



Motor Trades Association of Australia

PUBLIC SUBMISSION COVER SHEET

NATIONAL REVIEW INTO MODEL OHS LAWS

Background

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association is a federation of the various state and territory motor trades associations and automobile chambers of commerce, as well as the New South Wales based Service Station Association Ltd (SSA) and the Australian Automobile Dealers Association. Members of the MTAA Federation include:

- the Australian Automobile Dealers Association (AADA)
- the Motor Trades Association of the ACT (MTA ACT)
- the Motor Traders Association of NSW (MTA NSW)
- the Motor Trades Association of the Northern Territory (MTA NT)
- the Motor Trade Association of South Australia (MTA SA)
- the Motor Trade Association of Western Australia (MTA WA)
- the Service Station Association Limited (SSA Ltd)

MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades, ranging from motor vehicle body repair to automotive parts recycling. MTAA represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over \$160 billion and which employ over 308,000 people. The vast majority of businesses represented by MTAA employ five or less people.

The Member Bodies of the MTAA Federation each provide a dedicated range of services, publications, and advisings to their various members to assist in the development and management of businesses in the retail automotive sector. They provide industry training, industrial relations advice, occupational health and safety services and technical advice. In addition, as a collective they are the peak retail automotive industry organisations, which represent the industry on a range of issues within their respective state or territory as well as to Federal Government.

In respect of OH&S services, each state or territory Member Body has either a full time or multi-tasked person engaged in the provision of OH&S training, advice and assistance. Those staff are also involved with setting key state and/or national standards, codes of practice, and other stakeholder activities that might be relevant to the industry at the state level. Those staff may also be involved in the direct representation of member businesses where appropriate.

MTAA's emphasis in this submission is very much on a regulatory framework that can be readily understood and complied with by small to medium sized enterprises. Such a framework ought to have a level of compliance which is reasonable and practical. That framework also needs to contain adequate explanatory definitions to assist employers in achieving compliance objectives.

An underlying point in our submission is that the motor trades have possibly the most diverse range of workplace hazards, when the enormous variety of tasks, equipment, and duties performed by individual small businesses are recognised. These tasks and duties might include, for instance, commercial body building, major-component reconditioning (for example engine

reconditioning), vehicle service, motor body repair, spare parts distribution and storage and retailing.

Legislative Approach

MTAA and the motor trade associations in all states and territories strongly support the hierarchical regulatory structure that is based on the Robins Committee approach (UK 1972). This structure might be thought of as being represented by a pyramid. At the apex of this pyramid rests the Act, which gives legislative effect to the principles underpinning the desired OH & S outcomes. Under the apex are positioned the Regulations to the Act, which cover the performance based and prescriptive standards that need to be met in order for the Act's objectives to be met. Forming the base of the pyramid are the Codes of Practice, guidelines and other explanatory documentation that details the practical implementation of the Regulations and the Act.

In response to question 2 contained in the Department's Discussion Paper, MTAA believes that the Victorian OH&S Act -- with key principles defined in Section 4 -- has merit, as other jurisdictions rely on performance based prescriptions (specifying outcomes) and the former provides more guidance to small business on what should be achieved.

Section 4(5) of the Victorian OHS Act 2004 should, however, be modified to encourage employee representation at the workplace. Many operations require employee involvement in OH&S and the definition of employee ought to include those at foreman or supervisory level. This is critical to ensuring adequate employee representation, notwithstanding health and safety representatives and health and safety committees; the latter of which generally are more widely used in businesses of 20+ employees.

As to the Discussion paper's question 3, the appropriate title of the OH&S Act is not critical as they are generally similar. SA, for example, includes 'welfare' in its title and it may be of some benefit to describe any proposed legislation as Occupational Health Safety and Welfare legislation (welfare is included in the Objects of both the Victoria and SA Acts).

With respect to question 4 -- should the model OH&S legislation specify its objectives -- MTAA considers that SA, WA and Victoria, in their respective sections 3, 5 and 2, adequately address the Objects. While there are similar approaches employed elsewhere, MTAA suggests Section 3 Parts (a), (b), (c), (d) and (e) of the SA OHS&W Act 1986 might be a good basis for any proposed legislation, albeit with the addition or incorporation of words from Section 5(e), (f) & (g) of the WA OH&S Act.

As to question 5 -- should the model OH&S Act include a set of principles of health and safety protection -- see MTAA's response to question 2. MTAA does, however, have some concerns with including principles that might be taken more as as motherhood statements, which may lead to unintended consequences. This, then, is a matter to be carefully analysed. Arguably, principles that contain high-level open statements of duties of care are not necessary if the objectives are robust enough, as appears to be the case in SA and WA.

As to question 6, we see some merit in WorkSafe Victoria's comment that, ". . . *the concepts of prevention, equity, participation, cooperation and acceptance of responsibility should be included in the Objects (and, if necessary, Principles but note our precautionary approach)*".

Scope, Application & Definitions

As to question 7 -- should the model OH&S Act maintain the status quo regarding industry specific legislation (and question 8) – MTAA makes the following comments:

It is MTAA's preference for there to be one 'umbrella' OH&S framework covering all types of industrial activity as generally exists now. Under that umbrella, high-risk industries or activities should generally be dealt with through the operation of any associated regulatory framework. One obvious exemption to this would be major hazardous facilities (and there are others of a similar nature), which may better be dealt with through the operation of specific legislation or regulation.

