

VECCI SUBMISSION NATIONAL REVIEW INTO MODEL OHS LAWS

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About VECCI.

The Victorian Employers' Chamber of Commerce and Industry (VECCI) is Victoria's most influential employer group, servicing over 15,000 Victorian businesses per annum. An independent, non-government body, VECCI was started by the business community to represent business.

Our membership base is diverse, with involvement from all levels and sectors of industry including: business services, hospitality, health services, manufacturing, retail, major charities, tourism and emerging sectors.

VECCI is active in providing education and support to business in their management of Occupational health and Safety. VECCI offers frequent seminars and a broad range of training courses designed for business and offered in both metropolitan and regional areas. VECCI also provides business with access to free telephone advice on the subject of Occupational Health and Safety

VECCI provides representation on the Victorian Occupational Health and Safety Advisory Committee, the Stakeholder Reference Group and up to 10 WorkSafe managed industry related working groups developing guidance and strategies for improved OHS performance.

VECCI was also actively involved in the review of the Victorian Occupational Health and Safety Act 2004 through the reference group which assisted Chris Maxwells' review and report. Our participation in the implementation of the new Act and the development of the regulations and Compliance Codes continues.

VECCI has daily contact with members on a broad range of Occupational Health and Safety issues.

VECCI welcomes the opportunity to submit on a national health and safety regulatory model.

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

SPECIFIC COMMENTS

VECCI has responded to the majority of the questions in the discussion paper. Some were answered in response to prior questions and were not therefore addressed a second time.

VECCI would appreciate further discussion prior to a national model being developed.

VECCI has supported a move to national uniformity of state OHS laws for some time. Businesses who operate in multiple jurisdictions, businesses who operate on state borders and those who occasionally perform work across borders have been seeking uniformity for some time.

A uniform national model adopted and implemented by the jurisdictions will not by itself deliver uniformity for business unless it is accompanied by a uniformity of interpretation by the courts and a uniform compliance and enforcement policy adopted by all the jurisdictions.

VECCI has also long espoused the principle that compliance should not be prescribed, should not result in excessive red tape and should be understood and practicable for small business. We have also espoused the responsibility of the regulator to work co-operatively with stakeholders to assist industry to understand what is expected of them and what compliance with OHS obligations looks like. In Victoria VECCI believes WorkSafe has made significant progress in that regard.

VECCI are concerned that any national body established to develop the regulatory package further is not dominated by jurisdictional representatives to the exclusion of employer and employee representatives. The recently signed Inter Government Agreement (IGA) which recommended a National body to replace the ASCC be governed by 8 jurisdictional representatives plus one Commonwealth but only two representatives from employers and employees is a concern. The recent Manual Handling Code of Practice adopted by the ASCC is unusable in its' current form and is a warning of what can happen when the gap between a national body and the stakeholders immediately concerned with health and safety becomes too wide. Uniformity of legislation will not assist unless regulations, codes and guidance material are relevant and useable at the workplace.

VECCI hope our contribution is of value to the panel. Resources and time to devote to the task are always limited and we remain willing to be involved and contribute further to the process.

Legislative Approach:

Regulatory Structure.

Much of the commentary in this submission is based on VECCI's Victorian experience. This should not be seen as the promotion of the Victorian model as exemplary. Our frequent reference to it is a result of that model forming the main basis of VECCI's experience.

. Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

VECCI believe the principal OHS Act should be performance based, stating the duties of care and the outcomes that must be achieved. VECCI believe this is the best means of providing legislative protection for a future which will see new risks emerge and new controls become available.

The legislation should contain a set of objectives that are centred around the protection of persons, the elimination of risk and the establishment of a co-operative consultative approach among all parties.

The temptation to construct a model which is a compromise of the various existing jurisdictional legislations needs to be avoided. The temptation to produce an aspirational model that extends duties and increases the breadth of duty holders also needs to be resisted.

The Australian states and Territories have committed to adopting a national model on the condition it does not deliver a lesser standard of health and safety. This provides a temptation to develop a model which by including all increases duties and duty holders but as a result reduces practicability, and is perceived as unfair. Such a model would have the potential to see risks transferred off shore rather than controlled.

Whether a lesser standard of health and safety has been provided for cannot be measured by the severity of penalty, the number of duties or the number of duty holders. It must be determined in conjunction with the practicality and the outcomes delivered.

Developing a national legislative model provides an opportunity to step back and reassess what needs to be achieved. VECCI have approached this submission from that perspective.

The legislation should contain a set of principals that espouse achieving the highest level of safety reasonably practicable, articulates the responsibility of those persons in a position to effectively implement risk control and espouse the principal of broad consultation between all stakeholders. Stating these principals informs stakeholders of how the Act should be applied.

Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

The model OHS Act should identify core duties and obligations of the workplace parties. It should resist regulating at the level of detail. Detailed standards are better achieved through subordinate legislation that can be amended more quickly as needs arise. The Act will apply to all workplaces whereas a detailed regulation may only apply to a minority of workplaces. The Act must only contain duties that apply across the whole spectrum of work.

The model Act should set a broad framework for safety management and the core principles to be applied.

Robens-style regulation, when properly implemented, will focus all workplace parties on continuously improving their health and safety practices applicable to their particular circumstances and the risks faced by that particular workplace. Regulation must recognise the differing capacities of employers. Most employees are employed in small and medium sized enterprises with limited resources.

VECCI support a Robens model of a tiered regulatory approach.

There is an occasional tendency to use regulation as a means to legislate issues more to do with government policy or a knee jerk reaction to an event than a genuine attempt at achieving improved safety standards. When this occurs voluntary guidelines on good regulation making are ignored.

The regulation on consulting with HSR's separately from other employees in Victoria in 2006 is an example of that policy based regulation making. There was never any demonstrated need for the regulation, it contradicted the Act which allowed employers and employees to determine their own system of consultation and in practice it separated the HSR from the work group. Nonetheless it was still made.

It has long been acknowledged that Australian governments are drowning employers in red tape¹ and that OHS regulation has been a major contributor to the red tape burden.

It is important therefore that any national model legislation clearly distinguishes what criteria must be met to allow a regulation to be made. Self imposed voluntary constraints on government regulation making appear to have failed in reducing the regulatory burden on employers. As such VECCI argues that the principles for good regulatory practice need to be included in the legislation that empowers the making of regulation.

