11,000.

21 31/1995, Art. 32. See the examination of this Act in Adrian Brooks, 'Systems Standard and Performance Standard Regulation of Occupational Health and Safety: A Comparison of the European Union and Australian Approaches' (2001) 43 *JIR* 361 at 379.

22 There is no easy or concise interpretation of 'mutua', but the idea is obviously associated with the original nature of organisations such as Colonial Mutual, National Mutual. Possibly the closest modern approximation in Australia would be the credit unions, or the community banks in Victoria.

23 *The Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation* (Sydney: WorkCover, 1 November 2000), estimated the cost, over a ten year period, of the hazard identification and risk assessment provisions, as $252,968, 601 (Table 8, p 56). In Appendices 1 and 3, the number of employers in the state was assessed as 266, 242. However, the cost figures are based on the assumption that a percentage of employers already have risk management systems which would fulfil the requirements of the Regulation, and would therefore incur no extra costs.

24 Above at 95–96.

of risk management systems. However, the two issues – consultation and risk management systems – are not inevitably linked. That is to say, there could be consultation without any formalised risk management system being in operation, and there could be a formalised risk management system that did not involve any employee input through consultation. Whether such a system qualified as a good one would be another matter. The Act and Regulation require a risk management system that involves employee input through the joint operation of ss13 to 19 and Chapter 2 of the Regulation. The employer *must* consult at the various stages of the system established in order to comply with Chapter 2. That said, the new elements of the consulation system established in the 2000 Act and the 2001 Regulation do not, of themselves, have any obvious effect on the obligations for risk management – obligations which, I have already pointed out, existed generally by virtue of the general duty of care in the 1983 Act but which have now been clearly identified in the 2001 Regulation. The changes to the consultation procedures have an independent significance, which is discussed below.

4. *Changes to the Provisions for Employee Participation*

In relation to employee participation, the major development of the regime constituted by the 2000 Act and the 2001 Regulation is the extension of the envisaged forms of participation and the apparent situation of participation as an integral part of the risk management schema. Specifically, the Act now provides for employee health and safety representatives as well as for health and safety committees with employee membership. It is, however, questionable just how significant this extension will be. In fact, it is necessary to query whether there has been any true extension at all, or whether the real situation is one of a diminution of employee involvement.

A. Employee Participation Under the 1983 Act

The *Occupational Health and Safety Act* 1983 differed from its counterparts in all other Australian jurisdictions (except the Northern Territory) in that it made no provision for the election of employee health and safety representatives. The other jurisdictions had a two-tier participatory system of which the fundamental tier was that of elected health and safety representatives, and the secondary tier that of joint management-labour health and safety committees. The fundamental character of the representative tier was recognised in the Robens Report, which recommended that the foreshadowed new legislation should oblige employers to accept health and safety representatives chosen by the employees. The Report also recommended the establishment of joint management-labour committees, but specifically declined to recommend that their establishment be obligatory. The Robens Committee considered that consultative bodies established under legislative duress would not 'work', though a compulsory system of representatives could. Inherent in this differentiation was the Robens Committee's view of the role of health and safety representatives. It saw them as having an adversarial or policing role, as operating as a form of shop-floor inspectors, identifying and warning as to breaches of duty by the employers. Whether the

employers willingly accepted the election of the representatives or not, that policing role could be carried out. But the function of the committees was one of planning and suggesting. Their role was cooperative and consultative, and it was necessary that they operate consensually. This could not occur unless the employer was committed to the pursuit of improved health and safety. Legislation could compel the establishment of a committee, but it could not compel the attitude of cooperation necessary for the committee to 'work'. Employers would be free to establish committees, encouraged but not compelled to do so.[25] In the event, the legislation passed in response to the Robens Report, the *Health and Safety at Work etc Act* 1974, provided that both representatives and committees were to be compulsory on employee request.[26]

The various Australian jurisdictions – except New South Wales and the Northern Territory – followed this approach.[27] There is no definitive evidence as to why New South Wales adopted a scheme which provided for committees only. The Williams Report had recommended the British system of representatives, *backed up* by committees.[28] Anecdotal evidence suggests that the New South Wales variant stemmed from a 'trade-off' to attract the support of the Coalition parties and the employer organisations to the proposed new legislation. Criticism of the legislation on this issue was met by the argument that the employee members of occupational health and safety committees could carry out the functions of health and safety representatives. Up to a point this was true, though it was pointed out that for committee members to perform the *adversarial* role of representatives could detract from the committees' capacity to perform their primary consultative and cooperative functions.[29]

The occupational health and safety committees were provided for by s23 of the 1983 Act. They were to be established in all workplaces of 20 or more employees when a majority of the employees requested it. They were to be composed of members elected by the employees and members appointed by the employer – with the proviso that the number of elected members be equal to or greater than the number of appointed members. At least one of the appointed members should be someone with authority to carry out any recommendations of the committee on matters pertaining to health and safety at the workplace. The primary function of the committees was to keep under review the policies and measures directed to ensuring health and safety. As part of that function, the members were to undertake 'induction' inspections of the workplace as soon as possible after election or appointment, the committee was to carry out regular inspections at least quarterly,

25 Robens Report, above n2 at 20-21.

26 By the *Health and Safety at Work etc Act* 1974 s2(7) and the *Safety Representatives and Safety Committees Regulations* 1977 Reg 9(1), the 'employee request' for a committee was made via the elected health and safety representative.

27 Originally, the Northern Territory had no provision for employee participation, but the *Work Health Act* was amended in 1991 to include a provision for health and safety committees.

28 *Report of Commission of Inquiry into Occupational Health and Safety* (New South Wales Government Printer 1981) at 48–55.

29 Adrian Brooks, 'Flaws of a Committee-based Participatory System' (1987) *3 J'nl of Occupational Health and Safety* 224 at 226.

and the members were entitled to inspect at any time a risk to health and safety was notified or came to their attention. Following notification to the employer of risks established on inspection, the members were entitled – if the employer did not take action – to call in an Inspector. The employer was to allow the committee members paid time off to attend approved training courses, and to perform their statutory functions. The employer was also to make available to the committee information as to health and safety at the workplace, and necessary facilities for the performance of their functions. The Occupational Health and Safety (Committees in Workplaces) Regulations laid down specifics as to the request for establishment of a committee, the determination of the constitution of the committee, the process of election, the conduct of meetings, and the term of office of members.[30]

B. Participatory Provisions in the Occupational Health and Safety Act 2000

Section 23 of the 1983 Act was a direct, independent and categorical obligation. Its closest equivalent in the 2000 Act is s17,[31] but this is not a truly independent obligation. It is a development of the obligation to consult, laid down by s13. Moreover, the requirements in s17 are not stated categorically but as alternatives. Since the requirements relating to risk management systems are also presented as developments of s13, it could well be argued that s13 is the most significant section of the Act. On the other hand, the risk management requirements follow by necessary implication from the obligation in s8 that 'an employer must ensure the health, safety and welfare at work of all the employees of the employer'. How could it be said that this had been done in the absence of risk identification and assessment? Nevertheless, while it is arguable that it is s8 that is fundamental, there is no doubt that it is s13 and the supporting sections and regulations that encapsulate the 'flavour' of the 'new' participation regime.