Reference to Codes of Practice or guidance material (as per the pyramid structure referred to in response to question 2, above) has merit in providing supplementary explanation to the Regulations. For small business in particular, MTAA considers non-mandatory guidance material as absolutely critical to assisting those business' to comply (for example SafeWork SA's "safeguards"; similar guidance materials from other jurisdictions, and; MTA's wide-ranging safe operating procedures with disclaimers).

Codes of Practice should not be mandatory and should have the status of guidance material along with any other industry specific material that is available. The circumstances under which it might be acceptable for Codes of Practice to be given legislative force would be those in which all parties in an industry agree.

MTAA makes the following comments in connection with question 9 -- should the model OH&S Act contain provisions for improving coordination between safety regulators within jurisdictions.

MTAA is uncertain if this question is referring to specific activities or industry specific provisions across jurisdictions? In any event, the Association believes that the question ought to be attenuated towards the identification of that which will produce the best safety outcome. MTAA suggests that national standards with respect to safe transport, use and handling of plant (operating instructions, design, erection, installation and the like) offer the best prospect of certainty in that regard.

It would be MTAA's preference to see regulators work towards common enforcement and compliance policies. In multi-enterprise sites it is very difficult to say who has the responsibility for a particular event (for example, in situations of businesses sub-contracting) and the situation often arises whether the job design is wrong or the way the job is done is incorrect. Resultantly,

regulators often take the pragmatic approach of making the principal contractor responsible, even where there is little integration/causal connection.

The issue of shared responsibilities in terms of, for example, group training schemes or labour hire, raises practical problems in the imposition of a shared responsibility in circumstances where serious injury or fatality may occur. These practicalities could be particularly complex in circumstances involving the consumption of drugs or alcohol in the workplace where, for example, the employer could not reasonably have detected that consumption in the short term (during post-lunch breaks or off-site work for instance). To this extent regulators need to have a consistent and fair approach across jurisdictions, which take into account specific factors determining reasonableness.

As to questions 10 and 11 -- should the general duties of care be tied to the conduct of work/workplace and or extended to members of the public -- MTAA believes that the focus must be on workplaces. This focus needs to be on the exclusion of non-workplaces and any vehicles or other mobile equipment that might be being transported to, from and / or used at another workplace. There also needs to be some exclusion recognising (and creating) circumstances and mechanisms where the employer has no control over the worksite and other factors contributed to and / or caused an accident. We recognise this is a difficult area to address adequately.

MTAA makes the following comments with respect to questions 12, 13, 14 and 15.

With the changing nature of traditional employment to include (for example) labour hire, contracting, franchising, outsourcing and home workers, there needs to be a set of compliance standards and / or guidelines similar to those in part adopted by SA, which have a predominant focus on labour hire. MTAA is concerned, however, that issues such as outsourcing and home work cannot adequately be dealt with in the context of small business in that manner.

It might be appropriate, though, for any proposed standards and guidelines to reflect the duty of care as extends to the safe use of plant, chemicals, personal protection equipment (PPE) and other equipment supplied by the employer (and relevant safe operating procedures). Any further extension to this duty – for instance with respect to matters such as manual handling or regular inspections -- needs to be the responsibility of the outworker/home worker.

As to emerging hazards and risks, we accept that psychological, social and work environment problems (such as stress, fatigue and bullying) all increase the risks associated with work. MTAA would caution against including these factors in the definition of 'Health', however, for the reasons outlined below.

First, in many cases, current workers compensation guidelines recognise the presentation of a person with these factors as presentation with an injury. Second, presentation of a person with these factors could be the result of the employee's non-work activities. Third, these factors are difficult to assess on the spot as to their extent and seriousness, and often the only action or precaution that can be taken is to remove the employee from the workplace (or source of stress, which could be unrelated to the actual work environment). Additionally, MTAA would caution

against imposing any severe penalties on employers as a consequence of these emerging hazards and risks as they are not readily identifiable.

Definitions of key terms and concepts are critical to national consistency, training, education and overall understanding by all parties. As to the defining of the terms listed in paragraph 2.4, MTAA believes the definitions contained in SA, WA and Victorian regulation to be adequate. MTAA has some concern with the definitions contained in the NSW legislation, however, and would oppose the importation of those terms.

As to any other issues relating to scope, application and definitions of model OH&S legislation, MTAA are opposed to the calling-up of Australian Standards (as are other stakeholders for reasons based on cost, application, overlap and the like) and believe that appropriate guidance materials -- referred to earlier -- would suffice.

Duties of Care – Who owes them and to whom?

As to questions 16, 17, 18 and 19, which question the need for a controlled test for the definition and consequent roles and responsibilities of duty holders and relevant defences, MTAA makes the following comments:

The issue of control is partially addressed in Section 19 of the SA OHS&W Act, and its equivalent in WA and Victoria. While the concept of control is expressed differently in different state legislation, it does generally extend the duties of employers to contractors and their employees in relation to matters over which they have control, as well as a duty on persons who manage or control their business. To the extent that NSW and Queensland statutes provide a defence that a duty was breached due to causes outside their control, that would seem to be reasonable and clear and desirable in a national model.