VECCI is aware that the courts have for many years applied little weight as to whether information regarding a risk or risk control was contained in guidance material or a Code of Practice. What has interested the courts is the state of knowledge regarding the risk and the state of knowledge readily accessible to the employer on the means of controlling that risk.

The courts have shown they give little weight to the status the bureaucracy may have applied to a particular document. Courts have been comfortable in making judgements regarding the employers' compliance or otherwise against the knowledge and guidance available to the employer in all guises. Information such as manufacturers operating and maintenance instructions, general industry knowledge as well as published Codes or regulations have been given equal weight by the courts.

¹ MYOB Australian Small Business Survey January 2007

VECCI recommend three regulatory tiers being;

- legislation,
- regulation and
- state of knowledge material.

By assigning codes a special status, guidance and other good general information such as manufacturers' safe operating instructions are subsequently reduced in status and perceived importance. As a consequence they may be given scant regard with a resulting reduction in safety.

Applying a regulatory or code status to information or guidance often necessitates adopting a writing style and format that reduces the codes effectiveness and usability. The ASCC National Manual Handling Code of Practice is an example of that. Regulations and codes are also composed by persons within regulators who are unfamiliar with the industry and the terminology used in that industry.

Codes also require a regulatory body to produce them. Guidance material can be produced by numerous bodies including manufacturers, suppliers and industries.

Should Codes continue as guidance with an elevated status VECCI would prefer to see that status expressed positively.

"Compliance with the provisions in the code will deem an employer to be compliant with the Act in that particular matter"

VECCI view that positive message as much preferred and more likely to be taken up by employers than one which states;

"Non compliance with this Code will be taken as proof of non compliance with a provision unless the employer can show compliance through an alternative means."

The first offers a positive certainty while the second a semi-definite negative message.

Regulation.

Gary Banks Chairman of the Productivity Commission stated in a speech on regulatory reform² that notwithstanding improvements in some areas, common faults with regulatory instruments include:

- unclear or questionable objectives;
- a failure to properly target the regulation at the source of the 'problem';
- undue prescription and complexity;
- overlap, duplication or inconsistency with other regulation, especially across Jurisdictions;
- excessive reporting or other paperwork requirements;
- poorly expressed, and confusing use of terms; and
- unwarranted differentiation from international standards.

"Principle 2 of the Victorian Governments Guide to Good Regulatory Governance States;

2. Businesses and consumers are largely capable of making informed decisions on their own.

² Regulation for Australia's Federation in the 21st Century

• *It is not the role of government to dictate behaviour or limit choice, unless the reasons for doing so can be clearly justified. As far as possible, the Government will not undermine private capacity and networks, or prevent consumers and businesses from willingly taking on risks that they are capable of managing.”*

VECCI also reproduce part of 3.2.8 of the same guide.

“Where appropriate, and where permitted by the enabling Act, the Victorian Government encourages the use of performance-based Regulation. This is because a performance-based approach provides affected parties with the flexibility to choose the means of compliance to fulfil the stated objective, and can result in the implementation of the least-cost means of achieving the specified outcome, and hence lower compliance costs. Moreover, the means of compliance can be adjusted readily in light of changes in technology and/or industry knowledge.”

Prescriptive regulation should not exist when multiple means of controlling a risk are available. For example a regulation should not prescribe how to consult with employees because multiple ways of achieving good consultation exist.

The principal legislation should articulate and deliberately seek to limit the circumstances where a regulation is able to be made. Terminology such as “requiring records of matters” and “any other matter or thing required”³ must be avoided where the principal Act prescribes when regulations may be developed.

As an example a move to a National regulatory system is likely to see an adoption nation wide of the National Plant Standard as Plant regulation. That standard includes hand operated tools in the definition of plant. That inclusion requires designers, manufacturers and suppliers to develop, document and pass on a risk assessment of the plant. Employers must also perform and document a risk assessment. Hand held non powered plant includes shovels, hammers, spanners, scissors and desk top paper staplers. This definition failed to pass the RIS requirements in Victoria on two occasions because the cost of injury prevention compared to the cost of compliance was disproportionate. In states which have adopted this national standard it is obvious the regulation is not enforced for hand held hand operated tools. Yet without legislated restraints being applied in the principal Act one can be assured that future national regulations on plant will continue to include hand operated non powered tools. The justification for retention will be that to remove them will be a reduction in the standard of safety.

Q3. What is an appropriate title for the model OHS Act?

A title such as “Occupational Health and Safety Act” or “Workplace Health and Safety Act” should accurately express the content of the legislation and be relatively understood by stakeholders.

The title should not include ‘welfare’ because it can communicate implications that a duty exists to managing worker personal issues such as mental illness or family problems. The word can also be interpreted as the requirement to provide facilities such as dining and toilet facilities to workers. Health already includes psychological health which can include some aspects of personal welfare.

³ Section 158 (k) & (q) Victorian OHSA 2004.

As an example, there is a widely held view that following a trauma such as a robbery an employer has a duty to provide trauma counselling. This is commonly accepted despite there being no evidence such counselling provides any benefit in preventing injury. The inclusion of the term welfare is likely to further cement this perception of there being a duty to provide a variety of ethereal services.

If there is uncertainty as to meaning and confusion as to how it will be interpreted it should be left out of the title or alternatively clearly defined.

Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?

Objectives would include,

- to secure the health, safety and welfare of employees and other persons at work; and
- to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and
- to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and
- to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards.

Q5. Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

Principles would include;

- The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable 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 reasonably practicable.
- Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety 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.

Q6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?

VECCI believes that OHS legislation and regulation must encourage a mutual obligation to provide the highest standard of health and safety reasonably practicable.

VECCI suggests the principal Act should set out objectives for the regulatory body as well as their functions.

The objectives should be performance based and include a requirement to collaboratively work with duty holders to identify and develop advice, guidance and practical risk controls. It is VECCIs' experience that regulators can take their role to administer the Act down a number of pathways. One is to focus primarily on prosecution of employers while another is to identify risks, develop solutions and make those solutions available to employers so they can comply with their duties under the Act.

The development of guidance can be done by a regulator without reference to the stakeholders or it can be done in consultation and in collaboration with employer and employee stakeholders.

The Act should list objectives for the regulator which the regulating body must seek to apply.

There should be no immunity extended to the crown. Governments as significant employers should be equally accountable to the laws they apply to other employers. The duties assigned to Senior Officers of a private sector corporation should also apply to department heads in the public sector.

