ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA

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NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

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INTRODUCTION

ABOUT THE ACEA

The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services to the built and natural environment.

There are over 260 firms, from large multidisciplinary corporations to small niche practices, across a range of engineering fields represented by ACEA with a total of some 41,000 employees.

ACEA presents a unified voice for the industry and supports the profession by upholding a professional code of ethics and enhancing the commercial environment in which firms operate through strong representation and influential lobbying activities. ACEA also supports members in all aspects of their business including risk management, contractual issues, professional indemnity insurance, occupational health and safety, procurement practices, workplace/industrial relations, client relations, marketing, education and business development.

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EXECUTIVE SUMMARY

By standardising and bringing all OHS regimes into a single Model OHS Act it will bring much needed national reform in OHS across Australia that will help workplace productivity, participation and efficiency, and the provision of greater shared protections for all stakeholders through a national consistent approach. Most importantly, ACEA believes it will result in better safety outcomes.

A workforce that is obstructed by duplicated OHS legislation fails to reach its full potential to contribute to the Australian economy which can lessen the development of the nation's commercial growth. Without dealing with these recognized business barriers increases in compliance red tape will continues business inefficiency will persist, and a lack of understanding in OHS duties for all business operators will remain.

The social impact of injury, disease or death as a result of a workplace accident on family, friends and the community is profound and incalculable. The economic impact of death and disablement on industry and the community can be measured in billions of dollars a year. This is made of costs such as the loss of trained, skilled and experienced people, compensation payments, hospitalisation and medical resources including rehabilitation, ongoing care costs and to victims, the costs of litigation and payouts by insurers under compensation or negligence actions.

For consulting firms, especially those who operate in multiple jurisdictions, business is hindered by an inconsistent commercial environment due to complex and over-lapping OHS legislation. This increases bureaucratic procedures, wastes company time and resources and ultimately reduces business capability all to the detrimental effect of business development.

Differing legislative OHS frameworks in each jurisdiction also reduce the capability and competence of consultants to understand their OHS obligations. Consultants who unintentionally fail to recognise or identify the different approaches to OHS legislation in each jurisdiction, can inadvertently expose themselves and others to increased hazards and risks which can in addition can affect OHS performance.

The number of complex and over-lapping sets of OHS laws also impact on consulting engineers through the reduction in workplace efficiency and productivity especially labour productivity. This is because firms who mobilize employees to work in various jurisdictions are burdened with need to re-train and re-educate employees on the new OHS duties they may face.

As a result of these factors, consulting firms also have to use a number of extra resources to mobilize employees across jurisdictions which raise costs, are time-consuming and a create a needless burden for employers to maintain. Furthermore, the use of these additional resources and processes needed to mobilize workers across jurisdictions also reduce consulting business efficiency through lost productivity, increased business expenses and reduction in profit capability.

ACEA acknowledges that these costs are hard to completely measure and obtain, however there is additional financial impact felt in the consulting engineering industry in relation to the costs of professional indemnity (PI) insurance claims and premiums for design-related failures.

The business community has long been citing OHS reform as one of the keys to reducing regulatory burden and this National Review into Model OHS Laws is an extremely valuable and constructive opportunity for all stakeholders (i.e. all levels of government, Unions and employer associations) to undertake a detailed and comprehensive evaluation of our current web of OHS laws in Australia.

ACEA is in full support of the fundamental belief that all stakeholders have a responsibility to create better and safer workplaces for all Australians under a shared goal of prevention and national cooperation.

ACEA POSITION ON MODEL OHS LEGISLATION

ACEA welcomes the National Review into Model Occupational Health and Safety Laws and strongly appreciates the opportunity as a key stakeholder to make comment and recommendations on the optimal structure and content of the Model OHS Act.

National consistent OHS laws have been a leading policy objective for the ACEA, its members and the consulting and engineering industry for many years. ACEA unequivocally supports the adoption of OHS laws, regulations, and codes of practices that deliver improved workplace health and safety performance and safer working environments throughout Australia for all stakeholders.

The ACEA supports the development of a Model OHS Act that:

- fosters a culture that places a significant value on workplace safety for all stakeholders consistently across all jurisdictions in Australia;
- improves the capabilities and competence of employers and their employees to efficiently and effectively mange their OHS duties and responsibilities;
- recognises that the workplace 'duty of care' applies to both employers and employees;
- reduces the regulatory commercial burden faced by employers by standardizing their duties and obligations;
- increases workplace productivity and the improvement of workforce mobility and participation;
- increases competition and equality between all business operators by creating a level OHS playing field;
- is based primarily around a principle-based regulatory approach complemented by performance, process and prescriptive regulations and codes of practices; and
- reduces workplace injury, disease and fatalities.

ACEA does not support the harmonization of OHS that will:

- give scope for jurisdictions to keep elements of their OHS regimes;
- initiate a race to bottom in safety standards for all stakeholders;
- reduce or compromise work safety for employees ; or
- drive down OHS performance in the workplace.

ACEA strongly contends that the interests of industry and the community would be better served by the adoption of nationally consistent OHS legislation. Model OHS legislation will also importantly contribute to the growth and development of cooperative federalism within Australia and the progression of our nation's economic and social goals.

National legislation needs to be clear, effective and practical with desired outcomes expressed in terms of the improvements and levels of performance required. ACEA will continue its constructive engagement with government and industry in working towards the development of nationally consistent OHS legislation.

1. LEGISLATIVE APPROACH

REGULATORY STRUCTURE

The current variations in the regulatory approach and the degree of detail in each jurisdiction's Acts, regulations and codes are inconsistent. There is a challenge to achieve a suitable balance in the legislative structure between general duties, prescription, performance and process based standards that will accommodate the requirements of both big and small businesses, and different types of industries, which can all lead to the best health and safety outcomes.

Model OHS Act

The most suitable regulatory approach that should be taken in the Model OHS Act would be based primarily around principle-based requirements and not prescriptive requirements. This is because prescriptive standards are based around a command and control approach in which duty holders either meet the desired requirement or they don't without any variation to meet the duty.

A principle-based regulatory approach for the Model OHS Act will also provide duty holders with a greater amount of flexibility in meeting their OHS duties and responsibilities. A flexible approach towards safety outcomes will allow duty holders to use their experiences, knowledge and skill of their work activities to design, implement and mange suitable solutions to any workplace hazard or risk.

The use of the principles set out in the International labour Organisation (I.L.O) Conventions and other international instruments which the Australian Government has ratified should be the basis of the regulatory structure of the Model OHS Act.

Recommendations:

- Model OHS Act to adopt primarily a principle-based regulatory approach that moves away from a more traditional detailed prescriptive rule based approach.
- Model OHS Act to be consistent with many of the principles set out in the International labour Organisation (I.L.O) Conventions and other international instruments to which the Australian Government has committed to adopt.

Regulations & Codes of Practices

To help compliment a principle-based regulatory approach for the Model OHS Act the use of process, performance and prescriptive-based approaches should be used for subordinate legislation and codes of practices. The use of process- based regulations and prescriptive-based codes of practices will allow duty holders an appropriate balance in the legislative structure which accommodates their individual needs and approach to achieving OHS.

The use of performance-based regulatory approaches to OHS, especially in regulations, is supported because this approach can cater for the ever-changing business environment and the growing advances in technology that many business operators adopt (i.e. business environment changes of geography, employment and contractual relationships & technology changes in design systems and processes).

Performance-based subordinate legislation also has the capacity to adapt to new environmental situations and/or modified technologies more effectively. This would be in contrast to a prescriptive regulatory approach, which in the case of environmental and technological changes would require repeated regulatory amendment to reflect these changes.

When more detail and description is required to meet an OHS requirement then a code of practice can be developed. A code of practice offers valuable guidance material to stakeholders as it provides recommended practical and concise guidelines regarding what is required to achieve compliance with any OHS obligation.

Recommendation:

- Model OHS Act should be complimented by a mix of process and prescriptive based regulations and codes of practices so as to help all duty holders to meet their OHS obligations.

TITLE, OBJECTS & PRINCIPLES

Title of Model OHS Act

The Model OHS Act should be titled "National Occupational Health and Safety Act'' or the "Workplace Health and Safety Act".

ACEA disagrees with the inclusion of welfare in the title of the Model OHS Act. This is because the inclusion of welfare could unfairly impose welfare obligations (i.e. mental-wellbeing) on employers in areas that may be unrelated to work activities. Also welfare areas like mental well-being (i.e. physiological & psychological behaviours) lack defining studies into their relationship with work activities. Therefore employers at this stage can not be expected to have duties of care to provide for the mental well-being of employees.