While defining and attributing those with duties in relation to workplace organisation does create a degree of uncertainty, the duty holders, and especially where there can be shared responsibilities in SA has been addressed. This, to the extent that it is practical, is done by defining duties of the range of parties from owner to occupier to employee to installers, importers and the like. (see SA OHS&W Regulations Schedules 1 and 2). While there may be some gaps in control using duty holder responsibilities, and overlap with shared responsibilities, this focus is reasonable in a national system where there could be unintended consequences through the use of broader definitions.

As part of the shared responsibility for safety, employees as duty holders must be given a role to play in achieving healthy and safe workplaces. This includes responsibilities for not endangering themselves and others due, for example, to the consumption of drugs or alcohol, or the reckless endangerment of others due to individual actions including through the use of plant equipment, vehicles or chemicals. Similarly, there seems to have been, across all jurisdictions, a lack of enforcement towards employees committing such breaches.

There should be non-delegatable duties in relation to control, and duty holders must be consistently aware of their responsibilities, and accountable for them, irrespective of whether they are an employer, employee, self employed person, contractor, manufacturer, importer or supplier. As to multiple duty holders and multiple duties, MTAA believes this is adequately addressed with clear definition in Sections 19-25 of the SA OHS&W Act 1986 (and its equivalent in other states) and MTAA suggests that this Act be used as a guide.

MTAA makes the following points in relation to questions 20 to 36.

Primary reliance on employment relationships is not entirely satisfactory when framing safety obligations given the wide variety of work relationships mentioned. Employees generally, having been inducted into safe workplace practices and procedures, should all owe duties of care to themselves and to others with whom they come into contact. Similarly, members of the public should have some duty of care with respect to entering workplaces, which are generally designed to prevent entry or access to work areas unless accompanied.

To the extent that duties are necessary to protect non-employees and other persons performing work the test should be what is 'reasonably practicable'. That test would also need to contain regard to the nature of work, risks of exposure to hazards, and the conditions of access and egress to the work area. The test should take into account the severity of risk of injury and the likely consequences. For example, when is it reasonable and practical to bar entry to a building site (which could vary from small housing site to major building site) compared to automotive workshops, where signage, reporting, design, and prohibition entry to premises may be reasonable with ongoing vigilance by staff? As previously foreshadowed, duties of employers should be owed to the range of employees and consideration in terms of members of the public as outlined in Sections 19-25 of the SA OHS&W Act 1986, above.

As to the duties of workers and others, including those not performing work (for example, visitors) the current legislative frameworks address personal protective clothing and equipment. However where it is provided and employers try and enforce the wearing thereof, there is continual resistance and habits which mitigate against ensuring safe environments for workers and visitors. This becomes an extremely frustrating problem, particularly among small business. Model OH&S legislation needs to be consistent and needs to have appropriate and reasonable enforcement procedures. Model OH & S legislation also needs to act in such a manner as to assist in bringing about a sustained change of attitude through consultation and encouragement, rather than a range of punitive measures.

While some OH &S laws include the appointment of an individual to hold responsibility for OH &S at a workplace or site, (for example, SA and Tasmania with Responsible Officers, NSW with Director Liability, Queensland with WHSO Officer and the building industry with OH&S Supervisors) MTAA would strongly advocate for there to be no such provision in national legislation, as each jurisdiction currently gives a different emphasis to or, in some cases, non-recognition of, such appointees. Ideally, therefore, these matters should best be addressed in regulations.

As to the positive duties of officers of bodies corporate, SA has section 59A of the OHS&W ACT 1986, which deals with imputation provisions. MTAA understands that other jurisdictions also have accountability provisions in various contexts. What is critical, however, is fair and reasonable defences to such provisions depending on factors such as knowledge and extent of control.

As to questions 31 & 32, most states (except QLD Section 15((b)&(c)) do not impose duties on persons in control of plant as we understand it. MTAA would consider this to be extremely onerous on small business. Everyone needs to be responsible and accountable to the extent that is reasonable and practical. Sharing of responsibility underpins the Robens philosophy as is demonstrated in the SA, VIC and WA legislation (as MTAA understands it) and this is critical to small business and other applications (such as sellers and users of farm and horticultural equipment for example).

On the issue of design (under paragraph 3.8); in an industry with a whole range of equipment and plant used by small business, MTAA strongly believes there should be a duty on manufacturers and designers to ensure safe use in construction, maintenance, repair or service. In respect of buildings or structures, however, many of our businesses operate on leased or rented premises. It would be difficult, therefore, to do anything to require the design of buildings and structures to impose any other requirements than to be safe for those who are using them given their multi-purpose operations.

As to questions 33-36 on decommission and disposal of plant/substances; our industry has little input other than with respect to the disposal of underground storage tanks, which is dealt with in other jurisdictions generally through the provisions of Environment Protection legislation.

‘Reasonably Practicable’ & Risk Management

MTAA make the following comments in relation to the concept of ‘reasonable practicable’, as referred to in questions 37-41.

MTAA believes the definition of employer duties in Section 19 of SA’s OHS&W Act 1986 is fairly standard across the jurisdictions and sufficiently detailed to assist small business. MTAA accepts the view that some jurisdictions, in particular NSW, do apply the standard of almost absolute duty, which must not be part of a national framework. This standard is interpreted by the Court as placing an obligation on employers to have regard for employees that foolishly disregard their own safety.

For small to medium enterprises in largely diverse industry sectors such as the motor trades, it is almost impossible to comply with all of the requirements with respect to hazard management (site inspections, plant, hazardous substances, manual handling with appropriate instruction, supervision, training and safe operating procedures, PPE and the like). The definition of reasonable, therefore, should not be left up to the regulator, but needs to be contained in some detailed guiding principles of interpretation.