Scope, Application & Definitions:

Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?

VECCI believes there should be a single law incorporating all industries. Regulations, where required, can be developed to apply minimum standards to a particular industry such as a mine or major hazard facility. A model Act may establish the enabling conditions for industry-specific subordinate legislation.

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

The primary OHS duty holder is the employer, on the basis that they are in a position of management and control of the workplace. Australian OHS law also places duties on key persons such as self-employed persons, people who control and manage workplaces, employees, designers of plant, manufacturers and suppliers of plant and substances to be used in workplaces, officers and the designers of buildings.

The model OHS laws should seek to streamline rather than expand the number of duty holders, thus ensuring that the legislative framework captures all contemporary forms of work but does not extend coverage in ways which create confusion and which would be impossible to enforce.

VECCI recommends for instance that it is meaningless to impose a duty on importers. It is not possible for the state jurisdictions to enforce the importing of an unsafe piece of machinery because it is a customs issue outside of their jurisdiction. It may also be the intention of the importer to rectify the safety deficiency. VECCI suggests that a duty which applies to suppliers of plant and substances would apply to importers the moment they *supplied* the imported good to another party. Excluding importers is therefore not a reduction in standards of safety.

VECCI also opposes applying a duty on designers of buildings or structures that adds a duty for the safe construction of the building or structure. The business of safe construction should belong to those in daily control of the task and who have expertise in that phase. The duty should not be elevated up the chain to those whose expertise is both different and limited. Designer duties must be limited to the design of buildings and structures that will be used as workplaces. The duty should be to design a workplace that is safe and without risks to the health and safety of workers.

VECCI also suggest that if architects were required not only to design a building but also required to develop a safe construction guide, the economics suggest that once this was developed for a specific design that design would be applied in every case to avoid the cost and risk of devising further safe construction guidelines. The community may object to this architectural sameness.

VECCI raise a point of consideration regarding the issue of duty holders assigned under the Act.

Currently in Victoria Self Employed persons have a duty to ensure that other persons are not exposed to risks arising from their undertaking. In effect they have no obligation under the OHS Act to protect their own personal health and safety. As such a self employed painter can work at three metres on a rickety ladder provided they take precautions to ensure that they do not create a risk of falling on or injuring another person.

A painter who is also an employer would be required to provide fall prevention to reduce the risk to their employee. As such the latter employer incurs compliance costs that can be avoided by the self employed person. As such the OHS Act does not provide a level playing field. WorkSafe Victoria suggest that the principal has a duty to the painter as a contractor. However is the principal an employer? Can they practicably intervene and commence directing how the work is to be done? The principal may be a house holder or a self employed shop owner.

For the sake of an even playing field and in the interests of removing a competitive incentive to avoid compliance VECCI believe the duties of the self employed should be extended to ensure they do not expose themselves to risk.

Q10. Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?

A workplace should be the place where employees conduct work whether it operates within a building or structure or not. In that way the duty of the employer under any Occupational Health and Safety Act to persons other than employees is limited to the conduct of the undertaking within the workplace and is not confused with product liability or other duties in other legislation such as environmental legislation etc.

The employer should have a duty to employees which includes contractors and their employees in the workplace of the employer and the duty should be to, as far as is reasonably practicable, provide and maintain a working environment that is safe and without risks to health.

Q11. Should general duties of care under the model OHS Act be extended to members of the public? If so, how?

The employer should also owe a duty to persons in the workplace whose health and safety may be affected by the conduct of the undertaking. If the proposition seeks to place a duty on members of the public VECCI would oppose that. The employer is responsible for the conduct of those in the vicinity of where work is being performed to the extent reasonably practicable.

In situations such as aged care, restaurants, retail stores and hospitals persons who are not workers are always present. An employers' duty should be to control risks to persons who are not workers which result from the performance of work. The OHS Act should not stray into the areas of food safety, medical practices etc.

Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

VECCI understands that working arrangements will continue to change and evolve over time in response to technology and markets. As an example, working from home is likely to become more common in the future as work seeks to accommodate family demands and technology permits it. The Model OHS Act should be broad enough to enable any changes to be sufficiently covered. Being overly specific may narrow the scope rather than broaden it. Existing OHS legislation has proven capable of dealing with the evolution of working arrangements that have occurred in recent decades. This includes clarifying who employers owe general duties of care to.

Q13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

The model Act should be confined to matters of health safety and disease. All emerging risks would be covered under that scope. There is no need to address specific risks in the legislation.

Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

The following need to be defined in the model legislation

Definitions should be established for the following non-exhaustive list of terms to appear in a Model OHS Act.

1. These include:
 - Consultation.
 - Designer.
 - Designated work groups
 - Accident.
 - Duty of Care.
 - Education.
 - Employer.
 - Employee.
 - Hazard.
 - Health
 - Health and Safety Committee
 - Health and Safety Representative
 - Incident.
 - Inspector
 - Senior Officer
 - Plant
 - Person
 - Self employed person
 - Substance
 - Supplier

- Reasonable person
- Reasonably practicable.
- Risk.
- Training.
- Volunteer
- Workplace

Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act??

In matters which relate to psychological risk and also if discrimination is included in the legislation these judgements should be subject to the 'reasonable person observing the conduct' test. Judgements should not be made on whether the complainant believes a risk or a discrimination exists but based on whether the "man on the omnibus" would conclude such a risk exists and it is reasonably practicable for the employer to control that risk.

Q16. Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?

VECCI recommends that control should be a part of the reasonably practicable determination as is the matter 'foreseeability". VECCI are cautious that by defining control it will limit it's application when in practice the question of whether an employer had actual control needs to take into account a multitude of factors which will vary from circumstance to circumstance.

Victoria in it's WorkSafe position (ruling) on reasonably practicable has indicated what factors it will analyse in making a determination on whether an employer had acted reasonably. Such a document, which is non binding, is an appropriate means of defining control rather than legislation.

Courts and tribunals in some jurisdictions have interpreted control to mean 'control to any extent' This has too often been used to impose duties on persons who, by any reasonable analysis, are in no position to exercise control or influence safety outcomes.

In effect these rulings have an effect that once a corporation is identified as a 'principal' control is automatically assumed. In practice the principal may lack the expertise or may have done everything a reasonable corporation could be expected to do in the circumstance to ensure safety.

