A single health and safety act for mining and industry in South Africa

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Opsomming

Veiligheid en gesondheid in die werkplek is hoogs gedebatteerde onderwerpe in die afgelope paar jaar aangesien die terme "gesondheid" en "welsyn" ingesluit is in artikel 24 van die Grondwet van die Republiek van Suid-Afrika. Elkeen is geregty op ’n werksomgewing wat nie nadelig is vir hul gesondheid of welsyn nie. Aangesien die Wet op Beroepsgesondheid- en Veiligheid die gesondheid en veiligheid in die industrie ondervang, en die Wet op Gesondheid en Veiligheid in Myne gesondheid en veiligheid in die mynbou, ontstaan daar soms leemtes en gapings in die reg aangesien die twee wette deur verskillende departemente beheer word – die Departement van Arbeid en die Departement van Minerale en Energiesake. In 2003 is ’n wetsontwerp opgestel wat die integrasie van die twee wette voorgestel het. Dié wetsontwerp het ’n liggaam voorgestel wat gesondheid en veiligheid in sowel die industrie as mynbou sou behartig.

Die studie sal die agtergrond van veiligheid en gesondheidswetgewing bespreek deur te verwys na verskillende definisies wat van toepassing kan wees. Ten einde ’n enkele wet op gesondheid en veiligheid te kan voorstel, sal ’n vergelyking getref word tussen die bepalings van die Wet op Beroepsgesondheid- en Veiligheid, Wet op Gesondheid en Veiligheid in Myne, asook die geïntegreerde wetsontwerp. Die verskillende rolspeleters – werknemer, werkgewer, verteenwoordigers, komitees, gebruikers van masjinerie, en regeringsinstellings – sal in ag geneem word aangesien hul verpligtinge ’n kardinale rol speel in die formulering van ’n voorgestelde wet.

Trefwoorde

Abstract

Health and safety in the workplace has been a highly debated subject in the past few years as the terms "health" and "well-being" are included in section 24 of the Constitution of the Republic of South Africa. Everyone has the right to a working environment that is not detrimental to his or her health and well-being. As the Occupational Health and Safety Act governs health and safety in the industry, and the Mine Health and Safety Act the health and safety in mining, a gap exists as there are two different departments governing the two pieces of legislation, namely the Department of Labour and the Department of Mineral Resources.

In 2003 a draft integrated policy was compiled – the National Occupational Health and Safety Integration Bill which established an authority to govern health and safety in terms of both mining and industry. This study will consider the background of health and safety legislation by referring to the definitions applicable to health and safety. In order to propose a single health and safety act in South Africa a consideration of the duties and responsibilities of employers, employees, health and safety representatives, health and safety committees, suppliers and manufacturers, users of machinery and institutions is necessary. To reach a conclusion as to whether or not the introduction of a single health and safety act is possible in South Africa, it is necessary to compare the different provisions of the MHSA, the OHSA and the Integration Bill.

Keywords

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List of Abbreviations

CEO
Chief Executive Officer

CIM
Chief Inspector of Mines

GN
General Notice

GG
Government Gazette

HASLAC
Health and Safety Legal Audit Council

HSE
Health and Safety Executive

ILC
International Labour Conference

ILO
International Labour Organisation

MHSA
Mine Health and Safety Act

MHSC
Mine Health and Safety Council

MHSI
Mine Health and Safety Inspectorate

MOSA
Machinery and Occupational Health Act

MOHAC
Mining Occupational Health Advisory Council

MPRDA
Mineral and Petroleum Resources Development Act

MQA
Mining Quality Authority

MRAC
Mining Regulation Advisory Committee

MWA
Mine Works Act

NOHS
National Occupational Health and Safety

NUM
National Union of Mineworkers

OHSA
Occupational Health and Safety Act

SAPS
South African Police Service

SIMRAC
Safety in Mines Research Advisory Committee

WHO
World Health Organization


Chapter 1 Introduction

1.1 Background

Worldwide approximately 6300 people die every day as a result of not being protected in the workplace.\(^1\) There are many risks and hazards in the workplace, which include the possible exposure to hazardous substances, health issues\(^2\) and the loss of life, to mention a few.\(^3\) The promotion of health and safety is very important for the well-being of working individuals as well as the success of companies and South Africa in general.\(^4\) The legal regulation of health and safety in the workplace is complex.\(^5\) In South Africa, the common law and statutory provisions regulate occupational health and safety.\(^6\) The two main acts regulating health and safety are the *Occupational Health and Safety Act* 85 of 1993 (hereafter referred to as OHSA), and the *Mine Health and Safety Act* 29 of 1993 (hereafter referred to as MHSA).

Section 24 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) stipulates that everyone has the right to an environment that is not harmful to their health and well-being. "Health" and "well-being" imply that section 24 may also apply to the working environment.\(^7\) Initially the protection of workers did not always receive the necessary attention.\(^8\)

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\(^2\) Such as the exposure to asbestosis, falling of scaffolding structures.


\(^4\) Swanepoel, Van Wyk and Erasmus *Human Resource Management* 582.

\(^5\) Thompson and Benjamin *South African Labour Law* G1-5.


\(^7\) Danna and Griffin 1999 *Journal of Management* 357.

\(^8\) See chapter 1.2.
1.2 History of health and safety

Originally, the health of workers in the workplace was regarded as a separate issue from occupational safety. A distinction was also made between safety of workers in mines and industry, which caused different development directions in terms of health and safety legislation. The OHSA applies to all employers and employees in industry, while the MHSA is applicable to all people working in mines as defined in the Mineral and Petroleum Resources Development Act 28 of 2002. Both the MHSA and OHSA have a rich history and different departments dealt with the different sectors of the workplace.

The health and safety of mineworkers has always been cause for concern, as mines are inherently dangerous. The first act that dealt with health and safety in mines was the Mines and Works Act 27 of 1956 (hereafter MWA). This Act aimed, inter alia, to provide measures for the safety of mineworkers. However, the MWA did not provide equal protection for the different races in South Africa as it had been promulgated during the Apartheid era. The distinction between races resulted in many unprotected mineworkers losing their lives and livelihood and over a million experienced serious

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9 Masilo and Rautenbach Commentary on Mine Health and Safety 1-1. See also Thompson and Benjamin South African Labour Law G1-1.
10 Masilo and Rautenbach Commentary on Mine Health and Safety 1-1.
11 Excluding those who are protected by the MHSA and the Merchant Shipping Act 57 of 1951, this act will not form part of this study.
12 The Mineral and Petroleum Resources Development Act 28 of 2002 defines "mines" in section 1 as "(a)(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any boreholes, whether being worked or not, made for the purpose of searching for or winning a mineral; (ii) any other place where a mineral resource is being extracted including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource, and if it is used as a verb (b) in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area".
13 Thompson and Benjamin South African Labour Law G1-1.
14 Thompson and Benjamin South African Labour Law G1-1.
15 Erasmus ea Human Resource Management for the Public Sector 395.
16 The MHSA was the result of the Mines and Works Act 27 of 1956 (hereafter MWA) being repealed. Masilo and Rautenbach Commentary on Mine Health and Safety 1-1.
17 Preamble of the MWA.
18 Masilo and Rautenbach Commentary on the Mine Health and Safety 1-1. The MHSA differs from the NWA, in the sense that equal protection is provided to employers and employees of all races.
injuries. These statistics caused the National Union of Mineworkers (hereafter referred to as the NUM) to be established in 1980. Their main concern was, amongst others, to become a single labour organisation that could protect the economic and social welfare of mineworkers, as well as to address gaps and weaknesses in the legislation dealing with the health and safety of mineworkers. The NUM instigated the drafting of the Mine Health and Safety Bill of 1993, which led to the MHSA.

The first legislation dealing with health and safety in industry (other than mining) was the Machinery and Occupational Safety Act (hereafter referred to as MOSA). The MOSA was the first comprehensive legislation on health and safety and was regulated by the then Department of Labour. The MOSA made provision for the health and safety of people at work and for the mitigation and avoidance of different hazards in the workplace. This Act was amended once to introduce different duties and rights for the health and safety of workers in industry. The OHSA replaced the MOSA in 1993.

The introduction of separate legislation to deal with the safety of workers in the mining sector and industry resulted in fragmentation as two different government departments enforced the legislation and functioned differently. This caused both

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19 Masilo and Rautenbach Commentary on the Mine Health and Safety 1-1.
20 Masilo and Rautenbach Commentary on the Mine Health and Safety 1-1. This union is also known as the NUM. The NUM consists of different branches which could only exist if there are a 100 members or in the case where there is a Regional Committee which forms a branch with one or more workplace whose members join. It also consists of four different unions, the NUM was more specifically formed in May 1987.
21 The NUM.
23 Such as the discrimination of different workers, poor legislative implementation, as well as work-related injuries and death. NUMSA 2013 http://www.numsa.org.za/history/.
26 Thompson and Benjamin South African Labour Law G1-1.
29 By the Machinery and Occupational Safety Amendment Act 40 of 1989.
30 Thompson and Benjamin South African Labour Law G1-2.
31 Kotzé 2006 PER 1.
32 Kotzé 2006 PER 1.
in institutional\textsuperscript{33} and legislative\textsuperscript{34} fragmentation to occur due to the history and development of the health and safety legislation.\textsuperscript{35}

\textbf{1.3 MHSA and OHSA: a comparison}

The possible institutional and governance fragmentation can also be seen from a comparison of the MHSA and OHSA; they have similarities and differences. The similarities include, for example, the obligation of the employer to protect the health and safety of the employees\textsuperscript{36} as far as reasonably practicable.\textsuperscript{37} Both Acts aim to provide measures that will protect the health and safety of workers in the work environment.\textsuperscript{38} Commentators also allege that the MHSA provides better protection for workers than the OHSA\textsuperscript{39} and believe the MHSA is a more effective template for a modern approach to health and safety legislation.\textsuperscript{40} The OHSA is administered by the Department of Labour and the MHSA by the Department of Mineral Resources, which results in different interpretations as to what is expected regarding health and safety. The institutions, or functionaries, which are involved with the monitoring of health and safety, differ. The role players include, for example, employers, employees, manufacturers and suppliers, users of machinery and representatives and committees, and finally government institutions. The different rights and duties of the various role players, as well as the rights, duties and functions of the different inspection authorities seem to differ. The enforcement of both acts has apparent similarities, but also present differences.\textsuperscript{41}

\begin{flushleft}
\textsuperscript{33} Kotzé 2006 \textit{PER} 3 describes institutional fragmentation as the fragmentation between the different functionaries of the different governmental spheres.

\textsuperscript{34} Kotzé 2006 \textit{PER} 3 describes legislative fragmentation as the fragmentation between institutional/sectoral and inter-sectoral. This occurs in the instance of the OHSA and MHSA.

\textsuperscript{35} Kotzé 2006 \textit{PER} 15.

\textsuperscript{36} See chapter 3.2.1.2.1 and 4.2.2.2.1.

\textsuperscript{37} Section 1 of the OHSAct and section 5 of the MHSA.

\textsuperscript{38} Mentioned in both section 1 of the MHSA and in the Preamble to the OHSA.

\textsuperscript{39} Masilo and Rautenbach \textit{Commentary on the Mine Health and Safety} 1-2.

\textsuperscript{40} Thompson and Benjamin \textit{South African Labour Law} G1-45.

\textsuperscript{41} These similarities and differences are discussed in chapters 3 to 5.
\end{flushleft}
1.4 Movement towards integration

In the past few years, there have been attempts to integrate the MHSA and the OHSA.\textsuperscript{42} In 1999, Cabinet discussed the integration of the different government agencies concerning health and safety prevention.\textsuperscript{43} A Draft Policy\textsuperscript{44} was proposed stating, amongst others, that the OHSA should reflect the values of the MHSA.\textsuperscript{45} The Draft Policy was followed in 2003 by the Integrated Occupational Health and Safety Bill (hereafter referred to as the 	extit{Integrated Bill}) to address fragmentation in occupational health and safety.\textsuperscript{46} The purpose of the 	extit{Integrated Bill} is to establish an authority that will be responsible for the implementation and administration of an integrated policy.\textsuperscript{47} This 	extit{Integrated Bill} never developed into anything more than just a Bill; the reason for this has never been made known. By the time of writing of this dissertation, no final Bill has been published yet.\textsuperscript{48}

It seems that there is a need, at least theoretically, to discuss whether one health and safety act in South Africa can be introduced as this argument arises from time to time.

1.5 Research question and aims

The research question therefore is whether one health and safety act for both mining and industry could be introduced into the South African legal system? The aim of this study is to determine if a single health and safety act can be introduced in South Africa. In order to reach this aim, sub-aims are formulated:

- To provide a background to health and safety legislation in South Africa;
- To define terminology applicable to the health and safety legislation in South Africa;
- To discuss the role players, including their rights and duties, referred to in the health and safety legislation;

\textsuperscript{42} These attempts date back to as far as 2003.
\textsuperscript{43} Thompson and Benjamin 	extit{South African Labour Law} G1-3.
\textsuperscript{45} Thompson and Benjamin 	extit{South African Labour Law} G1-3.
\textsuperscript{46} Preamble of the 	extit{National Occupational Health and Safety Integration Bill} of 2003.
\textsuperscript{47} Clause 2 of the 	extit{National Occupational Health and Safety Integration Bill} of 2003.
\textsuperscript{48} At 2 November 2016. The researcher made several attempts to obtain the information from the Department of Labour on the progress of the Bill, but no information was forthcoming.
• To discuss the enforcement measures in the health and safety legislation;
• In order to come to a conclusion and to make recommendations.

The study is a literature-based study of primary sources, namely the OHSA, MHSA, policies and the Integration Bill. The legislation will be compared with regard to the terminology, role players and the enforcement of the legislation. This study is supported by a study of secondary literature, such as textbooks, chapters in books, journal articles and internet sources.

In this dissertation chapter 2 explores the definitions, other than South African definitions of terminology applicable to occupational health and safety and provide a background to health and safety legislation. These definitions are discussed in order to determine as to whether or not the definitions in terms of South African legislation could be broadened. Chapter 3 compares the definitions and institutions in terms of the MHSA, the OHSA and the Integrated Bill. Chapter 4 explores the different role players identified and compare their rights and duties in terms of the MHSA, the OHSA and Integrated Bill. Chapter 5 discusses the different enforcement measures in the MHSA, OHSA and the Integrated Bill. Thereafter chapter 6 will conclude the study and provide recommendations on whether it is possible to introduce a single health and safety Act in South Africa.

Chapter 2 Background

2.1 Introduction

In order to have a clear understanding of health and safety, it is necessary to define "health and safety", "workplace", "hygiene", "hazards", "risks" and "reasonable practice". These terms will be defined by considering different secondary literature sources, other than South African legislation, such as academic journal articles, and some reference will be made to case law. After considering these terms, the different role players involved will be identified, thereafter the enforcement of health and safety legislation will be discussed, specifically command and control, and also the different alternative enforcement measures.

2.2 Definitions

It is necessary to determine what is to be understood under "health and safety" in the "workplace". These terms are related to "hygiene", "hazards", "risks" and "reasonable practice". The terms may have different meanings for different people depending on where their work environment. A common understanding of the terminology may provide a better foundation for the integration of terminology used in both mining and industry. Therefore, the aim of this chapter is to provide a background to health and safety legislation in terms of definitions, the applicable role players and the enforcement of such legislation.

2.2.1 Health and safety

In order to define the term "health and safety" it is necessary to establish first what is meant by "health". The Occupational Health and Safety Convention\(^5\) define "health" as "not merely the absence of disease or infirmity, it also includes the physical and mental elements affecting health which are directly related to safety and hygiene\(^5\) at work".\(^5\) "Health", according to the World Health Organization (WHO), is the complete physical,

\(^{50}\) 155 of 1981.
\(^{51}\) See 2.2.5 for the definition of the term "hygiene".
\(^{52}\) A3(e) of the Occupational Health and Safety Convention (1981).
social and mental state of well-being. "Health" is therefore not necessarily the absence of a disease only. "Well-being" can be seen as a state of being healthy, happy, or even prosperous. When "health" is considered in the workplace, the term "occupational health" is sometimes used. In 1950 the ILO and WHO defined "occupational health" as the "promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations by preventing departures from health; controlling risks and the adaptation of work to people, and people to their jobs". "Health" relates to both mental and physical integrity. Workplace health specifically deals with the well-being of workers, therefore the workplace should be in such a state that workers' well-being is not negatively affected.

According to the Webster Dictionary, "safety" is deemed as the "freedom from danger or harm or a state of being safe". It is also a state where something is not deemed as dangerous or harmful for the individuals involved.

"Occupational health and safety" has been defined as the study of hazards arising in the workplace and the analysis, recognition, anticipation and control thereof. "Occupational health and safety" is certain if the employer does "health and safety management" as mentioned in the Business Dictionary.