The provisions as to participation are to be found in Division 2 of Part 2 of the Act, entitled 'Duty to Consult'. The participatory scheme derives its source from ss13 to 15, which mandate *consultation* as part of the risk management system implicitly required by s8 (and expressly described in the Regulation). The requirement of participation has thus a procedural rather than an organic status within the Act. This is made clearer by ss16 and 17. Section 16 identifies the methods of consultation which will fulfil the requirement to consult in s13 – which, as seen earlier, is a requirement appended to the regulatory scheme which mandates a procedure to comply with the obligation implicit in s8. Section 16 states that consultation under the Division can be undertaken by any one or more of the following means:

> (a) ...with an occupational health and safety committee or committees established by the employer and employees for the place of work or the employer's undertaking...

30 This paragraph summarises the effect of ss23–25 of the 1983 Act and the *Occupational Health and Safety (Committees in Workplaces) Regulation* 1999.

31 Set out below at 104.

(b) ... with an occupational health and safety representative or representatives elected by the employees to represent them...

(c) ... in accordance with other arrangements agreed by the employer and the employees.

The import of this list of available methods is derived from s17.

(1) OHS committees

An OHS committee is to be established for the purposes of consultation under this Division if the employer employs 20 or more persons in the employer's undertaking and a majority of those employees request the establishment of the committee or if WorkCover so directs. More than one committee is to be established if a majority of those employees request their establishment and the employer agrees or if WorkCover so directs.

(2) OHS representatives

An OHS representative is to be elected for the purposes of consultation under this Division if at least one of the persons employed by the employer requests the election of the representative or if WorkCover so directs. The employees may elect more than one OHS representative if the employer agrees or if WorkCover so directs.

(3) Other agreed arrangements

Other agreed arrangements for consultation with employees are to be made in accordance with any requirements of the regulations. A Federal or State industrial organisation of employees may represent, for the purposes of consultation under the agreed arrangements, any of those employees who request the organisation to represent them.

(4) General

The employer may make arrangements for the establishment of an OHS committee or the election of an OHS representative whether or not it has been requested by any of the employees of the employer.

There are a number of points – oddities even – that flow from this section. The first is really a point of terminology, of infelicitous drafting, although it produces an apparent contradiction between ss16 and 17. Section 16 appears to give a free choice of methods of consultation – it *may* be undertaken 'by any one or more of' the means stated. But s17 makes the establishment of a committee obligatory if a majority of 20 or more employees request it, and the election of an OHS representative obligatory if even one employee so requests. There is also some anomaly in requiring employer agreement to the establishment of two or more committees or the election of two or more representatives, however great the majority of employees requesting a multiplicity, when there is on the other hand an *obligation* to accept a representative provided even one employee is in favour. Finally, subs(4) is not strictly necessary, at least in toto. Of course, an employer can make arrangements for a committee whether or not requested by employees, and an employer could *appoint* an employee as a representative. However, it is

questionable whether an employer can compel the employees to elect committee members or a representative.

Section 18 states the functions of the committees and representatives dealt with in ss16 and 17. An OHS committee or an OHS representative has the following functions:

(a) to keep under review the measures taken to ensure the health, safety and welfare of persons at the place of work,

(b) to investigate any matter that may be a risk to health and safety at the place of work,

(c) to attempt to resolve the matter but, if unable to do so, to request an investigation by an inspector for that purpose

and such other functions as prescribed by regulations. A number of comments are necessary. First, the functions of committees and representatives are the same. In that respect, the Act departs from the views of both the Robens and the Williams Reports.[32] Secondly, their functions are almost identical to the functions of OHS committees as previously laid down in s24 of the 1983 Act. Thirdly, their functions are inherently re-active. In relation to the re-active nature of the functions, this is most obvious in para (a). Leaving aside the fact that this function is more in keeping with those given in other jurisdictions to committees rather than to OHS representatives, it is also less extensive than other formulations of a committee's role. Under s18(a), the function is to review 'measures taken'. There is no reference to putting forward measures which ought to be/could be taken. Contrast, for example, s37(4)(a) of the 1985 Victorian Act whereby a committee's functions are, inter alia, to:

> ...facilitate cooperation between an employer and the employees of the employer in instigating developing and carrying out measures designed to ensure the health and safety at work of the employees...[33]

The New South Wales wording would not prevent a committee taking a more proactive role, but the terminology contributes to the overall message to be derived from the new legislation.

C. Participatory Provisions in the Occupational Health and Safety Regulation 2001

The provisions of Part 2 Division 2 of the Act are expanded in Chapter 3 of the Regulation, which is entitled 'Workplace Consultation'. Clause 21 defines 'OHS consultation arrangements' as the requirements of ss16 and 17 as to the establishment of an OHS committee or representative or other agreed consultations arrangements, and a 'workgroup' as the group of employees that is

32 See above at 101–102.

33 And see also the *Occupational Health and Safety (Committees in Workplaces) Regulation* 1999 (NSW) cl 13(b): 'the committee is to assist in the development of a safe working environment and safe systems of work at that place of work and is to assist in the formation of an occupational health and safety policy suitable for that place of work.'

represented by a particular OHS committee or OHS representative. The division of the employees of an enterprise into one or more workgroups is not expressly required by the Regulation; whether intentionally or by oversight, it is left implicit in the wording of Chapter 3. Clause 23 deals directly with the manner of identifying these (implicitly required) groups. By cl 23(1):

> The relevant workgroups to be represented by OHS committees or OHS representatives are to be determined in a manner that ensures that they are able to represent effectively the employees in each workgroup and, in particular, in a manner that enables them to undertake regular meaningful communication with the employees in each workgroup.[34]

The implications of this direction are spelt out in cl 23(2), which states that 'the diversity of the employees and their work must be taken into account when determining the relevant workgroups'. In particular, the following are to be considered:

(a) the hours of work of employees (including the representation of employees on shift work);

(b) the pattern of work of employees (including the representation of part-time, seasonal or short-term employees);

(c) the number and grouping of employees;

(d) the geographic location where the employees work (including the representation of employees in dispersed locations such as those in the transport industry or working from home);

(e) the different types of work performed by employees and the different levels of responsibility;

(f) the attributes of employees (including gender, ethnicity and age);

(g) the nature of the occupational health and safety hazards at the place of work; and

(h) the interaction of the employees with the employees of other employers.

