

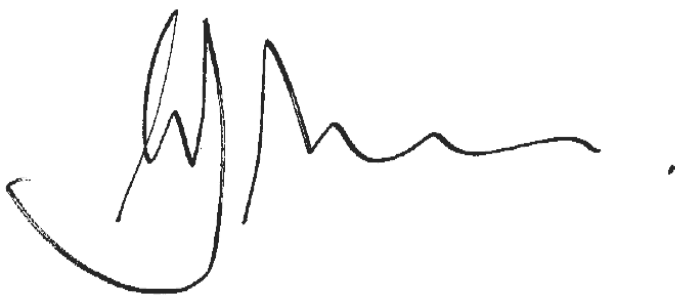
National OHS Review Secretariat
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19 June 2008

Please find attached my comments pertaining to the *National Review into Model Occupational Health and Safety Laws Issues Paper* (May 2008).

I would be more than happy to be contacted by your secretariat to provide any additional clarifying information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew See'. The signature is fluid and cursive, with a large initial 'A' and 'S'.

Andrew See

CHAPTER 1 – LEGISLATIVE APPROACH

1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

Legal obligations need to be clearly understood. While principles-based standards provide a useful insight into the scope of such obligations, without more, they remain nebulous and intangible.

The general duties of care need to clearly articulate and expand upon the fairly well understood common law principles. Beyond that though, there is a need to ensure that a level of process based standards are established, in order to ensure that behaviour of the obligation holders can be assessed in a clear and definable manner.

Prescriptive standards should only be used as a last resort. The legislation (most likely subordinate legislation) should only prescribe and impose exactly what specific measures should be taken, where the consequences of a hazard are so significant and the need for risk minimisation so absolute, that no other possible way of controlling the risk can be achieved other than by way of the prescribed means.

2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

The current *Workplace Health and Safety Act 1995* (Qld) is a good model of State based ‘OHS Law’. Codes of practice and advisory standards should assist in being the practical guidance to those charged with the task of understanding and putting into practice their statutory obligations. The national model should assume the similar constructs as existing state based practices.

3. What is an appropriate title for the model OHS Act?

Workplace Health and Safety Act 2008 (Cth)

The model OHS Act should form part of a suite of workplace law, that should include the *Workplace Relations Act 1996*, the *Safety, Rehabilitation and Compensation Act 1988*, the national equal opportunity, racial discrimination and sexual harassment prevention laws.

The reason why the legislation should be described as workplace health and safety law, rather than occupational health and safety law is obvious enough. The notion of an “occupation” is far too narrow a concept, given the scope of what the legislation is seeking to do and the broad range of obligation holders that it should be intended to cover. In addition, the scope of the legislation should be considered in the context of “workplace safety”, that of itself seeks to scope the impact of the behaviour or those who owe a duty, to all those who come in contact with the workplace.

4. Should the model OHS Act specify its objectives? If so, how and what should they be?

Yes. The objectives should be to establish a nationally consistent approach to workplace health and safety law.

The objectives should be to:

- Promulgate and promote the policy underpinnings of the Act and supporting legislative schemes
- To ensure that there is a suitable level of public awareness in relation to the health and safety obligations imposed on all of the relevant obligation holders
- To prescribe the obligations in clear and simple language
- To clarify the broader regulatory framework that would include overarching statutory arrangements, consultative processes, models for development of health and safety standards etc
- To establish a penalty and reinforcement regime to ensure ongoing and effective compliance with these objectives

5. Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

No. The Victorian legislation is structured in the way that it is, because the objectives under that Act are quite innocuous. The principles can be incorporated into the purpose of the legislation in language that is clear and simple for all to understand.

6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?

Obvious there are questions of legislative overlap that need to be considered. If it is the case that the federal law is to provide a paramount set of operating arrangements, then the basis for how that is to take place is something that may require further debate and analysis.

The former National Occupational Health and Safety Commission was instrumental in shaping a national approach to occupational health and safety laws, standards and practices.

There is no reason why a reinforced and revitalised federal regime could not reassume that role. State based laws should focus on the monitoring and ongoing educative efforts required to achieve compliance.