53 World Health Organization.
56 Currie and De Waal The Bill of Rights Handbook 526.
59 Occupational safety includes the health and well-being of people employed in a work environment. To promote the safety of employees, the law and regulations are enforced by the US Department of Labor to prevent workplace illnesses, accidents, injuries, and fatalities, as seen in the Business Dictionary under occupational safety http://www.businessdictionary.com/definition/occupational-safety.html. The reason for mentioning the US Department of Labor is only for definition purposes, no reference will be made to the US legislation for purposes of this dissertation.
63 According to this dictionary it is deemed as: Organized efforts and procedures for identifying workplace hazards and reducing accidents and exposure to harmful situations and substances. It also includes training of personnel in accident prevention, accident response, emergency
For purposes of this dissertation "occupational health and safety" may be defined as the control, prevention, anticipation and analysis of any hazards which could occur in the workplace and which could cause injury or illness, or which could affect the workplace health and well-being of the employee. If the definitions of "health" and "safety" are considered, it seems that "occupational health" can be defined as "the physical, social and mental elements relating to a worker’s well-being in the workplace by ensuring a disease and injury free workplace, a workplace where risks are controlled; where the work is adapted to the people and the people to their work". The reason for considering these definitions with reference to foreign legislation is to see if the South African definitions are up to standard, and also how it compares to foreign definitions.64

2.2.2 Workplace

To ensure health and safety in the workplace, it should be a place of innovation.65 Before discussing the required innovation, one should understand what the term "workplace" means. According to the Occupational Health and Safety Convention,66 the "workplace" includes any place where employees need to go to on a direct or indirect instruction of the employer.67 It can also be defined as the physical location where the operations or work of an agency is performed.68 The OSH profile for Singapore69 mentions a few different places that are included in the term "workplace", namely:

- construction worksites;
- shipyards;
- both oil and petrochemical plants;
- semiconductor plants and
- metalworking factories.70

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64 See chapter 3.2.
69 Reference made to this is only for example purposes, the Singapore legislation will not be discussed in this dissertation.
70 Occupational Safety and Health Profile for Singapore 16.
These places seem to be examples as they do not refer to mines and may exclude certain workplaces, for example abattoirs. "Workplace" has also been defined as "an establishment or facility at a particular location, one or more work area". It is not clear whether "workplace" would include driving to and from the workplace, or if it includes the "course of employment". According to the Business Dictionary, the "course of employment" can be defined as follows:

Regular activities through which an employee carries out (or is supposed to carry out) the orders of his/her employer. A wrong is considered committed during the course of employment only if what the employee was doing (at the time the wrong happened) falls within the scope of those activities.

On interpretation of the definition, it seems as if the "workplace" would include driving to and from the workplace. In Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others, the court interpreted the term "workplace". This court discussed the term as defined in section 213 of the Labour Relations Act. One of the disputes was based on whether or not different mines are deemed as separate workplaces. In this case the term was defined as "the place or places where the employees of an employer work". The court states that, "If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function, or organisation, the place or places where the employees work in connection with each independent operation constitutes the workplace for that operation". The court a quo mentioned that a "workplace" is "effectively, an independent operation with regard to its size, function or organisation". The court a quo found that mines are not independent operations as all mines are operated under a central head

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74 (JA103/2014) [2016] ZALAC 11.  
76 Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11.  
77 Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11 para 49.  
78 Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11 para 52.  
office where they are managed financially.\textsuperscript{80} Individual mines cannot be deemed as employers, as the overhead mining company is the employer.\textsuperscript{81} The appeal court concurred with the opinion of the court \textit{a quo}.\textsuperscript{82}

For purposes of this dissertation a "workplace" can be defined as every independent premises or place or operation with regards to size, function or organisation where an employee acts on instruction of the employer including driving to and driving from the workplace, and may include one or more places, managed by one central head office.

In a workplace a worker can be exposed to risks\textsuperscript{83} and hazards\textsuperscript{84} that could include, for example, the employee’s exposure to unhygienic circumstances. The term "hygiene" will be discussed first.

\textbf{2.2.3 Hygiene}

According to the WHO "hygiene" includes those conditions and practices that are deemed as a helping aid in maintaining the health of workers as well as the prevention of diseases being spread.\textsuperscript{85} "Occupational hygiene" refers to the anticipation, evaluation, recognition and control of conditions in the workplace that might lead to illness or any health effects.\textsuperscript{86} If a workplace is not hygienic, it cannot be deemed safe for an employee.\textsuperscript{87} The hygienic levels of the workplace is monitored through biological testing, for example the taking of urine samples and the testing thereof.\textsuperscript{88} The medical

\begin{flushleft}
\textsuperscript{80} Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11 para 55.
\textsuperscript{81} Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11 para 57.
\textsuperscript{82} Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11 para 86.
\textsuperscript{83} See 2.2.5.
\textsuperscript{84} See 2.2.4.
\textsuperscript{85} There are different types of hygiene. It is necessary to consider this as in the workplace both hand hygiene and medical hygiene are applicable. WHO http://www.who.int/topics/hygiene/en/. While in the workplace one's hands are exposed to unhygienic circumstances, it is necessary to determine what amount of dirt exposure is deemed as safe for the employee.
\textsuperscript{86} Thompson and Benjamin \textit{South African Labour Law} G1-17.
\textsuperscript{87} Thompson and Benjamin \textit{South African Labour Law} G1-26.
\textsuperscript{88} Thompson and Benjamin \textit{South African Labour Law} G1-26.
\end{flushleft}
practitioners of the workplace conduct these tests. In order to ensure occupational hygiene employers may appoint occupational hygienists who then assist them in understanding and minimising the hazards. Occupational hygienists come from many different backgrounds such as chemists, doctors, nurses, engineers and others that specialize in the exposure to hazards in the workplace. The reason why occupational hygiene is important is that, if the workplace is hygienic, chances are that unexpected illnesses may not occur.

2.2.4 Hazards

The responsible authorities should ensure that "hazards" do not occur. A "hazard" can be defined as having the potential to cause harm. "Hazards" are classified into different categories namely ergonomic, physical, biological and chemical hazards. Some examples of work-related hazards include the use of electricity that may lead to fire or explosions, the inhalation of or exposure to hazardous substances. Hazards can affect both the physical and mental health of the employees; therefore it is important to ensure that a working environment is as hazard-free as possible. A hazard-free working environment has a beneficial impact on the economy of the workplace.

To ensure a hazard-free working environment, employers should take note of the precautionary principle. Here the important principle is that one should rather avoid certain circumstances, if one cannot make a good scientific-based decision. This ensures that employers do not take steps that could be hazardous to employees. For the purpose of this study a "hazard" can be defined as "any circumstance which has the

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89 Thompson and Benjamin South African Labour Law G1-26.
93 Take one step http://www.takeonestep.org/Pages/yoursafety/safenotsorry/workplacehazards.aspx.
96 Burton WHO Healthy Workplace Framework and Model 33.
97 Burton WHO Healthy Workplace Framework and Model 34.
98 Burton WHO Healthy Workplace Framework and Model 34.
99 Burton WHO Healthy Workplace Framework and Model 34.
potential to cause harm or exposure to danger”. Hazards may also be associated with "risks".

### 2.2.5 Risks

It is important to distinguish between a "hazard" and a "risk". A "risk" is a measure of the possibility of a specified harmful effect in specified circumstances. According to the ILO Code of Practice a "risk" is defined as:

> A combination of the likelihood of an occurrence of a hazardous event and the severity of injury or damage to the health of workers caused by this event.

A "hazard" is something that can cause harm, and a "risk" is the chance or possibility that a hazard will, for example, cause harm. In other words, a "hazard" is the "potential source of harm" and a "risk" is the likelihood of someone being harmed or of a hazard occurring.

Employers have to undertake "risk assessments". The meaning of a "risk assessment" is the "process of evaluating the risks to safety and health arising from hazards at work". According to the ILO "risks" should be analysed by using the following procedure:

- a) the factors should be identified which could affect hazards and also the severity of the potential consequences;
- b) by the evaluation of the existing controls and the effectiveness thereof (of the control measures);
- c) by estimating the possible consequences and the likelihood of the consequence, this estimation will be done in terms of the levels of exposure or hazards;

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103 ILO Code of Practice Safety and health in the use of machinery 10.
104 ILO Code of Practice Safety and health in the use of machinery 10.
107 Health and Safety Authority Hazard and Risk 2016 http://www.hsa.ie/eng/Topics/Hazards/.
110 ILO Code of Practice Safety and health in the use of machinery 10.
d) a whole combination of all of the above to ensure the best evaluation is done and that the prioritization of risk actions.\textsuperscript{111}

The employer will have to consider the severity and scope of the hazards or risks applicable, the available knowledge, if it would have been possible to mitigate such hazard or risk, and the cost and benefits of mitigating the hazard or risk.\textsuperscript{112} For purposes of this dissertation, "risks" can be defined as the likelihood of an incident/occurrence of hazardous situations that could cause severe injury or illness, as assessed in terms of "risk assessments".\textsuperscript{113}

2.3 Role players

There are different role players involved in health and safety in the workplace, each with its own responsibilities with regarding health and safety. International labour standards define the rights and duties of the role players involved.\textsuperscript{114} The different role players include, amongst others, the employers, employees, managers, committees, representatives, users of machinery, designers and manufacturers, and government institutions.

"Employer" is defined as "any physical or legal person that employs one or more workers".\textsuperscript{115} Primarily, an employer’s main duty is to ensure the health and safety of his or her employees and anyone who enters the workplace.\textsuperscript{116} The employers must, for example, ensure that the installation of machinery is inspected.\textsuperscript{117} A competent person must do inspection regularly.\textsuperscript{118} Periodical risk assessment of machinery must be done, especially when modifications are undertaken.\textsuperscript{119} The appropriate measures must be used in terms of the identified risks.\textsuperscript{120} Records and documentation should be compiled regarding operating procedures, job safety analysis, safe work-method statements and

\textsuperscript{111} ILO Code of Practice \textit{Safety and health in the use of machinery} 27.
\textsuperscript{112} Ellerbeck 2013 \textit{Without Prejudice} 41.
\textsuperscript{113} See also chapter 3.6.
\textsuperscript{114} ILO \textit{Building modern and effective labour inspection systems} 15.
\textsuperscript{115} ILO Code of Practice \textit{Safety and health in the use of machinery} 10.
\textsuperscript{117} ILO Code of Practice \textit{Safety and health in the use of machinery} 24.
\textsuperscript{118} ILO Code of Practice \textit{Safety and health in the use of machinery} 24.
\textsuperscript{119} ILO Code of Practice \textit{Safety and health in the use of machinery} 32.
\textsuperscript{120} ILO Code of Practice \textit{Safety and health in the use of machinery} 32.
working instructions. The employers are responsible for the training of competent employees. The employer has to liaise with the relevant government departments and unions on the matter of the OHS.

Safety and health committees are to be established. These committees consist of safety and health representatives and employer representatives. They function in accordance with the local legislation, regulations and code of practice. The health and safety representatives are responsible to monitor the effectiveness of the health and safety measures. Health and safety committees are constituted when there are more than two representatives.

Workers are defined as "any person who performs duties, either regularly or temporarily, for an employer". The workers are entitled to certain rights but they also have different duties, such as safe working methods. The workers should also cooperate with the employers. The workers should use the personal protective equipment (PPE) provided to them and should not misuse any safety provisions. The workers have to participate in health and safety training. They have to be consulted. Workers also have to undergo training on all relevant national legislation and practice. Workers' rights include the right to participate in the review and application process of new OHS measures.

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121 ILO Code of Practice *Safety and health in the use of machinery* 34.
This training should be provided in terms of the requirements of the national law and the practice thereof. The information is seen in the ILO Code of Practice *Safety and health in the use of machinery* 38.

122 ILO Code of Practice *Safety and health in the use of machinery* 35.


125 Representatives of the employees.

126 Thompson and Benjamin *South African Labour Law* G1-36.


128 As defined earlier in the paragraph.


130 ILO Code of Practice *Safety and health in the use of machinery* 39.

131 ILO Code of Practice *Safety and health in the use of machinery* 40.

132 ILO Code of Practice *Safety and health in the use of machinery* 40.

133 ILO Code of Practice *Safety and health in the use of machinery* 40.

Other role players are the manufacturers and designers. Article 12 of the *Occupational Health and Safety Convention* places the responsibility on manufacturers, designers and importers to utilise the principle of prevention. Therefore, the correct measures should be used to prevent any danger or risk. Designers and manufacturers should design machinery to ensure that hazards are eliminated as far as possible. They are responsible to ensure that the machinery complies with the safety requirements. This, for example, should provide the correct certification and documents as required by the relevant laws and regulations. The correct instructions should be provided to the employer, employee and user of machinery to avoid any risks and hazards. The designers and manufacturers have the duty to complete a risk assessment in relation to the machinery/equipment that have to include:

- a) the determination of all of the uses the machinery might be used for, including both misuses and intended uses;
- b) the identification of both hazards and hazardous situations, which might occur with use and misuse;
- c) the most reasonably practicable elimination of any hazards;
- d) the estimation of risks, which include the taking into account the possible severity of injuries, health damage and also the probability of the occurrence thereof;
- e) to evaluate the adequate control of the risk levels with a view to the required reduction of risks;
- f) the reduction of risks identified by the application of measures for protection.

The government creates institutions that are responsible for occupational health and safety. Governments have the responsibility for the dialogue between the different parties or role players. In terms of tripartite relationships (between the government, employers and trade unions; in the instance where there is no union present, the

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138 ILO 2009 *Promoting a safe and healthy working environment* 51.
139 As identified by the ILO Code of Practice.
140 ILO Code of Practice *Safety and health in the use of machinery* 14.
141 ILO Code of Practice *Safety and health in the use of machinery* 14.
142 ILO Code of Practice *Safety and health in the use of machinery* 14.
143 ILO Code of Practice *Safety and health in the use of machinery* 15.
144 ILO Code of Practice *Safety and health in the use of machinery* 15-16.
relationship is directly with the employee). Correct utilisation of these public-private partnerships is expected from the government.  

2.4 Enforcement

According to section 24 of the Constitution, it is necessary to make use of "reasonable legislative and other measures" to ensure an environment that is not detrimental to any individual’s health and well-being. These measures could include enforcement instruments. There are various enforcement instruments that can be used such as command-and-control instruments, alternative instruments and economic instruments.

2.4.1 Command and control instruments

Enforcement instruments are known as command-and-control instruments. Command and control instruments include measures where the government has the duty to prescribe certain requirements that are to be promoted and enforced. These instruments include, for example, the issuing of authorisation licences and permits. Command-and-control instruments have both advantages and disadvantages. Command and control includes the "do's and don'ts" of health and safety enforcement. Australia's enforcement strategy is, for example, pro-active. The Australian approach includes inspections and surveys that ensure workplace safety and compliance with duties. This more structured and evidence-based approach is followed to avoid accidents. Ideally, compliance should be measured by incident

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147 ILO 2008 International Labour Conference 16.
148 Section 24 of the Constitution.
149 Paterson and Kotzé Environmental Compliance and Enforcement 375. Including criminal measures and administrative measures.
150 UNEP Manual on compliance with and enforcement of multilateral environmental agreements 300 and Nel and Wessels 2010 PER 48.
151 UNEP Manual on compliance with and enforcement of multilateral environmental agreements 300.
152 Which includes dependability, as it is a solid guideline, clarity and easy detectability of non-compliance. See Nel and Wessels 2010 PER 52-53.
153 Which includes ineffective policy choice deliveries, the information sensitivity which could cause problems, inflexibility and difficulty to perform. See Nel and Wessels 2010 PER 52-53.
154 UNEP Manual on compliance with and enforcement of multilateral environmental agreements 300.
155 ILO 2009 Promoting a safe and healthy working environment 35.
156 ILO 2009 Promoting a safe and healthy working environment 35.
157 ILO 2009 Promoting a safe and healthy working environment 35.
reporting, which entails that companies are required to report any work-related accidents.\textsuperscript{158} The OHSA, amongst others, \textsuperscript{159} makes provision for criminal prosecution of any non-complying party.

There are different bodies responsible for compliance in terms of health and safety legislation, specifically inspectorates.\textsuperscript{160} It is ideal to have a regulatory body that reacts to fatalities and accidents, identifying whether health and safety management was lacking.\textsuperscript{161} Such a body should have clear authority to collect implementation information and be allowed to access different facilities to monitor compliance.\textsuperscript{162} Enforcement can be ensured by inspection\textsuperscript{163} and penalties.\textsuperscript{164} Labour inspectorates are the main source of advice and guidance in terms of the regulation and enforcement and laws.\textsuperscript{165} Article 5(d) of the \textit{Convention} makes provision for communication in terms of enforcement.\textsuperscript{166}

Administrative measures, for example, include the issuance of compliance notices, directives, abatement notices and the suspension and withdrawal of authorisations.\textsuperscript{167} One of the measures includes the issuing of a notice, which requires the wrongdoer to take reasonable steps to correct the non-compliance. If the wrongdoer fails to comply with the prescriptions of the notice, the administrator may take further legal action,\textsuperscript{168} for example criminal prosecution as set out above.