MTAA agrees that the meaning of what is reasonably practicable should be included in model legislation as provided for in the Western Australian or Victorian legislation. MTAA is of the view, however, that national OH&S legislation must add the concepts of 'control' or 'capacity' as an element in the 'reasonably practicable' test. To the extent that the test, or examples for assessing compliance with the standard, is required it must be confined in subordinate instruments/regulations not the model Act.

As to questions 42-44, MTAA makes the following comments on risk management:

As paragraph 4.2 states, “ . . . *the employer should not just be responding to demonstrated risks but should have a system of identifying and assessing all possible risks and instituting reasonable and appropriate measures*”. The problem therein posed is that jurisdictions require prioritising all hazards from those of high risk (requiring immediate actions), through to low risk, and the assessment process using tables can, at times, require some subjective interpretation. To this extent and given the volume of potential risks in the automotive field (sometimes up to 100 items of plant are in regular use in a small business repair establishment), this gives rise to an enormous task in the risk assessment process. Accordingly MTAA would strongly advocate for a generic but effective guidance tool and some standard forms of guidance for accurate record keeping.

SA, for example, incorporates risk management principles into Regulations. Victoria has removed one of the three elements combining identification and assessment. The second step of course is control measures including, as an outcome, safe operating procedures. MTAA would advocate a two-step process in a national regulatory framework, preferring the Act to be simple and covering broad principles only.

Consultation, Participation and Representation

In respect of questions 45-48 on the duty to consult, MTAA makes the following comments:

Consultation is a fundamental, critical duty underpinning any national model. The system should imply flexibility depending on the size and nature of the workplace and the relevant industry sector.

The Act should only recognise different levels of consultation for different workplaces. Given question 48, provision for consultation should be extremely flexible. Much legislation fails to recognise the wide variety of consultative methods and usually implies more participative arrangements, such as those outlined in the next section, as the more important methods, when in reality the day to day contact is also critical.

Any national model should, in its subordinate instruments, recognise the range and type of consultation to facilitate flexibility and use of means such as electronic methods and email and, perhaps, self-paced learning arrangements, which could also assist in consulting with staff over new work/processes in remote/isolated/multi-site areas.

MTAA makes the following comments in respect to questions 49-62 that are concerned with participation and representation.

The requirements to establish Health and Safety Representatives (HSRs) and Health and Safety Committees (HSCs) across jurisdictions vary considerably in terms of election, appointment, powers and functions. Similarly, there is recognition of alternative and effective mechanisms that are not even recognised in some jurisdictions as key forms of industry representation (for example, site supervisor roles in the building industry, toolbox meetings in small business and in small work groups/processing in large employers with multiple operations).

Accordingly requirements to have HSCs or HSRs should not be mandatory and any reference to HSRs and HSCs in the model legislation should simply provide for equal representation on committees and recognition of the role, function and appointment of HSRs (with the flexibility to allow anyone other than middle or general management to perform such a role). Similarly, there should be general recognition of other forms of representation and participation as key workplace triggers for promoting interests in OH&S and improving health and safety performance at the work place.

In terms of the structure and functions of HSCs where they are introduced into a workplace, MTAA believes they should be part of a regulatory framework rather than the model laws. HSCs need to provide for equal representation, no restriction on who should chair and non-mandatory appointment. HSCs also need criteria on which to assess suitability and to outline forms of training (which could include video media and self-paced learning) rather than demanding a 4 or 8-hour course (which is impractical for multi-site and medium sized business) Any guidance materials for HSCs need to assist in ensuring effective operation and encouragement of training in job roles and responsibilities with respect to communication, consultation and effective hazard management relevant to the workplace/work group. Any mandatory training in regulations should be confined to less than one day depending on the size nature and structure of safety committee members.

As to appointment/election of HSRs to participate in a HSC it is difficult to come up with a simple model given the majority of business in the retail motor trades are small businesses. However, there should be an ability to appoint, on a consensus basis (failing which to elect perhaps as per the SA legislation), HSRs from work group/s involving persons other than true middle management and above, as on many occasions working foreman/supervisors have very similar functions in working with other employees. They are also recognised as having the same duties and responsibilities as other employees, but this group are not recognised in the legislation as having opportunity to be part of those standing for consensus, nomination, or even election.

As to training, qualifications and other specific responsibilities (for example SA allows HSRs to issue default and stop work notices). MTAA has serious difficulties with the mandatory 5-day HSR Level 1/Level 2 requirements when they apply to many medium and small business. MTAA would advocate flexible forms of learning as part of that course, perhaps with a legislative module, key hazard theory, communication, consultation and familiarity with compliance as part of essential off-the-job training. Nevertheless, any requirements also need to

be sufficiently flexible to undertake at least 2-days through on the job assessment/external learning.

The reality is that HSRs have taken an enormous amount of time to be accepted in SA (despite being recognised in the legislation for 22 years) and the majority of industry, including employees on site, have shown little interest despite five full days of inflexible off the job training with a requirement of any split of training to be undertaken within four weeks. By contrast, large enterprises including public authorities, mining or manufacturing have, in MTAA's experience, seen fit to provide training given their structure, nature of work, Quality Assurance requirements and so on. Additionally, the period of training in the SA legislation seems more appropriate, so one would assume a national model providing, say, a minimum of 3 days off the job as suggested above.