National Safety Standards should be developed as sub-ordinate obligations to the Principal Act, that should be translated into workplace specific and industry practices that are monitored and enforced at the state level.

CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS

7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and the industry specific legislation?

At one level it seems somewhat ill-conceived to have national health and safety laws that do not have a capacity to be reinforced at the same level of government.

While clearly Ministers of Labour will subscribe and commit to a national model, at issue remains whether or not the States will wish to relinquish their role as the traditional regulators of industry health and safety law.

The system of Australian workplace health and safety law has been supported by a regime that has as its focus the major occupational/workplace hazards (noise, plant, hazardous substances, etc).

It is these major hazard groups that become the further focus for industry regulation.

The problem for any national model, is that it requires the supporting layers of infrastructure to gain meaning and relevance. If not, the legislative effect of any national law will be token and of questionable practical effect.

Either the system is to be converted into a national system of regulation or it is not. If not, the national body may facilitate the processes that give rise to the conformance to nationally consistent safety and health standards.

The role of any residual state based laws could be in the ‘translation’ exercise that ensures industry specific language and practice are stamped on these standards in order that they may be able to be properly applied at the local or industry based level.¹

8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (eg could industry specific issues be dealt with in regulations, codes of practices or guidance materials under the model OHS Act)?

No. The National Law should develop standards. The State based law should convert those standards into Industry practice.

9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

Yes. The ‘Australian Workplace Health and Safety Commission’ should be formed by State based appointees, who should in turn have some responsibility for facilitating State based workplace health and safety laws. The system no longer requires notions of tri-partite participation.

¹ See for example the Workplace Health and Safety Industry Committees that have played an instrumental part in Queensland Workplace Health and Safety regulation.

The States should be regulated for compliance in a broad brushed way, with reporting models a central component of any new arrangements.

The State based inspectorate could monitor their industry compliance to national standards. Breaches of obligations could nonetheless be available under both state based and national based law.

10. Should general duties of care be tied to the conduct of work, to the workplace, or to some other criteria?

See the Queensland legislative structure for an appropriate level of language, scope and classification.

11. Should general duties of care under the model OHS Act be extended to members of the public? If so, how?

Yes. Members of the public should be required to observe their obligations to comply with workplace health and safety laws while in or around workplaces.

Some of this will require major shifts in public education and awareness, though that in itself should not be an insurmountable problem. Anecdotally, but nonetheless more and more frequently do you see pedestrians failing to following instructions from health and safety officers at construction sites. Members of the public should understand that they have an obligation to understand and abide by workplace health and safety arrangements that are governed by law.

12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so how should this be achieved?

Certainly workplace health and safety and workers compensation laws appear to have been inept in preventing the ongoing incidence of workplace stress arising from workplace bullying and harassment.

The shield of 'reasonable management action' that is often applied under the state and national workers compensation schemes is an easy defence for employers who may still nonetheless not appropriately discharge their workplace health and safety obligations. Workplace ergonomics for office workers is a similar area of regulation that appears poorly understood, with little real evidence of awareness of risks and ways of discharging obligations.

13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

Any emerging hazards must fall into the same protocols as the traditional family of hazards.

14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

The dual exposure of Australian workplaces to possible breach of obligation under National as well as State based health and safety laws, will ensure that there is no capacity at the state level to treat national standards as 'parenthood' arrangements.

15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?

The real issue is what are the constitutional limits that are imposed on the federal government when seeking to introduce a national system of health and safety regulation.

This situation is not analogous to the scope of the right to regulate workers compensation insurance as found in *Attorney-General (Vic) v Andrew* [2007] HCA 9 21 March 2007.

If the corporations power is the vehicle of the model for regulation, some level of co-operative federalism will need to be assumed.

CHAPTER 3 – DUTIES OF CARE – WHO OWES THEM AND TO WHOM

16. Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?

On occasions there is likely to be an overlap of responsibility in terms of issues of discharging a duty of care. The most obvious examples would be where several employers are involved in undertakings at a workplace, some with broader responsibilities than others.