\textsuperscript{158} Occupational Safety and Health Profile for Singapore 19.
\textsuperscript{159} Thompson and Benjamin \textit{South African Labour Law} G1-9.
\textsuperscript{160} These are examples taken from the OSH Profile for Singapore 21.
\textsuperscript{161} Occupational Safety and Health Profile for Singapore 17.
\textsuperscript{162} UNEP \textit{Manual on compliance with and enforcement of multilateral environmental agreements} 405.
\textsuperscript{163} A 9(1) of the \textit{Occupational Health and Safety Convention} of 1981. The inspection can be done in terms of a case management approach. Where a team commits to drafting a new strategy to avoid accident occurrence. See the \textit{Occupational Safety and Health Profile for Singapore} 17.
\textsuperscript{164} A 9(2) of the \textit{Occupational Health and Safety Convention} of 1981.
\textsuperscript{165} ILO 2009 \textit{Promoting a safe and healthy working environment} 36.
\textsuperscript{166} ILO 2009 \textit{Promoting a safe and healthy working environment} 36.
\textsuperscript{167} In South Africa the rules of the \textit{Promotion of Administrative Justice Act} 3 of 2000 will be applicable here.
\textsuperscript{168} Section 6 of the PAJA.
2.4.2 Other instruments

Alternative measures include both incentive-based measures and voluntary measures.\textsuperscript{169} Incentives schemes\textsuperscript{170} include a reward and encouragement system, which imply that complying parties are awarded.\textsuperscript{171} These measures could, for example, include tax benefits, deposit-refund systems and subsidies. Different categories of awards are available such as workplace safety and health best practice awards,\textsuperscript{172} safety and health performance awards,\textsuperscript{173} safety and health award recognition for projects,\textsuperscript{174} developer awards,\textsuperscript{175} innovation awards\textsuperscript{176} and workplace safety health officer\textsuperscript{177} awards.\textsuperscript{178} Voluntary measures are aimed at voluntary self-regulation. This measure specifically relies on the education of the employer and the employee, which could lead to negotiations in the instance of non-compliance.\textsuperscript{179} Examples of these measures include for example the OHSAS 18001,\textsuperscript{180} corporate social responsibility programmes, labelling schemes, public participation and training programmes, and auditing processes. According to Vosko and others international standard-setting organizations (hereafter

\begin{footnotes}
\item[169] Nel and Wessels 2010 \textit{PER} 53.
\item[170] Incentive schemes can be defined as "A program implemented by an organization deliberately intended to induce or encourage a specific action by using incentives." It is used to motivate parties to comply with the prescribed health and safety provisions. See also Investor Words 2016 http://www.investorwords.com/19095/incentive_scheme.html.
\item[172] Where companies are awarded for the elimination and control of health and safety hazards in the workplace. \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[173] \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[174] The recognition in the instance where companies implemented the health and safety systems in an impressive manner. \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[175] Where companies are awarded for new projects which achieved good safety and health results through good implementation and management. \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[176] This is an award for developers who play an active role in ensuring good OSH practices among the contractors. \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[177] The team with the most innovative solution for health and safety gaps and issues is awarded. \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[178] Awards WSHO’s who help in the creation of safe and healthy workplace. \textit{Occupational Safety and Health Profile for Singapore} 21.
\item[179] Vosko \textit{et al} 2011 "New approaches to Enforcement and Compliance" 6, see also http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf.
\item[180] Known as Occupational Health and Safety management systems.
\end{footnotes}
the ISO) have not developed a health and safety standard on the same level as the ISO 14000 standard.\textsuperscript{181}

Agreement or commitment-based instruments speak for themselves as it is based on the agreement between parties holding parties accountable.\textsuperscript{182} Commitment is a voluntary tool that internalises the process of enforcement in the entities that hold themselves accountable.\textsuperscript{183} In terms of the agreement-based enforcement instruments, one that would be specifically applicable to health and safety is the tripartite agreements or relationships. "Tripartite relationships" help in creating a framework for labour inspection, which is very important for health and safety.\textsuperscript{184} According to De Silva,\textsuperscript{185} tripartite relationships can be defined as:

The cooperation process whereby governments:

- Consult and involve representatives of employers and workers in the formulation of socio-economic policies at the national and industry levels and, in particular, on the legal framework of labour relations and labour-related policy;\textsuperscript{186}
- Ensure that the social partners’ views and concerns are reflected in the policies and laws formulated;\textsuperscript{187}
- Provide the social partners with opportunities to contribute to socio-economic progress, and thereby enable them to fulfil a wider role than one of only providing direct services to their members in relation to matters covered by the employment relationship.\textsuperscript{188}

"Tripartite relationships" create a certain responsibility on the government regarding health and safety.\textsuperscript{189} In terms of a tripartite relationship there are six elements\textsuperscript{190} applicable. The elements include the following: the right to work, the right to associate, the right to collective bargaining, the right to withhold labour, the right to protection and the right to be trained.\textsuperscript{191} The right to work includes a right to equal opportunities in the workplace, the freedom of performing a work of choice, as well as the right to

\begin{itemize}
  \item Consult and involve representatives of employers and workers in the formulation of socio-economic policies at the national and industry levels and, in particular, on the legal framework of labour relations and labour-related policy;
  \item Ensure that the social partners’ views and concerns are reflected in the policies and laws formulated;
  \item Provide the social partners with opportunities to contribute to socio-economic progress, and thereby enable them to fulfil a wider role than one of only providing direct services to their members in relation to matters covered by the employment relationship.
\end{itemize}

\textsuperscript{182} Nel and Wessels 2010 \textit{PER} 48.
\textsuperscript{183} Nel and Wessels 2010 \textit{PER} 48.
\textsuperscript{184} ILO 2010 \textit{Building modern and effective labour inspection systems} 18.
\textsuperscript{185} De Silva \textit{ILO Publications} 2.
\textsuperscript{186} De Silva \textit{ILO Publications} 1.
\textsuperscript{187} De Silva \textit{ILO Publications} 1.
\textsuperscript{188} De Silva \textit{ILO Publications} 2.
\textsuperscript{189} ILO 2008 \textit{International Labour Conference} Preface.
\textsuperscript{190} UFS https://lms.tuit.co.za/courses/107/pages/the-elements-of-the-tripartite-relationship.
work freely whether or not work union is present. All of these different rights are the responsibility of the government and the employers. The state can only ensure these rights by making use of a legislative framework that stipulates that the employer should comply with these rights. A problem that crops up is the fact that there is no definite framework or guideline to go by in terms of tripartite relationships, as every country has different needs and legal frameworks.

2.5 Conclusion

The term "occupational health and safety" can, for purposes of this study, be defined as the control, prevention, anticipation and analysis of any hazards which could occur in the workplace and which could cause injury or illness, or which could affect the health and well-being of the employee in the workplace. A "workplace" can be defined as every independent premises, place, or operation regarding size, function or organisation where an employee acts on instruction of the employer. This includes driving to and driving from the workplace, and may include one or more places managed by one central head office, for example where mines are many single areas managed by one overhead company. "Hygiene" is an important aspect as unhygienic circumstances influence the health and safety of employees. A "hazard" can be defined as any circumstance that has the potential to cause harm. Hazards may also be associated with "risks". The term "risks" can be defined as the likelihood of an incident/occurrence of a hazardous situation, which could cause severe injury or illness. These would be assessed in terms of the risk assessments.

There are different role players involved in occupational health and safety in the workplace: the employer, employees, health and safety committees and representatives, suppliers and manufacturers, users of machinery and government institutions. These role players have different rights and duties important for the

194 De Silva ILO Publications 2.
195 See chapter 3.2 for reference to South African definition.
196 See chapter 3.4 for reference to South African definition.
197 See chapter 3.5 for reference to South African definition.
198 The role players are discussed in chapter 4 of the dissertation.
health and safety regime. The government departments' responsibilities include the policymaking process and the giving of advice to the Minister. These departments are also responsible for the enforcement of health and safety legislation. The enforcement of health and safety legislation can be ensured in terms of the different enforcement tools. These tools include command and control instruments and other enforcement tools\textsuperscript{199}, which will be discussed under chapter 5.

\textsuperscript{199} These will be discussed in chapter 5.
Chapter 3 Definitions

3.1 Introduction

In this chapter, the definitions in the MHSA, the OHSA and the Integrated Bill will be compared. In this section the definitions of "health and safety", "workplace", "occupational hygiene", "hazards and risks", "incidents" and "reasonable practice" in the MHSA, OHSA and the Integrated Bill (where applicable) will be compared. The definitions will also be compared with the definitions referred to in chapter 2.

3.2 Health and safety

The MHSA did not define "health and safety". "Health" is referred to as the "occupational health in mines". The MHSA also refers to the term "healthy" which means to be illness or injury free from any occupational occurrence. Reference is also made to a health and safety standard to promote health and safety in mines.

The MOSA does not mention "health", but the OHSA includes both "health and safety" in its title. An employee is deemed "healthy" if he or she is free from illness or injury, which could occur because of occupational causes.

The National Occupational Health and Safety Integration Bill defines "occupational health and safety" as all those activities that are connected with:

a) the promotion of health and safe work practices and working environments and conditions;
b) the prevention of work-related accidents and diseases;
c) the provision of medical assistance to persons who are injured in work-related accidents or who contract work-related diseases; and
d) the provision of medical aid, compensation, rehabilitation and other benefits to persons who are injured in work-related accidents, or who contract work-related diseases, including the dependants of persons who die as a result of these causes.

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200 Section 102 of the MHSA.
201 Section 102 of the MHSA.
202 Section 102 of the MHSA.
203 Thompson and Benjamin South African Labour Law G1-16. As mentioned before, the mining industry is not covered by the OHSA.
204 Thompson and Benjamin South African Labour Law G1-16.
205 Section 1 of the OHSA.
Both the MHSA and the OHSA refer to "health" or "healthy" to mean that employees are free from illness and injury caused during their occupation. The Integrated Bill provides a more comprehensive definition and includes not only the prevention from illness and injury, but also the promotion of health and safety practices, the provision of medical assistance, medical aid and rehabilitation. The definitions in chapter 2 also refer to well-being and to the steps that need to be taken to ensure physical, emotional and social well-being. When comparing "health and safety" with the definition in chapter 2,\textsuperscript{208} it is important to note that "occupational health" may also include the promotion of very high degrees of well-being. "Health and safety" may include the steps taken to ensure that no hazards occur in the workplace. When compared with the definition of "health and safety" in chapter 2 – which is defined as "the physical, social and mental elements relating to a worker’s well-being in the workplace by ensuring a disease and injury free workplace, a workplace where risks are controlled and where the work is adapted to the people and the people to their work",\textsuperscript{209} it seems clear that the definition of the Integration Bill is the more comprehensive term and should therefore be used with the addition of the physical, social and mental elements of well-being.

### 3.3 Workplace

As health and safety relates to the workplace, it is necessary to clarify the definition of the term "workplace". The MHSA defines "working place" as "any place at a mine\textsuperscript{210} where employees travel and work".\textsuperscript{211} In the MHSA, "works" are also defined as:

any place, excluding a mine, where any person carries out -

(a) The transmitting and distributing to another consumer of any form of power from a mine, by the employer thereof, to the terminal point of bulk supply or where the supply is not in bulk, to the power supply meter on any such other consumer’s premises; or

(b) Training at any central rescue station;

(c) The making, repairing, re-opening or closing of any subterranean tunnel; or

(d) Any operations necessary or in connection with any of the operations listed in this paragraph.\textsuperscript{212}

\textsuperscript{207} Clause 1 of the Integration Bill of 2003.
\textsuperscript{208} See chapter 2.2.1.
\textsuperscript{209} See chapter 2.2.1.
\textsuperscript{210} See the footnote on the definition of mines on page 2.
\textsuperscript{211} Section 102 of the MHSA.
The OHSA defines "workplace" as "any premises or place where a person performs work in the course of his employment".\textsuperscript{213} The \textit{Integration Bill} does not mention the workplace. The OHSA definition is more comprehensive as it includes the words "course of employment". The definition corresponds to the OHS Convention's definition\textsuperscript{214}, which states that the workplace would include the area where an employee acts under an instruction of an employer, or act in the course of his or her employment. Such a definition implies that a health and safety act could also apply externally to the actual premises of the mine or industry. When comparing the definitions of South African legislation, one should consider the definition as in chapter 2. There "workplace" is defined as "every independent premises or place or operation with regards to size, function or organisation where an employee acts on instruction of the employer. This includes driving to and driving from the workplace, and may include one or more place managed by one central head office".\textsuperscript{216} In this instance the definition of chapter 2 will be the definition to follow but adding all the examples of a workplace such as mines, industry, abattoirs, excluding aviation.

3.4 Hygiene

According to the MHSA "occupational hygiene" means the "anticipation, recognition, evaluation and control of conditions at the mine that may cause illness or adverse health effects to persons".\textsuperscript{217} The OHSA defines "occupational hygiene" as the "anticipation, recognition, evaluation and control of conditions arising in or from the workplace, which may cause illness or adverse health effects to persons".\textsuperscript{218} The \textit{Integration Bill} does not define "occupational hygiene". Hygiene is necessary to ensure health in the workplace. For purposes of an integrated health and safety act, and for this dissertation, "occupational hygiene" could therefore be defined as the "anticipation,
recognition, evaluation and control of conditions arising in or from the workplace (including mines) which may cause illness or adverse health effects to persons”. This definition should be mentioned in a single health and safety act.

3.5 Hazards and risks

According to the MHSA a "hazard" can be defined as "a source of or exposure to danger".219 The OHSA has a similar definition in section 1. The MHSA defines "health hazard" as "any physical, chemical or biological hazard to health" or that the minister has declared as such.220 There is no definition of the term "hazard" in the Integration Bill. The definition concurs with the definition in chapter 2 which is "any circumstance which has the potential to cause harm".221 The definition in terms of chapter 2 of "hazards" is "any circumstance which has the potential to cause harm".222

According to the MHSA and OHSA a "risk" is the probability of any harm or occupational injury that may occur to any person involved in the workplace.223 This is something that the employer, or anyone involved, should avoid or mitigate as far as reasonably possible and practicable.224 The Integration Bill does not refer to "risk". The term "risk" should concur with the definition as mentioned in chapter 2, which is the "likelihood of someone being harmed or a hazard occurring".225 Hazards and risks relate to "incidents".

3.6 Incidents

The OHSA does not define an "incident", but it refers to section 24 of the Act.226 Section 24 categorises incidents as those where a) a person dies or is likely to die or loses a body part or becomes unconscious as a result of workplace activities,227 b) or is injured

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219 Section 102 of the MHSA.
220 Section 102 of the MHSA, section 1 of the OHSA.
221 See chapter 2.2.4.
222 See chapter 2.2.4.
223 Section 102 of the MHSA.
224 This term will be discussed in the paragraph to follow.
225 See chapter 2.2.5.
226 Section 24 of the OHSA
227 Thompson and Benjamin South African Labour Law G1-52.
to such an extent that work is impossible for at least 14 days,\textsuperscript{228} c) major incidents which should be reported to the inspector,\textsuperscript{229} and d) incidents which need not be reported. The OHSA defines "major incidents" as:

\begin{quote}
\textit{an occurrence of catastrophic proportions, resulting from the use of plant or machinery, or from activities at a work place}.\textsuperscript{230}
\end{quote}

These occurrences are deemed to have the potential to cause extensive harm.\textsuperscript{231} Another category necessary to report include those incidents that might endanger the health and safety of anyone.\textsuperscript{232} These "incidents" include the spilling of dangerous substances, machinery failing and machinery running out of control.\textsuperscript{233} There are also "incidents" which are not necessary to be reported to the inspector, namely traffic accidents,\textsuperscript{234} incidents in private households,\textsuperscript{235} as well as aviation accidents.\textsuperscript{236} The \textit{Integrated Bill} does not define this term either.