Welfare provisions could be initiated through a phased approach after further understanding and knowledge on the subject is available to industry. ACEA suggests that a review in welfare provisions could take place after the Model OHS Act has been in operation for a designated period (i.e. 5 years). This allows the Model OHS Act to be established and administered for a suitable period while more studies and information surrounding mental well-being are explored.

Recommendations:

- Model OHS Act to be titled National Occupational Health and Safety Act or Workplace Health and Safety Act.
- Model OHS Act does not include welfare provisions until further analysis has been achieved and linked to work activities.

Objectives and Principles of Model OHS Act

The Model OHS Act should specify its objectives and principles because they help inform legal understandings of the purposes of OHS Legislation. The objectives and the principles will also highlight what the Act has been set up to achieve and what the performance-based regulatory approach is with respect to safety at work. The Model OHS Act should employ in the legislative approach shared responsibility, practicability, reasonableness and balance.

Recommendations:

Model OHS Act objectives should be as follows:

- To promote and provide for the health and safety of people at work.
- To promote and protect people at a place of work against risks to health or safety arising out of the activities of persons at work.

- To promote and provide that people take appropriate action to protect their own health and safety, as well as others at work.
- To promote a safe and healthy work environment for people at work that protects them from injury and illness.
- To promote and provide for consultation and co-operation between employers and employees in achieving the objects of this Act.
- To promote and provide that risks to health and safety at a place of work are identified, assessed and eliminated or controlled.
- To develop and promote community awareness of occupational health and safety issues.
- To provide a legislative framework that supports changes in technology and work practices through evolving requirements of occupational health and safety standards.
- To deal with the impact of particular classes or types of dangerous goods and plant at, and beyond, places of work.

Model OHS Act principles should be as follows:

- The importance of health and safety requires that employees, other persons at work and members of the public are protected against risks to their health and safety using measures that are reasonable and practical in the circumstances.
- Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonable and practical.
- Employers and self-employed persons should be proactive, and take all reasonable and practical measures, to minimise or eliminate risks at workplaces and in the conduct of undertakings.
- Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.

2. SCOPE, APPLICATION & DEFINITIONS

INDUSTRY SECTORS

The Model OHS Act should be broad and encompass all stakeholders and workplaces. However, it is recommended that specific high risk industries (i.e. mining) should have specific regulations that exist alongside the Model OHS Act. Specific regulations for high risk industries should only be adopted if it has been demonstrated that there is specific issues in that industry that need to be to be addressed in subordinate legislation (i.e. regulation). This should only happen after a rigorous cost-benefit analysis and regulatory impact statement has been undertaken and proven to warrant specific industry OHS requirements.

If the Model OHS Act should establish mechanisms for industry-specific subordinate legislation, then the subordinate legislation must be adopted nationally and not under separate or inconsistent state or territory regulations.

Recommendations:

- Model OHS Act should cover all workplaces but should allow mechanisms to allow for industry-specific subordinate legislation.

- Subordinate legislation should only be developed if it is shown that after a rigorous process (i.e. cost-benefit analysis and regulatory impact statement) that there is a valid reason.

WORKPLACES & NON-WORKPLACES

General Duties of Care

The general duties of care in the Model OHS Act should be tied to any place where work is performed.

Recommendation:

- Model OHS Act should be relevant to workplaces and a workplace is any place where work is, or is to be, performed by a worker or a person conducting a business or undertaking.

PUBLIC SAFETY

Employers have a duty to ensure that people who are not their employees but are in or near the workplace are not exposed to risks to their health and safety as a result of the employers work activities. For example, people passing a building site must be protected from the risk of falling objects and from traffic entering or leaving the site.

The community expects that designers who design buildings or structures design them without hazard or risk, as far as is reasonable and practical, to both workers who will use the intended design project and the general public who may directly or indirectly use the design project.

Recommendation:

- Model OHS Act to include duties of care which help protect members of the public being exposed to risks resulting from an employer's activities in the workplace. The duty of care must only be as far is reasonable and practical to the level of control the employer has over the public.

RESPONDING TO CHANGE

Work Organisation

There has been a dynamic change in work organisation in Australia over recent decades through the increase in outsourcing, new contractual relationships and shifting employment patterns. ACEA believes this shift in working arrangements will continue and will play an important part in the effective operation of the future economy.

The biggest shift in working patterns and work arrangements for consulting firms has been the growing use of design and construct contracting (D&C). As a result of this shift in working and contractual arrangements for consulting firms, ACEA has witnessed the increasing difficulties that occur in D&C contracting work.

For example, consulting firms increasingly have an 'arms length' relationship with the client or end user of a design project. Under most D&C contracting activities, the contractor is often imposed between the client and consultant, and it is the contractor who largely determines the design, based on economic considerations rather than the real needs of the client. Short design timeframes can allow minimal investigation by the design engineer. In many cases, contractors and principals protect themselves from liability and third party actions by incorporating unqualified fit for purpose clauses and other warranties in consultant contracts merely to shift the risk.

Consultants owe a duty of care for their own actions, however issues arise where the risk transferred to them is outside their control and management (i.e. the contractor's or client's risk). If a collaborative and performance-based approach is to be developed, there is a need to break down the silos that these contractual relationships have built up. For example, there is little or no opportunity for the consultant to raise issues with the project owner given that they are working under contract with the contractor.

The ability of designers to achieve their OHS obligations (i.e. safe design) is now heavily influenced and burdened by the relationship with other key stakeholders. Therefore, safe design is not the sole province of the designer, but rests with a range of stakeholders, starting with the client who commissions the work and including, construction contractors, owners and developers whose influence can have a major impact on the safety outcomes of a design.

Recommendation:

- Model OHS Act needs to be sufficiently broad and flexible to accommodate new and evolving types of work arrangements and to be able to impose duties which reflect those new working relationships and structures.

EMERGING HAZARDS AND RISKS

Mental Well-Being

Ongoing changes to the economy, technology, work arrangements and population demographics in Australia are starting to potentially increase new hazards and risks, and affect the frequency and outcomes of existing hazards and risks[1].

ACEA acknowledges that there may be new and emerging hazards and risks in the workplace such as those associated with physiological and psychological health issues (i.e. mental well-being). However, ACEA recommends that mental well-being can not be fully included as a specific objective or duty owed to employees in the Model OHS Act at this stage. This is because these possible emerging hazards and risks are unknown and unproven in their connection to the workplace and work activities. The inclusion of welfare provisions in the Model OHS act will only further dissolve the principle that as human-beings we hold the main responsibility for our own mental well-being whether at work or not.

Recommendation:

- Model OHS Act should not place specific objectives or duties on employers based on any emerging hazards or risks which at this stage can not be directly related to work activities.

DEFINITIONS

Definitions for Model OHS Act

One of the past problems associated with OHS legislation was the inconsistency of key definitions in each jurisdiction which caused uncertainty and misunderstanding for duty holders. The problem of definitions is a particularly important issue and of concern for consulting firms. This is because consulting firms often conduct simultaneous projects in multiple jurisdictions with inconsistent key definitions and the variations in definitions cause uncertainty in meeting their OHS obligations.

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[1] National Review into Model OHS Laws Issues Paper- pg9

The inclusion of consistent definitions of key terms within the Model OHS Act will help form the cornerstone of the legislative framework. Failure to adequately define key terms may raise serious compliance issues for all duty holders as a lack of certainty or understanding of their OHS duties could result in misunderstandings among duty holders as to what is required to achieve OHS compliance.

ACEA believes that it is vitally important that the definition of designer be contained within the Model OHS Act as certainty is a fundamental requirement in OHS legislation and regulation. The general lack of certainty, at present, in OHS legislation is a re-occurring complaint among all consultants. In order for designers to be in a position to adequately understand the scope of their obligations under the Model OHS Act, it is important that the Act provide an adequate definition of exactly what constitutes a designer.

If duty holders are able to refer directly to the Model OHS Act to ascertain their OHS obligations it significantly reduces uncertainty and this is essential for the effective implementation and operation of the Act.

Recommendations:

- Model OHS Act adopts a nationally consistent approach to definitions of key terms as failure to do this will simply add a further layer of complexity to achieving national harmonisation of OHS legislation.

Key terms recommended include:

- Designer-a designer is a person or organisation whose profession, trade or business involves them in preparing designs for facilities/structures, including variations to a facility/structure, or arranging for people under their control to prepare designs for facilities/structures[2].