By cl 23(3), it is not necessary to establish a separate workgroup for each such class of employees, place of work or other matter referred to in cl 23(2).

The concept of 'workgroups' was first introduced in the Victorian *Occupational Health and Safety Act* in 1985 (in which they are referred to as 'designated work groups'). The major purpose behind the concept there was to provide a referent as to the appropriate number of health and safety representatives for a particular enterprise, since it would be only in the smaller enterprises that a single health and safety representative could adequately discharge the functions of the position. However, the New South Wales application of the 'workgroup'

34 This sub-clause is, in terms of strict grammatical interpretation, nonsensical. As expressed, it requires that the workgroups enable *the workgroups* to represent effectively the employees within them. What is actually intended is that 'the relevant workgroups... are to be determined in a manner that ensures that *the OHS committees or OHS representatives* are able to represent effectively the employees' in the relevant groups.

concept to the establishment of OHS committees follows logically from the acceptance of multiple committees in s17(1) of the 2000 Act – an acceptance which itself follows logically from the experience of committees under the 1983 Act. The 1983 Act, as expanded in this respect by the Committees in Workplaces Regulations of 1984 and 1999, did not make clear whether a multiplicity of committees within an enterprise would conform to the legislation. The legislation spoke of *a* committee 'at a place of work', and cl 7(4) – in the 1999 version – listed factors to be taken into account in establishing the constitution of a committee to ensure effective representation for 'all persons employed at a place of work':

(a) the operation of various shifts;

(b) various departments or sub-units;

(c) geographical location;

(d) the variety of different occupations;

(e) the composition of the workforce; and

(f) the degree and character of the hazards present at the place of work.

These matters, particularly (b)–(c), suggested that a single committee was envisaged.

The implication of considering these matters in establishing the constitution of a committee is that the committee is to represent the whole enterprise, with members chosen from the various shifts, locations, occupations, gender and ethnic groups. However, experience soon showed that a committee representing that array of interests within a large, ethnically diverse and geographically scattered workforce would be unwieldy. Over the years, the WorkCover Authority sanctioned an interpretation of the legislation that allowed for a multiplicity of committees in large enterprises.

The list of factors relevant to the establishment of workgroups in cl 23(2) bears an obvious relation to the list of factors relevant to the constitution of committees in cl 7(4) of the 1999 Regulation. However, the appropriateness of some of the factors will vary, depending on what they are 'relevant to'. I would suggest that the list in cl 23(2) is largely inappropriate, because it conflates two quite different aims – the aim of providing for properly representative committees, and the aim of providing for workable committees. The 2001 Regulation provides no guidance as to the factors to be taken into account in establishing membership of the committees for the workgroups identified. I believe that omission is the result of the mistaken inclusion of factors relevant to committee composition in the list of those relevant to the establishment of workgroups.

To my mind, in establishing workgroups for which committees are to be established (or representatives elected), the major factor is one of geography, of premises. Subsidiary to that, or perhaps indicative of that, is nature of work. Where an enterprise has premises in different locations, then it will generally be appropriate to have a committee in each location. Even where the enterprise is contained on one site, it may be possible to identify spatially-distinct parts of the site, where different processes are going on. Again, it may be appropriate to have

separate committees representing those separate departments. And numbers may also suggest a more detailed departmentalisation. However, it does not seem sensible to separate the workers into gender-based or ethnically-based workgroups, independent of the site of the work, with different committees representing those gender or ethnic groups. The particular occupational health and safety issues arising from gender, race or age, from type of work or level of responsibility, should be taken into account in the composition of the committee for the particular workgroup, not through identification of the workgroup itself. Essentially, all of the matters listed in cl 23(2) are relevant to occupational health and safety, and to employer-employee consultation, but not all are relevant to identification of work-groups. In fact, to divide work-groups on some of the lines mentioned could be potentially inimical to health and safety, in that the identification of problems would be fragmented between a number of committees. Admittedly, the effect of cl 23(3) is that an enterprise will not inevitably be split into separate workgroups and thus separate committees on the basis of all the factors listed. However, the qualification in sub-cl (3) does not go far enough. The problem is that a number of the matters listed in sub-cl (2) should not be there at all, but in a separate regulation dealing with establishing the constitution of the committees themselves and not with the determination of the workgroups to be represented.

Clause 23(4) appears somewhat out of place, for it has nothing to do with the identification of workgroups. It provides that 'OHS consultation arrangements that include both an OHS committee and an OHS representative for a workgroup must ensure that the committee is the principal mechanism for consultation for that workgroup.' There is a sense in which the placing of the provision is explicable, in that it would make no sense *until* the requirement for the setting-up of workgroups had been laid out. However, I would argue that the prioritising of a particular method of consultation belongs in the Act itself, in the Division establishing the duty to consult and the approved methods.

Clause 22 concerns the 'setting-up' of the procedures for consultation, as required by s15(f) of the 2000 Act. I noted earlier an inconsistency between s16 and s17. There is a related inconsistency disclosed by cl 22(1). Section 17 makes it obligatory that an OHS committee be established if a majority of 20 or more employees so request and that an OHS representative be elected if at least one employee so requests. Once such request is made, s17 leaves no scope for employer consultation on the matter. On the other hand, s17 makes no reference to workgroups – which wait for Chapter 3 of the Regulation to make their appearance. The committees as envisaged in the Regulation are to represent workgroups. Yet there is a 'prior' obligation in s17 to establish a committee on the request of a majority of 20 or more employees. Section 17 is thus apparently speaking of a committee to represent the entire enterprise. Admittedly, it recognises the possibility of multiple committees – with employee request and employer agreement, but it does not tie those multiples to workgroups.

Clause 22(2) deals with the further matters to be considered when the initial consultation has resulted in the choice of OHS committee/s or OHS representative/

s as the method of 'OHS consultation arrangement' to be adopted. Paragraph (a) flows on from cl 23 – the employer must consult on the composition of the workgroups. Additionally, the employer must consult on:

(b) the relationship between an OHS committee and an OHS representative if both are to be provided...;

(c) the number of employee representatives and of employer representatives on any OHS committee;

(d) the arrangements for electing any OHS representative or employee representatives on any OHS committee (including arrangements for dealing with absences, the removal of members or other casual vacancies);

(e) the arrangements for meetings of any OHS committee and meetings between the employer and any OHS representative (including the frequency of ordinary meetings and the calling of special meetings);

(f) the procedures for any such meeting (including whether meetings may be held by electronic communication or the circulation of papers);

(g) the arrangements for communications between the persons elected by the employees in a workgroup and those employees (including procedures for enabling the employees in the workgroup to raise issues and make complaints about occupational health and safety matters);

(g) the arrangements for the training of members of any OHS committee or any OHS representative; and

(i) the relationship between representatives of the workgroup of an employer and the representatives of the workgroup of another employer.