There are practical consequences of all this, not the least of which is where conflict exists in terms of whose health and safety system should be paramount or required to dovetail into the other. Invariably the commerciality of these relationships also is called into play and rightly or wrongly, the question may often be determined based on who is responsible for paying whom at the workplace.

The critical issue is not who is in control, but how can issues of dispute regarding rights and responsibilities for the duty holder, be resolved.

This would appear to be an area where government needs to be more effective in providing a suitable conduit for communication and resolution of issues between the parties.

17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

Nil response, based on answer to 16 above.

18. What control should be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

There is some scope for delegation where multi-employers or obligations exist at a workplace. That does not mean that the legal duty is relinquished only that on most occasions that it has been contractually transferred so that the undertaking of the work or activity can take place in the context of one health and safety management system, rather than several.

Delegation of course does not justify abrogation of responsibility and the primary duty of identification of obligations, developing appropriate systems for their discharge, ensuring that the obligations are being carried out and where appropriate reviewed and refined, remains. These all remain non-transferable obligations for all duty holders.

19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

Again, the problem appears to be that there are obvious power relationships at work that quite often the courts and the health and safety inspectorates seem to disregard.

Yes, some of the responsibilities may need to be clarified, but perhaps the role of the inspectorates need to be enhanced so that at workplaces where there are multiple duty holders, a greater degree of assistance is provided in the appropriate protocols that must exist for the sustainability of various undertakings being carried out simultaneously. Too often sub-contractors are bearing the brunt of a lack of appropriate co-ordination at major workplace activities.

20. Is primary reliance on employment relationships a valid basis for framing safety obligations?

No. Employment relationships are not the only basis for that. There are other commercial contractual relationships that exist that may or may not impact on the status of a worker's line of communication with her or his employer.

Certainly at contract, the role of the worker needs to be understood, but where several different employers are deployed at a workplace and the blurring of activity from a worker's point of view is easy to occur, then questions of co-ordination and reinforcement of obligations and how they work in a complementary fashion, are all key issues for consideration.

21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Again, the issue is really one of individuals submitting to broader health and management systems. This of course impacts on all issues such as induction, adequacy of supervision, effective communication protocols between employers, monitoring of arrangements both by the person in charge of the workplace and the health and safety inspectorates.

22. Is there a broader concept that more effectively covers the various work arrangements?

The issue of an overarching Health and Safety Management System can only take the practical issues of compliance so far. At the end of the day it is the employer or other duty holder at the workplace who holds the key to ensuring compliance and integration of activities takes place.

23. How and to what extent should the model OHS Act specify an employer's duty of care?

There is no reason why the model OHS Act could not specify these duties.

Critical issues would appear to be:-

- Induction
- Education and awareness
- Deployment and reinforcement of protocols
- Liaison and supervision
- Employer monitoring obligations
- Issue identification and feedback
- Processes for modifying and reviewing health and safety practices and protocols
- Grievance and dispute resolution.

24. To whom should these duties be owed?

Some of these obligations may extend beyond those owed to individual workers, but may also be required to extend to other workers and members of the public who are exposed to the workplace.

25. How, and to what extent, should the model OHS Act specify worker's duties of care?

Similarly this is an area, where the obligation has not been adequately expressed. One reason for this has traditionally been because of the sub-ordinate notion that has been given to the worker's duties and the fact that the employer has always been seen to have the primary obligation at work.

It is clear though that an individual worker may be able to influence the risk of injury or accident despite the best efforts of an employer.
For this reason, the obligation of an individual worker needs to be better clarified and understood.

26. Should the model OHS Act include duties of care for persons who are not performing work (eg visitors to a workplace, members of the public)? If so, what should the duties be?

Yes, however some of these issues are going to cause a level of debate, particularly where a 'private citizen's rights' are being asked to submit to workplace health and safety laws that may firstly require some level of understanding.

27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

The OHS Act certainly needs to establish an obligation framework for this to take place. Again the issue will be at what level of the legislative hierarchy should the details of such arrangements be set out.

A person appointed to a position such a statutory Workplace Health and Safety Officer, should assume their functions within the context of the broader obligations of all of the duty holders.