If VECCI's preference of assigning the hearing of offences to the normal criminal courts with access to the normal appeal provisions is granted it will likely mean there is no need to define control in the legislation. That would permit a court to determine the issue on the evidence presented around each specific circumstance. VECCI believes this may be more just than requiring the court to assess a matter against some generic definition.

The International Labour Organisation (ILO), holds that individuals are to be held responsible and liable for matters and events over which they have 'reasonable and practical control'.

Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

The extent of control must recognise the right of other duty holders to rely on the control exercised by skilled and expert workers or contractors operating in a competent and safe manner and in accordance with safety procedures and standards. For example, if a principal does every thing reasonably practicable to ensure they have engaged an expert they should be able to rely on that expertise; to the extent that there is any safety failure arising from their work, it would be appropriate to recognise the expert as the party with control or responsibility. It is not helpful to also impose on another party who, in practical terms, could exercise no real practical control and did not interpose themselves in the performance of the work.

Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be??

The practice of the Authorities in prosecuting multiple parties confuses where responsibility really lies unless both parties contributed to the existence of a risk by failing to control contributing factors clearly within their ability to exercise control.

It would normally be a part of an employers defence to show that they had no real control over the risk. Guidelines or 'rulings' is in our current experience a better means of defining control. From that the circumstances where responsibility for safety can be rightly delegated should be clearer.

This should be viewed distinctly from the notion that a party may 'contract out' of safety obligations. Such a notion is not supported.

Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

Employers are often uncertain where the limits of their responsibility lay in relation to contractors, sub contractors and labour hire arrangements. As an example, is an employer who engages a qualified electrician through a contractor or labour hire agency required to go beyond assurances from the parties they contract with that the person provided is qualified and competent? Is it appropriate for a Vicar to be responsible for the safety of the scaffolding erected to repair the church?

It would be difficult for a Model OHS Act to clearly identify all potential multiple duty holders or multiple duties. Guidance materials may be more appropriate in assisting employers to determine the extent of their duties rather than legislative definitions. VECCI see potential for a legislator to attribute responsibility where it can not be practicably applied.

Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations?

Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Q22. Is there a broader concept that more effectively covers the various work arrangements?

The duty should be primarily a duty that employers owe in respect of their employees in a particular workplace.

It must however be recognised that it is sometimes appropriate to extend these duties to other parties. OHS legislation has developed various mechanisms to ensure that this occurs.

For example, s 21(3) of the Victorian OHS Act extends duties to independent contractors engaged by an employer to the extent that the employer exercises control over particular matters that may impact on the safety of the contracted workers.

It may also be appropriate to extend these duties to cover other parties who are not workers but only to the extent that those parties are exposed to risks that arise from the activities of the employer in the workplace. i.e. to customers in a timber yard.

Q23. How and to what extent should the model OHS Act specify an employer's duty of care?

The words 'practicable' or 'reasonably practicable' in the OHS statutes are intended to limit the general duty. Some statutes use the word 'practicable' while others refer to 'reasonable practicability'. Any duty must be qualified by what is reasonably practicable.

To suggest, as some have, that this limitation should not exist is to argue that the employers duty should extend to what is not practicable and that which is not reasonable for the employer to control or influence. Such arguments are a nonsense. It suggests OHS duties should extend to duties which are not possible to comply with. This would reduce the credibility of the entire legislation.

VECCI, for the removal of doubt, suggest that reasonably practicable must apply to all duties imposed on an employer including the duty to supervise, train, provide information and consult.

Q24. To whom should these duties be owed?

The duty should be owed to employees (including contractors) at the workplace and to members of the public within the vicinity of the workplace whose safety may be affected by the performance of work as part of the employers undertaking.

Q25. How, and to what extent, should the model OHS Act specify worker's duties of care?

Employees must:

- Take reasonable care for their own health and safety.
- Take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace.
- Co-operate with his or her employers with respect to any action taken by the employer to comply with a requirement imposed by or under the Act or the regulations.
- Not intentionally or recklessly interfere or misuse anything provided at the workplace in the interests of health, safety and welfare.

This duty should apply to all employees' including those in the management chain. In determining compliance, account should be given to the employees knowledge about the matter and the extent of the employees' ability to exercise control over the matter.

Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Appointing a specific person can act to remove responsibility from others if not in reality, in perception. All persons at work should have a duty to ensure a safe work environment. All should be subject to the same penalty for non compliance. It may be appropriate to nominate a person of sufficient authority to represent the corporation on OHS issues. i.e. to resolve disputes and inform and represent the collective mind of the corporation.

In mining the legislated responsibility placed on the mine manager is being questioned because it can be seen to permit or encourage others to act without due care.

Q30. Should the model OHS Act include positive duties for officers of bodies corporate?

Commonly legislation provides for and specifies offences⁴ by senior offices. Maxwell recommended positive duties such as exercising due diligence to ensure the corporation complies with duties under the Act. The Victorian legislation however expresses the duties in a negative way. It maybe that the legislative writers felt that should they list a number of actions a Senior Officer adhere to establish compliance performing those actions from time to time still fail to influence the control of risk. This might also explain why other jurisdictions apply open ended duties such as 'due diligence.'

While it may clarify the duties of Senior Officers to have legislated positive duties such a list (in an attempt to be measurable) may promote the adoption of systems which often assume an importance and reduce vigilance and innovation. Often the system exceeds in importance the objective of providing a safe work place.

Once again VECCI is reluctant to recommend positive duties are legislated without being assured that such duties will be reasonable, practicable and more importantly useful.

⁴ Section 144 Victorian OHS Act 2004.

Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

VECCI is aware that section 26 of the Victorian Occupational Health and Safety Act which is headed 'Duties of persons who manage or control workplaces' is interpreted by various parties in a number of ways. It could be used to prosecute a plant manager or supervisor because it is more general than the stated duties of employees. It also duplicates the employers duty to provide a safe working environment. The example below came to our attention last year.

A small disability services employer had been contracted to provide disability services (respite care) by the State Department of Human Services. The building was provided by the department. A WorkSafe inspector issued a notice on the employer that required the installation of additional fire protection equipment. The employer was informed by the Department that since it was a matter that affected the safety of the employers' employees it was their responsibility to spend the money upgrading the building. The Inspector agreed with the department and refused to re issue the notice on the department despite them being the building owner.