We do not think national model legislation or regulation should address other specific responsibilities of HSRs: that should be left to individual states. As to whether there are other classes of work for whom current representation requirements are not effective, the answer is yes. This might particularly be the situation with mobile work within the metropolitan or rural/isolated areas, isolated work for emergency callouts and onsite farm work, farm machinery repairs and a range of other applications in automotive (for example isolated console operators working odd/evening shifts in retail) and other industries. Clearly the model OHS Act should recognise and allow for flexible forms of representation and participation whether through phone/messaging/other electronic media or reporting.

As to including right of entry provisions in model OH&S legislation, these are very different across jurisdictions and MTAA would oppose a generic provision. This objection is on the basis that OH&S primarily is a workplace issue to be addressed by those in the workplace with powers to access workplace inspectors who have a vast array of punitive, educative and preventative roles and responsibilities. Furthermore they are able to access serious accidents, incidents and emergencies across jurisdictions with linkages to hospital and other facilities and most legislation requires the immediate reporting of notifiable incidents and occurrences (for example Reg. 6.6 of SA Regulations). Employees individually or through a representative have the opportunity to get an Inspector to the worksite at any time and do so. Any other forms of entry such as that by union officials/organisers should be confined to IR legislation and it has been the experience of various jurisdictions that workplace safety should be addressed on site with appropriately trained and qualified persons – so often others seem to get safety issues out of context or engage on a fishing exercise for other pursuits and this is not conducive to consensus, participation and consultation.

MTAA makes the following comments in respect of questions 63 - 70:

As stated in the preceding questions, it may be appropriate, in consultation with the employer, to have HSRs issue notices requiring resolution (in effect improvement notices), but this should be in the legislation and allow also for the provision of external advice, via the Inspectorate, where the matter is in dispute. Each jurisdiction should decide whether issue resolution should be addressed differently in particular industry contexts, or other applications. There should be no unintended consequences with this type of provision.

As to having the right to refuse or cease to undertake work considered unhealthy or unsafe by either HSR or an employee, such an entity should be required to direct any concern to the Inspectorate or onsite safety personnel for investigation and or determination. It might also be a further requirement that other duties be assigned with a system containing checks and balances. Given the seriousness of this issue, it should be addressed in the legislation as a matter of principle, with the employer/manager having the right to object and put a case for continued work as part of the Inspectorate's determination.

In respect of questions 71-78 in relation to protection from discrimination and victimisation of persons raising OH&S issues, MTAA makes the following comments:

There should be a duty upon persons to raise health and safety issues via the appropriate consultative mechanisms/representatives/committees or other on site avenues and then, if not satisfied, via the Inspectorate/Safe Work Authority. However if there is a belief that such person/s could be discriminated against or victimised then protective measures for that person need to be in place. For instance, a provision providing reverse onus of proof on the employer, such as that found in Section 56 of SA's OHS&W Act 1986, MTAA observes as being effective to the extent that there has been little need for its exercise over the entire time it has been in existence.

SA also has a new Section 55A relating to Workplace Bullying. This includes a consultative process, which is primarily conciliatory in nature, but which is also clearly linked to the rest of the OH&S legislation. It provides an opportunity to bring into account the alleged aggressor through compulsory workplace meetings, with avenues of conciliation where that mechanism fails.

In our experience there is no need for specialist criminal/civil proceedings to address this issue specifically. There is much in the way of overlapping jurisdictions (unlawful termination and prohibited conduct, Workplace Relations Act and Equal Opportunity legislation) which together provide protection against injury in employment whether or not dismissal is the end result. In summary we believe ADR (alternative dispute resolution) processes are in place and are adequate to deal with this issue without creating further cross-jurisdictional issues assuming for the moment provisions as outlined above are in place.

Regulator Functions, Powers & Accountability

As to questions 79-83 on the role and function of regulators MTAA makes the following comments:

Advisory and enforcement powers should be separate.

In MTAA's experience (over 30+ years) the regulators functions have now progressed into three identifiable and distinct areas:

- first - the regulator should continue to have a preventative team which has advisory, informative, education and consultative functions usually performed with relevant stakeholder involvement/feedback and specific projects (targeting for example safe plant, equipment and operating procedures in the national farm machinery audits 2005/6);
- second - an intervention group which is involved in formulating, disseminating assessing and monitoring standards of OH&S practice and improvement;
- third - the compliance team which either accepts matters referred to it for assessment and enforcement or investigates with an eye to prosecution or a suite of other penalties from caution to expiation notices to seeking orders that the company invest in an improvement program, modification of equipment or prosecution leading to fines and penalties.

While paragraph 6.1 suggests the Victorian OH&S Act 2004 allows for the making of interpretive documents to assist duty holders to understand how the Regulator will interpret key issues and provisions in the Act/Regulations, MTAA has no experience with this in other jurisdictions and, therefore, would caution against simply importing this provision into national OH&S laws or regulations.

As to questions 84-89 MTAA makes the following comments:

The model OH&S Act should provide for the independence in appointment of Inspectors, who should be part of the Safe Work Authority's regulatory arm. The model legislation should be sufficiently drafted to allow a jurisdiction to provide assistance, guidance and advice either as part of, or separate from enforcement functions of inspectors. Our Association sees merit in the separation of these functions of compliance and advisory however it is recognised that not all jurisdictions are sufficiently resourced to achieve this outcome.