28. What should the liabilities of such appointed persons be if the responsibilities are not met?

Liabilities should exist within the context of the employment relationship. The primary obligation should be imposed on the employer and company directors.

29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

The duty holder should be responsible for the appointed person's discharge of responsibilities.

30. Should the model OHS Act include positive duties for officers of bodies corporate?

Yes, a director's duties should be established in the context of the responsibilities that are recognised within their corporate governance framework.

31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

There could be a broader articulation of what these responsibilities are.

32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

No. This level of prescription needs be developed at the level of local level laws.

33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (ie conception to disposal)? If so, what should the duties be in relation to these activities?

This is an area of law that is not clearly understood. Certainly the responsibilities of designers is an area where still insufficient public education has been given to their level of exposure. Some notions of system life cycle may be assisting in certain settings.

34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

Yes. There is no reason why the manufacturer should not be responsible for the deployment and operation of plant or structures, that expose workers and others at the workplace to accident or illness.

35. How should the activity of supply be defined ? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

The supply of plant for example, requires a duty holder to pass over physically that plant to another person. Do the hire firms have a responsibility to ensure that no unsafe plant should be deployed at a workplace? I would think not. That primary responsibility would still rest with that entity or person who is charged with the responsibility of deploying the plant.

36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

Nil submission.

CHAPTER 4: REASONABLY PRACTICABLE & RISK MANAGEMENT

37. Should a test of “reasonably practicable” be included in the model OHS Act?

The difficulty with imposing a generic definition to “reasonably practicable” is that what is practicable can often only be assessed in the context of the specific set of risks and hazards that may arise.

This is an area of prescription or guidance that may be better placed in sub-ordinate legislation. Certainly there is good sense ensuring though that the OHS principal legislation makes that requirement for the sub-ordinate or complementary legislation.

38. If not, what alternative standard should be included?

N/A

39. How should the standard be defined? What level of details should be provided?

Nil comment

40. Should control be an element of the standard?

Nil comment

41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so what should they contain?

Practical examples should be included within the health and safety standards not the model OHS Act. The model Act should nonetheless prescribe the requirement that such standards will require examples of how compliance can be effectively assessed.

42. Should hazard and risk be defined in the model OHS Act?

Yes, for the sake of adopting standard language and common frameworks, both the definitions of hazard and risk should be set out within the model OHS Act.

43. Should a definition of reasonably practicable or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Certainly risk management principles should be enshrined into the legislation. All of these processes can be effectively used in the case of benchmarking legislative requirements against actual behaviour.

44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

Risk management principles should be interwoven into the general duties, and thereafter further spelt out within the obligations imposed through the implementation of safety standards.

CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

45. What provisions should be made in the model OHS Act for consultation?

Consultation is an effective component part of workplace health and safety law. Too frequently though there has been an inadequate means of monitoring the efficacy of the communication and consultation processes at work.

46. What are the work relationships to which a consultation provision should apply?

Certainly the phases of works should be canvassed:-

- Recruitment
- Engagement
- Induction
- Deployment
- Clarification of responsibilities and supervisor
- Impact of change
- Review and
- Education .

47. Should there be different levels of consultation required for different work relationships?

The principles of effective consultation should remain. Most importantly is the need to provide real and workable ways in which this can be assessed by both informal and formal mechanisms.

48. How should consultation be provided for :

- **A multi employer site**
An overarching obligation (such as exists for a Principal Contractor in construction projects) needs to be identified.
- **An employer with operations across more than one worksite**
The protocols for consultation should not be that different. What does seem to be a problem often is the supervisory and skill levels of OHS personnel and the capacity to ensure that standard corporate practices are maintained.
- **Small business**
This is an area where some translation of ‘size’ and ‘output’ needs to take place. For small businesses there are enormous pressures in meeting compliance obligations. Issues of scaling need to be factored into examples provided within both the Principal Act and subordinate legislation.
- **Remote workplaces**
Examples of alternative consultative protocols need to be given. For example, the quality and usefulness of elearning needs to be assessed in an objective fashion.
- **Precarious employment**
This issue still relies on an educative effort and awareness. Employers need to understand the scope of their obligations and how this translates to unique activities.
- **Workers from culturally and linguistically diverse backgrounds.**
All workers (and persons exposed to workplaces) must be provided with workplace health and safety instructions/signage etc that will ensure their safety.