- Designer of constructions sites- a designer of a construction site is a person or organisation whose profession, trade or business involves them in preparing designs for construction sites as workplaces, who may also design the construction work processes, such as building works.

- Control- refers to the ability of a stakeholder, as far as is reasonable and practical, to compel or direct corrective action, to secure safety within a workplace/premises.

- As far as is reasonable and practical–must imply that a calculation has to be made by a stakeholder in which the level of known risk is placed on one scale and the necessary known measures to avert the risk (whether in money, time or trouble) is placed on the other; and that, if it can be proven that there is a disproportionate relationship between them (i.e. known risk being minor in relation to the known measures), the stakeholder with the duty is able to discharge the burden of proving that compliance was not 'reasonable and practical.

- Hazard- in relation to a person means anything that may result in injury to the person or harm to the health of the person.

- Risk- in relation to any potential injury or harm, is the likelihood and consequence of that injury or harm occurring[3].

- Employer- means a person that employs an employee under a contract of employment.

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[2] National Occupational health and Safety Commission, 2005, National Standard for Construction Work.

[3] National Occupational health and Safety Commission, 2005, National Standard for Construction Work.

- Person with control- a person who, by virtue of their position or role has the ability to command, direct or compel.

- Safe design- is an approach that begins in the design and planning phase with an emphasis on hazard identification and risk assessment processes which help eliminate or minimise risks for the design project based on occupational health and safety (OHS) considerations.

- For the purposes of clarity and certainty, the Model OHS Act should include the adoption of the definitions of consultation, construction site, construction work, construction project, high risk construction work, client, employee, risk assessment, employee representative, workplace, and duty of care.

3. DUTIES OF CARE

THE CURRENT APPROACH

Duty of Care

The theory of a general duty of care is that a duty of care is owed by one person to another. This concept is one of the foundations of OHS legislation throughout the world, including Australia.

The duty provisions in OHS legislation are primarily based around the employer being the main OHS duty holder. This is due to the employer having control, resources and the main influence in the workplace. Employees also have a significant general duty to take appropriate steps for their own health and safety, and that of others in the workplace.

ACEA believes that a 'general duty of care', 'duty of care' or 'general duties' , insofar as this principle applies to workplaces, should be based on:

- an employer must, as far is reasonable and practical, promote and provide a work environment in which employees are not exposed to hazards;

- employees must take reasonable care for their own safety and health, and that of others, at work; and

- self-employed persons, must, as far as is reasonable and practical, provide that their work does not adversely affect the safety and health of others.

Recommendation:

- Model OHS Act to keep the general duty of care concept that a duty of care is owed by one person to another.

CONTROL

Persons in Control

ACEA remains dissatisfied with the current application of the concept of 'persons in control' in all jurisdictions. This is because the current legislative approach in all jurisdictions provides that if a stakeholder is capable of exercising any control at all they are deemed to be the 'person in control'.

It is our contention that this concept acts more as a mechanism to gather the maximum number of potential targets for prosecution, rather than as a mechanism for ensuring a reduction in the number of workplace injuries and fatalities.

ACEA suggests that the standard of control set by the International Labour Organisation (I.L.O) which states that a person is to be responsible and liable for matters and events over which they have 'reasonable and practicable control[4]' should be used in the Model OHS Act.

It is also recommended that a definition of 'persons in control' be included in the Model OHS Act. This is because stakeholders need to be able to consult the Model OHS Act and understand when they will be deemed to be a 'person in control' (i.e. person who, by virtue of their position or role has the ability to command, direct or compel).

Recommendations:

- Model OHS Act should be streamlined rather than increase the number of persons in control.
- Model OHS Act to use I.L.O approach.
- Model OHS Act to include a definition of control.

Designers and Control

Engineering design is a complex process, involving a broad range of inputs and influences on design outcomes by project stakeholders, other than the designer, including equipment suppliers, materials suppliers, construction contractors and clients.

ACEA has concerns that some OHS Acts (i.e. WA Occupational Safety & Health Act 1984) place an additional duty on designers for risks to health and safety of those affected by the construction work of the design project. Good designers do have consideration of the constructability of design, but these considerations are always limited to a designer's expertise and knowledge. Importantly, a designer's qualifications only deal with the principles of engineering design, not construction. A designer has no formal training in construction processes and therefore they are not competent to control elements of construction.

ACEA believes that the WA OSH Act 1984 Section 23- Duties of manufacturers, etc burden designers with OHS responsibilities to which they have no expertise or control over. This is because the person in control of the design of the built form (i.e. designer) is not in control of the construction of the structure.

Buildings or structures are designed for in-service conditions but there are many structural stability issues that arise during the construction phase which can remain until the structure is fully installed or completed. The way a contractor goes about the construction (and therefore the interim stability of the structure) can be influenced by a number of things other than structural design (i.e. site access, subcontractor availability, timing etc), though stability of the structure (i.e. temporary and permanent) is always paramount. The client engages the designer to design, it is not expected that the designer have either the expertise or competence to advise on the constructability of the design as this is the role and responsibility of the contractor.

ACEA believes most jurisdictions focus on the designer's obligations while making little or no reference to other parties with exception to the QLD WHS Act 1995 which at least places legislative responsibilities on the Client (s30A), Project Manager (s30C) and Principal Contractor (s31)[5].

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[4] I.L.O Convention 155- Occupational Health and Safety and the Working Environment.

[5] Queensland Workplace Health and Safety Act 1995.

Current OHS legislation in Australia also does not promote or provide for a "team approach" with regard to safety in design for construction, use and maintenance of buildings or structures. There are concerns that there is no designated role assigned with the responsibility to ensure that an effective safety in design process is completed for an overall design/project.

Indeed, traditional forms of contracting have a 'master and servant' approach with no avenue for collaboration or innovation. This culture needs to be driven by the owner of the project, down through the design and construction hierarchy of the teams involved. What is missing is the safety in design equivalent of the United Kingdom (UK) regulated client-appointed Construction, Design & Management (CDM) Coordinator.

In the UK a CDM Coordinator must;

- identify, collect and communicate pre-construction information to designers and contractors;
- co-ordinate health and safety aspects of the design work and promote co-operation;
- facilitate good communications between the client designers and contractors;
- liaise with the principal contractor regarding on-going design and information for both the construction phase plan and health and safety file; and
- prepare or update the health and safety file.

The introduction of a "Safety in Design (SID) Coordinator" role should be established into the Model OHS Act with the client having clear responsibility and control for assigning this role and ensuring the party fulfilling the role is doing so effectively. As with the UK CDM requirements, the SID Coordinator will be responsible for development of a health and safety file that collates all relative safety in design review information.

If a 'SID Coordinator" role is not introduced, then a duty for the early engagement of the contractor in the design phase should be included. This should be supported by a secondary duty on a designer to fulfil an advisory role in relation to the construction of their design within their expertise. ACEA envisages this role to be advisory only without the associated sanctions of a full breach of obligation. In this situation, the Model OHS Act should make it clear that a designer's responsibility during the construction phases extends to identifying the potential hazards to those charged with constructing the design. The obligation for ensuring OHS of those constructing the building or structure should rest with the party in the best position to assess the hazards and take alleviating action, that is, the construction contractor or project manager.

ACEA suggests that as a result of the issues detailed above, designers have one of the most onerous legislative obligations (i.e. safety in design), yet designers are frequently facing indifference and/or a lack of knowledge from other parties who should be contributing to a successful safety in design outcome.

Recommendations:

- Model OHS Act should not place duties regarding the construction of a design project on designers as they are not constructors, and a separate definition of a designer of construction sites as workplaces and construction work processes to be identified and included.

- Model OHS Act establishes a SID Coordinator based on the UK CDM Coordinator role which assigns the responsibility to ensure that an effective safety in design process is completed for an overall design/project.

- If a SID Coordinator role isn't established in the Model OHS Act, a requirement for early engagement of the contractor in the design phase and a secondary duty on designers without full breach obligations should instead be included.

Demolition & Control

ACEA does not believe that it is reasonable or practical to impose an obligation upon designers for the demolition phase of a project. The identification of all hazards which may arise during the demolition phase of a particular building or structure arising through the design is not feasible, attainable, or manageable.

As well, building redevelopment continually occurs in Australia whereby earlier buildings are reconfigured or redesigned for new purposes (i.e. churches become blocks of units, warehouses become apartments, and office blocks become hotels) which means that the designer of the original project has little or no foreseeable knowledge of what the project might later become. Hence it is extremely difficult and impractical for a designer to have control of the demolition phase of the original design project when new materials, construction methods and the intended purpose of the original design project all may have altered after redevelopment.