### 3.7 Reasonably practicable

The MHSA and the OHSA define "reasonably practicable" as practice that considers:\textsuperscript{237}

\begin{quote}
a) the severity and scope of the hazard or risk concerned;
b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
c) the availability and suitability of means to remove or mitigate that hazard or risk; and
d) the costs and the benefits of removing or mitigating that hazard or risk.\textsuperscript{238}
\end{quote}

Reasonable steps should be taken to avoid any hazards or risks. It is the responsibility of both the employer and employee to ensure that hazards and risks do not occur. The \textit{Integration Bill} does not mention the term "reasonably practicable". It is proposed that

\begin{itemize}
\item \textsuperscript{228} Section 24(1)(a) of the OHSA.
\item \textsuperscript{229} Thompson and Benjamin \textit{South African Labour Law} G1-52.
\item \textsuperscript{230} Section 1 of the OHSA.
\item \textsuperscript{231} Thompson and Benjamin \textit{South African Labour Law} G1-52.
\item \textsuperscript{232} Thompson and Benjamin \textit{South African Labour Law} G1-52.
\item \textsuperscript{233} Section 24(1)(c) of the OHSA.
\item \textsuperscript{234} Section 24(3)(a) of the OHSA.
\item \textsuperscript{235} Section 24(3)(b) of the OHSA. When an incident occurs in the household, the house owner should report the incident to SAPS.
\item \textsuperscript{236} Section 24(3)(c) of the OHSA.
\item \textsuperscript{237} Section 102 of the MHSA and s 1 of the OHSA.
\item \textsuperscript{238} Section 102 of the MHSA.
\end{itemize}
in a single health and safety act, this term should be considered as a measuring point to ensure every step is taken to ensure health and safety.

Reasonable practicability is mentioned in terms of the following issues: the identification of hazards,\textsuperscript{239} the evaluation of work-associated risks and the identification and evaluation of the steps necessary to avoid these risks and hazards.\textsuperscript{240}

\textbf{3.8 Conclusion}

The MHSA and OHSA does not include a comprehensive definition of the term "health and safety". The \textit{Integration Bill} identifies the different activities, which include the promotion of a healthy and safe workplace, the prevention of accident and disease, as well as the provision of medical assistance.\textsuperscript{241} When compared with the definition of "health and safety" in chapter 2, which is defined as "the physical, social and mental elements relating to a worker’s well-being in the workplace by ensuring a disease and injury free workplace, a workplace where risks are controlled and where the work is adapted to the people and the people to their work", it should also include references to the physical, social and mental elements of the workers' well-being.\textsuperscript{242} The \textit{Integration Bill}'s definition is a very comprehensive definition of "occupational health and safety". "Workplace" is defined as "the work premises or an area where the employee acts to an instruction of an employer, or act in the course of his or her employment".\textsuperscript{243} "Hazards" and "risks" occur because of unwanted incidents, where "hazards" include "any physical, chemical or biological hazard to health". The definition in terms of chapter 2 of "hazards" is "any circumstance which has the potential to cause harm".\textsuperscript{244} Therefore, "hazards" are "any physical, chemical or biological change in circumstances which could cause harm". "Risks" include the "probability of any harm or occupational injury to occur to any person involved in the workplace".\textsuperscript{245} The term "risk" should concur with the definition as mentioned in chapter 2, which is the "likelihood of

\textsuperscript{239} This is a duty of the employer- the rest of the duties will be discussed in chapter 4.
\textsuperscript{240} Section 12 of the OHSA.
\textsuperscript{241} See chapter 3.1.1.
\textsuperscript{242} See chapter 2.2.1.
\textsuperscript{243} See chapter 3.1.2.
\textsuperscript{244} See chapter 2.2.4.
\textsuperscript{245} See chapter 3.1.3.
someone being harmed or a hazard occurring". Hazards and risks will include the occurrence of different incidents. "Incidents" consists of different categories. In order to avoid incidents employers should follow reasonable practice to ensure the health and safety of the employees, and the employees should take every reasonable step to ensure health and safety of the employees. As seen earlier, there is no comprehensive definition of the term "incident", which should therefore be written into a single health and safety act in order to avoid ambiguity. In order to avoid incidents from occurring, the employer should take the "reasonably practicable" steps to ensure health and safety. Both the MHSA and the OHSA discuss this term. Steps include the determination of the severity and scope of the hazard or risk, the state of knowledge reasonably available, availability and suitability of removal and mitigation means, and the costs and benefits thereof.

In the following chapter, the different role players applicable to health and safety will be discussed with reference to the MHSA, the OHSA and the Integration Bill where applicable.

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246 See chapter 2.2.5.
247 See chapter 3.1.4.
248 Section 102 of the MHSA.
Chapter 4 Role players and their rights and duties

Even though certain workplaces are perilous, a general responsibility in terms of common law is placed on employers for ensuring safe working conditions. The role players have been identified as employers, employees, contractors, users of machinery, government institutions, and suppliers and manufacturers. In the paragraphs that follow a discussion takes place on role players, as well as their different rights and duties in terms of the OHSA, MHSA and the Integrated Bill, where applicable.

4.1 Duties of different role players

Health and safety legislation places a duty on the different role players to maintain a healthy and safe workplace for those affected. In the paragraph to follow the duties of the employer, employee, institutions, health and safety representatives, suppliers and manufacturers, and users of machinery will be discussed.

4.1.1 Employers

The duties and responsibilities of employers in terms of the MHSA, OHSA and the Integration Bill will now be discussed.

4.1.1.1 MHSA

The employer has a number of duties and responsibilities in terms of the MHSA. One of the most important duties of the employer is to ensure and maintain a healthy and safe environment on the mine. The employer must also provide training for the safe operation of machinery. There are also other general duties that the employer should

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249 Erasmus et al Human Resource Management for the Public 394.
250 See chapter 2.3.
251 See chapter 4.1.1
252 See chapter 4.1.2.
253 See chapter 4.1.6.
254 See chapter 4.1.3.
255 See chapter 4.1.4.
256 See chapter 4.1.5.
257 Section 5(1) of the MHSA.
258 Section 2(1)(a)(i)-(ii) of the MHSA.
comply with, namely the undertaking of risk assessments\textsuperscript{259} and the provision of information\textsuperscript{260} on health and safety issues.\textsuperscript{261} The employer should both eliminate and control risks\textsuperscript{262} as quickly as possible. The employer must make use of incident reports in order to conduct health surveillance in the workplace.\textsuperscript{263} To ensure that employees are safe, employers are obliged to provide PPE to them.\textsuperscript{264} This equipment should be provided along with training to showing the employees how it is correctly used.\textsuperscript{265}

It is one of the duties of the employer to take reasonably practicable steps to ensure a safe and healthy working space.\textsuperscript{266} In the \textit{Pike River}\textsuperscript{267} case, which originated in New Zealand,\textsuperscript{268} there was a methane explosion causing the death of many workers. The explosion was viewed as gross negligence on the employer’s part.\textsuperscript{269} In this case, the employer was found guilty because the hazard was not mitigated because the employer failed to manage a methane explosion or the air circulation.\textsuperscript{270} There are lessons to be learnt from this case such as that it is really important to take reasonable steps to avoid any hazards by making use of mitigation mechanisms and various control measures.\textsuperscript{271}

The duties of the employer, as stipulated in terms of the MHSA, promote a proactive approach, as they oblige the employer to take definite steps to protect his or her workers. If an employer does not take the steps as mentioned here, it could lead to health and safety disasters. An example applicable from a South African disaster is the one that took place in Merriespruit,\textsuperscript{272} where the collapse of a gold mine’s slime dam caused both death in and huge damage to the town nearby.\textsuperscript{273} In terms of the rights of

\begin{center}
\begin{footnotesize}
\begin{enumerate}
\item Section 11(1), (2), (4), (5) of the MHSA
\item To both employees and members of the public. Section 19(1) of the MHSA.
\item Section 19(1) of the MHSA.
\item Section 11(2) and (4) of the MHSA.
\item Section 13(1)-(3) of the MHSA.
\item Section 6(2)-(3) of the MHSA.
\item Section 6(2) and section 10(1)(a) of the MHSA.
\item Section 2 of the MHSA.
\item The Department of Labour v Pike River Coal Limited CRN 11018500202/202,211.
\item Royal Commission 2010 http://pikeriver.royalcommission.govt.nz/.
\item Ellerbeck 2013 \textit{Without Prejudice} 41.
\item Ellerbeck 2013 \textit{Without Prejudice} 41.
\item Ellerbeck 2013 \textit{Without Prejudice} 42.
\item Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd 1961 (2) SA 505 (W).
\end{enumerate}
\end{footnotesize}
\end{center}
the employer, the MHSA does not explicitly mention the rights of the employer, but the
duties of the employer are discussed more in depth.274

4.1.1.2 OHSA

The employer is an important role player in the OHSA, which defines the "employer" as:

Any person who employs or provides work for any person and remunerates that
person, or expressly or tacitly undertakes to remunerate him but excludes a labour
broker.275

The definition of employers is wide and it differs from the MOSA definition, which
included any individual who assisted employers in their business.276 The employer
should ensure the health and safety of every person on site.277 This will include persons
who are contractors or any other person who enters the workplace,278 or any other
person who enters the workplace.279 Employers are responsible for the health and
safety of those who could directly be affected by anything happening in the
workplace.280 The employer will always be held responsible for safety.281 The employer282
must prevent people working under the influence of alcohol, drugs or both.283 The
employer is obliged to consider not only the employee’s health and safety, but also the
employee's rights and well-being.284 This duty implies that employers have to develop a
strategy in terms of employee wellness.285

The employer has different duties that include the provision and maintenance of a risk
free, safe and healthy workplace.286 These should be ensured in the production, the

274 As per ss 2, 3-8, 10-15 of the MHSA.
275 Section 1 of the OHSA.
276 Thompson and Benjamin South African Labour Law G1-14.
277 Section 9 of the OHSA, see Van Onselen 2006 Risk Management 5.
278 See paragraph c.
282 Many of the employer's duties are derived from foreign legislation, as it is done to comply with
international standards. As an example one can consider the duty to consult with the committees;
this duty is based on the British legislation of 1974. In terms of exemption, the employer should
notify safety representatives thereof.
284 Erasmus et al Human Resource Management for the Public Sector 400.
285 Erasmus et al Human Resource Management for the Public Sector 400.
processing, storage and transport of substances.\textsuperscript{287} The duty to maintain a safe and healthy workplace can only be fulfilled if effective monitoring systems are applied and where any shortcomings are detected to fix them.\textsuperscript{288}

Employers are obliged to do risk assessments\textsuperscript{289}, which include hazard exposure.\textsuperscript{290} Such risk assessments include the following steps:\textsuperscript{291} the identification of the possible hazards, to assess these hazards as to which effect it would have on the employee, and lastly to take steps to eliminate or mitigate these hazards.\textsuperscript{292} In the instance where an accident has occurred, the employer is obliged to keep record thereof as well as report said instance to the inspector.\textsuperscript{293} The assessment of risk should cover all types of workers such as office staff, maintenance staff and night cleaners.\textsuperscript{294} This duty is both preventative and precautionary.\textsuperscript{295}

The employer is obliged to provide PPE\textsuperscript{296} to employees.\textsuperscript{297} The provision of PPE should be made in the instance where the work is listed\textsuperscript{298} in the \textit{Government Gazette}. Employers are obliged to take certain measures to ensure the safety and health of the employers.\textsuperscript{299} This duty includes, for example, eliminating or mitigating pollution.\textsuperscript{300}

If an employer does not take the necessary steps to ensure health and safety, it could happen that disasters occur. An example to consider is the incident in Bhopal\textsuperscript{301} where

\textsuperscript{287} Thompson and Benjamin \textit{South African Labour Law} G1-22.
\textsuperscript{288} Thompson and Benjamin \textit{South African Labour Law} G1-22.
\textsuperscript{289} See section 12(1)(a)-(c) of the OHSA.
\textsuperscript{291} Section 8(2)(d) of the OHSA.
\textsuperscript{292} Thompson and Benjamin \textit{South African Labour Law} G1-22.
\textsuperscript{294} Thompson and Benjamin \textit{South African Labour Law} G1-23.
\textsuperscript{295} Section 8(2)(f) of the OHSA, this duty is both preventative and precautionary as the employer is liable for enforcing safety measures in the workplace. This can for example be done by appointing supervisors to overlook the safety in the workplace.
\textsuperscript{296} Section 8(2)(g) of the OHSA.
\textsuperscript{297} Section 12 of the OHSA.
\textsuperscript{298} Thompson and Benjamin \textit{South African Labour Law} G1-24.
\textsuperscript{300} Union Carbide Corporation http://www.bhopal.com/.
approximately 2000 people were killed and almost a thousand injured because of an atmospheric release of the chemical, methyl isocyanate.\textsuperscript{302}

The employer has the duty to consult with unions, committees and representatives in terms of health and safety issues.\textsuperscript{303} The employer is obliged to appoint representatives\textsuperscript{304} when there are more than twenty employees.\textsuperscript{305} Another responsibility on the employer is to consult with the representative\textsuperscript{306} on a matter such as the appointment of employer's assistants and the providing of information.\textsuperscript{307} It is the duty of the employer to consult with the health and safety committees on health and safety measures.\textsuperscript{308}

Investigations, reporting and inquiries into incidents are important duties of employers. When an occupational disease occurs, the medical practitioner is obliged to report the disease if he or she believes that it arose from work duties.\textsuperscript{309} Employers have the right to refuse employees the right to representatives although this should only occur in very rare cases.\textsuperscript{310}

\subsection{4.1.2 Employees}

The duties and responsibilities of employees in terms of the MHSA, OHSA and the Integration Bill (where applicable) will now be discussed.

\subsubsection{4.1.2.1 MHSA}

The employee is obliged to take reasonable care to ensure his or her own health and safety\textsuperscript{311} and the health and safety of others.\textsuperscript{312} This is done by, for example, wearing the correct protective clothing, showing up for the prescribed training and complying

\begin{thebibliography}{99}
\bibitem{304} Section 17(1) of the OHSA.
\bibitem{305} Thompson and Benjamin \textit{South African Labour Law} G1-33.
\bibitem{306} Section 17(2) of the OHSA.
\bibitem{307} Thompson and Benjamin \textit{South African Labour Law} G1-45.
\bibitem{308} Venter and Levy \textit{Labour Relations in South Africa} 39.
\bibitem{309} Section 25 of the OHSA.
\bibitem{310} Sieberhagen, Rothman and Pienaar 2009 \textit{South African Journal on Human Resource Management} 5. The employee however still has the right to report the refusal.
\bibitem{311} Section 22(a) of the MHSA.
\bibitem{312} Section 22(b) of the MHSA.
\end{thebibliography}
with the standards of health and safety.\textsuperscript{313} When a dangerous incident occurs, the employee must report this incident to the supervisor.\textsuperscript{314} There is a statutory duty on employees to report anything that could potentially risk their health and safety.\textsuperscript{315}

An employee has the right to elect a representative in terms of health and safety, which enables him or her to take part in health and safety matters.\textsuperscript{316} Employees have the right to receive adequate training in terms of health and safety to ensure that the correct procedures are followed in emergencies.\textsuperscript{317} Employees also have the right to leave a working place that could be deemed as dangerous.\textsuperscript{318}

4.1.2.2 OHSA

As the right to a healthy and safe workplace is a reciprocal right, employees need to fulfil the general duties.\textsuperscript{319} The employee has the duty to take care of his/her own health and safety and of the health and safety of others\textsuperscript{320} to ensure a safe workplace.\textsuperscript{321} This can only be done if the employee complies with his or her contractual obligations; also by ensuring that any act done in the workplace does not endanger anyone else.\textsuperscript{322} In the case where an employer obliges the employee to fulfil a duty, the employee is bound to complete said task with due diligence, always considering the health and safety provisions.\textsuperscript{323}

Employees should evaluate their actions and check as to whether or not they comply with the different standards.\textsuperscript{324} In the instance where the employee detects any unsafe circumstances or conditions, he or she is obliged to report to the situation\textsuperscript{325} to the

\begin{footnotes}
\item[313] Section 22(c) of the MHSA.
\item[314] Section 22(d) of the MHSA.
\item[315] Masilo and Rautenbach \textit{Commentary on the Mine Health and Safety} 1-25.
\item[316] Plimmer 1997 \textit{Indicator} S4 42.
\item[317] Plimmer 1997 \textit{Indicator} S4 42.
\item[318] Section 23(1) of the MHSA.
\item[319] Section 14 of the MHSA.
\item[320] Section 14(a) of the OHS.
\item[321] Erasmus \textit{et al} \textit{Human Resource Management for the Public Sector} 396.
\item[323] Erasmus \textit{et al} \textit{Human Resource Management for the Public Sector} 396.
\item[324] Thompson and Benjamin \textit{South African Labour Law} G1-30.
\item[325] Section 14(d) of the OHS.
\end{footnotes}
inspection authorities. The employee is obliged to report accidents, for example, in the instance where the unsafe conditions has escalated to such an extent that he or she was injured in the course of employment. Employees are obliged to act in such a way that is deemed as safe. The employee should comply with the procedures and rules stipulated by the employer.