Such inspectors should have Certificate IV equivalent training in OH&S in addition to relevant technical skills and practical experience with relevant Regulations. We would see some merit in the Inspectors being appointed by the Governor, not the Safe Work Authority (as occurs in theory in SA), and there should be a mix of scientific, engineering, compliance testing, and employer/small business backgrounds (along with employee/nursing/OH&S professionals) without specifying proportions from each of these backgrounds.

Compliance & Enforcement

As to enforcement measures outlined in questions 90 and 103 MTAA comments that:

The enforcement period or hierarchy of measures in order of escalation as proposed is supported with the following qualifications –

- (a) advice and persuasion followed by warnings and negotiated outcomes is acceptable;
- (b) as to provisional improvement notices (PINs), there should be an opportunity in the national model to reflect the HSR's role (as per SA legislation) to issue a PIN provided there is adequate prior consultation and attempts at rectification of the

- problem for a whole range of potential safety breaches. At the practical level, small business employers in particular are continuously facing problems in communicating safety protection. In many instances the power to issue a PIN as a last resort on site would assist in bringing about a change of behaviour/culture and the model should reflect this type of two-pronged approach to safety through HSRs.
- (c) infringement notices are not always applied in a fair manner or context and give rise to wide discretion with on the spot fines. However, with the appropriate procedures and avoidance of subjectivity, they are a useful measure. MTAA prefers the SA OHS&W Act 1986 provision, which says, “*infringement notices (expiation notices) can only be issued for a failure to comply with an improvement notice*”, thereby providing an incentive for immediate response and positive reinforcement.
 - (d) improvement notices are perhaps in the right place in the structure where an Inspector, as a alternative to the foregoing, tends to issue an improvement notice in the presence of doubt. In the operation of the SA regime, the improvement notice has not been a major punishment. But again, the way it is applied in some other jurisdictions imparts a a different impact rather than simply bringing about immediate change, education and commitment.
 - (e) prohibition notices need to be clearly defined with the opportunity for an appeals process and removal on a successful outcome. But, guidelines/safeguards in determining when and how to issue such notices should be essential to prevent subjective assessment by an officer issuing the same. We believe that prohibition notices similar to those in SA, Victoria and WA are a basis for drafting a model provision.
 - (f) as to “probation” or ‘enforceable undertakings’, MTAA would strongly support this type of activity. This may make a business rectify an unsafe procedure/equipment/process and, depending on the size of business and the nature and severity of issue, require promotion of that procedure to others within the relevant industry. MTAA believes this enforcement measure has strong merit and perhaps should be given a far greater emphasis on a national model where for example, a large company, rather than being prosecuted for potentially hundreds of thousands of dollars, is given the opportunity to invest that amount in an agreed enforceable undertaking of this nature. Similarly, noting Queensland legislation not requiring an offender to admit fault or liability as a condition of entering into an enforceable undertaking (Section 42D), this should further encourage investment in health and safety by the potential litigant offender.
 - (g) as to fines and other punitive action in lower and higher courts we hold the view that these are dealt with differently across jurisdictions. In SA for example, there are division 1-6 fines allocated in order of severity and linked directly to breaches of the legislation by various duty holders based at least on the intent that OH&S is a shared responsibility. On this aspect we see merit in a model which is clear for the purposes of such action. As to the level of fines, however, whilst SA has currently apparent fines in the medium to higher end of the range compared to other jurisdictions, this is not the case as the Act allows for issuing of multiple charges in some contexts which are not available under other jurisdictions. By contrast other jurisdictions even with higher penalties have no such provision. It is therefore very difficult to recommend what would be a suitable level of fines as a deterrent so we believe the

model should confine itself to a median average of that applicable across jurisdictions allowing them, therefore, to decide on what is appropriate. We also hold the view that raising the bar on fines achieves no more of a deterrent, it only creates stress on small to medium enterprises, that are already 'cash-strapped' and the deterrent is more than adequate as it stands even in the lower penalty jurisdictions. Furthermore there should be a positive provision pointing to enforceable undertakings, training, education and the like to bring about widespread change and the ability of regulatory authorities to direct funds for those matters into appropriate grants or other measures to provide wider industry training.

- (h) MTAA could foresee circumstances where regulators request an injunction or compliance order granted by the Court, but within the motor trades there has been no experience of this. It would be a useful potential tool to remain in the list of enforcement measure. Hopefully in Australian it would see little use.

Prosecutions

As to questions 104-141 -- dealing with the enforcement of OH&S laws through prosecution where other compliance and enforcement options are exhausted or deemed inappropriate by the authority -- MTAA's comments as follows:

MTAA believes the model OH&S Act should provide that most cases be subject to civil proceedings, as very few are premeditated actions leading to breach of duties or obligations. The exception being that unless a matter is a minor indictable offence in which case it could be dealt with by (as is the situation in South Australia) an Industrial Magistrate.

Where a matter is to be considered a criminal offence and penalties apply (for example under Section 59 of SA OHS&W Act with respect to reckless endangerment) there should be a full criminal trial to determine any conviction and the penalty. Similarly for any other provisions carrying serious criminal charges.