49. Should there be a requirement for establishing HSRs and HSCs?

Too often the notion of HSR and HSC conjures industrial division at workplaces. Unfortunately though for many high risk workplaces, the existence of these activities, largely sponsored by trade union organisations comes about because of the lack of capacity for mutual interests (including worker health and safety) to be achieved harmoniously.

Industrial law is perhaps the better framework to enshrine the rights of workers to meet, organise and represent their concerns. Some workplaces will not culturally or democratically lend themselves to either the HSR or HSC model. If anything, this process should recommend certain amendments to the Workplace Relations law to complement the Model OHS Act.

50. What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

As indicated above, some reference should be made to the worker's rights in the context of industrial laws, not workplace health and safety laws.

51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

Again, this is really a matter for the individual workplace. This is essentially democracy at work.

Workers who feel that they are being discriminated against for agitating these type of arrangements should be able to access existing industrial laws for some protection.

52. When an election is required, who should be entitled to vote?

All workers should be entitled to vote, in determining their representatives at work.

53. What should the powers and functions of the HSR be?

The HSR if not a paid employee, should only act as an advisory and consultative input into the workplace process. If on the other hand a designated workplace health and safety officer, who is accredited in workplace health and safety assumes this function, then perhaps the issues may be somewhat different.

54. What should the structure and functions of HSCs be?

Committees should not sit outside of the ordinary management structures of a workplace, as otherwise they can assume token roles in the effective management of an organisation. Instead of prescribing specific structures and functions, it may be more useful to establish the core activities and functions that management must ensure are in place through their existing consultative arrangements.

55. What training and qualifications should members of HSRs and members of HSCs have?

This really depends on what type of statutory function is provided to these groups. As indicated, if the role of the HSR is more technical and expert, then clearly some accredited skills stipulation is needed. The HSC on the other hand needs to have a prescribed process. And as suggested earlier, this can be achieved inside existing consultative arrangements that are not necessarily uniquely OHS ones.

56. Are there alternative mechanisms that should be considered?

See above

57. To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?

There is no reason why these broad requirements cannot be stipulated within the OHS Act.

58. Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?

One group of workers who appear to bear the brunt of workplace issues are the supervisors. A critical issue here is that of workload and capacity to ensure that they effectively discharge their health and safety monitoring and advisory obligations when time poor. This is a practical area where some revisions or improvements to legal obligations should take place.

59. Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?

The right of entry provisions should only be provided to statutory accredited officials. If it is the case that an HSR or Health and Safety Officer has the same accreditation as a Statutory Inspector, then perhaps that is reasonable to allow entry where reasonably sought and accessed.

60. Should the model OHS Act specify training and qualifications for such persons?

Yes, if someone has the right of entry they need to have qualifications to justify that right.

61. In what circumstances should the right of entry be exercisable?

This right of entry should be analogous to the rights provided to a workplace health and safety inspector for basic enforcement issues.

62. What powers should be exercisable upon entry, and subject to what conditions or limitations?

- Right to seek meeting with person in charge of workplace or undertaking.
- Right to cease work while statutory inspector attends the workplace
- Right to speak to workers affected by halt in work
- Right to inspect area subject to complaint or concern

63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

Workplace health and safety issues should be resolved through the traditional dispute resolution powers of the Australian Industrial Relations Commission.¹

64. When should issue resolution procedures be activated?

Obviously where imminent risk to accident or illness is concerned and where the matter cannot be resolved by the usual dispute resolution procedures relative to the significance of the issues.

65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?

The procedure could be referred to within the model OHS Act, but I do think that much of the supporting process requirements can be satisfied through other mechanisms and subordinate materials.

66. How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?

The model OHS Act can only embrace and build on existing industrial law for these things. No one can enforce effective communication and resolution of issues at work. At best, these processes can be addressed through traditional means.