Before examining the paragraphs in detail, it needs to be noted that consultation under cl 22(2) is 'unguided' – there are no guidelines as to how it is to be carried out. It is consultation *about* the manner of consultation. A number of issues arise from the paragraphs of cl 22(2). Paragraph (b) supports my earlier comment that the functions given to OHS committees and OHS representatives are the same. Paragraph (c) requires consultation as to the number of employees and employer representatives on an OHS committee. This takes up the matter previously dealt with in cl 7 of the Committees in Workplaces Regulation. Paragraph (d) obviously had no prior equivalent in relation to the election of OHS representatives. The election of employee members of OHS committees was previously covered by cl 8 of the Committees in Workplaces Regulation. There is a significant difference between the two, in that cl 8 made the procedure for election a matter for decision by a meeting of the employees. It was not something in which the employer was statutorily given a right of input. Now it is something for consultation (in an unspecified manner) between employer and employees. And what employees? If, by the consultation required in para (a), the workplace has been divided into workgroups, is the number of committee members and the procedures for electing the employee members to be decided between the employer and the employees *in*

the workgroup, or between the employer and all the employees? Logically, it should be the former, but there is no such indication given in the Regulation.

By paras (e) and (f), there is to be consultation as to the arrangements for meetings (including frequency) and the procedures for meetings. Under the Committees in Workplaces Regulation, these were to be decided by the committees themselves (with the proviso that meetings had to occur at least quarterly). Admittedly, decision by the committee involved employer-employee consultation in that the committee had employer appointees and employee-elected members. Nevertheless, given the unspecified nature of the consultation required by cl 22(2), the employer's role may be enhanced. The same point can be made in relation to para (h), which deals with arrangements for training. Under the old Regulation, it was for the committee itself to select from amongst the various WorkCover-accredited training programs. Paragraph (g) has no direct equivalent under the earlier legislation. However, it is clearly desirable that communication between an OHS representative or committee member and his/her 'constituents' be facilitated. On the other hand, it would be perhaps preferable if the Regulation stated a duty to facilitate, rather than merely to consult (in unspecified manner). That comment applies also to para (i). There is an obvious benefit in communication between representatives of workgroups where work is being done jointly with more than one employer involved, to the extent that it should be something where coordination is an obligation of the several employers, and not merely a matter for consultation.

Clause 22(3) deals with *pre*-consultation about arrangements *other than* OHS representatives and committees:

> If the proposed OHS consultative arrangements provide for other agreed arrangements, the employer must consult on arrangements with respect to meetings with the employer, communication with the employees, the functions and training of the persons involved, the procedures for resolving occupational health and safety issues, the role of any relevant industrial organisation of employees, and other relevant matters.

Again – it is a little oddly worded, since the 'proposal' of other arrangements would have identified most of the matters about which sub-cl (3) requires consultation. If not, how does one know they are 'other'? What is really intended seems to me thus: *if the parties have decided against either committees or representatives, then they should consult as to what form of consultation they shall have, including....'*

Clauses 22(4)–(5) apply to 'OHS consultation arrangements', which include the three possible modes: OHS committees, OHS representatives and 'other agreed arrangements'. Clause 22(4) directs that the arrangements be reviewed 'as occasion requires'. There should be consultation as to new arrangements if requested by a majority of the employees in the workgroup or if 'there has been a significant change in the composition of the workgroup that is not reflected in the existing arrangements'. This sub-clause displays the confusion previously alluded to, resulting from the interaction of cl 22(2) with s17. Requests for committees or

OHS representatives under s17 logically (and in the layout of cl 22(2)) precede the establishment of workgroups. And – again logically – the new arrangements to be consulted about under cl 22(4) will examine the situation in comparison to that at the time of the initial requests. Yet the sub-clause talks of changes in the composition of 'the workgroup'. There are thus two possible interpretations: that cl 22(4) envisages changes to the arrangements for a *particular* workgroup, or that it refers to changes in the overall arrangements as a result of developments in the composition of the *workforce* of the enterprise. The nub of the ambiguity is whether the consultation about changes should be with representatives of all the employees of the enterprise, or merely those within a particular designated 'workgroup'.

Clause 22(5) also presents difficulties when seen in conjunction with s17(3). Section 17 lists the three modes of OHS consultation arrangements, with subs(1) dealing with OHS committees, subs(2) dealing with OHS representatives, and subs(3) being headed 'other agreed arrangements' and stating that they are to be made in accordance with the Regulations and that:

> ...A Federal or State industrial organisation of employees may represent, for the purposes of consultation under the agreed arrangements, any of those employees who request the organisation to represent them.

Clause 22(5) states:

> A Federal or State industrial organisation of employees may represent, for the purposes of consultation on OHS consultative arrangements, any of those employees who request the organisation to represent them.

'OHS consultative arrangements' refers to all three possible methods of consultation. So the Act makes provision for union representation in a subsection devoted to (as per the heading) the 'other agreed arrangements', and the Regulation makes provision for union representation in a sub-clause devoted to all three methods of 'OHS consultation'. A number of questions arise. One wonders why union representation is permitted in the *Act* in the case of 'other' arrangements and merely in the *Regulation* in the case of OHS committees and representatives. And one wonders if, in relation to 'other' arrangements, cl 22(5) states anything not already provided by the Act in s17(3). One explanation for the embedded uncertainties is bad drafting. For a start, it may be that s17(3) is badly drafted in that the title applies only to the first sentence. This reading would remove the anomaly of approving union representation in one mode of consultation only, and the subsequent anomaly of extending the approval to the other two modes by regulation. However, that interpretation is dependent on cl 22(5) being concerned with exactly the same thing as the second sentence of s17(3). When we compare that second sentence with cl 22(5), we note a difference in wording: s17(3) uses the phrase 'consultation under the agreed arrangements' whereas cl 22(5) speaks of 'consultation on OHS consultative arrangements'.

Do the two phrases have the same meaning? Furthermore are they intended to have the same meaning? Strictly speaking, they do not have the same meaning.