Employees should be protected in the workplace, but they are not allowed to be harassed or victimised in terms of the monitoring of safety. Full-time employees are entitled to have representatives, even if the employee is not literate or qualified. The compensation of the employee may not be deducted if it could negatively influence the employees’ safety. The reason why the compensation is mentioned is that, if anything prohibits the employee from acquiring the correct PPE, it is deemed as unlawful. The employee is entitled to be protected in the workplace.

4.1.3 Health and safety representatives and committees

The duties and responsibilities of health and safety representatives and committees, in terms of the MHSA, OHSA and the Integration Bill (where applicable), will now be discussed.

4.1.3.1 MHSA

Health and safety representatives and committees must be appointed when the employees reach a certain number. There should be representatives available for

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326 Erasmus et al Human Resource Management for the Public Sector 396.
327 Section 14(d) of the OHSA see also Erasmus et al Human Resource Management for the Public Sector 396.
328 Thompson and Benjamin South African Labour Law G1-18.
329 Section 14(c) of the OHS.
333 Thompson and Benjamin South African Labour Law G1-34.
334 Section 23 of the OHS.
335 Section 24 of the MHSA.
337 Section 25 of the MHSA. When 20 or more employees are appointed, the employer must appoint representatives. When a mine has more than 100 employees, a committee is compulsory.
each shift in the workplace. Representatives and committees cannot incur any civil liability. What this means is that, when they exercise powers in terms of the Act, they cannot be sued or punished for the omission of an act. The employer should appoint and elect the representatives. The employer should consult with the representative trade union to reach a collective agreement in terms of a few important issues, for example, how many full-time representatives should be present at the workplace, how to fill representative vacancies, and how the functions should be exercised, to mention a few. When there is no representative trade union involved the employer should consult with registered trade unions, or employees, to discuss the issues connected with health and safety representatives.

For a person to qualify as a representative, he or she must be a full-time employee at the workplace and know the working conditions, and to qualify as a full-time representative he or she must be appointed as a full-time employee and comply with any other agreed or prescribed qualification. A representative may either be appointed or elected. Representatives have different rights and responsibilities which include, amongst others, to direct the employee to leave the workplace if circumstances look dangerous, identify hazards and risks, make recommendations on matters affecting employees, inspect any document, request information from

338 Section 25(1) of the MHSA.
339 Section 25(3) of the MHSA.
340 Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-32.
341 Section 29(1) of the MHSA.
342 Section 26(1)(b) of the MHSA.
343 Section 26(1)(e) of the MHSA.
344 Section 26(1)(f) of the MHSA.
345 See section 26(1)(a)-(m) of the MHSA for the other subjects of consultation.
346 Section 26(6)(a) of the MHSA.
347 Section 26(7)(a) of the MHSA.
348 Section 28(1)(a) of the MHSA.
349 Section 28(1)(b) of the MHSA.
350 Section 28(2)(a) of the MHSA.
351 Section 28(2)(b)(i) of the MHSA.
352 Section 28(2)(b)(ii) of the MHSA.
353 By the employer. See section 29(4) of the MHSA.
354 Amongst the employees. See ss29(1)-(3) of the MHSA.
355 Section 30(1)(b) of the MHSA.
356 Section 30(1)(d) of the MHSA.
357 These recommendations are made to the employer or the health and safety committee, see section 30(1)(e) of the MHSA.
358 Section 30(1)(f) of the MHSA.
the inspector,\textsuperscript{359} and be assisted by an advisor.\textsuperscript{360} The rights include amongst others to attend any health and safety committee meeting of which the representative is a member,\textsuperscript{361} or where recommendations will be made;\textsuperscript{362} also to take part in consultations,\textsuperscript{363} inquiries\textsuperscript{364} and audits,\textsuperscript{365} inspect the workplace\textsuperscript{366} and visit accident sites.\textsuperscript{367} When the representative inspects the workplace, the employer should be allowed to take part in the inspection.\textsuperscript{368} The representative has the right to receive training.\textsuperscript{369} Representatives are entitled to compensation for work done.\textsuperscript{370} Representatives are all entitled to be informed of inspections, inquiries, investigations\textsuperscript{371} or accidents.\textsuperscript{372}

Committees are also established during negotiation and consultation with the relevant representative trade union.\textsuperscript{373} The consultation will include the following subjects: amongst others the number of representatives that should be on the committee,\textsuperscript{374} how the committee members will be appointed or elected,\textsuperscript{375} the terms such as the removal of members,\textsuperscript{376} how vacancies will be filled,\textsuperscript{377} what type of assistance will be provided\textsuperscript{378} and how disputes will be resolved.\textsuperscript{379} Committees should hold regular meetings.\textsuperscript{380} The committee has rights and powers, which include amongst others to represent employees,\textsuperscript{381} take part in consultations,\textsuperscript{382} request information,\textsuperscript{383} agree on the

\textsuperscript{359} Section 30(1)(g) of the MHSA.
\textsuperscript{360} Section 30(1)(h) of the MHSA.
\textsuperscript{361} Section 30(1)(i)(i) of the MHSA.
\textsuperscript{362} Section 30(1)(i)(ii) of the MHSA.
\textsuperscript{363} Section 30(1)(k) of the MHSA.
\textsuperscript{364} Section 30(1)(t) of the MHSA.
\textsuperscript{365} Section 30(1)(n) of the MHSA.
\textsuperscript{366} Section 30(1)(m) of the MHSA.
\textsuperscript{367} Section 30(1)(q) of the MHSA.
\textsuperscript{368} Section 30(5)(b) of the MHSA.
\textsuperscript{369} Section 30(6) of the MHSA, this training should occur during normal working hours.
\textsuperscript{370} See section 31 of the MHSA.
\textsuperscript{371} Section 32(1)(a) of the MHSA.
\textsuperscript{372} Section 32(1)(b) of the MHSA.
\textsuperscript{373} Section 33 of the MHSA.
\textsuperscript{374} Section 33(1)(b) of the MHSA.
\textsuperscript{375} Section 33(1)(c) of the MHSA.
\textsuperscript{376} Section 33(1)(d) of the MHSA.
\textsuperscript{377} Section 33(1)(e) of the MHSA.
\textsuperscript{378} There are certain facilities that should be provided, see s 33(1)(g) of the MHSA.
\textsuperscript{379} Section 33(1)(h) of the MHSA.
\textsuperscript{380} Section 35 of the MHSA.
\textsuperscript{381} Section 36(1)(a) of the MHSA.
\textsuperscript{382} Section 36(1)(b) of the MHSA.
additional qualifications of representatives and report on meetings held. The committee is entitled to receive support from the employer in terms of facilities and annual reports.

4.1.3.2 OHSA

Safety representatives and committees are established to monitor and regulate workplace health and safety. When an employer has more than twenty employees, he must appoint health and safety representatives. This ensures that unilateral actions do not occur and forces the employer to consult with others before making a decision. There should be one representative per every fifty employees unless an inspector decides differently.

Section 18 of the OHSA stipulates the functions and duties of the representatives. The main purpose of these representatives is to ensure that the health and safety measures are effectively exercised, and to check whether employees are exposed to hazards. This purpose will only be attained if the representative is allowed to examine any cause of harm or injury. The site of the incident is therefore open to the representative to investigate at all times. The representative may represent the employees to either the employer or health and safety committees. The broad duty of the representative is to monitor the effectiveness of health and safety measures, identify different potential hazards and to investigate when incidents occur.

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383 Section 36(1)(d) of the MHSA.
384 Section 36(1)(e) of the MHSA.
385 Section 36(1)(f) of the MHSA.
386 Section 37(a) of the MHSA.
387 Section 37(b) of the MHSA.
388 Thompson and Benjamin *South African Labour Law* G1-33.
389 Section 17(1) of the OHSA.
390 Section 17(5) of the OHSA.
391 Thompson and Benjamin *South African Labour Law* G1-36.
392 Section 18 of the OHSA.
393 Section 18(2) of the OHSA.
394 Section 18(1)(a)-(j) of the OHSA see also Thompson and Benjamin *South African Labour Law* G1-37.
395 Section 18(1)(c) of the OHSA.
396 Section 18(2)(a) of the OHSA.
397 Section 18(2)(b) of the OHSA.
398 Venter and Levy *Labour Relations in South Africa* 289.
Where there are more than two representatives in the workplace, the employer should appoint a health and safety committee. This committee is obliged to meet as often as possible. There are no specific procedures for the meetings; it is in the hands of the committee to determine. When an incident occurs, the committee is obliged to discuss the incident, and to report to the inspector. The committee should therefore be very active in the incident and accident analysis process, to stay informed. Committee members are obliged to keep the employees’ best interests at heart.

In the case where the representative has a suspicion that there might be health and safety issues in the workplace, he or she is entitled to conduct an inspection on any item that he/she deems unsafe. The representative has the right to be part of any consultations completed by the inspector, as this leads to better relationships between the representative and the inspector. The representatives are entitled to have a technical advisor accompanying them during the inspection process. If the representative is part of a health and safety committee, he/she has the right to attend any meeting held by said committee. The representative is entitled to join in any internal health audit. This can be seen as in section 18(1) where the rights are stipulated with the term "may". Training courses are to be modified in order to cover all of the needs that representatives may have.

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400 Section 19(1) of the OHSA.
402 Section 19(4) of the OHSA.
403 Section 19(5) of the OHSA.
404 Thompson and Benjamin South African Labour Law G1-39
405 Thompson and Benjamin South African Labour Law G1-41.
406 Section 20(1)(b) of the OHSA.
407 Thompson and Benjamin South African Labour Law G1-41.
408 Thompson and Benjamin South African Labour Law G1-41.
409 Section 18(1)(g) of the OHSA.
410 Section 18(1)(h) of the OHSA.
411 Section 18(1)(i) of the OHSA.
412 Section 18(1)(j) of the OHSA.
413 Section 18(2)(f) of the OHSA.
414 Thompson and Benjamin South African Labour Law G1-36.
The committee is allowed to make certain recommendations in terms of health and safety issues.\textsuperscript{415} If these issues cannot be resolved, the committee is entitled to approach the inspector to monitor the related issues.\textsuperscript{416} The committee may write a report based on an incident to the inspectorate.\textsuperscript{417}

4.1.4 Suppliers and manufacturers

The duties and responsibilities of suppliers and manufacturers, in terms of the MHSA, OHSA and the \textit{Integration Bill} (where applicable) will now be discussed.

4.1.4.1 MHSA

Manufacturers and suppliers include anyone who:

\begin{enumerate}
\item[(a)] designs, manufacturers, repairs, imports, or supplies any article for use at a mine and who must ensure, as far as reasonably practicable-
\begin{enumerate}
\item[(i)] that the article is safe and without risk to health and safety when used properly; and
\item[(ii)] that it complies with all the requirements in terms of this Act;
\end{enumerate}
\item[(b)] erects or installs any articles for use at a mine must ensure, as far as reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health and safety when used properly; or
\item[(c)] designs, manufacturers, erects or installs any article for use at a mine must ensure, as far as reasonably practicable, that ergonomic principles are considered and implemented during design, manufacture, erection or installation.\textsuperscript{418}
\end{enumerate}

They are faced with the duty to ensure that the designed article is safe and not detrimental to the health of the users.\textsuperscript{419} This duty will be fulfilled by ensuring that the correct information\textsuperscript{420} is supplied to those using the article or machine.\textsuperscript{421}

4.1.4.2 OHSA

To ensure the health and safety in the workplace, suppliers and manufacturers have the main duty to ensure that the items provided by them are safe. This means that it

\textsuperscript{415} Section 20(1)(a) of the \textit{OHSA}.
\textsuperscript{416} Venter and Levy \textit{Labour Relations in South Africa} 289.
\textsuperscript{417} Thompson and Benjamin \textit{South African Labour Law} G1-45.
\textsuperscript{418} Section 21(1)(a)-(c) of the MHSA.
\textsuperscript{419} Section 21(3) of the MHSA.
\textsuperscript{420} Correct information includes the mention of health and safety risks (s 21(4)(b)(ii)), any use restriction (s 21(4)(b)(iii)), any precautions necessary (s 21(4)(b)(iv)) and the emergency procedure (s 21(4)(b)(v)).
\textsuperscript{421} Section 21(4)(a) of the MHSA.
should be in such a condition that it is safe to use,\textsuperscript{422} not perilous to the employee's health and safety.\textsuperscript{423} If the equipment does not comply with the different standards, they will be held liable to modify it as stipulated in section 10.\textsuperscript{424}

Another duty is the provision and disclosure of information. The information should include whether or not any dangerous substances will be released, as well as whether the health and safety of others will be affected.\textsuperscript{425} Those responsible for the installation of machinery or articles\textsuperscript{426} have the duty to ensure that the machinery or articles are not detrimental to the health and safety of anyone affected.\textsuperscript{427}

\textbf{4.1.5 Users of machinery}

The duties and responsibilities of users of machinery, in terms of the OHSA, will now be discussed. The OHSA is the only Act referring to users of machinery. The MHSA and \textit{Integration Bill} are therefore not referred to.

\textbf{4.1.5.1 OHSA}

A user of machinery is a role player who is in control of their own machinery or who uses machinery for their own benefit.\textsuperscript{428} Users of machinery are burdened with many different duties, such as keeping record of any incident that could occur or have already occurred in the workplace.\textsuperscript{429} This record should be open and available to both the inspectorate\textsuperscript{430} and health and safety representatives at all times.\textsuperscript{431}

\textbf{4.1.6 Institutions}

The duties and responsibilities of the government institutions involved, in terms of the MHSA, OHSA and the \textit{Integration Bill} (where applicable), will now be discussed.

\textsuperscript{422} Section 10(1) of the OHSA.
\textsuperscript{423} Erasmus \textit{et al} Human Resource Management for the Public Sector 396.
\textsuperscript{424} Section 10 of the OHSA.
\textsuperscript{425} Section 10(1) of the OHSA.
\textsuperscript{426} Section 10(2) of the OHSA.
\textsuperscript{427} Section 10 of the OHSA.
\textsuperscript{428} Thompson and Benjamin \textit{South African Labour Law} G1-15.
\textsuperscript{429} Thompson and Benjamin \textit{South African Labour Law} G1-53.
\textsuperscript{430} Reg 10(1) in GN R929 in GG 25129 of 25 June 2003.
\textsuperscript{431} Thompson and Benjamin \textit{South African Labour Law} G1-53.
4.1.6.1 MHSA

From a governance perspective, the Ministry of Mineral Resources and the Department of Mineral Resources are the main institutions involved in mine health and safety. The MHSA, however, also establishes other institutions, to assist the Minister and Department in their work. These institutions include the Mine Health and Safety Council (hereafter the MHSA),\(^\text{432}\) the Mining Regulation Advisory Committee (hereafter the MRAC),\(^\text{433}\) a Mining Occupational Health Advisory Council (hereafter referred to as MOHAC)\(^\text{434}\) and a Safety in Mines Research Advisory Committee.\(^\text{435}\) The MHSA also provides for the establishment of a Mining Qualifications Authority (hereafter the MQA).\(^\text{436}\)

The Minister has certain roles and responsibilities in terms of the MHSA, for example, the prohibition or restriction of work.\(^\text{437}\) This restriction or prohibition may only be done if the Minister has consulted with the Council,\(^\text{438}\) unless the Minister is of belief that the immediate prohibition or restriction is in the public interest.\(^\text{439}\) The Minister is entitled to declare health hazards in the *Government Gazette*.\(^\text{440}\) Prohibitions, restrictions and declarations are issued in terms of notices.\(^\text{441}\) The Minister may apply other legislation to the mine, for example the OHSA.\(^\text{442}\)

The MHSC consists of employer's representatives,\(^\text{443}\) employee representatives,\(^\text{444}\) state department members,\(^\text{445}\) and the Chief Inspector of Mines.\(^\text{446}\) The Minister must appoint Council members\(^\text{447}\) and committee members.\(^\text{448}\) The Council must advise the Minister on

\(^{432}\) Section 41(1) of the OHSA.
\(^{433}\) Section 41(2)(a) of the OHSA.
\(^{434}\) Section 41(2)(b) of the OHSA.
\(^{435}\) Section 41(2)(c) of the MHSA.
\(^{436}\) Section 41(3) of the MHSA.
\(^{437}\) Section 75 of the MHSA.
\(^{438}\) Section 75(1)(a) of the MHSA. See paragraph below.
\(^{439}\) Section 75(1)(b) of the MHSA.
\(^{440}\) Section 76(1) of the MHSA
\(^{441}\) Section 77 of the MHSA.
\(^{442}\) Section 80(1) of the MHSA.
\(^{443}\) Section 42(1)(a) of the MHSA (five members).
\(^{444}\) Section 42(1)(b) of the MHSA (five members).
\(^{445}\) Section 42(1)(c) of the MHSA (four members).
\(^{446}\) Section 42(1)(d) of the MHSA - the Chief Inspector chairs the Council.
\(^{447}\) Section 42(2) of the MHSA.
health and safety issues.\textsuperscript{449} It is the duty of the Council to co-ordinate activities of the committees and liaise with the MQA,\textsuperscript{450} as well as statutory bodies.\textsuperscript{451} The Council must promote health and safety in the mining industry.\textsuperscript{452} It is also the responsibility of the Council to arrange a tripartite summit to review as to whether or not the health and safety is up to standard in the mining industry.\textsuperscript{453} It is also the duty of the MHSC to advise the Minister annually on relevant research.\textsuperscript{454} The MRAC is responsible for advising the Council on legislation, standards and guidelines.\textsuperscript{455} The MOHAC is the committee responsible for advising the Council on occupational health and the issues thereof.\textsuperscript{456} Another Committee worth mentioning is the Safety in Mines Research Advisory Committee (hereafter referred to as SIMRAC) who is the committee responsible for advising the Council on research undertaken on health and safety.\textsuperscript{457}

MQA functions include the generation of education and training standards.\textsuperscript{458} It is their responsibility to seek accreditation in terms of the \textit{South African Qualifications Act}\textsuperscript{459} and to be the responsible monitoring and auditing body.\textsuperscript{460}

The Mine Health and Safety Inspectorate (hereafter referred to as the MHSI) is responsible for the enforcement of health and safety legislation.\textsuperscript{461}

"Tripartite relationships" are not defined explicitly. What tripartite relationships entails, is a three-way relationship between the government, the employer and the employee. A
tripartite arrangement was established in June 1997, with the aim to promote the national policies in terms of regulation, monitoring, auditing and inspection of mines.