67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

This will need to link in again with current workplace relations laws. Yes, there should be a statutory right to genuinely refuse to follow instructions where health and safety is at risk. The issue though is very much one that needs to be resolved under industrial law, with reference to the model OHS Act and supporting subordinate contextual materials.

¹ Clearly these dispute processes need to be overhauled also.

68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

As mentioned earlier that will depend on what qualifications are given to this role and how the person is appointed to assume those responsibilities.

69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so what should be provided?

While the OHS Act may alert the stakeholders to this issue, it is a matter more appropriately addressed and resolved under the Workplace Relations Act.

70. In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?

No. This issue should be addressed under existing industrial laws and relevant instruments.

71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?

This issue is not really a question of discrimination but more likely to be regarded as one of victimisation. A worker should be entitled to pursue a grievance under industrial law for victimisation based on agitating genuine workplace health and safety concerns.

Such a situation is analogous in some ways to Section 659(2)(e) of the Workplace Relations Act, that make unlawful a termination based on the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of law laws or regulations or recourse to competent administrative authorities;

72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative action?

As above, no this type of complaint can be agitated under the workplace law. It is not in my view correct to characterise this type of matter as unlawful discrimination based on current notions of that concept.

73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?

In my view any breach should be addressed in the context of civil proceedings, unless criminal intent was involved.

74. Who should have the burden of proving elements of offences (eg conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements ?

The standard should be the civil standard.

75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?

No, this is capable of pursuing under the criminal law.

76. What remedies should be available to the victims?

Remedies will be available at tort and possibly breach of contract. The difficulty as it appears to be noted, is the sheer cost for individuals to prosecute such cases. Perhaps a penalty and enforcement regime would be of assistance in matters of this type.

77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?

No as mentioned earlier, this should be referenced to the relevant (and if need be expanded) workplace relations law.

78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

Nil submission

CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?

Yes, this should be the primary source of power for the establishment of the regulator. The legislation should set out the constitution, function and responsibilities.

80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?

No some of this material could well be left to the subordinate legislation.

81. Should the model Act include provisions that allow the making of interpretative documents?

This will depend on the relationship between the federal and state laws

82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?

The regulatory and prosecutory arms need to be separate in my view. The prosecutors need to consider material provided to them in an objective manner.

83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?

They do not have to be. Many workplaces, particularly without large OHS infrastructure, welcome the role of advisory support provided by inspectors and field workers. The skills repertoire and range of options available to the advisor/enforcer should be part of what is regarded as the compliance spectrum.

84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?

This should all be provided for within the jurisdiction that is charged with compliance. If that is to be a dual function of the Commonwealth and States, then the range of compliance issues needs to be separated and respective roles assigned. This is a fundamental question to the review of the law.

85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

It would be highly unlikely that any model could be sustained where inspectorates do not have compliance and enforcement as their primary concern. To that extent, the regulator should rely on its administrative machinery to provide advice and assistance to industry stakeholders.

86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?

Inspectors need to be accountable and on occasion need to be monitored to ensure that they discharge their roles in a balanced fashion.

Inspectors should submit to the model OHS Act, with some clarification provided in relation to complaints etc from stakeholders to the regulator.

87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

Yes. In case of minor breach, mistake or provision of additional information that presents greater clarity on an earlier decision.

88. What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable ? What further appeal should be allowed?

Under Queensland Workplace Health and Safety Law, the review at the first instance is to the Chief Executive Officer of the Regulator. In some respects this does not provide an effective means of addressing issues independently. Perhaps again, some of these issues could be referred to a separate statutory authority such as the Australian Industrial Relations Tribunal that may have a specialist workplace health and safety panel.

89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

Nil submission

CHAPTER 7: COMPLIANCE & ENFORCEMENT

90. Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

Yes the structure of the enforcement measures should be clearly established.

91. Should these be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?

The Model OHS Act should be the primary location for these enforcement measures.

92. What provisions should be made for PINs, improvement notices and prohibition notices in the model OHS Act?

All of these arrangements should be provided for within the model Act.

93. Should PINs improvement and prohibition notices contain recommendations about how to achieve compliance?

Yes.

94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?

These should be capable of statutory review through a tribunal.