Consultation 'on OHS consultative arrangements' is the consultation prior to and leading to the decision as to which mode of consultative arrangement is to be adopted. Consultation 'under the agreed arrangements' is the ongoing consultation on OHS matters by means of the mode agreed for the particular workplace – by means of an OHS committee or OHS representatives or whatever 'other' arrangement is agreed. If the phrases were intended to have these separate meanings in the places in which they appear, it eliminates the charge of bad drafting. The result would be that, in the *pre*-consultation as to which mode of consultative arrangement to adopt, employees may be represented by a union. Once the mode is agreed and adopted, employees may be represented by a union in consultation with the employer on OHS matters in the workplace only if the mode adopted is 'other' than an OHS committee or OHS representatives. It may be noted that, in practical terms, employees who seek or accept nomination as candidates for election as members of OHS committees or as OHS representatives are likely to be from the ranks of union members in the workplace. However, those 'practical terms' disclose a separate anomaly, in that in workplaces with a union presence, it is likely that the employees will push, in the *pre*-consultation, for either OHS committees or OHS representatives (or both) as the method of consultation to be adopted. Put another way, it is unlikely that there will be unionised employees in the workplaces where, by the adoption of 'other agreed arrangements', union representation in the consultation is approved by s17(3).

Clauses 24 to 26 establish certain minimum requirements for the chosen modes of consultation. They thus qualify, or place limits on, the scope of possible outcomes of the *pre*-consultation referred to in cl 22. Under cl 24, employee members of a committee representing a workgroup must be elected by the employees of the relevant workgroup. That is unexceptionable, but what is not provided – in cl 24 or elsewhere – is whether the employee members must be themselves members of the relevant workgroup. That is a normal requirement where representation is divided between workgroups,[35] though it can cause a certain instability when employees, who are members of committees, are moved from section to section in an enterprise.[36] Clause 24(b) requires the elections to be 'conducted in a manner that is consistent with recognised democratic principles'. This is intriguingly vague. To some extent it allows flexibility; nevertheless, there might be arguments whether voting by show of hands was so consistent, or voting for an electoral college. Under cl 24(c), the election may be conducted by a union, federal or state, 'if the employees concerned request the organisation to conduct the election'. This leaves open the possibility of a request for the election to be conducted by a union which does not represent any members of the workgroup,

35 See, for example, *Occupational Health and Safety Act 1985* (Vic) s30(1), *Occupational Health, Safety and Welfare Act 1986* (SA) s28(2), *Occupational Health and Safety Act 1989* (ACT) s40(2).

36 In fact, close reading of the Act and the Regulation shows that it is nowhere expressly stated that the OHS representative and 'employee representatives' on OHS committees need even be employed by the employer in question. This is so dramatic a departure from all other examples of legislation of this type that one is driven to conclude it is an oversight in the drafting rather than an intentional development.

and, since cl 24 lays down 'minimum' requirements, this would appear to be an issue on which the employer does not have consultative rights.

Clause 24(d)–(e) states that the number of employer representatives on a committee must not exceed that of employee representatives and that the chairperson must not be an employer's representative. This parallels the requirements of the 1999 Regulation. Clause 24(f) understandably has no equivalent in the previous legislation – it provides that an OHS representative for a workgroup may be an employee representative on the committee for that workgroup without the need for further election if the consultation arrangements (arrived at by the consultation referred to in cl 22(2)) so permit. There is an argument for having the representative as part of the committee. There are also arguments against – the mixing of the adversarial and consultative roles envisaged by the Robens Committee. Paragraph (f) thus points up the fact, already noted, that s18 of the 2000 Act gives the same roles to OHS representatives and committees. Additionally, it is submitted that even if para (f) is accepted as logical in content, it is inappropriate in its situation. It belongs in cl 22, with the other matters open for employer-employee agreement, rather than in cl 24 with matters which are *minimum* requirements, that *must* be complied with whatever the parties may agree as to future arrangements. This last point also applies to cl 24(g), which allows for multiple committee membership without further election by employee representatives 'if...provided for in the OHS consultation arrangements'. Clause 24(h)–(i) sets a maximum term of office of two years for employee representatives on committees, with re-election for one further term permissible.

Clause 24(j) takes up a matter covered in cl 9(2) of the previous Regulation, stating that:

> a person is not eligible to be an employer representative on a committee unless the person has authority to act on behalf of the employer in occupational health and safety matters at the place of work.

There is an important difference between this and the formulation in cl 9(2). In the earlier formulation,

> The employer's representatives on an occupational health and safety committee are to include, as far as practicable, a person with authority to implement preventative measures and otherwise act on behalf of the employer in matters associated with occupational health and safety.

The significant variation is between *one* of the employer representatives having authority to implement committee decisions (under cl 9(2)) and *all* of them having such authority (under cl 24(j)). If the authority to which the paragraph refers is the full authority of the employer, then it is questionable how many persons in an enterprise would be eligible to be employer representatives. If it is merely 'some vestige of authority', no matter in how small a degree, then it is questionable of what value the paragraph is.

Clause 25 sets the minimum requirements in relation to the election of OHS representatives. It is largely the same as cl 24(a)–(c), (h)–(i). Clearly, no equivalent

of paras (d)–(f) and (j) would be possible. Clause 26 covers the 'other' arrangements. It is, however, inevitably uninformative, since functions under the 'other' arrangements are to be as 'derived from the agreement'. Template arrangements may be formulated at industry level.

D. Related Obligations

Clause 27 establishes obligations of the employer *related to* the duty to consult. By sub-cl 27(1) the employer has eight obligations 'in connection with OHS consultation arrangements':

(a) to record those arrangements;

(b) to publicise the arrangements amongst the employees;

(c) to provide members of OHS committees and OHS representatives with reasonable access to the employees they represent;

(d) to provide reasonable facilities for the purpose of carrying out the arrangements;

(e) to ensure employer representatives on an OHS committee participate regularly;

(f) to ensure that employees are paid 'as if they were engaged in the duties of their employment' for time spent as members of an OHS committee or as OHS representatives, and for time spent in required training;

(g) to pay any costs reasonably incurred by employees in connection with participation in the OHS arrangements and in the required training; and

(h) 'to facilitate the OHS consultation arrangements of another employer where employees of that other employer are working at the employer's place of work'.

There is no prior equivalent to the obligations in cl 27(a)–(c), though this is not particularly significant in relation to the obligation to record and publicise, given that previously there was only one available mode of arrangements. As for providing access in para (c), the previous absence of such a requirement in relation to employee members of committees is more noteworthy. In relation to provision of facilities, in one sense this obligation goes further than the previous requirements, which merely (under the previous cl 14(1)(d)) gave employee members of committees a right to information held by the employer about health and safety matters at the workplace. The obligation to ensure the participation of employer representatives on committees is also new, and clearly valuable. Obviously, the establishment of an OHS committee would be largely useless if the employer representatives did not carry out their functions conscientiously. There would be no genuine consultation without such participation.

