

## WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

### SPECIFIC COMMENTS

#### Legislative Approach:

Q1. The type of regulatory approach should depend on the hazard or risk that is being controlled. The type of approach should depend on perceived level of risk and potential outcomes of the hazard. Each type of approach has its benefits. Performance-based standards are appropriate for dealing with issues such as noise where an exposure limit is set. There is various ways that that noise exposure can be controlled depending on circumstances. However, prescriptive standards are useful in extremely hazardous working situations such as confined spaces where death can be a likely outcome. Here, the Qld regulation mandates sections of AS/NZ 2865. On the other hand, process-based standards are useful in managing hazards associated with hazardous substances as they provide a process to follow to give outcome of managing worker exposure and being able to demonstrate the discharge of obligation. While principles based standards are necessary to inform individuals of what their responsibilities are in relation to health and safety, but should be prescriptive enough that there is no ambiguity in what is required of duty holders. In short, the type of approach should be determined on a case by case basis when developing legislation.

Q2. The OHS Act should be limited to the principles based standards, administrative issues, the operating framework of the regulator, and detailing the framework of OHS management.

Q3. The title should depend on the overall purpose of the Act. If the scope of the act is to protect only workers at work, then it should be called Occupational Health and Safety. If the purpose is to protect any person that can be affected by the activities of the workplace then it should be called Workplace Health and Safety Act.

Q4. Objectives should be specific and measurable. They should not be open for misuse or misinterpretation by regulators when trying to build a case against an employer.

Q5. Whether the Act should include principles for protection should be answered by asking the question 'will it add any value or improve safety'. Not opposed to the concept but there should be a value add from their inclusion.

Q6. Issues that should be considered is the consistent application of requirements by the regulators and the competency of the regulators. Currently, the Qld Act sets the qualification for WHSO's but does not set the same for Inspectors administering the Act and Regulation. In QR's dealings with WHSQ inspectors, we frequently come across situations where they themselves are misinterpreting their own powers under the Act and requirements of the regulation.

#### Scope, Application & Definitions:

Q7. No.

Q8. Yes. There should be an overarching OHS Act that covers issues that go across all industries. This should be administered by one regulator. Industry specific safety legislation should be contained in a Regulation that sits under the OHS Act with a specific regulator administer that Regulation.

Q9. Yes. There should be a clear delineation between what each regulator is responsible for and what needs to be reported to each regulator. Under the different Qld legislation QR can be in a situation where it needs to report one incident to QT, WHSQ and ESO.

Q10. General duties should be tied to the conduct of work at a workplace (wherever the workplace may be). It should be tied to carrying out duties as directed by the employer.

Q11. General duties should be extended to members of the public for legitimate reasons. For example, construction activities that can place members of public at risk due to the location of the work being shared environment with the public. They should not apply if members of the public wilfully or recklessly place themselves at risk or their conduct is not that of a reasonable person.

Q12. Yes. There needs to be more guidance on responsibilities of labour hire companies, contractors, and principle contractors versus the hiring. There is currently a great deal of ambiguity around who is responsible for what. This could be achieved by providing codes of practice that support general duties.

Q14. Each jurisdiction uses different terminology. The terminology should be consistent and accepted definitions of key terms should be adopted.

## **Duties of Care – Who owes them and to whom?:**

Q16. Yes, there should be a definition of 'control' because in many cases responsibility for OHS comes down to who has effective management and control of the workers/ workplace. The definition should be nationally recognised.

Q17. The duty holder should be the person who has direct or indirect control (through the management hierarchy) that would reasonably be expected to know and approve of work practices. It is not always correct to assume that the person in control of the workers or workplace has absolute control as they may be bound by company rules and procedures.

Q18. This is a difficult question to answer as there are certain circumstances in which control of worksites is handed over. Control should be able to be delegated or relinquished but the person it is handed over to needs to be clearly identifiable and aware of what the control means. This person would then legally have effective control and management.

Q19. Yes. How it is achieved will depend on what the situation is. The Act needs to allow for provisions for handing over duties or control, or providing guidance, through codes of practice, on processes and procedures for handovers.

Q20. Yes.

Q21. Duties owed to non-employees should be shared. If they are workers of a labour hire company then that company should provide basic OHS training and protective equipment. The host employer should be responsible for the employee's health and safety at the workplace if they are under the direction of the host employer. This should be the same for volunteers. If the employees belong to contractors, eg. Mowing company that looks after parks, then there should be dual responsibilities between the company who owns the asset to notify of certain hazards and the contractor for ensuring that their workers are protected from exposure to those hazards.

Q22. The duties towards these type of employees should be linked to who has effective management and control of the work they are performing.

Q23. Employers duties should be related to the level of management and control they have or should be expected to have by a reasonable person over the work and/ the workplace.