A furniture factory was served with a prohibition notice preventing the use of a mezzanine level because it had inadequate access and no fall protection at the edge. The Land lord refused to carry out the work and the prohibition notice remained. The Inspector refused to issue a notice on the landlords managing Agent on the basis they were not the employer.

It was VECCIs' view that the owner of the asset was responsible for spending on asset improvements. But if they continued to refuse, did the employer have a duty to control the risk?

VECCI suggest there is a need for clarity that distinguishes between the duty of the landlord and the employer who performs work at the workplace. There also needs to be clarity about transfer of responsibility if the prescribed duty holder fails to comply with that duty and as such exposes the employees of the employer to risk.

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

The current duties applying to the designer, manufacturer, supplier, installer or erector, and employer are sufficient. To apply duties attached to an activity would discourage innovation and cause confusion. Was the duty attached by the activity or simply because the person engaged in the activity was a manufacturer?

Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

The duty can only apply to duty holders within the jurisdiction. A manufacturer or supplier would be responsible if it was reasonably practicable for them to identify and control the risk and they failed to do so.

Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

Supply should include any stage of supply from wholesale to second hand and include auction. Consideration needs to be given to a situation where a product which has a known defect that compromises safety is sitting on a suppliers shelf in multiple numbers. In such a situation it contains no risk and a duty only arises when the product is supplied to another person. Can an inspector issue a notice requiring rectification of the defect prior to the defect giving rise to a risk?

‘Reasonably Practicable’ & Risk Management:

Q37. Should a test of “reasonably practicable” be included in the model OHS Act?

Q39. How should the standard be defined? What level of detail should be provided?

The general duty on employers should be qualified by the concept of reasonably practicable. Reasonably practicable should be defined and include;

- The likelihood of the hazard or risk concerned eventuating.
- The degree of harm that would result if the hazard or risk eventuated.
- What the person concerned knows, or ought to reasonably know, about the hazard or risks and any ways of eliminating or reducing the hazard or risk.
- The availability and suitability of ways to eliminate or reduce the hazard or risk.
- The cost of eliminating or reducing the hazard or risk.

Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

The Victorian Section 12 WorkSafe Position on Reasonably Practicable provides a good interpretation of how the concept should be applied.

Q40. Should control be an element of the standard? (see Chapter 3)

VECCI has been reluctant to support a definition or test for 'control' in the legislation without sighting which interpretation current in various jurisdictions is the definition likely to be included. For that reason VECCI prefer to rely on control being considered as a factor when determining what is reasonably practicable.

- a. Eliminate inconsistencies in legislative interpretation;
- b. Identify and define who is in control with regards to the employment relationship.

Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

VECCI supports the initiative of the Victorian Government to modify the risk management process in their OHS Act by focusing on the need to undertake risk control, particularly where an effective control for a particular hazard is known. This is a more practical framework than one requiring risk assessment as a red tape exercise in circumstances where it is not needed and where that process will not add to the safety outcomes that are reached.

Risk assessment can lead employers to determine that a risk is low in likelihood and consequence and therefore need not be addressed. Assessment can contradict the requirement in the Victorian Act to eliminate or reduce **all** risks to the degree reasonably practicable. There is no evidence that risk management improves safety outcomes. In small to medium business it causes OHS to be perceived as an obligation to own documents.

Traditional risk management systems do not appear to be very useful in managing some injury types such as stress. How employers achieve compliance should not be mandated in legislation other than the principle that employers must be pro-active in identifying and controlling risk.

Consultation, Participation and Representation:

VECCIs experience is that involving employees in health and safety programs encourages commitment to the achievement of business OHS goals and an awareness of shared responsibilities. Employees can provide some of the most practical and constructive suggestions on OHS risks and the management of those risks. Member companies have indicated that risks never before identified by HSRs and solutions never previously mentioned

have been raised since the duty to consult with all employees was introduced in Victoria in January 2007.

Q45. What provisions should be made in the model OHS Act for consultation?

Whilst VECCI supports provisions for consultation in the model OHS Act, we believe the method of consultation should be determined by the business, based on the nature, culture and size of the business.

The provision for consultation should be limited to *'an employer so far as is reasonably practicable consult with the employees who are likely to be directly affected by the employer in relation to controlling risks'*.

Q46. What are the work relationships to which a consultation provision should apply?

Q47. Should there be different levels of consultation required for different work relationships?

Consultation provisions should be directed at encouraging discussion and information sharing on health and safety matters between employers and employees. Agreement should not be a required outcome of consultation.

VECCI sees that consultation can be corporation wide (building of a new workplace) to the micro level(a maintenance person will be working next to a single worker) We have recommended that as well as formal structures for corporate issues employers need to implement consultation at the supervision level to deal with transient micro issues. Excessive prescriptions would work against that. Therefore our response to question 48 is simply that such provisions cannot be legislated and must be left to the workplace.

Q49. Should there be a requirement for establishing HSRs and HSCs?

Q50. What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

Q52. Where an election is required, who should be entitled to vote?

Q53. What should the powers and functions of HSRs be?

VECCI believes that employees are entitled to be represented if they make a decision to be represented. Representation should not be a mandatory requirement

Representation should not act to exclude the direct participation of employees in consultation with the employer on matters relevant to their personal Health and Safety.

In answer to question 50 VECCI responds that no provisions other than the requirement to consult with affected employees and any HSR representing them should be provided in the Act. How that is accomplished should be determined in consultation at the workplace. A HSC is one means of consulting but may act to exclude workers in some situations where HSRs or committee members fail to communicate the views of workers and fail to communicate information provided to by the employer back to workers. HSRs and HSC members have no duties under current legislation including no duty to represent.

If the duty is on the employer to consult with workers, VECCI always recommends the employer does not delegate and rely on persons with no duty to consult with employees.

In Victoria any single employee can request a designated work group be negotiated and the Act requires the employer to negotiate and come to an agreement. Once determined nominations are sought and if one nomination only is forthcoming the nominated person is deemed elected.

On occasions where a business of 30-40 workers have seen no need for a HSR a new worker may request negotiations, nominate themselves and because no other worker sees a need become the duly elected HSR for the work group with all the related powers but no accountability. Employers can live with this outcome but to then claim the HSR is representative of the work group is a nonsense. To then regulate to use the existence of this HSR as a justification to exclude direct worker involvement is detrimental to good consultation and probably good safety. VECCI recommend that a Work group should only be required to be negotiated when one third or more of employees in a work area request it.