The obligation to pay employees involved in consultation and training for consultation was previously provided for under cl 18 of the 1999 Regulation. There is, however, a slight difference in the way the obligation is expressed which has possible consequences. Clause 18(1) stated that an employee representative on an OHS committee

(a) is taken to be engaged in the person's usual work at that place while duly exercising the person's function as a member of the committee or while attending any training courses...and

(b) is entitled to exercise those functions or attend any such training courses at any time, including during the person's ordinary hours of work.

Under cl 18(2),

> A person so taken to be engaged in the person's usual work is, without affecting the generality of subclause (1), entitled to pay, including pay (at the appropriate rate) for any period that the person is so engaged which exceeds the person's ordinary hours of work.

Thus, the right to pay for time spent in exercising the functions of a committee member flowed from the person being taken to be engaged in his/her usual work during that time. Clause 27(1)(f) does not expressly deem the time spent in exercising consultative functions to be spent in doing 'usual work'. It simply requires the employer to pay for that time 'as if' the employees concerned were engaged in their normal duties. The difference in wording will not increase or lessen the amount of money that the relevant employees receive, but it could affect calculation of the amount of time they had served in their employment. This could affect, at least to a minor extent, the accrual of certain other rights. To that extent, the position of participants in consultation under the new legislation is potentially diminished. On the other hand, para (f) is more far-reaching in its application. The previous cl 18 dealt expressly only with employee representatives on committees. But para (f) extends the right to pay to 'employees participating in consultation...(whether they participate as representatives of employees or of the employer)'.

Clause 27(1)(g) also goes further than the earlier legislation. There, the employer was required to pay the fees for the required training courses. This flowed from the statement in the previous cl 16(1) that the training to be provided to committee members under s25(2) of the 1983 Act was 'to be provided by the employer'. The phrase 'the costs reasonably and necessarily incurred by employees in connection with...participation in...consultation or training', under the new cl 27(1)(g), is apt to include a variety of matters additional to the fees for training courses.

Finally, cl 27(1)(h) has no prior equivalent, but is clearly of value, and accords with the underlying philosophy that the achievement of improved occupational health and safety is something involving overlapping lines of obligation and responsibility. The sorts of facilitative measures involved would include, for example, allowing OHS representatives or committee members of the 'other' employer access to places where their 'constituents' were working, and providing information about matters affecting health and safety at the premises to the representatives or committees of the 'other' employer. However, valuable as this provision is, it should be noted that it is unsupported by the legislation as it stands. It appears in a list of obligations 'in connection with OHS consultation arrangements'. Those arrangements are required for the fulfilment of the

employer's obligation in s13 of the Act to 'consult...with the employees of the employer'. There is no way in which facilitating the consultative arrangements of another employer can be argued to be part of consulting with one's employees. For that reason, I would suggest that a separate section requiring such inter-employer cooperation should be included in the Act.

Clause 28 imposes an obligation on all employees which is 'connected with' OHS consultation:

> (1) An employee must take reasonable steps to prevent risks to health and safety at work by notifying the employee's employer or supervisor of any matter that, to the knowledge of the employee, may affect the capacity of the employer to comply with the requirements of this Regulation.

This obligation on employees to notify flows logically from the employee's duty in s20 of the Act. However, the reference to 'capacity to comply' is oddly worded. First, it is odd in confining itself to compliance with the Regulation and not extending to the Act. Secondly, it is odd in its use of the concept of 'capacity to comply'. As I read it, what this clause is trying to say is that the employees should notify matters that may constitute breach and thus affect the employer's compliance.

E. Powers and Functions of Representatives and Committees

Clauses 29 and 30 are concerned with the functions of OHS committees and OHS representatives. As seen earlier, s18 of the Act sets out those functions:

> (a) to keep under review the measures taken to ensure health, safety and welfare;
>
> (b) to investigate any matter that may be a risk to health and safety;
>
> (c) to attempt to resolve the matter but, if unable to do so, to request an investigation by an inspector; and
>
> (d) such other functions as prescribed by the Regulations.

Clause 29[37] is concerned with the function in s18(c). The 'attempt to resolve the matter' is to be made via the consultative arrangements which are in place; the employer must be formally notified and is to consider the matter and 'respond in a timely manner'. If the matter is not thus resolved after the employer has had a 'reasonable opportunity' to act, a inspectorial investigation may be requested. Where the consultative arrangements incorporate an OHS committee, the request for an investigation is to be made by the chair of the committee. Finally, under cl 29(5), '[t]his clause does not limit any other power with respect to the inspection of places of work or of disputes arising at places of work'. The result of cl 29 is that the s18 function of 'attempting to resolve the matter' merely means formally notifying the employer, and then – where there is no resolution by the employer within a reasonable time – notifying the inspectorate. It is a purely 'post-box'

37 Which is headed 'Procedure for resolving matter that may be risk to health and safety'.

function. What then of the function in s18(b): to investigate the matter? What powers of investigation do OHS representatives and committee members have?

It is worth noting that, whereas the 1983 Act and 1999 Regulation stated both functions *and* powers of members of OHS committees, the 2000 Act and 2001 Regulation lay down functions only. They make no reference to powers, except in cl 29(5) – 'This clause does not limit *any other power* with respect to inspection of places of work or of disputes arising at places of work...' Of course, what is presented as a function may be more accurately categorised as a power. This is true of some of the so-called 'Additional functions of OHS committees and OHS representatives' set out in cl 30. But to keep something under review, to investigate something, to attempt to resolve something (as per s18) are true functions, not powers. Thus, if the legislation confers any *powers* on OHS representatives and committee members, they will be found under the guise of functions in cl 30. That clause sets out seven 'additional functions', of which the first four are in fact powers, while the last two are functions:

(a) to make a request to accompany an inspector on an inspection under s69(b) of the Act that affects the workgroup that the committee or representative represents;

(b) to be an observer during any formal report by an inspector to the employer in connection with any occupational health and safety matter concerning the workgroup that the committee or representative represents;

(c) to accompany an employee of the workgroup that the committee or representative represents, at the request of the employee, during any interview by the employer on any occupational health and safety issue;

(d) to be an observer during any formal in-house investigation of an accident or other occurrence at the relevant place of work that is required to be notified to WorkCover under Division 4 of Part 5 of the Act;

(e) to assist in the development of arrangements for recording workplace hazards and accidents to promote improved workplace health and safety;

(f) to make recommendations on the training of members of OHS committees and of OHS representatives; and

(g) to make recommendations on the training of employees in relation to occupational health and safety.