By imposing obligations upon designers for the demolition phase of a design project, ultimately every designer is burdened with the ongoing process of risk assessment and analysis for the life of the design product. This will add a significant burden and responsibility on designers that are incommensurate to actual operational control and is not within their expertise and ability. ACEA believes this is an unreasonable and unrealistic approach to achieving improvements in workplace safety in design.

It is recommended that duties of designers of buildings and structures be heavily based on the VIC OHS Act 2004.

VIC OHS ACT 2004- 28. Duties of designers of buildings or structures

> *(1) A person who designs a building or structure or part of a building or structure who knows, or ought reasonably to know, that the building or structure or the part of the building or structure is to be used as a workplace must ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to the health of persons using it as a workplace for a purpose for which it was designed.*

Victoria has chosen to only impose obligations upon designers which extend only for as long as the structure is being used for the 'purposes for which it was designed'.

Recommendations:

- Model OHS Act to adopt the principles of the VIC OHS Act 2004- Duties of Designers of Buildings and Structures.
- Model OHS Act to specifically exclude obligations on designers for the demolition phases of a building or structure.

WORK RELATIONSHIPS

Employment Relationship Duties

ACEA recognises that it's appropriate to extend duties to other parties at certain times, situations and to the extent that those parties are exposed to risks that arise from the employers work activities. For example, VIC OHS ACT s 21 (3) extends duties from employers to independent contractors.

Recommendation:

- Model OHS Act to include duties to designated third parties, such as the general public, but the duty must remain within activities of work and within a workplace.

DUTIES OF EMPLOYERS

Responsibilities of Employers.

Employers have the prime responsibility, at present, for the health and safety of employees in the work place. The Model OHS Act must place duties on employers in respect to their employees but an employer's obligations must be limited to the extent that they have control over the workplace, work activity and the employee.

Recommendations:

ACEA believes that the Model OHS Act should impose duties on employers that promote and provide:

- appropriate safe systems and coordination of work for ensuring, so far as is reasonable and practical, that employees are safe and the risks to health in connection with the use, handling, storage or transport of plant or substances are eliminated or minimised;
- plant or systems of work that are, so far as is reasonable and practical, safe and without risks to health;
- each workplace under the employer's management and control, so far as is reasonable and practical, is in a condition that is safe and without risks to health;
- adequate facilities, so far as is reasonable and practical, for the welfare of employees at any workplace under the management and control of the employer;
- information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work activities in a method that is safe and without risks to health.
- supervise the occupational health and safety of employees in the workplace, so far as is reasonable and practical;
- monitor conditions at the workplace under the employer's management and control; and
- appropriate and necessary information to employees concerning health and safety at the workplace.

DUTIES OF WORKERS AND OTHERS

Responsibilities of Employees

ACEA has repeatedly raised concerns to all levels of Government that current OHS legislation fails to confer the balance of a shared culture of OHS responsibility between employers and employees in the workplace. OHS legislation within all jurisdictions places a disproportionate responsibility for workplace safety on employers and at best, an unbalanced or secondary responsibility for workplace safety on employees.

It's recommended that much the same way that the behaviour and actions of 'rogue' employers carries punitive measures, that the 'rogue' or irresponsible behaviour and actions of employees, in falling to comply with safety directives should carry similar penalties.

Recommendations:

The Model OHS Act should include that:

- an employee must take reasonable care for his or her health and safety;
- an employee must take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace;
- an employee must not to wilfully or recklessly interfere with or misuse anything provided for workplace health and safety at the workplace;
- an employee must not to wilfully or recklessly injure himself or herself;
- an employee must fully comply with instructions given by the employer or others for workplace health and safety at the workplace;
- an employee must co-operate fully with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulation;
- an employee must report hazards or risks, as far is reasonable and practical, within the workplace, to their employer to help eliminate or minimise health and safety risks; and
- an employee must use appropriate personal protective equipment if required for any work activity whether the equipment is either provided by the employer or by the employee that they must use it and gain proper training and instruction on its use.

APPOINTED PERSONS AND OFFICERS

The Model OHS Act does not need to provide a provision or mechanism for persons to be appointed to a position that has specific OHS responsibilities in the workplace. For example, in Queensland all employers with 30 or more workers must appoint a Workplace Health and Safety Officer to help employers meet their OHS obligations under the QLD WHS Act 1995.

There should be no restriction or mechanism for employees to approach or be appointed to specific OHS responsible positions in any workplace irrespective of size or industry.

Recommendation:

- Model OHS Act should not have to provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities, however if a provision is to be used that the QLD WHS Act 1995 requirement should be adopted.

DUTIES OF PERSONS IN CONTROL

Under the Model OHS Act, a person who has control of a design of a building or structure that is to be used by people as a place of work, must ensure, as far as is reasonable and practical, that the building or structure is safe to be used as a workplace .

Recommendation:

- Model OHS Act to provide provisions for persons deemed in control of a workplace, and what duties they owe, to whom, and when the duty is owed.

ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

ACEA is currently unable to comment on this area due to not having enough information and evidence available at this time to make a valuable and constructive contribution.

If information or evidence comes to light in the future and the ACEA subsequently believes it can make comment, then it will respond accordingly.

4. 'REASONABLY PRACTICABLE' & RISK MANAGEMENT

CONCEPT OF 'REASONABLY PRACTICABLE'

The Concept of Reasonably Practicable vs. Reasonable and Practical

In all Australian jurisdictions the primary qualification to meet your OHS duties is based on the concept of "reasonably practicable". Workplace stakeholders have obligations under OHS legislation to ensure the workplace safety of relevant persons, as far as is reasonably practicable. This is a well established and respected test at law.

In the majority of Australian jurisdiction's (excluding QLD and NSW) the onus of proving what is 'reasonably practicable' falls on the statutory authority. In QLD & NSW through the operation of "absolute/strict liability" duties the onus of proving reasonably practicable falls upon the accused party. ACEA opposes absolute/strict liability approach, explained in Section 8- Prosecutions.

Reasonably practicable involves a balancing act between the likelihood and severity of, for example, a potential injury/illness weighed up against the cost and difficulty of taking action to eliminate or reduce the risk of injury/illness. ACEA believes that this is a robust test that employers/duty holders must meet but proposes that a more proportionate approach would be the introduction of a "reasonable and practical" qualification.

For example, "practicable " in an OHS sense means that if an employer is able to meet their OHS duties to an employee, because in theory it seems to be feasible, then it is capable of being achieved.

On the other hand, "practical" means that if an employer is able to meet their OHS duties to an employee because it has been successfully tried or confirmed by past experience, then the employer must put it into practice.

The test of "reasonableness" in both cases should remain an objective test; that is, an employer/duty holder is to be judged by the normal behaviour expected of a rational person in the employers/duty holder's position and who is required to comply with the same duty.

ACEA believes that the test of 'reasonable' and 'practical' is a more appropriate test for duty holders in meeting their OHS obligations because it allows businesses the flexibility to respond within their operational and commercial capabilities.

This test is a reasonable obligation for business in comparison with the test of 'reasonably practicable' which is a higher test for duty holders because 'reasonably practicable' fundamentally means that if it can be done, it should be done, irrespective of commercial implications.

As a fall back position, if the proposed test of 'reasonable' and 'practicable' for duty holders isn't supported, ACEA will accept the test of 'reasonably practicable' as a significant qualification to meet OHS requirements of the Model OHS Act.

Recommendations:

- Model OHS Act to use the concept and test of 'reasonable' and practical' in relation to providing health and safety in the workplace.

- As fall back position the qualification of "reasonably practicable' to be used in the Model OHS Act.

RISK MANAGEMENT

Like many enterprises, design inherently involves risk and requires those risks to be identified, evaluated and properly managed.

Risk management systems can be complicated or simple, depending on the individual needs of the business. However, some form of risk management system is an essential part of the business planning process and leads to an understanding of the levels to which a business is exposed. Identifying and quantifying these risks is the first step in a process of prevention - developing strategies to minimise the possibility of an action or incident occurring. Risk management is also directed towards ensuring that if an action or incident does occur, the outcome has minimal impact on the commercial viability and performance of the business.

Risk management has assumed increased importance in recent years as the insurance industry seeks to reduce its underwriting losses, increase its return on investment from premiums and reduce its potential exposure to insurance claim payouts. Like many professional services business, consultants have been hit hard by major premium increases, increased exposure through increased deductibles and outright refusal of cover for some industry activities. The areas of difficulty associated with insurance are often linked to insurers' perceived levels of exposure to liability and risk of a business.