Q24. Duties should be owed to anyone who is legitimately at the workplace, whether they are an employee or not, or is affected by the work being undertaken.

Q25. The duties of workers should be specific and should cover their responsibility for complying with rules, procedures, instruction, directions and equipment for their health and safety and that of others who can be impacted by their actions.

Q26. Yes. The duties should be in relation to them following instructions and not wilfully placing themselves at risk by their actions or inactions.

Q27. Yes.

Q28. Liabilities should only be applied if the person has been negligent in the discharge of their responsibilities. They should not be liable if other duty holders have been negligent in the discharge of their duties. If individuals become personally liable, they will be reluctant to take on OHS responsibilities, or it could drive negative behaviour in trying to 'cover up' accidents.

Q29. They should be one and the same person.

Q30. Yes.

Q31. No. It needs to be clarified in terms of management hierarchy. For example, we can have a group manager that has a number of depots across a region who has depot supervisors. In this instance, who is the person in control of the workplace – is it the group manager or depot supervisor. The group manager would be providing directions for safety to the depot supervisor. Then you can also have a situation that out of each depot, work is conducted at the different locations where other workgroups can be present with their own supervisors. Who in this instance would be the person in control of the workplace – there are currently no provisions for this situation, it is left up to the business to manage.

Q32. Yes. The duty should be to the workers they are supervising and anyone who can be affected by the conduct of the work.

Q33. Yes. The duties should relate to the responsibilities at each stage of the life cycle.

Q34. When an upstream activity occurs in another jurisdiction, using the example provided, the manufacturer should only have the duty to ensure that they have manufactured the item in accordance with the design. If they find a fault with the design then they should have the responsibility to go back to the designer for rectification. If they find fault and knowingly disregard and this can be proved, then they should be liable for any problems experienced by end user.

Q35. Supply should be defined in relation to every time an item changes hands.

### **'Reasonably Practicable' & Risk Management:**

Q37. Yes.

Q39. One that is consistent with case law.

Q40. Yes.

Q41. Yes. Should be examples from case law that provide real examples.

Q42. Definitions should either reflect or call up those definitions in Australian Standards or should at least be consistent across all jurisdictions.

Q43. Yes. The definition should be defined as established in case law for clarification of how it is to be applied.

Q44. Yes. Only in terms of requiring risk management. Rigid processes can increase bureaucracy when professional judgement can be used.

### **Consultation, Participation and Representation:**

45. Consultation should occur with workplace committees, employee representatives and workers directly and indirectly affected by any changes to the workplace that can affect safety.

Q46. See above.

Q47. Yes. Those workers directly affected by changes should have the most consultation.

Q49. Yes.

Q51. HSR's should be allowed for each workgroup or workplace and there should be an application process with the selecting panel consisting of at least the employer/ manager, employee and safety officer. HSC's should be established at all levels of an organisation with a corporate/strategic safety committed providing direction and advice.

Q52. All effected workers should be able to vote.

Q59. Yes. Authorised representatives of unions.

Q60. Yes.

Q61. Right of entry should only be exercisable after employees have officially raised concerns with employers and they have not been resolved. There should be an escalation of the issue to at least the next level of management and if the issue is still not resolved then workers should have the right to elevate their issues to their appropriately qualified union representative. The right of entry should extend to the union representative initially contacting the employer to resolve the issue and if this is not successful then they should have the right to attend the workplace and represent their members.

Q62. They should have the power to only inspect/review the issue that has been raised and then discuss with the employers to resolve.

Q67. Yes.

Q68. No. If all workers have the right to refuse or cease and unsafe activity then HSR and union representatives would not need this right.

Q70. No. This should be a management issues. It should only be elevated for resolution to a higher body in extreme circumstances.

## **Regulator Functions, Powers & Accountability:**

Q79. Yes.

Q80. Yes.

Q81. Yes and these should be made available to industry.

Q82. Inspectors and regulators should not be able to obtain internal investigation reports from companies to use against them in a prosecution as some companies take a 'no blame' view when investigating in order to determine and rectify underlying causes to prevent recurrence. When inspectors seek an accident investigation report from an employer to save them the time of conducting the investigation, it increases the risk of the investigations being watered down to avoid possible fines and prosecutions.

Q83. Yes, advisory and enforcement functions should be separated because companies are reluctant to seek advice from regulators due to fear that it will result in inspectors coming to the workplace to investigate the issue.

Q84. The model Act should specify the qualification and powers of inspectors as a minimum. Inspectors should be required to have some level of industry experience or their needs to be some on-the-job coaching from experienced inspectors.

Q85. Yes. Inspectors should have a certain level of education and understand business needs. They should have a level of industry experience as detailed in Q84.

Q86. Yes, if an employer is seeking advice.

Q87. Yes. If the employer can prove to the inspector that there has not been a contravention.