Clearly, none of what are actually powers in the first four paragraphs are directly relevant to the function, in s18(b), of investigating a matter that may be a risk to health and safety. And what becomes clear when taking s18 together with cls 29–30 is that the legislation contains no powers of inspection by OHS representatives or committee members. In this, it departs from all other legislation of this type and from the previous NSW legislation. I mentioned earlier that the functions of OHS representatives and committees in s18 of the 2000 Act are effectively the same as those of OHS committees in s24 of the 1983 Act. However, s25 of the 1983 Act then went on to lay down 'Powers of Members of Occupational Health and Safety Committees'. Under the previous s25(1):

A member of an occupational health and safety committee... shall, for the purposes of the committee, have power:

(a) to carry out such inspections of the place of work....

as may be prescribed.

The prescription was in cl 14(1) of the 1999 Committees in Workplaces Regulation:

For the purposes of section 25(1) of the Act, a member of an occupational health and safety committee established at a place of work has power:

(a) to carry out an inspection of that place of work in a manner determined by that committee:

(i) by way of routine inspection at intervals (not exceeding 3 months) agreed with the employer, or

(ii) whenever an accident or possible hazardous situation is brought to the attention of the committee and failure to rectify the possible hazard could cause injury in the immediate future, and

(b) to carry out an inspection of that place of work at any time with the approval of the employer, and

....

(g) as soon as practicable after election or appointment to the committee, to inspect and familiarise himself or herself with that place of work and the persons employed thereat at a time agreed with the employer.

Moreover, not only are there no powers of inspection given in the new legislation, there is no requirement for the OHS representatives to be supplied with information about health and safety at the workplace. This is in contrast with s25(1)(b) and cl 14(1)(c)–(d) of the 1983 Act and 1999 Regulation. By s25(1)(b), members of OHS committees had power to obtain such information relating to the place of work as might be prescribed. Clause 14(1) gave power:

(c) to obtain from the employer, prior to their implementation, all details of proposed changes to that place of work which could affect the occupational health and safety of persons at that place of work, and

(d) to have access to all information kept by the employer:

(i) relating to accidents and occupational diseases occurring at that place of work, and

(ii) relating to any research, testing or examination of any plant or substance for use at that place of work (being any research, testing or examination relating to the risks to health and safety to which the plant or substance may give rise at that place of work)....

Clearly then, with no power to inspect nor to require the provision of information, the investigation which is a function of OHS committee members and representatives under the new s18(b) and the keeping under review of the occupational health and safety measures referred to in s18(a) will be very vague and inconclusive exercises. The same will be true for the assisting in developing

recording arrangements and the making of recommendations on training in cl 30(e), (f)–(g) of the new Regulation. Nor do the 'tag-along' powers in cl 30(a)–(d) provide much assistance. Given the absence of powers to inspect and to access information, the contribution of the employees to the employer-employee consultation required by Part 2 Division 2 of the Act will be of little value.

It is difficult to believe that the omission of these powers, whether they be called powers or misrepresented as functions, is intentional. The departure from standard practice is astonishing. One piece of evidence for the omission being simply an oversight is cl 29(5). There is little point in denying an intention to limit 'any other power with respect to...inspection' if no other such power exists, nor is intended to exist. An additional indication of oversight is that the Act, in s19, provides for 'further provisions with respect to consultation...' to be made by the regulations with respect to, inter alia:

> (d) the powers of members of OHS committees and of OHS representatives with respect to inspections of the place of work and the obtaining of information relating to the place of work and other things in relation to the place of work.

All the other topics listed by this section for further provision are dealt with in the Regulation: negotiations with respect to consultation arrangements, the establishment of committees, the election and functions of OHS representatives, and the training of members of OHS committees and of OHS representatives. Why list five matters and then deal only with four in a Regulation that sets out to be comprehensive? Yet how could such a glaring hole not be quickly noticed? And as evidence that the omission was *not* mere oversight there is the fact that there is no equivalent to cl 14(2) of the 1999 Regulations which prohibited disclosure of 'information relating to any manufacturing or commercial secrets of working processes...obtained by the [committee member] in connection with the exercise of the person's functions as a member of the committee'.[38] If no information is to be given, there is no need to prohibit its disclosure. This astonishing limitation on the basic powers of participants in the consultative process overshadows the absence of more 'radical' powers found in other examples of this type of legislation – such as the power to issue Provisional Improvement Notices.[39]

There is an obvious connection between information and training. Clause 31 deals with the training to be provided to OHS committee members and OHS representatives. The employer is to ensure that all such persons receive the required training, from a WorkCover accredited trainer, as soon as practicable after appointment or election. The training course must include all the seven topics listed in the Table to the clause.[40] The clause deals only with an 'induction' course of training, focussed generally on the legislation and on consultation and risk

38 Except, by the previous clause 14(3), where disclosure is made in connection with exercise of the functions of committee member, made with the employer's approval, ordered by a court etc.

39 See, for example, *Occupational Health and Safety Act 1985* (Vic) s33, *Occupational Health and Safety Act 1989* (ACT) s51.

40 In the light of the absence of a power to access information, there is an irony in the stated learning aim of Topic 3: 'Outlines effective communication techniques. Describes how these are essential in the consultative process'!

management procedures. There is no equivalent of the requirement in cl 16(2)(b) of the 1999 Regulation for attendance at further training courses which provided:

(i) training in connection with the industry or business with which the committee is concerned and in the special hazards to which employees are exposed in that industry or business, and

(ii) refresher training in their duties as members of the committee.

The final clause of the Chapter, cl 32, deals with 'Savings and transitional arrangements'. The new consultation arrangements are to be implemented within 12 months after the commencement of s13 of the Act, except that a committee under the former Act may be retained for the remainder of its term, with the new arrangements to be implemented within three months of the end of that term. Courses of training undertaken under the previous legislation are to be taken to have been undertaken for the purposes of and in accordance with the 2001 Regulation.

5. *Conclusion*

There are a number of other interesting developments in the legislation for the 'new regime', but I have concentrated here on the *nature* of the legislation by attention to the concepts of risk management and employee participation. Foremost of those is the clear identification of systems of risk management as an essential part of the concept of 'taking of reasonable care' which was introduced in the 1983 Act. An employer has *not* 'taken care' if, fortuitously, despite the absence of any evaluation of hazards, no risks result in injury or disease. To take care, one must know where and why care is needed. The clarification that proper systems of risk management are an integral part of fulfilling the duty of care is a decided 'plus' of the new legislation.