95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?

This will depend on the circumstances of each case. There should be no generic minimum specified timeframes.

96. Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices,? If so, what should the effect be?

No. Unless so ordered by a tribunal by way of injunctive relief.

97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Infringement notices should form part of the hierarchy of enforcement arrangements.

98. Should the administration of infringement notices occur under OHS law or individual state legislation?

This question again will depend on how much complementarity is achieved. Yes that model would be the ideal.

99. What amounts should be specified as fines for infringements?

Nil submission

100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?

The same general principles should apply as exist at common law. That is, a prima facie case and balance of convenience.

101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?

Enforceable undertakings at one level appear to be a by-passing of the parliamentary process. What in effect takes place, is that public service decision makers imposes their own stamp on outcomes that should be determined statutorily.

Enforceable undertakings possibly can only lead to confusion and lack of transparency.

102. Should the giving of an enforceable undertaking result in an admission of fault or liability?

See above

103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act ?

Nil submission

CHAPTER 8: PROSECUTIONS

104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

Unless there is a criminal intent, it would seem strange to characterise workplace health and safety breaches as being criminal in complexion.

105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

Wilful breaches of health and safety law that give rise to grievous bodily harm or death should be prosecuted as criminal offences only.

106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

This will depend on the split of responsibilities between federal and state laws. It would seem though that the role of the federal court and tribunal should be similar for other workplace law.

107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts) ? Why?

It does seem important to ensure that some degree of understanding on the technical issues was confidently assumed in the processing of matters before courts and tribunals. While there is no reason to doubt any capacity of judicial officers or tribunal members, clearly the more expert and familiar a person would be with the technical aspects of this law, the more effective they will be in the discharge of their responsibilities.

108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

Rights of appeal should lie to the courts. Under Queensland laws, this right at the present time resides in the Industrial Court. In the case of the federal law, there is no reason why the Federal Court could not have established an industrial division for this purpose.

109. Could defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

Those matters that gave rise to grievous bodily harm or death arising from wilful breaches or gross negligence, may be capable of being addressed by a trial by jury.

110. Who should be entitled to commence criminal proceedings?

This should be commenced by the Public Prosecutors.

111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

There is no reason why there should be a differentiation in the powers to commence civil or criminal prosecutions.

112. What should appropriate time limits be for the commencement of a prosecution and why?

In some respects there is a need to ensure that there is a link between the responsiveness of the regulator to enforce any prosecution of an offence and the event in question. Resources will no doubt shape the capacity of investigators to follow through on issues and review the legal prospects.

While 12 months does seem to be a reasonable period of time, it would seem rather opportunistic and illogical that some persons may avoid being prosecuted because of good fortune in the investigators not meeting the appropriate time lines. Some flexibility should be built into the model to enable special cases to be argued outside of the time constraints that may otherwise be imposed.

113. Should the model Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?

The rules of the prevailing courts and tribunals should be more than adequate to address these questions.

114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so why and what procedures?

No. The issues are well known at tort and require no additional promulgation of evidentiary requirements.

115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so which elements and how?

There are three critical questions to this analysis:-

- What was the relevant health and safety standard in place
- Was this being observed
- To what extent did the departure of this standard give rise to the offence

116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

These should be determinative in assessing compliance to the obligations that are imposed at statute.

117. Is 'reasonably practicable' an appropriate standard for the model OHS Act ?

It is somewhat of an elusive concept, although historically it is well placed to shape the way in which assessment of obligations takes place.

118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

The onus should be on the prosecutor to prove the breach.

119. Should the burden of proving elements of an offence differ between different types of offences (eg duties of care and procedural obligations)? If so, why?

Nil Comment

120. What, if any, defences could the model OHS Act provide?

The defences available under the Queensland Workplace Health and Safety Act at Section 37 of that Act are as follows:-

(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove—

(a) if a regulation or ministerial notice has been made about the way to prevent or minimise exposure to a risk—that the person followed the way prescribed in the regulation or notice to prevent the contravention; or

(b) if a code of practice has been made stating a way or ways to manage exposure to a risk—

(i) that the person adopted and followed a stated way to prevent the contravention; or

(ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; or

(c) if no regulation, ministerial notice, or code of practice has been made about exposure to a risk—that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.