If an election is held all employees in the agreed work group should be entitled to vote. VECCI fail to see what rationale could be justly applied to exclude a member of the work group from voting to select a representative of the group. Nor should any member of the agreed group be prevented from nominating.

Q53. What should the powers and functions of HSRs be?

HSRs should have the following powers.

- Ability to issue provisional improvement notice after consulting with the employer.
- Ability to call for work to cease if an immediate serious threat to health and safety exists.
- Ability to seek expert assistance from a qualified person on a OHS matter.

HSRs should also have access to information including Inspector reports or reports from suitably qualified persons engaged to identify and advise on risk management. They should have access to training as well as the provision of facilities needed for them to perform their role.

Members of a work group should have the ability to vote out a HSR by a majority vote. Employers should have access to a court to seek disqualification of a HSR if they use their powers for a purpose other than to preserve or improve safety.

Q59. Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?

Q60. Should the model OHS Act specify training and qualifications for such persons?

Q61. In what circumstances should the right of entry be exercisable?

Q62. What powers should be exercisable upon entry, and subject to what conditions or limitations?

VECCI see the regulators inspectorate as the appropriate authority to enter a workplace where a suspected non compliance exists. At a time when unions represent only 13% of workers in the private sector and 19% over all unions should simply be given the right to refer to an inspector.

Since right of entry is almost certain to be provided the condition must be a duty on the permit holder to provide the employer on entry with a written notice which clearly states the nature of the suspected non compliance. Entry must be restricted to observing that area where the non compliance is suspected. Abuse of the permit must be an offence punishable by fines and possible loss of permit.

All persons seeking a right of entry permit must apply to a court, must complete a course which includes the conditions and limits of the permit and must be without criminal conviction.

Q63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

Q64. When should issue resolution procedures be activated?

Q65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?

Q66. How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?

The model Act may appropriately provide for the making of regulations specifying model dispute resolution procedures, which would apply as a default provision where the parties have not developed their own dispute resolution mechanisms.

There should be an onus on the workplace parties to seek to resolve any matters between themselves before utilising any formal dispute resolution mechanism or seeking assistance from a mediator or other third party

Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

Common law provides a right to refuse work that is unsafe or unhealthy. VECCI have no objection if this same right is duplicated in the model legislation.

Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?

If there is a dispute relating to entitlement to payments when work is refused or ceased the matter should be resolved by the industrial relations system. VECCI do not support OHS legislation seeking to control employment matters.

Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?

VECCI believes existing provisions that are present in workplace relations and anti-discrimination should have scope to, in most circumstances, provide protections against discriminatory treatment and victimisation. As an example we refer the committee to the provisions of s 659(2)(e) and s of the Workplace Relations Act 1996.

OHS legislation also contains specific provisions in relation to victimisation and discrimination. Such provisions should be examined to ensure they are genuinely necessary and do not conflict or replicate provisions in other areas of law (e.g. anti-discrimination legislation).

Q72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?

The regulator must be the only party able to bring criminal prosecution proceedings for discrimination specified in the Act as constituting criminal behaviour. An actual aggrieved person believing themselves to be the subject of discriminatory treatment should be the only party capable of bringing an action for unlawful discrimination when the discrimination is not criminal in nature.

Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?

Criminal prosecution only. Other Acts such as the WPRA 96 provide avenues for workers seeking a remedy. The Victorian Sentencing Act (Section 8) also allows a court to award retribution to a worker if a finding of guilt is found.

Q74. Who should have the burden of proving relevant elements of offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?

In part the answer to this question depends on the approach taken in relation to the questions asked above. However, other anti-discrimination statutes (e.g. the Victorian Equal Opportunity Act 1995) the applicant bears the onus in most situations.

Discrimination access by workers could readily be used as a nuisance tactic as unfair dismissal provisions were misused as a means of seeking advantage.

Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?

Under no circumstances should a regulators opinion result in remedies being awarded. Such a power by passes the courts and allows the regulator to be investigator, prosecutor and judge. This is doubly so in cases where a potential jail term exists. A worker may seek an injunction from a court.

Q76. What remedies should be available to the victims?

Anti-discrimination legislation provides examples of the range of remedies generally available to applicants in these circumstances including injunctions, compensation, apologies, reinstatement etc.

Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?

No. Appropriate Acts (state and federal) dealing with discrimination should not be duplicated. If those Acts are deficient they can be modified to provide relief.

Regulator Functions, Powers & Accountability:

Q79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?

A model Act should provide for the establishment, functions, powers and accountability of regulators. The provisions in the model Act should be supported with subsidiary regulations.

The OHS Act should contain provisions in relation to regulators addressing the following issues:

- Participation in consultation with key stakeholders.
- Oversight and amendment of principal OHS legislation
- Development of OHS regulations, rulings and guidance material.
- Information, advice and promotion of health and safety.
- Investigative and inspectorate activities.
- Compliance, prosecution and enforcement.
- Functioning of state regulatory bodies, such as WorkCover agencies.
- Conduct of state courts and judicial services.

Q80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?

VECCI believe the publication of a national enforcement and prosecution policy is as important to harmonisation as the development and acceptance of a model legislation. VECCI supports the Victorian constructive enforcement policy. The prosecution policy provides transparency and a level of accountability which is essential when a regulatory body is awarded powers that exceed those normally granted to law enforcement officers.

The model OHS Act should require that regulators publish enforcement and prosecution policies. Compliance policies should also be required to be published by regulators.

These publications should be required for transparency and consistency purposes.

Improving OHS outcomes over the long term rests on the ability of the regulators to effectively enforce laws in a consistent manner which ensures a common 'compliance experience' for duty holders. This material is a necessary component of an effective

compliance approach. If there is no faith in the impartiality of the regulator the law becomes ineffective as a deterrent.

Q81. Should the model Act include provisions that allow the making of interpretative documents?

The model OHS Act should include these provisions to support employers in their efforts to comply with their duty of care. Also, these provisions can assist duty holders in understanding how regulators interpret key issues and provisions in the model OHS Act. Section 12 of the Victorian OHS Act 2004 adequately provides for this, with powers to make rulings which are interpretive but not mandatory.

These rulings provide certainty, consistency of application and transparency.

Q82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?

The distinction between those responsible for developing public policy and legislation and those enforcing such policies needs to be maintained. The policy role should remain distinct from the inspectorate role.