Also, the increasing use of Public Private Partnerships (PPPs) in their various forms between governments and the private sector for the development of major infrastructure raises new challenges in achieving equitable and effective models of risk allocation.

The importance and value of risk management standards should be a principle in the Model OHS Act, but it does not need to prescribe a particular approach to risk management. This is because if the Model OHS Act adopts a principle-based approach it allows duty holders a greater amount of flexibility in undertaking and developing appropriate risk management as part of their approach to OHS. The type, approach and level of risk management used by the employer/duty holder should be based on their capacity to undertake risk management (i.e. resources).

In other words, a principle-based approach gives duty holders greater freedom to develop their own risk management principles and techniques for their own compliance. This approach to risk management in the Model OHS Act promotes a more effective and innovative approach for duty holders to meet their OHS obligations, and moreover, reduces the complexity that prescriptive–based risk management principles would involve.

Recommendation:

- A principle-based Model OHS Act must not include prescriptive risk management standards.

5. CONSULTATION, PARTICIPATION & REPRESENTATION

DUTY TO CONSULT

Shared Responsibility to Consult

Consultation is an effective and efficient means of managing OHS in the workplace. It also initiates shared participation in OHS management by both employer and employee.

ACEA recommends an enlightened approach to OHS is needed rather than a one-sided 'employer blame-game' approach to OHS in the workplace. Enhanced consultation between all stakeholders (i.e. employers, employees, designers, clients & contractors) can help stop the 'employer blame-game' and help make workplaces healthier and safer.

Consultation and shared responsibility in workplace OHS can help produce the following outcomes:

- identify or assess hazards or risks to health or safety at a workplace;
- make decisions about the measures to be taken to control risks to health or safety at a workplace;
- identify and assess facilities in the workplace;
- resolve health and safety issues at the workplace;
- provide better information and training in the workplace; and
- make workplaces healthier and safer for all stakeholders.

As mentioned, working arrangements have changed for consulting firms and this has instigated a 'master and servant' working relationship. This type of relationship often involves multiple stakeholders including construction contractors, developers and contractors, and this 'master and servant' working relationship does not promote communication or collaboration.

This change in work relationship reflects not only the consulting engineering industry, but work relationships in all industries. Therefore, it's understandable that consultation between only the employer and employee is insufficient to address OHS management and control in the workplace as there are now many other stakeholders involved in work arrangements, such as sub-contractors.

The Model OHS Act must include provisions for consultation in the workplace however the method of consultation should be determined by both the employer and employee irrespective of size of company or industry. The Model OHS Act must also provide a reciprocal duty for employees to participate in consultation, with the duty based around the Northern Territory Workplace Health and Safety Act 2007 - Section 32 duties[6].

Recommendations:

- Model OHS Act to include provisions for consultation with the method of consultation decided by employer and employee irrespective of the employer's size or type of business activity.
- Model OHS Act should include reciprocal shared consultation duties where employees and other relevant stakeholders have a duty to consult with employers in managing and controlling OHS in the workplace.

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[6] Northern Territory Workplace Health and Safety Act 2007- Section 32.

PARTICIPATION AND REPRESENTATION

Health and Safety Representatives

The Model OHS Act should not mandate for the formation of health and safety representatives (HSR). In addition, HSR's must not have enforcement capabilities such as the power to issue notices in the workplace, which is not to say that HSR's are not a lawful or justifiable channel or mechanism to support OHS in the workplace.

If employers and employees would like to establish voluntary HSR's in the workplace, which is more appropriate and suitable, then the development of guidance material could be developed to help set up this role.

Recommendation:

- Model OHS Act should not mandate for the formation of health and safety representatives.

Right of Entry

The right of entry is a contentious issue for many stakeholders especially building contractors, but at present ACEA members are not impacted by any right of entry in the workplace. This is because ACEA members firms employ white-collar workers in a white-collar work environment that have little or no issues in their workplace regarding any right of entry by a union or other delegate.

Recommendation:

- ACEA is unable to make any recommendations for the Model OHS Act in this area.

PROTECTION FROM VICTIMISATION AND DISCRIMINATION

Any form of victimisation and discrimination in the workplace is opposed and there must be appropriate protections for persons in the workplace.

Anti-discrimination provisions are already contained in a number of Federal Acts, including the:

- Racial Discrimination Act 1975
- Sex Discrimination Act 1984
- Disability Discrimination Act 1992
- Human Rights and Equal Opportunity Commission Act 1986.

In Queensland, the Anti-Discrimination Act 1991 has provisions which provide protections against victimisation of people in number of situations in which an offender can be prosecuted. ACEA recommends that with these provisions in place for the protection against victimisation and discrimination in existing legislation, that there is no reason to replicate any provisions in the Model OHS legislation.

Recommendation:

- Model OHS Act does not need to include further provisions for victimisation and discrimination in the workplace as sufficient duties already exist in both Federal and State Acts.

6. REGULATOR FUNCTIONS, POWERS, & ACCOUNTABILITY

ROLE AND FUNCTIONS OF THE REGULATOR

Model OHS Regulator

The role and function of the regulator must do more than just enforce OHS law. A regulator should be the primary driver of OHS safety culture because they are the most appropriate body to influence and assist stakeholders to achieve improved OHS performance through education, advice and assistance.

Importantly, as a public administration a Model regulator should also be transparent, accountable and independent from any possible social, political or economic influence or power that may impact on their role or function.

In addition, any advice given to an employer by the regulator should not be admissible as evidence against a breach of the Model OHS Act.

Recommendations:

- Model OHS Act to provide for the establishment, functions, powers and accountability of regulators.
- Any advice given by the regulator should not be admissible as evidence in an OHS prosecution.

Model OHS regulators role and function should include:

- administering, policing and enforcing OHS legislation including investigative and inspectorate activities;
- educating, advising and assisting all stakeholders in meeting their OHS duties;
- being the main drivers of a safety culture within industry and the community ;
- being the peak regulatory body in promoting education, advice and assistance in OHS;
- being a public administration that is transparent, accountable and independent; and
- researching and developing to improve OHS performance and to collect OHS statistics and data to be published for review and analysis.

INSPECTORS

The Model OHS Act should provide for the appointment, powers, and functions of OHS inspectors. It must also set out the conditions and limitations that the OHS inspectors have in relation to their powers and functions.

ACEA believes that the role and the capacity of the OHS inspector should be strengthened to include advice and assistance as they can be the most appropriate persons to help employers meet their OHS duties. This is because OHS inspectors have the expertise, competence and qualification in understanding both the general working environment and specific industries which is due to their on-going exposure and experience in these fields.

Recommendations:

- Model OHS Act must provide for the appointment, powers and functions of OHS inspectors and their conditions and limitations in relation to their OHS powers and functions.
- Model OHS Act must strengthen the role of OHS inspectors to include advice and assistance provisions.

INTERNAL REVIEW OF INSPECTORS DECISIONS

ACEA is currently unable to comment on this area due to not having enough information and evidence available at this time to make a valuable and constructive contribution.

If information comes to light in the future to which the ACEA believes it can make comment, then it will respond accordingly.

7. COMPLIANCE & ENFORCEMENT

ENFORCEMENT MEASURES

In all Australian jurisdictions the OHS Regulator has a range of enforcement options available to it. The enforcement policies of the Regulator in all Australian jurisdictions are driven by three key principles. These principles include:

- Targeting
- Consistency
- Proportionality

Recommendations:

- Regulator administering and enforcing the Model OHS Act must focus relevant resources on 'targeting' specific industries which are likely to result in high-level risks to workplace safety.
- Regulator must endeavour to ensure that consistency in enforcement measures and outcomes exists for all workplaces and all stakeholders.
- Regulator must ensure that enforcement action is proportionate to the risks at the workplace and the seriousness of an injury or illness when it occurs.
- Model OHS Act must provide a compliance and enforcement approach that the more serious risks will warrant more severe enforcement action.
- An organisations previous health and safety track record and previous dealings with the Regulator must influence the appropriate enforcement options employed.

MEASURES EXERCISED AT THE WORKPLACE

Safety Directions, Warnings and Outcomes

When employers within a particular jurisdiction fail to adhere to their obligations under OHS, the regulatory authority has a range of enforcement options.

It's recommended that before any enforcement option is imposed on a duty holder for an OHS breach, that all other measures (i.e. advice, persuasion, warnings and negotiated outcomes) to change behaviour have been explored or exhausted. It's noted that the these measures may not always be suitable due to the gravity of the breach but in other situations these measure may be appropriate and proportionate to the OHS breach.