In respect of who may commence prosecutions and relevant procedures (paragraph 8.3), MTAA makes the following points:

- (a) we strongly believe prosecutions in the model must be brought by the regulator/Minister or, more generally Inspectors, and no one else. If this is a national model there needs to be consistency, clarity and equity, so any jurisdiction with divergent arrangements may well need to evaluate whether it is adequately resourced. MTAA totally opposes third party prosecutions. Furthermore, inspectors are trained, experienced and unbiased in considering cases for prosecution, utilising a detailed process of evaluation before putting the case forward to a higher authority. It is then the consideration and decision of Crown Law or the DPP as to whether prosecution should be taken and proceedings, therefore, initiated.
- (b) As to time limits in bringing such proceedings; it is suggested that 2 years is an adequate compromise, noting jurisdictions can vary from 6 months to 3 years after an offence has occurred. In SA the 2-year limit is adequate; there is a provision where individuals can commence prosecution under Section 58(7) after one year and

provision to apply to the DPP for extension of time. This safeguard has worked well within that jurisdiction.

- (c) As to specific provisions of conduct of prosecutions, they should be left to the rules of criminal law and the rules of the relevant court or tribunal rather than specific provisions in a model OH&S Act.

As to ordinary rules of evidence dealing with proof of relevant matters in court proceedings MTAA would support allowing expert reports to be admitted (without the witness present), certain facts about presumption of parties (employer, employee and the like), and certified copies of codes of practice and other documents, provided this is with the consent of parties.

To the extent that consequences of breach of duty of care is more serious than those of procedural obligations, including matters involving reckless indifference or death, the burden of proof should be borne by the prosecutor beyond reasonable doubt.

As to imputing conduct or intention of an employee/agent/officer of a body corporate, we would not accept any waiving of the ordinary rules of evidence given, for example, serious charges of reckless endangerment/indifference and the consequences of being proven guilty. In terms of the evidentiary status of regulations, codes of practice and other subordinate instruments MTAA comments as follows:

- (a) clearly regulations provide the detail in our proposals supporting the rights and responsibilities of duty holders under the model laws and, therefore, have a clear evidentiary status.
- (b) While jurisdictions may differ slightly, codes of practice are designed to deal in detail with those matters such as key hazards, processes or amenities. provided for in the regulations. To this extent they are detailed guidance material which must be followed unless there are reasonable alternative measures. Additionally, MTAA would object to them having direct evidentiary status. Similarly, it is MTAA's view that guidelines are designed to summarise provisions in Code of Practice or other workplace hazards usually in 1-3 pages and provide the duty holder with some guidance on how to apply this in a practical manner.
- (c) Hopefully by way of example in point (b) above, a Code of Practice on, say, the Safe Removal of a Tyre varies depending on the size, age, nature of construction (44 ply compared with 4 ply), application, the work environment, the equipment available, the frequency of use of handling, and even the type of hazard that is perceived. There is usually (and we have ample evidence) a wide range of hierarchical measures that need to be taken so an evidentiary burden will vary depending on the application.

In terms of the burden of proof, the concept of 'reasonably practicable' does not always give duty holders sufficient guidance on what it means. Arguably the WA and Victorian statutes provide more guidance for a national model. The standard of care required of the duty holder, therefore, should be that of a reasonable person, taking into account modern work practices, off-site work, labour hire, contractors, and volunteers. The burden should extend to employees to ensure their role in compliance with safety and health at work having regard to knowledge and experience. This is recognised in all legislation, but regulators do not seem willing to enforce

this in a punitive manner which, as stated earlier, has caused frustration as there is a lack of drivers for behavioural change amongst some of the workforce.

Given the concept of reasonably practicable underpins, in MTAA's view, model laws, the reverse onus of proof would allow a reasonable duty holder the ability to show that he took reasonable measures in the circumstances. This seems to be reflected in a majority of jurisdictions.

To the extent that the consequences of a breach of duty of care are more serious than procedural obligations, there would be merit in requiring different burdens in proving the elements of defence. We do, however, comment that we are unsure of the intent of question 119.

As to defences in the model OH&S legislation; refer to our earlier comments on what is meant by reasonable and practical.

In terms of the burden of proof and defences available to an individual (officer or employee) compared with those for a corporation, MTAA believes there is no simple answer. For example, if the nature of the offence is serious (for example, Section 21 (Employee), Section 59C (Officer) of the SA legislation) these matters require a reasonable defence as provided therein. By contrast the employer's duties broadly include the need to establish and maintain an OH&S management system with shared responsibilities, hazard management, consultation, training, supervision, instruction, reporting, and recording. This is fairly onerous on small to medium enterprises in diversified operations and leaves a fairly wide discretion for the courts to interpret that duty. To the extent that there is a better way of defining what is reasonable and practicable in this context, and recognition of systems and effort undertaken without leaving it to the wider discretion of the court, some effort should be made to reflect this in a model OH&S framework.

In terms of liability of officers of a corporation there are a wide range of situations in which some jurisdictions impute liability to an officer for actions taken by others (reckless endangerment for example). Other situations may provide an offence where there is a failure to take reasonable steps for ensuring compliance by the corporation, while yet others provide all officers of the corporation have a duty with a relevant defence (for example in the exercise of due diligence or lack of influence). It would seem to MTAA that the model legislation should have a common theme whereby an officer who commits the same offence as the corporation has a reverse onus of proof to show that he exercised due diligence or had a lack of influence or was in a situation where he could not reasonably have influenced the outcome having regard to factors such as knowledge of the risk, seriously competing priorities or state of mind.