Q88. There should be an independent review section of regulators that conducts reviews of decisions, like an internal audit section of a company. Employers should first be able to appeal directly to the inspector and there should be an opportunity for the employer to question the decision and provide operational feedback. If this does not result in a suitable outcome, the employer should then be able to approach the independent review section.

## **Compliance & Enforcement:**

Q90. Yes. Model depicted in Issue Paper with slight modification to 'Incapacitation'. This should become "Restriction". The business can continue to operate but under very tight safety restrictions as directed by the Regulator until safety improves with ongoing monitoring regime for a period of time. Also, Infringement Notices should come after Improvement and Prohibition Notices. Infringement Notices should only come into play if Improvement and Prohibition Notices have not been complied with.

Q91. Enforcement measure should be contained in the OHS Act.

Q92. Notices and the circumstances under which they can be issued should be detailed in the Act.

Q93. Yes.

Q94. There should be an allowance for the review of notices.

Q95. There should be a minimum timeframe, but depending on the complexity of the issue there should also be the ability for the employer to negotiate an extended timeframe with the inspector.

Q96. This should depend on the level of the notice. If an inspector issues a prohibition notice and the employer wants it reviewed, then this should occur immediately while the notice stays in force.

Q97. Yes. Only if an employer has failed to comply with an Improvement Notice.

Q98. Administration should be under the OHS law.

Q101. Yes. All potential prosecutions against a company should be open to the possibility of negotiating an enforceable undertaking.

Q102. No. It should represent the fact that the company is willing to improve its safety systems but does not always indicate that the business was entirely at fault.

## **Prosecutions:**

Q107. OHS prosecutions should be heard by specialist courts that understand business and operational issues associated with administering OHS.

Q109. Trial by jury should be an entitlement where a fatality has occurred.

Q114. Yes. Employers should have a full understanding of what evidence is required to determine breaches or what they must do to prevent breaches.

Q117. Yes.

Q118. The prosecutor should have to prove the duty holder did not meet the standard, as from the duty holder's perspective they may believe that they did everything that was reasonably practicable.

Q119. Yes. Duties of care should be subjective and rely on what is reasonably practicable, whereas procedural obligations can be quite specific and not open for too much interpretation.

Q120. Defences should be provided for principles based and performance based standards.

Q121. Yes. Where an employee is concerned prosecutors should have to demonstrate that the employee had effective management and control over the worker or workplace and they were negligent in the discharge of those duties.

Q122. This should depend on the circumstances. If the corporation and officer have been negligent in their actions and have not met the concept of reasonably practicable and 'blame' can be apportioned to a particular officer, then yes. But this should not promote or encourage Regulators to go on a 'fishing expedition' for the sake of prosecuting an officer. If no individual officer can be identified, then corporation should be charged with the offence.

Q123. Officer could be defined as those persons who have effective management and control or influence the operation at the workplace by the workers and could reasonably be believed to be aware of the activities at the workplace.

Q124. Covered in Q122.

Q125. Yes. It should contain examples from case law.

Q126. Yes. The Act should provide details of defence and these could come from the relevant case law.

Q128. Fines should only come into play after Improvement and Prohibition Notices have been exhausted.

Q130. Yes. Fatalities should attract higher fines than a breach in compliance that has not resulted in an accident. Fine should be related to the severity of the breach.

Q132. Yes.

Q133. A national register of case and Notices would facilitate consistent outcomes.

Q134. Enforceable Undertakings should be an alternative.

Q136. No, because under slightly different circumstances, death may not have been the end result. A lot of it comes down to risk management.

Q137. This should depend on the level of culpability and negligence.

Q138. The consequence of the breach should not be the only factor in determining penalties, especially if a worker has wilfully and recklessly placed themselves or another worker at risk.

Q141. Any revenue collected from fines and prosecutions should be invested in safety research and the development and provision of advice to industry.

## **Other Issues:**

Q142. No.

Q144. The level of consultation with the relevant industry should be more robust.

Q145. What needs to be reported should be clearly defined and not open for too much interpretation which can lead to under reporting. Overlap with other safety legislation need to be removed. For example, in Queensland, a company like QR Limited can be required to report the one accident to WHSQ, the ESO and QT. This becomes an administrative burden and does not provide much value in improving safety.

Q146. The Act should establish the body that conducts the external review and its powers.

Q147. Yes.

Q150. Occupational licences should have mutual recognition and should be consistent nationally.

Q151. Permits and licensing should be the same across all states. There should be a national register of licence holder so that if a licence is cancelled in one state, a prospective employer in another state can check on the status of the licence if looking to employ the worker.

Q152. The model Act should cover general issues and specific legislation relating to rail safety and dangerous goods, for example, should be covered by individual regulations and regulators to eliminate overlapping legislation and regulators.