The Model OHS Act must use graduated enforcement measures as they allow a regulator to shape their enforcement. The main enforcement options under the Model OHS Act must reflect their value in controlling behaviour and cooperation of duty holders.

Order of enforcement measures include:

- Improvement notices
- Infringement notices
- Prohibition notices
- Enforceable undertakings
- Prosecution

Improvement Notices

Where an inspector identifies a contravention of the Model OHS Act and the breach is unlikely to cause an immediate risk to health and safety, an improvement notice is an appropriate enforcement option. Improvement notices must only be issued when an inspector is satisfied that there is sufficient evidence to form a reasonable belief that a contravention in the Model OHS Act has occurred.

The improvement notice must also require an employer to remedy the contravention within a designated time period specified in the notice. If the improvement notice is not adhered to the inspector may; issue another notice; or issue an infringement notice for failing to comply with the improvement notice; or initiate legal proceedings within the courts.

Recommendation:

- Model OHS Act to include improvement notices as an enforcement option for the regulatory body.

Infringement Notices

An infringement notice (often referred to as an on-the-spot fine) may be issued for prescribed offences under the Model OHS Act, however such a notice does not always instigate corrective action of a breach as the notice is punitive in effect (i.e. duty holder is prepared to accept fine instead of corrective action).

Recommendation:

- Model OHS Act to include infringement notices as an enforcement option for the regulatory body.

Prohibition Notices

A prohibition notice may be issued under the Model OHS Act where the inspector has a reasonable belief that a situation is causing, or is likely to cause an immediate risk to workplace safety.

A prohibition notice should require the person deemed in control under the Model OHS Act to immediately remedy the situation. If the prohibition notice is not adhered to the inspector may initiate legal proceedings within the courts.

Recommendation:

- Model OHS Act to include prohibition notices as an enforcement option for the regulatory body.

Enforceable Undertakings

Enforceable undertakings should be an enforcement option in the Model OHS Act which must be designed to provide an effective remedy for contraventions without the need for formal Court proceedings.

Please refer to next sub-section: Measures Exercised in the Workplace- for recommendations.

Prosecution

Prosecution should be an enforcement option in the Model OHS Act.

Please refer to section 8: Prosecutions- for recommendations.

MEASURES EXERCISED BEYOND THE WORKPLACE

Enforceable undertakings

Enforceable undertakings are an Australian invention designed to provide an effective remedy for contraventions without the need for formal Court proceedings. Generally an employer who enters into such an undertaking has to apply in writing to the regulator.

The undertaking becomes binding upon the employer once it is accepted by the regulatory authority. Upon receiving such written advice the regulator must cease any prosecution proceedings for the alleged contravention. An enforceable undertaking may be withdrawn or amended at any time with the consent of the regulatory authority. If the regulatory authority, at any time, believes that the employer has contravened the provisions of the undertaking, they may apply to the Courts for an order.

ACEA supports enforceable undertakings as an alternative to prosecution against any breach of the Model OHS Act. This is because enforceable undertakings provide an employer the opportunity to mitigate an OHS breach and take corrective action in an effective and efficient way that may otherwise have resulted in a prosecution.

Recommendations:

- Model OHS Act should include the use of enforceable undertakings.

Enforceable undertakings must meet conditions such as:

- be a voluntary undertaking by the employer;
- the power to seek and enter into undertakings must be limited to the relevant OHS Regulator;
- compliance with an enforceable undertaking must preclude any further action by ay party with prosecutorial rights with respect to the matter;
- where enforceable undertakings have been established any action which may result for non-compliance with the undertaking must be restricted to the relevant OHS Regulator;
- there needs to be some mechanism by which the appropriateness of the proposed undertaking may be reviewed in the event that the person subject to the undertaking is of the view the action required is unsuitable;

- need to be confined to defined periods and resources, and actions arising from a failure to satisfy an enforceable undertaking should only proceed after proper notice has been given and the opportunity for a rectification provided;

- if prosecution is launched for breach of undertaking, action taken by the duty holders to meet the enforceable undertaking should be required to be taken into account and there must be a specific requirement that any fine be discounted for expenditure incurred as part of the undertaking;

- agreement to enter into an enforceable undertaking is not to be taken as an admission that a breach has occurred; and

- where a party is prosecuted for a subsequent offence, the existing of a previous undertaking which has been complied with is not to be taken as evidence of a previous offence.

8. PROSECUTIONS

PROSECUTION POLICIES

The prosecution policies of all OHS Regulators must be based upon the premise that prosecution is the final option that assists prevention of workplace safety incidents by deterring others from committing similar offences. This should be supported by the practice that is currently adopted in all jurisdictions of publicly reporting all successful prosecutions.

The decision to prosecute a duty holder for a breach of the Model OHS Act must be based upon an assessment of the nature of the non-compliance, the obligation holder's performance and the priorities of the Regulator. ACEA recommends that the Regulator should consider three key issues before legal action is undertaken.

These key issues are:

- Is a there case to answer?
- What are the prospects of conviction?
- Is it in the public interest to prosecute?

Recommendation:

- The decision to prosecute a breach of the Model OHS Act must be based on three key issues; that there is a case to answer; prospects of a conviction; and whether it's in the public interest.

CRIMINAL OR CIVIL LIABILITY

Criminal liability

Traditionally in all Australian jurisdictions a breach of OHS legislative obligations may result in a criminal prosecution. This results in a successfully prosecuted party having criminal penalties imposed upon them and having a criminal conviction registered against their name.

Despite OHS breaches not satisfying the general requirements of criminal law regarding intention (*Mens Rea)*, criminal sanctions are applied as a matter of public policy. Such penalties are justified on the basis that the potential application of criminal sanctions is necessary in order to deter other duty holders from other future breaches of workplace safety legislation.

ACEA believes that a breach of the Model OHS Act should remain a criminal offence and therefore prosecution and penalties should be administered and enforced through the basis of criminal law. Importantly, a breach of the Act must be proven in a Court of Law that the duty holder was both reckless in breaching the Act and negligent in breaching the Act.

Recommendation:

- A breach of the Model OHS Act must be only be a criminal offence.

Civil liability

In some State and Territory jurisdictions civil actions (breach of statutory duty) are permitted in cases of breaches of OHS legislative obligations. The Commonwealth, NSW and VIC legislation expressly prohibit any civil action for breach of these statutory duties.

However, the ACT, NT and SA Acts specifically leave open the question of civil liability for breach. The QLD, TAS and WA legislation are silent on the matter of civil actions. The question of whether the QLD, TAS and WA legislation impliedly give a private right of action has not yet been judicially decided.

The courts however, have held in similar circumstances that remaining silent with regards to civil liability results in it applying. Therefore, in the ACT, NT, QLD, SA and WA, in the case of a workplace injury or illness, the employer may be left facing a criminal prosecution and a private civil action from the injured/ill individual.

ACEA believes civil actions against breaches of OHS legislation across jurisdictions are not warranted as breaches of OHS should be a criminal offence.

Recommendation:

- A breach of the Model OHS Act must be a criminal offence and should not give rise to any civil remedy.

WHERE PROSECUTIONS SHOULD BE HEARD

OHS prosecutions should be heard and determined by judges in the District or Supreme Courts, not for example in any Industrial Relations Commission, like in NSW. This is because there is uncertainty over the legality of the Commission's power to exercise criminal jurisdiction in OHS prosecutions as they potentially do not have the same expertise in criminal law as judges who preside in District or Supreme Courts.

ACEA also recommends that a defendant who may be in breach of an OHS duty should be allowed the full protection of the law, so therefore any prosecutions of the Model OHS Act should be dealt with in the District or Supreme Courts. Defendants in OHS prosecutions should also be given the right to a trial with a judge and jury in similar fashion to other criminal law proceedings rather than a Local Court or Commission.

Recommendation:

- OHS prosecutions must be dealt with by judges in the District and Supreme Courts with rights to a judge and jury.

WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES

An OHS regulator authority should be the only body to bring prosecutions against the Model OHS Act and not Unions. This is because Unions are perceived as being biased and having a conflict of interests in the proceeds of prosecution.

Recommendation:

- Prosecution must only be the OHS regulator and not Unions.

EVIDENCE

Case to Answer

Prior to initiating legal proceedings the regulatory authority will review any breach to ensure that there is sufficient evidence to support a case to answer. In making this determination the Regulator will examine whether the evidence reveals that all the elements of the offence have been proved, and whether the inferences drawn from the circumstances are logical and supported by fact. Where the prosecuting authority is of the opinion that the available evidence does not support a case to answer a prosecution will not be instigated.