Inspectors should be bound by the directions of the regulatory authority.

Legislation should specify the role of the inspectorate. This role is properly framed around activities in education, advice and enforcement.

Inspectors should not be able to commence prosecution. They should be limited to referring a matter to a separate compliance division of trained investigators and lawyers for a comprehensive investigation. The role of compliance should be the preparation of a brief for the DPP.

Q83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?

Inspectors whose enforcement role is limited to the issuing of notices seem capable of also providing advice. To identify a non compliance they must understand what compliance looks like. Giving advice on that without going as far as acting as a consultant has been shown in Victoria to be well within their capabilities and is accepted and respected by employers and workers. If Inspectors were also investigators and prosecutors employers would be reticent in communicating with them.

Q84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?

In relation to inspectors, the model OHS Act should provide for:

The capacity of an OHS authority to appoint suitably qualified inspectors to act on behalf of the OHS regulator.

They should have general powers of entry and powers exercisable upon entry. A comprehensive code of conduct should direct Inspectors use of their powers upon entry to ensure sufficient accountability and transparency. The purposes for which the powers may be used should be set out in the model OHS Act and they should be specified. They make include powers such as:

- The powers to require the production of documents to take samples.
- The powers to issue search warrants.
- The powers to issue notices (eg prohibition, improvement, non-disturbance) to persons and to require the name and address of a person.
- The powers to provide advice to duty holders, as well as to enforce compliance with the law and to promote effective OHS outcomes; and
- The requirement to announce their entry into a workplace and to give a report concerning the entry to the occupier.

Inspector decisions should be liable to an internal review to promote transparency in OHS decision making.

The Authority must be required to ensure that inspectors are suitably qualified to undertake their duties in a professional and constructive manner.

Q85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

It is appropriate that this function is emphasised in the overall description of the duties or functions of inspectors. This overall description may either be contained in the model Act or subordinate legislation given effect by the Act.

Q86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?

In issuing notices an Inspector would be independent but if a party seeks a review the Authority must be able to exercise powers to substitute that direction of an Inspector.

Matters relating to conduct or competence should remain a matter between the Inspector and their manager. The Authority like all employers must be accountable for the actions and omissions of their employees.

Q88. What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?

Provisions should be made for internal reviews in the model OHS Act.

Most decisions by an inspector, predominantly on enforcement and inspector determinations, can be internally reviewed by independent experienced persons within OHS authorities. The review panel should be able to affirm, vary, revoke or substitute another decision for the original decision.

The option for an external review should also be provided for.

The option of the external review should also provide scope for orders to be frozen or a 'stay' order to be issued. External reviews can be heard by federal, state and territory civil and administrative tribunals.

Internal reviews should embody the following principles:

- The process should be transparent in prescribing procedures and time lines, with public identification of the persons appointed to manage the internal review process.
- The process should be economical and quick and review both decisions and non-decisions in the interests of safety.
- The internal review should also apply to the variation of decisions such as the extension of time to comply with an improvement notice.
- The right of review should be accessible to all affected workplace parties.
- The OHS authority should be able to review an inspector's decision of its own motion.
- On review, the Authority should be able to make any decision which the inspector could have made and exercise any power which the inspector could have exercised.
- The reviewing body should give reasons in writing for the decisions arrived at in the review; and
- The inspector should be a full participant in the review process and should be informed of the outcome and the reason for it.

Q89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

There should be jurisdictional memorandums of understanding that under specific circumstances allow an Inspector to exercise powers across state or Territory borders. This may be in cases where an employer has adjoining locations which straddle a border or where

a technical Inspectors expertise (mining engineer) is required and the jurisdiction lacks sufficient numbers of that expertise or the expertise is more accessible across a border. i.e. it is quicker to arrange a dangerous goods inspector to visit from Melbourne to Albury than from Gosford. The model Act should provide the ability for such jurisdictional agreements.

Compliance & Enforcement:

Q90. Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

An appropriate hierarchy of enforcement measures, and which is common amongst a range of regulatory areas are (and starting from the lowest and gradually escalating to the highest forms of enforcement measures):

- Verbal cautions.
- Letters of Caution.
- Improvements notices.
- Prohibition notices.
- Enforceable undertakings.
- Enforcing summary offences.
- Enforcing criminal penalty offences.

Q91. Should these be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?

Many jurisdictions have comprehensive policy documents on how the agency will approach enforcement (for example, WorkSafe in Victoria contains a range of primary and supplementary materials) .

VECCI believe a national enforcement and prosecution policy should be developed and signed off on by the jurisdictions. This policy is as important as a national Act. It would be possible to have the same legislation in every jurisdiction but have very different experiences if there is a lack of uniformity in the way the Act is enforced.

VECCI considers that uniformity can only be achieved through uniform legislation, a uniform enforcement policy and uniformity of the courts available to deal with offences.

Q92. What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?

Generally, the OHS model should replicate established existing provisions of allowing improvement notices and prohibition notices, while acknowledging that voluntary compliance, education and advice remain appropriate as the 'first response' of regulators before recourse to more coercive mechanisms.

Industry does not support scope for health and safety representatives to place PIN's on workplaces; it is not appropriate, nor are employees suitably trained, to exercise such a power. This is appropriately the province of independent inspectors.

Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?

Yes, it is important that they provide as much constructive advice as possible to ensure compliance as well as recommendations in relation to risk controls and other matters. Such an approach assists in building a consistent approach to compliance across a jurisdiction.

Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?

VECCI commend Part 10 of the Victorian OHS Act to the review as a workable template for addressing these issues (with the exclusion of PIN's as discussed above).

Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?

Employers should be given sufficient time to gather evidence and information and to implement measures to give effect to requested changes to the performance of work to comply with notices.

Q96. Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices? If so, what should the effect be?

In lodging an application for review a 'stay' should be possible so that notices may be suspended pending the outcome of the application for review or the outcome of the review itself.

Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Improvement and prohibition notices are very effective in producing adherence to compliance obligations. This makes infringement notices of marginal utility. Infringement notices do not provide an opportunity to correct or comply with a safety breach.

Generally, an employer will seek to correct an oversight and ensure they comply with an improvement or prohibition notice. Including infringement notices is unlikely to result in any practical improvement of safety outcomes.

Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?

Q99. What amounts should be specified as fines for infringements?