4.1.6.2 OHSA

From a governance perspective the Ministry of Labour and the Department of Labour are the main institutions involved in occupational health and safety. The OHSA, however, also establishes other institutions to assist the Minister and the Department in their work, such as the Advisory Council on Occupational Health and Safety.

The Minister has the following role and functions. The Minister should designate inspectors. The Minister may by notice in the Government Gazette issue general prohibitions on the employer. The Minister is empowered to prohibit any activity which threatens, or which has the potential to threaten, the safety of employees. These prohibitions include amongst others the prohibition of permitting employees to participate in work that threatens their health or safety and the prohibition and the notice thereof, subject to amendments. The Minister should also designate the person who will be the chief inspector. The Minister may make regulations in terms of any matter of this Act. The Advisory Council on Occupational Health and Safety is a council consisting of government members, different organisations, unions, employers and experts. This Council has a duty to advise the Minister in terms of all matters regarding occupational health and safety. The Council is entitled to help in the policy making process.

462 Masilo and Rautenbach Commentary on the Mine Health and Safety 1-50. 
463 Masilo and Rautenbach Commentary on the Mine Health and Safety 1-50. 
464 Section 28(1) of the OHSA. 
465 Section 21(1) of the OHSA. 
466 As per the definition of the OHSA (s 1 of the OHSA). 
467 Section 21(1) of the OHSA. 
468 Section 21(1)(a) of the OHSA. 
469 Section 40(1) of the OHSA. 
470 Section 27(1) of the OHSA, see also chapter 5.1.2. 
471 Section 43 of the OHSA. 
472 The Council is established in terms of section 2 of the OHSA. 
473 Section 4 of the OHSA. These are also the role players who are a part of the health and safety legislation. 
474 Section 4 of the OHSA. 
475 Section 3(1)(b) of the OHSA, see also Thompson and Benjamin South African Labour Law G1-17.
There are also technical committees, which are responsible for advice in terms of the Council's performance. The Department of Labour is entitled to receive advice on the formulation and publication of different standards and specifications.

4.1.6.3 Integration Bill

The *Integration Bill* has the aim to establish an authority that will handle all issues in terms of health and safety. This authority will be a combined force of members of the Department of Labour, the Department of Health and the Department of Mineral Resources. The "to be" established National Occupational Health and Safety Authority will have a board, which will consist of

- a CEO;
- a Department of Labour representative;
- a Department of Minerals and Energy representative;
- a Department of Health representative;
- four trade union members; and
- four employer's organisation members.

The Minister of Labour will be head of this authority. The Authority will act in accordance with the Minister's directions. Any provision made by the Minister is deemed as binding on all the members responsible for health and safety. The Authority is responsible for the implementation and administration of an integrated policy.

The Executive of the Authority is the CEO, the staff appointed by the CEO and staff seconded to the executive. The Executive is responsible for the development of an

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476 Section 6 of the OHSA.
477 Thompson and Benjamin *South African Labour Law* G1-17.
478 As designated by the Director-General of the Department of Labour.
479 As designated by the Director-General of the Department of Minerals and Energy.
480 As nominated by the Minister.
481 As nominated by the Minister.
482 Clause 7(1)(a)-(f) of the *Integration Bill* of 2003.
483 Who is responsible of the publishing of the policy as well as to direct the Authority on its functions.
484 Clause 1 of the *Integration Bill*.
485 Clause 3(1)(b) of the *Integration Bill*.
486 Clause 3(2) of the *Integration Bill*.
487 Clause 5 of the *Integration Bill*.
488 Clause 15(a) of the *Integration Bill*.
489 Clause 15(b) of the *Integration Bill*.
490 Clause 15(c) of the *Integration Bill*.
implementation plan to establish an integrated occupational health and safety system.\textsuperscript{491} The Executive may, where necessary, do research,\textsuperscript{492} consult with relevant stakeholders,\textsuperscript{493} perform legal acts on behalf of the Authority as well as defend any legal action.\textsuperscript{494}

The board of the executive holds office for a prescribed period of four years\textsuperscript{495} until replaced by other representatives designated by the Director-General of Labour.\textsuperscript{496} In the instance where the Minister deems a board member as not fit, he or she may remove them;\textsuperscript{497} also when a member was absent from three consecutive meetings without permission.\textsuperscript{498} The removal of a board member may only occur when the Minister has consulted with the trade union federations\textsuperscript{499} and the employer's organisations.\textsuperscript{500} When appointing the members of the Board, remuneration of the members should always be considered\textsuperscript{501} unless the member is part of an organ of state.\textsuperscript{502} Those appointed by the organs of state will be reimbursed out of the expenses of the Authority.\textsuperscript{503}

The Board must give advice to the Minister on any issue concerning health and safety in the workplace, specifically in terms of the way in which the Minister gives directions to the Executive in the exercise of his or her powers.\textsuperscript{504} The Board should also advise the Minister on effective ways to ensure that a culture of health and safety is promoted amongst both employers and employees.\textsuperscript{505} The Board is responsible for ensuring that South African legislation complies with the international standards.\textsuperscript{506} The Board should

\textsuperscript{491} Clause 16(a) of the \textit{Integration Bill}.
\textsuperscript{492} Clause 16(3)(a) of the \textit{Integration Bill}.
\textsuperscript{493} Clause 16(3)(b) of the \textit{Integration Bill}.
\textsuperscript{494} Clause 16(3)(g)-(h) of the \textit{Integration Bill}.
\textsuperscript{495} Clause 8(2)(a) of the \textit{Integration Bill}.
\textsuperscript{496} Clause 8(1) of the \textit{Integration Bill}.
\textsuperscript{497} Clause 9(1)(b) of the \textit{Integration Bill}.
\textsuperscript{498} Clause 9(1)(a) of the \textit{Integration Bill}.
\textsuperscript{499} If the person was appointed in terms of clause 6(e) of the \textit{Integration Bill}.
\textsuperscript{500} If appointed in terms of clause 6(f), this provision was made clause 9(2) of the \textit{Integration Bill}.
\textsuperscript{501} Clause 11(2) of the \textit{Integration Bill}.
\textsuperscript{502} Clause 11(3) of the \textit{Integration Bill}.
\textsuperscript{503} Clause 11(3) of the \textit{Integration Bill}.
\textsuperscript{504} Clause 12(1)(a)(ii) of the \textit{Integration Bill}.
\textsuperscript{505} Clause 12(1)(a)(iv) of the \textit{Integration Bill}.
\textsuperscript{506} Clause 12(2) of the \textit{Integration Bill}.
conduct research on all subjects that could affect health and safety. Whilst conducting this research the board should retrieve information and make use of experts to ensure that the correct steps are taken. The Board should meet at the very least twice a year, the where and when decided by the chairperson. During these meetings it is required to keep minutes of the proceedings and different decisions made in the meeting.

The Executive is responsible for the drafting of an implementation plan for an integrated health and safety system, as well as the development of a reporting system. Logistical support should be provided for the Board. It is a duty of the Executive to promote a culture of safety and health amongst workers, employers and other stakeholders. It is important to note that co-operative governance is a very necessary principle in this instance, as there are many different organs of state that responsibilities in terms of health and safety. The Integration Bill does not necessarily deal with employers and employees as such, as it only establishes an Authority that will deal with the implementation and administration of the health and safety policy. When considering a single health and safety act in South Africa, this could be deemed as the starting point; if an authority is then established, the legislation can evolve from there onwards.

### 4.2 Conclusion

When comparing the duties of employers and employees in terms of both the MHSA and the OHSA it is clear that there is a shared responsibility between employers and

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507 Clause 13(a) of the Integration Bill.
508 Clause 13(b) of the Integration Bill.
509 Clause 13(d) of the Integration Bill.
510 Clause 14(1) of the Integration Bill.
511 Clause 14(2) of the Integration Bill.
512 Clause 14(6) of the Integration Bill.
513 Clause 16(a) of the Integration Bill.
514 Clause 16(b) of the Integration Bill.
515 Clause 16(e) of the Integration Bill.
516 Clause 16(g) of the Integration Bill.
517 Clause 16(2) of the Integration Bill of 2003.
518 See 4.1.1 and 4.1.2.
519 Cooperative governance made its origin in Chapter 3 of the Constitution.
520 For example the departments of: Mineral Resources, Health and Labour.
employees to ensure the health and safety in the working environment. The MHSA also deems contractors as employees, where the OHSA deems them as independent employers. In a single health and safety act, it is proposed that contractors be deemed as employees, as he will be held responsible in terms of the act. It is clear that the main duty of an employer is to ensure health and safety for the employees. Employers are also responsible for ensuring the health and safety of those who enter the workplace. Employers should also undertake risk assessments to ensure that no unwanted risks are present in the workplace. Reasonable practicability is an important measure that is mentioned in both the OHSA and the MHSA. In terms of employees, it is clear that they also have duties in terms of the OHSA and the MHSA. These duties includes participation in training, as well as utilising the prescribed PPE, and in the instance where a dangerous or perilous situation occurs, the employee is obliged to report such a situation to inspectors. The employees are also responsible to ensure that their own health and safety is not threatened. Suppliers and manufacturers are role players who design any necessary articles for the workplace; they are obliged to ensure the safety of those who use the articles. They have to take reasonable steps to ensure the health and safety of the users of the machinery and articles necessary in the workplace. In terms of both the OHSA and the MHSA they are responsible for providing information on the safety of their articles supplied. The role players, who are responsible to ensure that health and safety occurs in the workplace, are known as representatives and committees. In terms of both the MHSA and the OHSA employers are obliged to appoint representatives when they have more than 20 employees. In addition, when representatives exceed the number of two

521 Evan 2015 IMIESA 71.
522 See chapter 4.1.1.1 and 4.1.2.1.
523 See chapter 4.1.1.2.
524 See chapter 4.1.1.1 and 4.1.1.2.
525 See chapter 3.6.
526 See chapter 4.1.1.1 and 4.1.1.2.
527 See chapter 4.1.2.1 and 4.1.2.2.
528 See chapter 4.1.2.1.
529 See chapter 4.1.4.1 and 4.1.4.2.
530 See chapter 4.1.4.1 and 4.1.4.2.
531 See chapter 4.1.4.1 and 4.1.4.2.
532 Section 25(1) of the MHSA and s 17(1) of the OHSA.
representatives, it is necessary to establish a health and safety committee.\textsuperscript{533} The committees are responsible to hold meetings in terms of health and safety issues. The MHSA and the OHSA both provide that the employer should consult with representative trade unions on issues regarding both the committees and the representatives, these issues include amongst others the appointment and election of the representatives and committee members, the removal of members and their functions and powers.\textsuperscript{534} Regarding users of machinery, no provision is made for these role players in terms of the MHSA; the OHSA covers their duties, which include recordkeeping of incidents that occur in the workplace.\textsuperscript{535} The institutions of government are responsible for policy making as well as the enforcement of the health and safety legislation. The MHSA is managed by the Ministry of Mineral Resources and the Department of Mineral Resources, but it needs institutions to assist in their work that include the MHSC, MQA, MRAC, MOHAC and the SIMRAC.\textsuperscript{536} The Minister is responsible for different aspects, some of which include prohibition of work in dangerous situations.\textsuperscript{537} The MHSC is the Council responsible for tripartite meetings, whilst the MRAC, MOHAC, and SIMRAC are responsible for advising the Council on different issues regarding health and safety in mines.\textsuperscript{538} The MQA is the committee responsible for training and education standards.\textsuperscript{539} In terms of government institutions it seems clear that the OHSA is less comprehensive than the MHSA, as there are not as many committees and councils involved.\textsuperscript{540} The Minister is responsible for different aspects including prohibitions of work, which concurs with the duties as in the MHSA.\textsuperscript{541} The Integration Bill does refer to employers, employees, users of machinery, health and safety representatives and committees, or suppliers and manufacturers. It only establishes an authority responsible for the administration and implementation of the integrated health and safety policy.

\textsuperscript{533} Section 34 of the MHSA and s 19(1) of the OHSA.
\textsuperscript{534} See chapter 4.1.3.1 and 4.1.3.2.
\textsuperscript{535} See chapter 4.1.5.1.
\textsuperscript{536} See chapter 4.1.6.1.
\textsuperscript{537} See chapter 4.1.6.1.
\textsuperscript{538} See chapter 4.1.6.1.
\textsuperscript{539} See chapter 4.1.6.1.
\textsuperscript{540} See chapter 4.1.6.2.
\textsuperscript{541} See chapter 4.1.6.1 and 4.1.6.2.
Chapter 5 Enforcement

The problem with occupational health and safety legislation is that it is inadequately enforced. This is the result of lacking a policy-making capacity and enforcement resources. In this chapter, the enforcement of health and safety legislation will be discussed with specific reference to the MHSA and the OHSA. Where applicable the legislation, as well as enforcement, will be compared in terms of the Integration Bill.

5.1.1 MHSA

According to the MHSA, the MHSI, MQA and MHSC are responsible for the enforcement of the Act. The MHSI, an established juristic person, hosted by the Department of Mineral Resources, ensures the enforcement of the mine health and safety legislation. The MHSI is entitled to inspect a mine or a workplace to check its safety and health status. The MHSI has a wide discretion that entitles it to call anyone for an appearance before the Inspectorate for questioning if the MHSI suspects unhealthy and unsafe conditions. The MHSI is an independent juristic person. The Inspectorate ought to be insured by the Chief Inspector of Mines (hereafter referred to as CIM) against loss, damage, liability or risk.

The Minister is empowered to appoint the CIM who must have the necessary qualifications and experience. The CIM has different duties amongst others to ensure that the provisions of the MHSA are complied with and enforced. It should

543 Gloy The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 20, as well as section 47(1) of the MHSA.
544 Gloy The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 20.
545 Gloy The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 22.
546 Section 50(2) of the MHSA.
547 Section 50(2)(b) of the MHSA.
548 Gloy The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 21.
549 Section 47 of the MHSA.
550 Section 49(6) of the MHSA.
551 Section 48 of the MHSA.
552 These are stipulated in section 49 of the MHSA.
553 The steps to take when non-compliance occurs will be discussed in chapter 5.4.
554 Section 49(1)(a) of the MHSA. The CIM oversees the organisation thereof and determines and implements health and safety promotion policies.
also ensure that all mines have a health and safety, as well as a hazard management system available for implementation when a risk or a hazard occurs. The CIM should collaborate with different bodies and institutions and control facilities. The CIM has the right to enter into agreements with other persons; also to authorise a competent independent person to perform the inspectors' duties. To ensure that enforcement of legislation is enacted, it is a duty of the CIM to publish different guidelines in the *Government Gazette* to keep those in mining informed. The CIM is responsible for the appointment of inspectors.