Recommendation:

- The regulating authority administering and enforcing the Model OHS Act must ensure that the above evidentiary procedures are maintained and followed.

THE BURDEN OF PROOF AND DEFENCES

Reverse onus of proof provisions

ACEA is fundamentally against the provision that the duty holder be required to prove whether an OHS requirement has been met, rather it should be the enforcement body to show through evidence that the law has been breached. Employers oppose any reverse onus of proof provisions, such as those in NSW and QLD, being implemented in the Model OHS Act as such provisions create suspicion before it can be objectively tested and it is contrary to presumption of innocence.

Reverse onus of proof provisions also deny constructive engagement between the Regulator and the duty holder who may be in breach of an OHS obligation. ACEA suggests that the first real engagement that the duty holder has is with the Courts while trying to defend their innocence. In other words, the Regulator is acting as the judge and jury in OHS compliance before any deemed OHS breach is impartially tested in Court of Law. To protect and uphold all duty holders' democratic rights the Model OHS Act must not interfere or change the widely accepted and promoted presumption of innocence.

In NSW the strict liability regulatory approach provides that once a OHS incident has occurred the onus is upon the party being prosecuted is to establish that they took all 'reasonably practicable (or equivalent)' measures to prevent such an accident. This approach contradicts the fundamental principle of criminal law that the prosecution should bear the onus of proving all of the elements of the offence.

Furthermore, the application of the reverse onus of proof or absolute liability means that the self funded duty holder must bear the expense and difficulty of establishing a defence. This is a difficult proposition particularly for small and medium firms who often lack the significant resources required to mount such a defence. ACEA believes that the regulatory authority backed by the resources of the state is the most appropriate party to bear the onus of establishing the elements of the prosecution. This approach is favoured by the High Court of Australia.

In the case of Chugg v Pacific Dunlop, Justice Deane observed:

"*The regulatory authority has the resources of Government available to him and is not expected to be in a position of disadvantage vis-à-vis the employer as regards what was and was not practicable in terms of maintaining a safe work environment. Indeed an inspector may well have more general information and more ready access to expert advice than an accused employer. (p. 254)*[7].

In addition, Chris Maxwell QC in his 2004 Review into the Victorian OHS legislation also noted that there is no evidence which suggests that deterrence – and thereby health and safety outcomes – are improved by having duty holders bear the onus of proving that all reasonably practicable measures were taken[8].

NSW and QLD remain the only Australian jurisdictions which apply strict liability obligations. The other seven Australian jurisdictions which regulate OHS do not apply such obligations. According to the Comparative Monitoring Report 2006[9], the operation of strict liability duties has not resulted in less workplace injuries in either QLD or NSW. In fact both have experienced workplace injury frequency rates which exceed the Australian average.

Hence, the operation of strict liability duties in these states has not resulted in workplaces that are any safer than the states which do not adopt a strict liability approach to OHS regulation. Moreover, despite the operation of these strict liability duties in NSW, it continues to lag behind the majority of other Australian State jurisdictions which do not see the need to enforce such strict liability obligations.

For these valid legal reasons the application of reverse onus of proof or strict liability obligations is inappropriate for the Model OHS Act.

Recommendations:

- Model OHS Act adopts the principles of criminal law.
- regulatory authority backed by the resources of the State is the most appropriate party to bear the onus of establishing the elements an OHS prosecution.
- Based on the Comparative Monitoring Report 2006, there is no basis that strict liability duties such as those in NSW are appropriate for any OHS legislation.

SENTENCING OPTIONS

Penalty Options

In sentencing workplace stakeholders for breaches of workplace safety, judicial officers in all Australian jurisdictions have significant discretion in relation to the level of penalty they impose. Although not technically a defence, factors such as early guilty pleas, and cooperation with the regulatory authority in the prosecution of others, goes a long way to mitigating the level of penalty imposed for a particular breach of workplace safety obligations.

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[7] Maxwell, C 2004, VIC Occupational Health and Safety Act Review, State of Victoria March 2004 pg: 358

[8] Maxwell, C 2004, VIC Occupational Health and Safety Act Review, State of Victoria March 2004 pg: 358

[9] Australian Safety and Compensation Council, Comparative Performance Monitoring-Report 2006.

Being discretionary, there is no guarantee that such actions would result in a reduction in the penalty applied. However, the courts in all Australian jurisdictions generally apply accepted levels of reduction based upon such factors. For example, if an employer/stakeholder enters an early guilty plea (providing it was prior to the commencement of proceedings) a certain percentage is generally reduced from the penalty to be applied. However, once again it is worth noting that this approach is an exercise in judicial discretion and as such its application depends upon the discretion of the particular judicial officer.

Reasonable Prospect of Conviction

The prosecution policies of all Australian jurisdictions recognise the economic and emotional implications of being subject to a workplace safety prosecution. Consequently, if the regulatory authority believes that there is not a reasonable prospect of securing a conviction it will not instigate a prosecution. This does not mean that only 'strong' cases are prosecuted. The decision to prosecute must also be based upon the existing priorities of the Regulator at any given time.

The Public Interest

It is in the public interest that the health and safety of workers and the general public be protected and enhanced. In all Australian jurisdictions a decision to prosecute is based upon a principled consideration of a number of factors. These factors may include: seriousness of the alleged offence; punishment and deterrence; circumstances of the alleged offence; maintenance of public confidence in the rule of law; public safety; alleged offenders previous history; and co-operation by the alleged offender in the prosecution of others. If the statutory authority is satisfied, based upon these factors, that a prosecution is in the public interests, a prosecution may be initiated.

Recommendations:

- The regulating authority administering and enforcing the Model OHS Act must ensure that the level of penalty should be discretionary based on a number of mitigating factors such as early guilty pleas and cooperation.
- The regulating authority must ensure that if there is not a reasonable prospect of securing a conviction that it will not instigate a prosecution.
- The regulating authority must ensure that if after all of the other factors have been considered and the prosecution is in the public interest, a prosecution may be initiated.

WORKPLACE DEATH AND SERIOUS INJURY

Directors and Company Officers

Workplace safety legislation in each Australian jurisdiction contains provisions which impose 'deemed personal criminal responsibility" upon company Directors/Officers where the company has been responsible for a workplace injury, illness or fatality.

This requirement is limited to Directors/Officers concerned in the management of the corporation. This involves the imposition of 'accessorial liability' which is the liability of the individual for the actions of the corporate office. It is worth noting in this regard that the company does not have to have been prosecuted or convicted of an offence before a director/officer can be convicted. However, the prosecting authority must still establish that the corporation did contravene all of the elements of the offence before the Director/Officer can be convicted.

It is a defence if the Director/Officer can show that they were not in a position to influence the conduct of the corporation in relation to the contravention, or that they used all due diligence to prevent the contravention. Traditionally, prosecutions against Directors/Officers have been directed at those with 'on the ground' operational control. However, it is becoming increasingly prevalent for prosecutions to be initiated against

executive Directors and other senior management who do not have any direct involvement in the company's operational activities.

ACEA believes that any breach of the Model OHS Act that causes a workplace fatality which can be attributed to a Director/Officer action or omission should be dealt with as an offence under industrial manslaughter. For the offence to be deemed as industrial manslaughter it must be proven in a Court of Law that the conduct of the Director/Officer was both reckless in causing death to the worker and negligent in causing death to the worker.

It is important that a Director/Officer must only be committed under the offence of industrial manslaughter if they have been proven in their conduct to be both recklessness and negligent in the death of a worker under the Crimes Act. So, if the Director/Officer is able to show that they were not in a position to influence the conduct of the corporation in relation to the breach, or that they used all due diligence to provide health and safety in the workplace, then the offence of industrial manslaughter would not be able to be proven.

Recommendations:

- Industrial manslaughter to be dealt with in the Crimes Act.
- To be guilty of Industrial manslaughter it must be proven that the conduct of a Director/Officer was both recklessness and negligent.
- Industrial manslaughter should be dealt with as part of the broader criminal law and not under any OHS legislation.

ENFORCEMENT OF PENALTIES

ACEA is currently unable to comment on this area due to not having enough information available at this time to make a valuable and constructive contribution.

If information or evidence comes to light in the future to which the ACEA believes it can make comment, then it will respond accordingly.

9. OTHER ISSUES

REGULATION MAKING POWERS

The development and implementation of subordinate legislation is currently undertaken by the relevant jurisdiction who decides when and if more detail is required for duty holders to meet their OHS duties under an Act. The development of a subordinate legislation must be conditional in that it must be warranted after both a cost-benefit analysis and regulatory impact statement has proven its need.