(2) Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control

It is often difficult to determine what are the “causes over which a person had no control”. This test appears one that needs further legislative guidance.

121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

It would be good to see further clarification that draws some distinction between the various types of responsibility that are clearly different between corporations and individuals such as employees.

122. Should ‘officers’ of a corporation be liable to an offence because the corporation has committed an offence?

This would be very much dependent upon the type of enquiry that has been made. There may be some occasions where a Director should be held personally liable for an offence under the Act. It certainly is though an issue that would not warrant a blanket approach.

123. How should office be defined?

An office holder must be in a position to determine the behaviour of the corporation in the day to day management and operation of the company.

124. Should liability of an office, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

Yes, there is simply no justification for automatically roping in an officer to any prosecution, without some direct link to the offence.

125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

There should be some indicia that can be relied on. These could include:-

- Capacity to influence the day to day management and operations of the company
- Ability to determine, approve and review company policies and procedures
- Capacity to monitor and report on workplace and employee outcomes

126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

One defence could be evidence of an inability to influence outcomes that are based on issues outside of the officer's control.

127. What should the approach to officers of unincorporated associations or volunteer officers be?

There should be no distinction between corporated or unincorporated arrangements.

128. For which offences should monetary penalties (fines) be imposed?

Nil comment

129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?

There is no reason why maximum fines should not be expressed within the model Act.

130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?

Nil comment

131. Should there be a statutory minimum fine for some offences, if so what?

Nil comment

132. Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?

Recklessness should be the primary determinant.

133. Are there options that could facilitate more consistent outcomes across the jurisdictions such as a national register of decided cases?

All state OHS decisions need to be available. Often litigants are decidedly disadvantaged where government agencies deprive public access to precedents.

134. What penalty options should be available in addition to or instead of fines?

Nil comment

135. Should the model OHS Act provide for terms of imprisonment for specified offences ? If so, which offences and what maximum periods of imprisonment ?

Reference should be made to the range of criminal offences and outcomes arising in the case of serious offences.

136. Should there be specific offences relating to workplace death or serious injury? If so, what?

Reference should be made to the relevant provisions of the Crimes Act.

137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

As above.

138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

Nil comment

139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

No. The procedural and enforcement provisions are adequately dealt with within court rules and procedures.

- 140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences, or requirements?**

No. The procedural and enforcement provisions are adequately dealt with within court rules and procedures.

- 141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?**

Nil

- 142. Should the power to make regulations be limited and if so, in what way?**

All regulations should be made subject to fundamental legislative principles.

- 143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?**

If it is the case that there are state and federal OHS arrangements working in tandem, it could be the case that dual breaches could occur.

- 144. What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?**

An inordinate amount of time has been spent over the years with the development and approval processes for codes of practice and in developing nationally consistent health and safety standards.

Codes need to be enshrined under a model that will enable the codes to be imported in their entirety under state based law.

- 145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?**

The reporting system should be the responsibility of the administering agency. The burden should not be imposed on industry.

146. What provisions should be made in the model OHS Act for the external review of the regulatory decisions?

Subordinate legislation traditionally is amenable to special review of the parliament. There is no reason why such a process should be disturbed.

147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

There should be scope for both outcomes to be pursued.

148. Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?

Yes. The question will remain though, whether or not the degree of trade union density, should impact on the level of involvement within that administration.

149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

These are matters that are best left resolved through existing industrial mechanisms.

150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?

Occupational and licensing requirements do need to be capable of mutual recognition.

151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:

- Better OHS outcomes;
- Greater efficiency and effectiveness;
- Lower regulatory compliance and enforcement burdens; and
- Improved harmonisation of the requirements for such permits and licensing for industry across Australia?

Government needs to maintain its 'hands on' involvement in the issuing of permits and licensing. Third party certification would appear to be fraught with danger and can often simply add extra levels of bureaucratic engagement.

152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

The legislation needs to be framed in a way that will compel compulsory translation of national standards into state based industry arrangements.

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