The inspector is empowered to monitor and enforce the provisions of this Act. This can be done by entering mines at any time without any notice or warrant. Any other place can be entered with the correct warrant whilst using any vehicle or equipment necessary. The inspector is entitled to question anyone on any Act-related matter, require custody of any necessary document, require any explanations, examine documents and inspect any article, work or condition. The inspector is also empowered to deal with dangerous conditions. In an instance where the inspector deals with dangerous conditions, he or she is empowered to instruct the complete halt of mining operations or any act or practice. This inspector should have the

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555 Section 49(4)(d) of the MHSA.
556 Section 49(4)(i) of the MHSA.
557 Be it governmental, educational or scientific, see also section 49(4)(h) of the MHSA.
558 Section 49(4)(j) of the MHSA.
559 Section 49(4)(b) of the MHSA.
560 Section 49(4)(c) of the MHSA.
561 Section 49B of the MHSA.
562 Section 50(1) of the MHSA.
563 The inspector is allowed to be accompanied by anyone who could assist him in the inspection process. As stipulated in s 51 of the MHSA.
564 Section 50(1)(a) of the MHSA.
565 Section 50(1)(b) of the MHSA.
566 Section 50(1)(c) of the MHSA.
567 Section 50(2)(a) of the MHSA.
568 Section 50(2)(b) of the MHSA.
569 Section 50(2)(c) of the MHSA.
570 Section 50(2)(d) of the MHSA.
571 Section 50(2)(e)(i)-(iii) of the MHSA.
572 Section 54 of the MHSA.
573 Section 54(1)(a) of the MHSA.
574 Section 54(1)(b) of the MHSA.
prescribed qualifications and experience. The inspection officer’s appointment is done by the CIM in terms of section 49(1)(b).

Enforcement will not be possible if good governance does not occur; thus it is the duty of the CIM to ensure that the different organs of state co-ordinate in terms of the promotion and regulation of occupational health and safety as well as environmental legislation. This means that it is the duty of the CIM to ensure that the different organs of state and the role players involved co-ordinate and co-operate in such a manner that co-operative governance is ensured.

5.1.2 OHSA

The Department of Labour is responsible for the implementation of the OHSA and the enforcement thereof. The enforcement should be done by different inspection authorities. In terms of OHSA an inspection authority can be defined as:

Any person who with the aid of specialized knowledge or equipment or after such investigations, test, sampling or analyses as he may consider necessary, and whether for reward or otherwise, renders a service by making special findings, purporting to be objective findings, as to-a) the health of any person;
b) the safety or risk to health of any work, article, substance, plant or machinery, or of any condition prevalent on or in any premises; or
c) the question of whether any particular standard has been, or is being complied with, with respect to any work, article, substance, plant or machinery, or with respect to work or a condition prevalent on or in any premises, or with respect to any other matter, and by issuing a certificate, stating such findings, to the person to whom the service is rendered.

The inspection authority or the Inspectorate ensures that the provisions of the Act are complied with. The Inspectorate is responsible for continuous monitoring as to

575 Section 49(1)(c) of the MHSA.
576 Section 49(1)(b) of the MHSA.
579 For example s 31BB of the National Environmental Management Act 107 of 1998, the Minister of Mineral Resources in terms of environmental legislation designates inspectors.
580 Section 49A of the MHSA.
581 Swanepoel, Van Wyk and Erasmus Human Resource Management 582.
582 Thompson and Benjamin South African Labour Law G1-41.
583 Section 1 of the OHSA.
584 Section 28 of the OHSA.
whether compliance in terms of health and safety provisions is ensured. The Inspectorate consists of different inspectors. An inspector has the right to prosecute non-complying parties if he/she deems it necessary. Inspectors have the discretion to make use of the necessary resources to ensure maximum compliance with the safety standards.

The inspector has the duty to carry his/her certification. The reason for this is that, where the inspector is exercising his/her duties, those subject to the inspection are entitled to request identification. It is part of the inspectors' power to conduct inspections, to question parties, to request documents for examination from the employer, as well as any other article which can be deemed as evidence. Any article used for inspection, may be removed by the inspector to complete further inspections. The inspector is entitled to enter any workplace occupied by an employer. As language might be a barrier in certain instances, the inspector is entitled to have an interpreter accompanying him during the inspection period. The inspector may stop or close any activity which is deemed as unsafe in the workplace. This prohibition is made via a notice. The inspector can monitor incidents by means of investigations, which are undertaken prior to the decision as to whether or not formal inquiries are necessary.

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585 Venter and Levy *Labour Relations in South Africa* 289.
589 Section 28(2) of the OSHA.
591 Section 29(1)(b) of the OSHA.
592 Section 29(1)(c) of the OSHA.
593 Thompson and Benjamin *South African Labour Law* G1-46.
594 Section 29(1)(g) of the OSHA. These items can specifically be removed as pieces of evidence in a criminal case.
595 Section 29(1)(a) of the OSHA.
596 Section 29(2) of the OSHA. He is entitled to have an assistant or a member of the police accompany him.
598 Which can be withdrawn if the employer has acted in a satisfactory manner to ensure health and safety.
599 Section 31(1) of the OSHA.
It is important to note that inspectors may make a decision where after the decision may be subject to appeal. The Chief Inspector is entitled to make the decision as to whether or not a formal inquiry should be held. A formal inquiry can be held where any person has been injured, suffered illness or dies in the workplace, due to a duty fulfilled in the workplace. The purpose of the inquiry is as follows: To determine whether or not the employer was liable, as well as to prevent any further incidents. Any decision made by the Chief Inspector based on formal inquiries is subject to appeal.

5.1.3 Integration Bill

According to the Integration Bill the Authority will be established in terms of Part 2 and deemed an organ of state. The Authority will consist of a Board and an Executive. The Board will be responsible to advise the Minister on issues relating to health and safety, whereas the Executive will be responsible for any function that the Minister entrusts to him or her. The Authority has to ensure the implementation and administration of the Integration Bill. The Ministers and their departments will be the enforcers, as the monitoring of the efficacy of the implementation and enforcement of the national policy will be the Minister’s responsibility. The National Occupational Health and Safety Authority will be responsible for the implementation and administration of the policy. The Authority’s Executive will consist of a Chief Executive Officer who appoints staff members. The Executive has duties, functions and

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600 Thompson and Benjamin *South African Labour Law* G1-46.
601 Section 32(1) of the OSHA.
602 Thompson and Benjamin *South African Labour Law* G1-55.
603 *National Union of Mineworkers & Others v Government Mining Engineer & Others* (1990) 11 *ILJ* 313 (W).
604 Section 35 of the OSHA.
610 The Executive is regulated by Part 4, clause 15 of the *Integration Bill*.
612 Clause 5 of the *Integration Bill* of 2003.
613 Clause 3(3) of the *Integration Bill* of 2003.
615 Clause 15(a) of the *Integration Bill*. 

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powers\textsuperscript{617} which include, amongst others, an implementation plan to establish an integrated health and safety system,\textsuperscript{618} to administer and implement the system,\textsuperscript{619} to develop databases and reporting systems,\textsuperscript{620} to prepare a draft which stipulates the compensation legislation which will apply to all sectors of the economy,\textsuperscript{621} support the Board,\textsuperscript{622} and to promote the culture of health and safety.\textsuperscript{623} The functions of the Executive will have to co-ordinate with those of other organs of state\textsuperscript{624} and must promote co-operative governance.

It seems that the proposed Authority will have a coordination role rather than an enforcement role. This seems to be a missed opportunity. An independent body that can enforce health and safety in both the industry and mining could have ensured an integrated approach to health and safety in South Africa.

\textbf{5.2 Enforcement instruments}

After discussing the enforcers of health and safety, it is necessary to discuss the enforcement instruments in terms of the MHSA, the OHSA and the \textit{Integration Bill}, where applicable.

\textbf{5.2.1 MHSA}

The MHSA relies mostly on command and control measures to enforce mine health and safety, for example, according to the MHSA both employers\textsuperscript{625} and employees can be held liable\textsuperscript{626} if they do not comply with the instructions of the provisions of the Act.\textsuperscript{627} According to the MHSA non-compliance occurs where any person fails to comply with:

\begin{itemize}
  \item \textbf{(a)} a provision of this Act;
\end{itemize}
(b) a regulation;
(c) a condition, suspension, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document determined, given, issued, prescribed or granted by or under this Act by the Minister, Chief Inspector of Mines, inspector, any person authorised under section 49(4) or any person to whom any power has been delegated or the performance of any duty has been assigned under section 96.628

The MHSA identifies different offences including the discrimination,629 interference with safety equipment,630 juvenile employment,631 negligence,632 breach of confidence,633 hindering the administration,634 falsifying documents,635 failure to attend when summoned,636 and failure to comply with this Act.637 In the instance where non-compliance can be proved, certain instruments are to be used, for example penalties. If one is convicted of any offence, one may be sentenced to a fine, imprisonment or any suitable penalty as determined by the court.638 The penalties include fines or imprisonment, or even the withdrawal or suspension of a mining authorisation.639

An inspector has the power to order compliance640 in the instance where the employer does not comply with the provisions.641 This will be done in terms of instructions with prescribed time periods.642 The inspector can also recommend a fine in writing.643 These fines must be supplied in duplicate to the health and safety representatives and committees.644 Even though the inspector has the right to impose fines and instructions, those who are affected have the right to appeal these decisions.645 The appeal does not

628 Section 91 (1)(a)-(c) of the MHSA.
629 As in s 83 of the MHSA
630 As in s 84 of the MHSA.
631 As in s 85 of the MHSA.
632 As in s 86 of the MHSA.
633 As in s 87 of the MHSA.
634 As in s 88 of the MHSA.
635 As in s 89 of the MHSA.
636 As in s 90 of the MHSA.
637 As in s 91 of the MHSA.
638 Section 92 of the MHSA.
639 Section 92 of the MHSA.
640 Section 55 of the MHSA.
641 Section 55(1) of the MHSA.
642 Section 55(1) of the MHSA.
643 Section 55A of the MHSA.
644 Section 56(a)(i)-(ii) of the MHSA.
645 Section 57 of the MHSA.
necessarily suspend these decisions;\textsuperscript{646} suspension of decisions only occurs when the Labour Court decides so.\textsuperscript{647} The Labour Court has exclusive jurisdiction on disputes arising out of this Act,\textsuperscript{648} but not in terms of offences in terms of this Act.\textsuperscript{649} The penalties for any offences in terms of this Act are either fines or imprisonment.\textsuperscript{650}

5.2.2 OHSA

It is the responsibility of the employer to ensure compliance in the workplace.\textsuperscript{651} The employer or the body corporate will be held liable for any damages that occurred due to non-compliance.\textsuperscript{652} Similarly, the OHSA also relies mostly on command and control to enforce occupational health and safety. Section 38 of the OHSA stipulates when an act or omission is deemed a criminal offence; this should be used as a guideline to prevent the non-compliance from occurring. Where non-compliance occurs the Act prescribes the necessary steps to be taken, whether it be imprisonment or a fine.\textsuperscript{653} The magistrates' court has jurisdiction.\textsuperscript{654} The approach regarding non-compliance was borrowed from foreign legislation.\textsuperscript{655}

Non-compliance with the provisions of the OHSA is a criminal offence, and for example includes the following:

- Failure to co-operate with the duties and questions of the inspectorate;\textsuperscript{656}
- Tampering with safety equipment as well as the misuse thereof;\textsuperscript{657}
- Reckless interference with anything provided in the interest of health and safety;\textsuperscript{658}
- Not using the safety equipment as provided;\textsuperscript{659} and
- To act recklessly in the workplace, and to decide consciously to act in such a manner.\textsuperscript{660}

\textsuperscript{646} Section 59 of the MHSA.
\textsuperscript{647} Section 59(2)(b) of the MHSA.
\textsuperscript{648} Section 82(1) of the MHSA.
\textsuperscript{649} Section 82(2) of the MHSA.
\textsuperscript{650} Section 92 of the MHSA.
\textsuperscript{652} Thompson and Benjamin South African Labour Law G1-28.
\textsuperscript{653} Thompson and Benjamin South African Labour Law G1-63.
\textsuperscript{654} Section 46(a) of the OHSA.
\textsuperscript{655} One can specifically refer to R v Cotton Felts Ltd (1982) 2 CCC (3d) (OntCA)
\textsuperscript{656} Section 38(1)(e) of the OHSA.
\textsuperscript{657} Section 38(1)(n) of the OHSA.
\textsuperscript{658} Section 15 of the OHSA.
\textsuperscript{659} Section 38(1)(o) of the OHSA.
\textsuperscript{660} Section 38(1)(p) of the OHSA.
Steps against employees who deliberately act recklessly or refuse to comply, may lead to the dismissal of the employee. In the instance where an inspectorate issues a written notice prohibiting dangerous activities and parties fail to comply with it, it is deemed a criminal offence. When a person obstructs, refuses or fails in assisting an inspector in the investigation process, it is deemed a criminal offence.

When a witness is present on the stand, he or she may refuse to answer incriminating questions. In preparing for a court case, any evidence retrieved from an inquiry must be recorded in a written report. An inspector cannot be held liable for any information mentioned in his report.

It is under the courts’ discretion as to what sanction to deliver onto to wrongdoer, for example: when an employer deducts an amount from the compensation of an employee, the order can be made that the employer pays back the money proportionally. The court could also order the wrongdoer to take the necessary steps to comply with the provisions of the Act within a certain timeframe. If the wrongdoer does not take these steps, he or she will be punished for the breach of the provisions as well as contempt of the court. The court combines command and control with economic instruments. For example, any person who fails to comply with the provisions of the OHSA, shall be deemed as guilty of an offence and will be held liable to a fine of no more than R50 000 or imprisonment no longer than one year, or both depending on the offence. In terms of the OHSA there is no maximum fine prescribed by the regulations, the maximum imprisonment time is limited to one year. If the offences

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662 Section 38(1)(b) of the OHSA.
663 Section 34 of the OHSA.
664 *S v Ramaligela* 1983 (2) SA 424 (V) para 430H.
665 Thompson and Benjamin *South African Labour Law* G1-59.
666 Section 32(10) of the OHSA.
667 Thompson and Benjamin *South African Labour Law* G1-62.
668 Section 38(3) of the OHSA.
669 Thompson and Benjamin *South African Labour Law* G1-63.
670 Section 38(1)(a)-(p) of the OHSA.
671 Section 38(1)(a)-(p) of the OHSA.
occur for a continuous period and it keeps recurring, it is allowed in terms of the regulations to add an additional R200 for each day the offence continues.\textsuperscript{672}

It is the responsibility of the employer\textsuperscript{673} to prove\textsuperscript{674} that the employee acted without the necessary permission, the employee did not have the authority to complete an action, or that steps\textsuperscript{675} were taken to prevent these actions.\textsuperscript{676}

5.2.3 \textit{Integrated Bill} 

The Bill creates new offences including, amongst others, corporate homicide.\textsuperscript{677} The homicide is to be dealt with in accordance with the \textit{Criminal Procedure Act}\textsuperscript{678} but may also be dealt with in terms of the Bill.\textsuperscript{679} "Corporate homicide" is defined as:

The causing of the death of a person as a result of the failure by the employer to comply with its legal duties, or where the employer failed to take the necessary steps to control the causative risk, or failed to implement an health and safety management system.\textsuperscript{680}

The duty will rest on the employer to ensure that this offence does not occur. However, in the instance where corporate homicide does occur, a penalty of R1 million or ten years’ imprisonment\textsuperscript{681} can be imposed.

5.3 \textit{Conclusion}

The MHSA and the OHSA use mainly command and control instruments to enforce the legislation. In terms of command and control, the employer and employee can be held liable in the instance where non-compliance with the OHSA or MHSA occurs.\textsuperscript{682} Non-compliance comes down to an offence, which is punishable by either fines or

\begin{itemize}
\item \textsuperscript{672} Section 43(4) of the OHSA.
\item \textsuperscript{673} Or the user of machinery.
\item \textsuperscript{674} The employer must prove all of these to ensure that he or she is not held liable for the action.
\item \textsuperscript{675} Section 37 of the OHSA stipulates these steps.
\item \textsuperscript{676} Section 37(1)(a)-(c) of the OHSA.
\item \textsuperscript{677} Botha 2008 \textit{Occupational Risk Management} 10.
\item \textsuperscript{678} The \textit{Criminal Procedure Act} 51 of 1977.
\item \textsuperscript{679} Botha 2008 \textit{Occupational Risk Management} 10.
\item \textsuperscript{680} Botha 2008 \textit{Occupational Risk Management} 10.
\item \textsuperscript{681} Botha 2008 \textit{Occupational Risk Management} 10.
\item \textsuperscript{682} See chapter 5.2.1 and 5.2.2.
\end{itemize}
imprisonment. The Labour Court will have jurisdiction to hear cases based on the OHSA, but not in terms of offences in terms of the MHSA. The Integration Bill also creates new offences including, amongst others, "corporate homicide", which is not mentioned in the MHSA and OHSA. Both the MHSA and the OHSA makes provision for administrative measures that need to be taken before a person is prosecuted or fined. The Acts strive toward corrective actions first rather than punitive action as a first point of departure. The Integration Bill does not prescribe any enforcement measures but it creates new offences. Both Acts make provision for an Inspectorate, in a single health and safety act, it would be proposed the inspector be an independent juristic person. This independent juristic person will then be appointed by the Department of Labour. In a single health and safety act in South Africa, it is proposed that command and control instruments still be used in terms of health and safety enforcement. A gap exists in terms of health and safety legislation enforcement as there is no apparent mention of other enforcement measures. In a single health and safety act, this gap should be filled with alternative measures.