ACEA suggests that under a national consistent OHS system subordinate legislation must remain nationally consistent across all jurisdictions.

Recommendation:

- The power to make subordinate legislation must be limited and based on evidence supported from cost-benefit analysis and regulatory impact statement.

CODES OF PRACTICE

In QLD and VIC adherence to the provisions of a Code of Practice constitutes a defence. Therefore, if the employer, or other workplace stakeholder, can establish to the satisfaction of the regulatory authority that they adhered to the provisions of a particular Code of Practice they will have established a total defence.

In all other Australian jurisdictions adherence to the provisions of a Code of Practice is one factor in determining compliance. However, in the NT, NSW and SA failure to adhere to the provisions of a Code of Practice raises a presumption of non-compliance. As a result, there is inconsistency in whether the use of a Code of Practice is a defence or not.

The development of a Code of Practices does offer valuable guidance material to stakeholders with recommended practical guidelines regarding what is required to manage or control exposure to hazards in the workplace. Codes of practices also help set out voluntary standards of protection to employers, employees, and all other relevant stakeholders. It is suggested to use the VIC OHS Act 2004 provisions[10] as a benchmark and guideline for the Model OHS Act relating to the power to make guidelines, how guidelines are made, and the withdrawal of guidelines and how guidelines do not affect rights and duties etc.

Any Codes must importantly be developed, designed and reviewed by the new independent national body for occupational health and safety and workers' compensation matters which is to replace the Australian Safety and Compensation Council. This is because this new body will remain objective and balanced in providing voluntary guidance material for employers and other relevant stakeholders. Importantly, Codes must be developed in consultation with industry broadly.

Recommendations:

- Model OHS Act to make the use of a Code of Practice as a defence in determining compliance.
- The provisions of the VIC OHS ACT 2004 (Division3 – Power to make guidelines) must be used as a benchmark and guideline for the Model OHS Act as this will promote consistency.
- Model OHS Act must provide provisions that allow the design, development and review of Codes of Practice through tripartite bodies (i.e. new independent national body).

NOTIFICATION OF INCIDENTS AND REPORTING

ACEA is currently unable to comment on this area due to not having enough information available at this time to make a valuable and constructive contribution.

If information or evidence comes to light in the future to which the ACEA believes it can make comment, then it will respond accordingly.

EXTERNAL APPEALS AND ISSUE RESOLUTION

ACEA is currently unable to comment on this area due to not having enough information available at this time to make a valuable and constructive contribution.

If information or evidence comes to light in the future to which the ACEA believes it can make comment, then it will respond accordingly.

[10] VIC OHS Act 2004- Division 3- Power to make guidelines

TRIPARTITE MECHANISMS

Tripartism is a valuable and constructive way to involve key stakeholders in policy development. In Australia, the most common structure of tripartite advisory groups is usually made up of government, Unions and employers.

ACEA believes that the Model OHS Act should facilitate tripartism in the administration of subordinate legislation through the establishment of an advisory group such as a Commission or Committee. This must be made up of key stakeholders that can advise on OHS issues. Any tripartite group must have its role and functions expressed in the Model OHS Act and be separated from the regulators role and function.

Recommendation:

- Model OHS Act should provide for the establishment of a tripartite advisory OHS group with a clear role and function determined within the Act.

MUTUAL RECOGNITION

ACEA supports Part 6 of the VIC OHS Act 2004 which deals with licenses, registration, permits and other requirements.

Recommendation:

- Model OHS Act should include a provision for mutual recognition for licenses, registration, permits and other competency requirements.

CROSS-JURISDICTIONAL COOPERATION

Cross- jurisdictional recognition, cooperation and information sharing by inspectors is supported because it will allow inspectors from different jurisdictions to combine resources to better help enforcement and compliance of the Model OHS Act.

Recognition, cooperation and information sharing by inspectors has the potential to enhance the Model OHS Act as inspectors have a valuable role in giving advice, promoting compliance in the workplace, and ensuring that OHS standards are improved. In addition, a cooperative approach by inspectors in all jurisdictions supports consistency and balance, and ultimately helps strengthen the Model OHS Act.

Recommendations:

- Cross- jurisdictional recognition, cooperation and information sharing by inspectors to be maintained and promoted as it will assist and strengthen the Model OHS Act.

- Inspectors to be able to act under the authority of another jurisdiction on a case by case basis.

INTERACTION OF FEDERAL AND STATE LAWS

ACEA is currently unable to comment on this area due to not having enough information available at this time to make a valuable and constructive contribution.

If information or evidence comes to light in the future to which the ACEA believes it can make comment, then it will respond accordingly.

10. SUMMARY OF RECOMMENDATIONS

ACEA RECOMMENDATIONS FOR THE MODEL OHS ACT

Below is a summary set of ACEA recommendations for the development of the Model OHS Act.

- Model OHS Act must adopt a principle-based regulatory approach that moves away from a traditional detailed prescriptive rule based approach.
- Model OHS Act must be complimented by a mix of process and prescriptive based regulations and codes of practices so as to help all duty holders to meet their OHS obligations.
- Model OHS Act must cover all workplaces but the Model OHS Act should allow mechanisms to allow for industry-specific subordinate legislation or regulation.
- Subordinate legislation or regulation must only be developed if it is shown that after a rigorous process (i.e. cost-benefit analysis and regulatory impact statement) that there is a need.
- Model OHS Act must be relevant to workplaces.
- Model OHS Act must be sufficiently broad and flexible to accommodate new and evolving types of work arrangements and to be able to impose duties which reflect those new working relationships and structures.
- Model OHS Act must not place specific objectives or duties on employers based on any emerging hazards or risks which at this stage can not be directly related to work activities.
- Model OHS Act must keep the general duty of care concept that a duty of care is owed by one person to another.
- Model OHS Act must be streamlined rather than increase the number of persons in control.
- Model OHS Act must not place duties regarding the construction of a design project on designers as they are not constructors, and a separate definition of a designer of construction sites as workplaces and construction work processes to be identified and included.
- Model OHS Act must establish a Safety in Design Coordinator based on the UK CDM Coordinator role which assigns the responsibility to ensure that an effective safety in design process is completed for an overall design/project.
- Model OHS Act must specifically exclude obligations on designers for the demolition phases of a building or structure.
- OHS prosecutions must be dealt with by judges in the District and Supreme Courts with rights to a judge and jury.
- Prosecution of the Model OHS Act must only be by the OHS regulator and not Unions.
- Model OHS Act must clearly provide provisions for persons deemed in control of a workplace.
- Model OHS Act must use the concept and test of 'reasonable' and practical'.
- A principle-based Model OHS Act must not include prescriptive risk management standards.
- Model OHS Act must provide for the establishment, functions, powers and accountability of

regulators.

- Model OHS Act must provide for the appointment, powers and functions of OHS inspectors and their conditions and limitations in relation to their OHS powers and functions.
- Model OHS Act must strengthen the role of OHS inspectors to include advice and assistance.
- Regulator administering and enforcing the Model OHS Act must ensure that enforcement action is proportionate to the risks at the workplace and the seriousness of an injury or illness when it occurs.
- The decision to prosecute a breach of the Model OHS Act must be based on three key issues; is there is a case to answer, what the prospects of a conviction are; and whether it's in the public interest to prosecute.
- A breach of the Model OHS Act must be a criminal offence and should not give rise to any civil remedy.
- Model OHS Act must adopt the principles of criminal law.
- Regulatory authority backed by the resources of the state must be the most appropriate party to bear the onus of establishing the elements an OHS prosecution.
- Regulating authority must ensure that the level of penalty should be discretionary based on a number of mitigating factors such as early guilty pleas and cooperation.
- Regulating authority must ensure that if there is not a reasonable prospect of securing a conviction that it will not instigate a prosecution.
- Regulating authority must ensure that if after all of the other factors have been considered and the prosecution is in the public interest, a prosecution may be initiated.
- Industrial manslaughter must be dealt with in the Crimes Act.
- To be guilty of Industrial manslaughter is must be proven that the conduct of a Director/Officer was both recklessness and negligence.
- Industrial manslaughter must be dealt with as part of the broader criminal law and not under any OHS legislation.
- Model OHS Act must provide for the establishment of a tripartite advisory group with a clear role and function determined within the Act.
- Cross- jurisdictional recognition, cooperation and information sharing by inspectors must be maintained and promoted as it will assist and strengthen the Model OHS Act.
- Inspectors must be able to act under the authority of another jurisdiction's on a case by case basis.