That said, there is room for debate as to whether the legislation has been sufficiently prescriptive in its requirements for risk management systems. It is impossible for it to be totally prescriptive – the diversity of workplaces makes a diversity of systems inevitable. However, there are many small businesses in which employers will still be 'at sea' as to what would amount to an adequate system for their workplaces. Admittedly, the Regulation makes partial recognition of this by the staged introduction of the requirements of cls 9–11, with the deadlines for compliance being 1 September 2002 in the cases of employers of more than 20 employees and 1 September 2003 in the case of employers of 20 or fewer employees. Nevertheless, there will be many who will need outside advice, whatever the timeframe. I consider that some direction within the Regulation whereby the employer must 'identify... assess... *or arrange for identification... assessment...*' is desirable. Guidance notes as to appropriate systems for small businesses is another possibility, though it carries the danger that the systems there set out would be adopted without consideration of their adequacy in particular circumstances. The subsidisation of largely non-profit organisations to provide risk management advice is another possibility,[41] and it should be recognised that the cost of such a scheme would be a continually decreasing one.

41 See above at 100.

Even at the largely non-prescriptive level of the provisions of Chapter 2 of the Regulation, there is an important issue not covered and that is the issue of health monitoring. Such monitoring is a very useful measure in identifying and assessing hazards, and in reviewing the success of the measures taken to eliminate or control hazards.[42] There are only two references to health monitoring in the Regulation as it stands. Clause 165 states that 'the employer must provide health surveillance for each employee who is exposed to a hazardous substance if there is a risk to the health of the employee as a result of that exposure, and the substance is mentioned in the Table attached or the exposure is such that an identifiable disease or health effect may be related to it'.[43] Clause 202 makes further specific requirements as to biological monitoring in relation to lead which is performed under cl 165. There are many risks to health where monitoring would provide information useful to the introduction of measures of elimination and control other than risks arising from exposure to hazardous substances.

A first glance at the new legislative scheme might give the impression of an enhanced commitment to employee participation.[44] However, a detailed examination does not bear out first impressions. If anything, the role of employees in the process has been diminished. That is certainly the case unless and until the legislation is amended to provide OHS committee members and representatives with powers of inspection and access to information. But even if that is done, there is a troubling 'doll's house' feel to it all. Yes – there is now an express duty to consult. And yes – the consultation arrangements must include employee health and safety representatives if an employee so requests. But given that the functions of health and safety representatives are the same as those of committees, this latter development will not substantially alter the climate in most workplaces (though it will provide employees with access to some degree of input in workplaces of less than 20 – which did not fall under the 'committee provisions' of the old scheme).

The essence of the scheme's disappointing treatment of employee participation is encapsulated in the terminology. Employee participation is one of the key concepts on which reformers in this area, and in other workplace-related areas, focus. But the new scheme does not really deal with *participation*. It deals – and expressly – with consultation. The word 'participation'[45] occurs only as qualified by consultation – participation in the consultative process. But consultation and participation are not the same things. For a start, consultation has an inbuilt and grammatical hierarchy, in that a subject consults with an object. The employer

42 For an example of health monitoring requirements, see Adrian Brooks, 'Systems Standard and Performance Standard Regulation of Occupational Health and Safety: A Comparison of the European Union and Australian Approaches (2001) 43 *JIR* 361 at 375-376.

43 The substances in the Table are: acrylonitrile, inorganic arsenic, asbestos, benzene, cadmium, inorganic chromium, creosote, crystalline silica, isocyanates, inorganic lead, inorganic mercury, MOCA (4,4-methylenebis 92-chloranaline)), organophosphate pesticides, pentachlorophenol (PCP), polycyclic aromatic hydrocarbons, thallium and vinyl chloride.

44 See, for example, the conclusion of Suzanne Jamieson and Mark Westcott, 'Occupational Health and Safety Act 2000: A Story of Reform in New South Wales' (2001) 14 *AJLL* 177 at 189: '[the new legislation] arguably alters the framework to encourage more thorough and meaningful consultation between employees, employers and trade unions...'.

45 Or 'participate' or 'participant'.

must consult with the employees. What the proponents of 'employee participation' are concerned with is not 'participation in a consultative process' but participation in *decision-making*. There is nothing about the new legislation that increases the rights of employees to participate in the making of decisions about matters affecting their health and safety at work. The consultation is, by s13, 'to enable the employees to contribute to the making of decisions affecting their health, safety and welfare at work', but this does not say that employees participate in the making of the decisions. They 'contribute to the making' in that they have a (limited and qualified) opportunity to express opinions before the decisions are made – by the employer. Section 14(c) may piously say that the consultation mandated requires 'that the views of employees are valued and taken into account'. But there is nothing in the actual process to ensure that.

The new regime – just as the old – is not one of employee participation, but one of *consultation*. And that consultation has its own philosophical bias or qualification. Effectively, it means talking – or even merely, from the employees' point of view, 'being told'. The attitude of the relevant agencies is not in favour of genuine participation, nor is it, in my view, in keeping with the attitudes of the committees and inquiries from which this style of legislation proceeded. It is an attitude whereby the employer must talk with the employees, but after this discussion full decision-making power still lies with the employer. This is borne out by the examination of the details of the legislation, and I can illustrate it also with anecdotal evidence, which must obviously remain unattributed. I have been informed[46] by a WorkCover-accredited OHS trainer that the committees (under the 1983 Act and 1999 Regulation) were not to proceed by taking votes. In fact, this was put very strongly – they *must not* resolve issues by voting. If the employer (through the employer representatives) did not accept recommendations of the employee representatives, then the issue was closed. Of course, even if a vote were taken, the result would have been merely a committee recommendation to the employer, which the employer was free to follow or ignore; but the WorkCover instruction was to the effect that even the making of recommendations required some demonstration of unanimity. That is not my reading of the import of the legislation. The requirements that employees have at least equal numbers on committees and that the employer's representatives have authority to implement occupational health and safety measures clearly point to the committees being able and entitled to vote as to the recommendations to be made.

Whether or not the legislation in its new form envisages committees voting on recommendations, it is clear that the consultation with employees which is presented as a major feature is largely if not entirely procedural. The requirements as to risk management systems, the consolidation and re-organisation of the associated occupational health and safety legislation, the translation of a vast number of specifications into performance standards, into statements of *outcome* – these features represent an important development, but the new statutory regime is not one of employee participation in any meaningful sense.

46 In fact, it was more in the nature of a castigation than of the proffering of information.