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683 See chapter 5.2.1 and 5.2.2.  
684 See chapter 5.2.1 and 5.2.2.  
685 See chapter 5.2.1 and 5.2.2. See also chapter 2.5.
Chapter 6 Conclusion

6.1 Introduction

The aim of this dissertation was to determine if a single health and safety act could be introduced in South Africa. Currently the MHSA regulates mine health and safety in the mining industry, while the OHSA regulates occupational health and safety in other industries. These two pieces of legislation have undergone various changes through history.\textsuperscript{686} As indicated commentators argued that the MHSA provides a better framework for the protection of workers' occupational health and safety than the OHSA. There have been attempts to integrate the MHSA and OHSA. In 2003, a draft Integration Bill was published but it did not really achieve an integration of the two pieces of legislation but established an Authority and created offences.\textsuperscript{687} As the argument arises from time to time whether a single health and safety act can be introduced in South Africa, it was necessary to discuss the possibility thereof. Primary sources, such as the OHSA, MHSA and the Integration Bill, were used to see as to whether or not integration was possible. If a single health and safety act is introduced in South Africa, it is proposed that these three primary sources should be used as a framework for a single health and safety act for South Africa.

6.2 Definitions

The term "occupational health and safety" was for purposes of this dissertation defined as the "control, prevention, anticipation and analysis of any hazards which could occur in the workplace and which could cause injury or illness, or which could affect the health and well-being of the employee in the workplace."\textsuperscript{688} The MHSA defines "health" as "occupational health in mines"\textsuperscript{689} and "safety" is not mentioned in the MHSA. OHSA deems someone as "healthy" if he or she is "free from illness or any injury";\textsuperscript{690} the Integration Bill deems "occupational health and safety" as any activities that promote

\textsuperscript{686} See chapter 1.2.
\textsuperscript{687} See 5.2.3.
\textsuperscript{688} See chapter 2.2.1.
\textsuperscript{689} Section 102 of the MHSA.
\textsuperscript{690} Section 1 of the OHSA.
healthy and safe work practice, the prevention of accidents and diseases in the workplace, medical assistance provision and aid provision and any compensation. It is necessary to consider foreign definitions, in order to determine if the South African definitions are up to standard internationally. The MHSA is not very comprehensive in terms of the term health and safety, whilst the OHSA covers health and safety in terms of different employment relationships. The Integration Bill identifies the different activities, which include the promotion of health and safe workspaces, accident and disease prevention, as well as the provision of medical assistance. As the Integration Bill is very comprehensive in terms of "occupational health and safety", it is proposed that this definition will be used, but adding reference to the physical, social and mental elements of well-being. Therefore the proposed definition of "occupational health and safety" will include all those activities connected to: a) the promotion of health and safe work practices and working environments and conditions; b) the prevention of work-related accidents and diseases; c) the provision of medical assistance to persons who are injured in work-related accidents or who contract work-related diseases; d) the provision of medical aid, compensation, rehabilitation and other benefits to persons who are injured in work-related accidents or who contract work-related diseases, including the dependants of persons who die as a result of these causes. One should always consider the foreign definitions to compare the standards internationally.

A "workplace" was defined as every independent premises or place or operation with regards to size, function or organisation where an employee acts on instruction of the employer, including driving to and driving from workplace, and may include one or more places managed by one central head office. The MHSA refers to the term "works" as any that excludes mines where any person transmits, distributes supplies, trains, repairs or operates in any way that is necessary in mines. The OHSA deems a "workplace" as "any premises or place where a person performs work in the course of his employment". The Integration Bill however is silent on this definition.

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691 See 3.1.1. see also clause 1 of the Integration Bill.
692 See chapter 2.
693 See chapter 3.1.1.
694 See chapter 3.1.1.
695 See chapter 3.1.2 and also s 102 of the MHSA.
696 S 1 of the OHSA.
reason for referring to foreign definitions, is to build a foundation on which to build the South African definition.

According to the MHSA "occupational hygiene" means the "anticipation, recognition, evaluation and control of conditions at the mine that may cause illness or adverse health effects to persons". The OHSA defines "occupational hygiene" as the "anticipation, recognition, evaluation and control of conditions arising in or from the workplace, which may cause illness or adverse health effects to persons". The Integration Bill does not define "occupational hygiene". Hygiene is necessary to ensure health in the workplace. For purposes of a single health and safety act in South Africa the definition for "occupational hygiene" is proposed to be anticipation, recognition, evaluation and control of conditions arising in or from the workplace (including mines), which may cause illness or adverse health effects to persons.

A "hazard" can be defined as any circumstance that has the potential to cause harm. The MHSA defines a "hazard" as "a source or exposure to danger"; the OHSA defines it as "a source of or exposure to danger" but the Integration Bill is silent on the subject. In chapter 2, the definition for purposes of this dissertation for the term "hazard" is "any circumstance which has the potential to cause harm or exposure to danger". It is proposed that, in a single health and safety act, the definition should then be "any circumstance which has the potential to cause harm or exposure to danger". Hazards are associated with "risks". In terms of chapter 2, the term "risk" is defined as "the likelihood of an incident or occurrence of hazardous situations which could cause severe injury or illness". Foreign definitions are considered to compare with South African standards. In terms of the MHSA a "risk" is the "likelihood of occupational injury or harm to persons" and, according to the OHSA, it is defined as "the probability

697 See chapter 3.1.2.
698 Section 102 of the MHSA.
699 Section 1 of the OHSA.
700 See chapter 2.2.3 and chapter 3.4.
701 See chapter 3.4.
702 S 102 of the MHSA.
703 S 1 of the OHSA.
704 See chapter 3.1.3.
705 See chapter 2.2.4.
706 See chapter 2.2.5.
that injury or damage will occur". The Integration Bill is however silent on this subject. A proposed definition for this term could therefore be the "likelihood of an incident or occurrence of hazardous situations which could cause severe injury or illness". The term incident is not defined in either, and should therefore be added in a single health and safety act.

Risk assessments places the duty of what is reasonably practicable, which is a measure that both the MHSA and the OHSA considers. It is a practice that considers a) the severity and scope of the hazard or risk; b) the state of the knowledge reasonably available; c) the availability and suitability of mitigation or removal; d) the costs and benefits thereof.\textsuperscript{707} Once again, the Integration Bill is silent on the concept. The measure of reasonably practicable should definitely be part of a single health and safety act in South Africa as it is a measure with which the employer should act. The abovementioned definitions all have certain differences and similarities; the proposed definitions are mentioned at the end of each discussion.

\textbf{6.3 Role players}

There are various role players involved in occupational health and safety. These role players include employers, employees, manufacturers and suppliers, users of machinery, health and safety representatives, and committees and institutions.\textsuperscript{708} Each has its own responsibilities and duties. The employer is defined as "any physical or legal person that employs one or more workers".\textsuperscript{709} Employers have the duty to ensure health and safety to those in the workplace.\textsuperscript{710} The employer should also undertake assessments to ensure that all the conditions are safe and risk free.\textsuperscript{711} The MHSA and the OHSA both agree with this duty.\textsuperscript{712} The training of the employees is also on the duty list of the employer.\textsuperscript{713} In terms of the MHSA the employer has many duties and

\textsuperscript{707} S 102 of the MHSA and s 1 of the OHSA.
\textsuperscript{708} See chapter 2.3.
\textsuperscript{709} See chapter 2.3.
\textsuperscript{710} See chapter 2.3.
\textsuperscript{711} See chapter 2.3.
\textsuperscript{712} See chapter 4.1.1.1 and 4.1.1.2.
\textsuperscript{713} See chapter 2.3.
responsibilities, such as ensuring health and safety in the workplace. The employer should provide information (including issues relating to safety and health and incident reports) upon request. The employer should do what is deemed as reasonably practicable to avoid any hazards or risks. This implies a proactive approach on the employer's side to make sure that the necessary steps are taken to ensure health and safety of employees or contractors, and others who enter the workplace. Employers should provide PPE to the employees to ensure their health and safety. According to the health and safety guideline, the employer should provide for policies.

The employee is defined as "any person who performs, either regularly or temporarily, for an employer" in terms of chapter 2. A reciprocal right exists in terms of employees, as employees also have a few duties and responsibilities such as ensuring their own health and safety by undergoing training and wearing the provided PPE. If the employee does not comply with the provision of the health and safety legislation, it constitutes an offence. The employee has the right to elect a representative who will then represent him or her in health and safety committee meetings. In terms of a single health and safety act in South Africa an employee will have the duty to ensure his or her own health and safety by using the provided PPE, participating in the training and reporting unsafe situations. The MHSA deems contractors as employees, where the OHSA deems them as independent employers, it is proposed they be deemed as employees in a single health and safety act.

Health and safety committees and representatives are established to ensure health and safety and to make provision for the correct communication between employers and employees. In terms of chapter 2, the representatives are responsible for monitoring

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714 See chapter 4.1.1.1.
715 See chapter 4.1.1.1 and 4.1.1.2.
716 See chapter 2.2.6, 3.6, 4.1.1.1 and 4.1.1.2.
717 See chapter 4.1.1.1.
718 See chapter 4.1.1.2.
719 See chapter 2.3, 4.1.1.1 and 4.1.1.2.
720 See chapter 4.1.1.2.
721 See chapter 2.3.
722 See chapter 2.3, 4.1.2.1 and 4.1.2.2.
723 See chapter 4.1.2.1 and 4.1.2.2.
724 See chapter 4.1.2.1 and 4.1.2.2.
725 See chapter 2.3, 4.1.3.1 and 4.1.3.1.
the efficacy of health and safety measures.\textsuperscript{726} The MHSA and the OHSA both provide for representatives to be elected, or appointed, the moment when there are 20 or more employees appointed.\textsuperscript{727} The representatives are responsible to make recommendations on issues regarding the health and safety of employees and attendance at committee meetings.\textsuperscript{728} In a single health and safety act in South Africa, representatives will definitely be necessary; they will also have to act on behalf of employees and participate in committee meetings. In terms of both the MHSA and the OHSA when there are more than two representatives appointed, it is necessary to establish a health and safety committee.\textsuperscript{729}

Manufacturers and suppliers of machinery or articles necessary in the workplace are obliged to prevent danger or risks.\textsuperscript{730} They are therefore responsible to undertake risk assessments to ensure that the items produced are safe.\textsuperscript{731} The MHSA and the OHSA provides that manufacturers and suppliers are responsible to ensure that their items are not detrimental to the health and safety of those present on the work premises.\textsuperscript{732} Users of machinery are not discussed in terms of the MHSA, and the OHSA only mentions it briefly.\textsuperscript{733} In a single health and safety act, a more in depth discussion of users of machinery should be introduced, as there are user of machinery in both industry and mining.

The government and government institutions are very important, as they are responsible for the national health and safety regime. The institution responsible for mine health and safety is the Department of Mineral Resources and the institution responsible for health and safety in industry is the Department of Labour. Their responsibilities include the policymaking process and the giving of advice to the Minister. The government institutions are responsible for occupational health and safety

\textsuperscript{726} See chapter 2.3.
\textsuperscript{727} See chapter 4.1.3.1 and 4.1.3.2.
\textsuperscript{728} See chapter 4.1.3.1 and 4.1.3.2.
\textsuperscript{729} See chapter 4.1.3.1 and 4.1.3.2.
\textsuperscript{730} See chapter 2.3.
\textsuperscript{731} See chapter 2.3.
\textsuperscript{732} See chapter 4.1.4.1 and 4.1.4.2.
\textsuperscript{733} See chapter 4.1.5.
as well as the dialogue between the different role players.\textsuperscript{734} The MHSA is governed by the Minister of Mineral Resources and the Department of Mineral Resources but they are assisted by the MHSC, the MRAC, the MOHAC and the SIMRAC.\textsuperscript{735} Each of these committees has a role to assist in the advising of the Minister and the Department on the governing of health and safety legislation.\textsuperscript{736} The OHSA is governed by the Ministry of Labour and the Department of Labour.\textsuperscript{737} The provision in terms of the OHSA is not as comprehensive as that of the MHSA. The MHSA is very comprehensive in terms of the government institutions and this should be the proposed framework to build on in terms of a single health and safety act in South Africa. The \textit{Integration Bill} establishes a combined new authority constituted from members of both the Department of Mineral Resources and the Department of Labour, representatives thereof, as well as trade union members.\textsuperscript{738} This Authority will be known as the National Occupational Health and Safety Authority.\textsuperscript{739} This Authority will be established to implement and administrate the integrated policy.\textsuperscript{740} It is proposed that the Authority and the establishment thereof should be followed when implementing a single health and safety act in South Africa.

In table 6.1, a summarising comparison will be made on the different role players and their duties and responsibilities in terms of the MHSA, the OHSA and the \textit{Integration Bill} in order to determine what the best description of each would be in a single health and safety act in South Africa.

\subsection*{6.4 Enforcement}

The MHSA relies mostly on the measure of command and control to enforce the health and safety legislation.\textsuperscript{741} Individuals are guilty of an offence by not complying with the provisions of the MHSA.\textsuperscript{742} The penalties for offences in terms of the MHSA include fines or imprisonment. According to the OHSA the employer can be held responsible for

\begin{thebibliography}{99}
\bibitem{734} See chapter 2.3.
\bibitem{735} See chapter 4.1.6.1.
\bibitem{736} See chapter 4.1.6.1.
\bibitem{737} See chapter 4.1.6.1.
\bibitem{738} See chapter 4.1.6.2.
\bibitem{739} See chapter 4.1.6.3.
\bibitem{740} See chapter 4.1.6.3.
\bibitem{741} See chapter 5.2.1.
\bibitem{742} See chapter 5.2.1.
\end{thebibliography}
ensuring compliance in the workplace.\textsuperscript{743} The OHSA mostly uses command and control to enforce occupational health and safety.\textsuperscript{744} When an individual is guilty of non-compliance, he or she can be punished with either a fine or imprisonment.\textsuperscript{745} In a single health and safety act in South Africa it would be proposed that not only command and control still be used, but also other measures as there exists a gap in the enforcement of health and safety legislation. The \textit{Integration Bill} introduces new offence known as "corporate homicide\textsuperscript{746}" and this should therefore be introduced into a single health and safety act.

\textbf{6.5 Recommendations}

It is possible to introduce a single health and safety act in South Africa. As there were already attempts to do so, it is clear that a need exists for a single act. It is also clear that the implementation of a single health and safety act will have an impact on the Department of Labour, as it is proposed they be the Department in charge of the regulation of a single health and safety act. When introducing the role players and their duties and responsibilities, the new Authority established by the \textit{Integration Bill} should be used as a starting point as government institutions should be the role players.\textsuperscript{747} When considering the employer, it is proposed to utilise a combination of the duties and responsibilities of both the MHSA and the OHSA,\textsuperscript{748} which should include the main duty of ensuring health and safety in the workplace. The employee should also have the responsibility to act in such a manner that his or her health and safety is not jeopardised. In a single health and safety act, it is proposed that the duties and responsibilities of the MHSA and the OHSA be combined to provide a more comprehensive description.\textsuperscript{749} It is proposed that health and safety representatives and committees definitely form part of a single health and safety act.\textsuperscript{750} In a single health and safety act, the users of machinery should be described more in depth to ensure

\textsuperscript{743} See chapter 5.2.2.
\textsuperscript{744} See chapter 5.2.2.
\textsuperscript{745} See chapter 5.2.2.
\textsuperscript{746} See chapter 5.2.3.
\textsuperscript{747} See chapter 4.1.6.3.
\textsuperscript{748} See chapter 4.1.1.1 and 4.1.1.2.
\textsuperscript{749} See chapter 4.1.2.1 and 4.1.2.2.
\textsuperscript{750} See 4.1.3.1 and 4.1.3.2.
that no gap exists regarding their responsibilities and duties.\textsuperscript{751} It is proposed that suppliers and manufacturers stay liable, as in the MHSA and OHSA.\textsuperscript{752}

When considering the enforcement of health and safety legislation it seems clear that a gap exists as command and control measures are mostly used, and this provides ground for development.\textsuperscript{753} In a single health and safety act, a combined or hybrid measure is proposed.

In the end, it seems clear that the introduction of a single health and safety act is possible in South Africa if the correct starting point is utilised.\textsuperscript{754}

\textsuperscript{751} See 4.1.5.
\textsuperscript{752} See 4.1.4.1 and 4.1.4.2.
\textsuperscript{753} See chapter 5.
\textsuperscript{754} See chapter 4.1.6.3.
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