As to unincorporated associations (sporting clubs/volunteers) the issue is a sensitive one and while we feel safe work practices and guidance materials critical, we do not represent these groups and, therefore, offer no comment.

In terms of sentencing options these differ significantly across jurisdictions. MTAA has commented earlier on fines and believes that any detailed analysis of the level of penalties for various offences would differ from jurisdiction to jurisdiction and that consensus in this area would be difficult to achieve. The only suggestion we make to facilitate more consistent

outcomes across jurisdictions would be for the state regulators to cooperatively agree with one sentencing format and that seems highly unlikely.

In terms of other sentencing options the one area we would support is non-pecuniary penalties. For example, allowing orders for undertaking of training to be imposed in a model provision. As to the maximum periods of imprisonment for more serious offences, we note the range of different maximum sentencing periods and again see this as a difficulty in coming up with a consensus in a national model. All of our industry obviously oppose the extreme arrangements as to what is perceived as an absolute duty of care. The provision for jail terms for officers and the wide range of varying arrangements reflect difficulties in coming up with a reasonable national model provision for potentially serious offences.

In terms of questions on serious workplace injury or death, any consequences in a National Model must relate to a degree of culpability as distinct from a mere breach. Penalties should reflect the usual options of voluntary remedial actions, ongoing programs and education, investment and support for victims/relatives and so on so that when the regulator assesses the form of action, there is discretion to proceed with a range of sentencing or non-prosecutorial options.

MTAA opposes specific offences relating to workplace death or serious injury. Rather, the approach should be an assessment based on exposure to risk, not looking at the consequences or severity. As to enforcement of penalties MTAA supports regulations having lower level divisional penalties, but believes that major criminal matters should be beyond the OH&S regulatory framework.

Other Issues

As to regulatory powers and codes of practice (questions 142-145), MTAA makes the following comments:

The model should provide for summary offences with lower penalties in a regulatory framework. Given the complexity of industries encompassed in model OH&S laws, to be consistent with MTAA's earlier comments there should be wide discretion to make regulations pertinent to specific industries, with the Act having broad objectives and enabling powers. As to codes of practice, these should continue to be seen as a process followed to achieve the same or better outcome than provided for in the regulations. As stated earlier, they need to address the key hazards processes and procedures envisaged in a regulatory framework with even simpler guidance notes/safeguards for duty holders to interpret in managing their exposure to risk and achieving compliance.

As to notification of incidents and reporting, MTAA has some familiarity with Regulation 6.6 of the SA OHS&W Regulations, which provides for reporting of notifiable incidents and injuries that are linked to emergency centres and the Safe Work Authority. We would suggest that other jurisdictions with a similar simple format should be considered as part of a consensus national framework on reporting of such matters.

As to proposals for tripartite mechanisms (questions 148-149) MTAA makes the following comments:

We would advocate, in any model OH&S laws, an advisory board based on bipartite consultation in giving strategic direction to report to the Minister, but with the parties having no administrative control. This is the current position in SA:

- a bipartite model;
- 8 voting parties;
- equal union and employer representation, and
- chaired by the Minister or his nominee.

We would have some concern with a tripartite governing body, given former experience in SA which was formerly tripartite in nature. This body's responsibilities were far too prescriptive; it became bogged down in red tape adopting national standards, or in debate. The structure set in place more recently, however, has demonstrated itself to be efficient, productive and well supported by stakeholders. We suspect this to be the same experience of other jurisdictions. As to provision for tripartite committees or work groups that deal with OH&S matters in particular industries, we have found they work effectively with less formality and broad consultation with stakeholders (for instance, national campaigns targeting reduction in accidents).

As to questions 150-151 on areas of mutual recognition across jurisdictions for the issues outlined in paragraph 9.6, MTAA makes the following comments:

It is critical that training, education and competency requirements for OH&S should be mutually recognised across jurisdictions even at the generic level. An exception to this might be recognition that slightly different regulatory frameworks may have different emphasis. However a Certificate IV, for example, in OH&S Management should be generic enough to cover this. Authorisations, licences, permits and registrations in the industries we represent should be consistent across all jurisdictions, recognising much of the work already done in the areas of national plant, chemical frameworks, or manual handling. However it should be a strong objective of any national model that the states and territories commit to common adoption of national standards unless there are good environmental or structural reasons for deviating.

As to mutual recognition of incident notification and reporting requirements this should be an important part of national OH&S laws.

As to plant and equipment it should be regulatory and part of a nationally consistent requirement. A concern we expressed earlier, which is not strictly covered in this section, is a need for mutual recognition of recording and reporting requirements, with regulations containing a standard format that can be directly used by, or modified to suit, particular industries. Small to medium business do not generally have a standard set of records. Rather, MTAA's experience has been that jurisdictions have different recording methods for the same industries and a tool such a standard format would assist businesses in compliance by reducing the variety of red tape and provide them with guidance of how this is to be.

In terms of how to achieve such mutual recognition, a national framework should set targets for achieving this in terms of plant, equipment and other forms of licensing.

As to question 152, the model OH&S Act should be framed to reduce the extent of overlap between federal/state/territory OH&S laws by providing a minimum common standard across jurisdictions that must be achieved. In effect, this would allow those jurisdictions which have deviated from the norm to either commit to change under harmonisation arrangements or at least to commit to any further changes in the future that will be consistent with a national framework, in areas where they do not currently address specific OH&S matters.

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