Generally, the OHS model should replicate established existing provisions of allowing improvement notices and prohibition notices, while acknowledging that voluntary compliance, education and advice remain appropriate as the 'first response' of regulators before recourse to more coercive mechanisms. Employers should be given sufficient time to gather evidence and information and to implement measures to give effect to requested changes to the performance of work to comply with notices. Infringement notices reduce the capital available to rectify the identified risk.

VECCI does not support the use of infringement notices

Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?

Q99. What amounts should be specified as fines for infringements?

VECCI does not support the use of infringement notices for the reasons outlined above.

Q101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?

Enforceable undertakings are legitimate tool in compliance activities, and have been used at the federal level for some time as well as by State OHS authorities.

Enforceable undertakings operate most effectively when developed in conjunction with a business and do not confer an inappropriate level of discretion on regulators. The obligations imposed by an undertaking must be clear and achievable.

The advantages of enforceable undertakings are that, unlike prosecutions, they can produce better results in respect of lasting compliance and do so across a wider range of workplaces and situations. For this reason industry supports their utilisation in appropriate circumstances.

Undertakings should be able to be negotiated at any point in a proceeding (or before proceedings are commenced) and should also be available to a court as a sentencing option.

Q102. Should the giving of an enforceable undertaking result in an admission of fault or liability?

No. This will limit the utility of duty holders entering into enforceable undertakings.

The giving of an enforceable undertaking should require an admission of fault or liability, and should be subject to no precondition that requires the assumption of guilt.

Q103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?

VECCI believes that Inspectors should have power to require a person to provide a sample for testing the level of drugs or alcohol where the Inspector has reasons to suspect that the use of a substance has contributed to an accident or has contributed to a non compliance. Refusing to comply with a request of an Inspector must be an offence. That offence would contain the same penalty applying to the refusal to comply with a prohibition notice.

Prosecutions:

Over the past decade there has been a race to the top by the jurisdictions to introduce the toughest laws and the highest penalties. The governments have decided the offences should be criminal and in some cases have provided for terms of imprisonment for particular offences. The governments have also granted additional powers to the investigating authorities which are not provided to the police who investigate other crimes. (Right to enter and seize documents at a workplace, right to demand answers to questions)

While the offences remain criminal, the powers of investigation extended, the penalties so financially severe and imprisonment a possible penalty, VECCI is insistent that prosecutions must be heard in criminal courts under the same procedures applying to all other criminal matters. That includes a beyond reasonable doubt onus of proof on the prosecution. One of the greatest powers the State has against a citizen is prosecutorial discretion.

Due to the seriousness of the matter only the state should be able to commence proceedings.

Any movement in model legislation which seeks to reduce the onus of proof on the state or which seeks to expand the persons or organisations able to prosecute must also remove the criminality, substantially reduce the penalties

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

VECCI cannot perceive the states giving up the criminal nature of prosecutions nor reducing the current penalties on the basis they would be perceived as agreeing to reduced safety standards. VECCI is therefore committed to offences being heard in criminal courts.

Civil remedies should not be introduced to provide an alternative to the regulator when they cannot satisfy the standard of proof required by criminal prosecutions.

If both criminal and Civil proceedings are provided for there cannot be any overlap. The offences dealt with need to be distinctly either Civil or criminal.

Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

With issues such as discrimination against a worker or HSR there is a case that serious offences that result in compromising safety (*I know the truck has no brakes, but drive it or I'll sack you*) should remain criminal offences proceeded with by the prosecutor. Lesser matters (*Since I called an inspector in my overtime has reduced*) could be brought by the aggrieved party in a civil jurisdiction.

VECCI has stated that the prime objective of any model legislation is to “secure the health safety and welfare of employees and other persons at work.” The model legislation should focus on that objective and resist the temptation to legislate in the area of the employer-employee relationship. To do so will devalue the legislation. If states want workers to have a right to access a civil remedy to address a detriment they should do so through amendments to existing legislations which deal with the employment relationship.

We refer the panel to the Guide *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers*, February 2004, Issued by authority of the Minister for Justice and Customs.

Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

There is no reason why, a separate list, within a court of competent jurisdiction, cannot deal with OHS offences, just as it does with a wide range of offences. Expertise within a list can be developed by those Magistrates and Judges within a list. At the federal level, judicial power can only be exercised by a Chapter III Court due to the separation of powers doctrine.

Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

It is difficult to see why conditions should be attached.

Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

In criminal matters VECCI answer yes. In particular if a matter is being brought against a person and imprisonment is possible access to trial by jury must be provided.

Q110. Who should be entitled to commence criminal proceedings?

The Commonwealth DPP Prosecution Guidelines clearly articulates that:

2.13 A decision whether or not to prosecute must clearly not be influenced by:

- a. the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- b. personal feelings concerning the alleged offender or the victim;
- c. possible political advantage or disadvantage to the Government or any political group or party; or
- d. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Q114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?

Generally, rules concerning evidentiary procedures etc., should be dealt with separately under non-OHS specific legislation.

There would need to be a specific shortcoming or need for OHS specific evidentiary procedures to be inserted in either the model laws, or other legislation.

Q115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?

Without knowing in advance the offence(s), and what elements constitute the offence, it is difficult to answer this question.

Q116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

In answer VECCI quote the Commonwealth Prosecution Guidelines;

“It is a fundamental and long standing principle of Commonwealth criminal law that a defendant is presumed to be innocent and that the prosecution must prove every element of an offence relevant to the guilt of the person charged

The mere fact that it is difficult for the prosecution to prove an element of an offence has not traditionally been considered in itself, a sound justification for reversing the onus of proof. If an element of the offence is also difficult for the defendant to prove, reversing the onus of proof places the defendant in a position in which he or she will find it very difficult to produce the information needed to avert conviction. This would generally be unjust.”

Q117. Is 'reasonably practicable' an appropriate standard for the model OHS Act?

As previously stated in this submission to discard standard would make employers liable for matters which are not reasonable and not practical to comply with.

The standard acknowledges that despite the best efforts of everyone a series of events previously not identified may result in a risk arising and an injury occurring.

Q120. What, if any, defences should the model OHS Act provide?

The Act should define duties and the defences should not be defined.

Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

To the extent that the Officer was in a position to know about the offence and in a position to influence the corporation. This provision should be reserved for when a corporation is guilty of an offence but the corporation has been dissolved or wound up.

Q127. What should the approach to officers of unincorporated associations or volunteer officers be?

Volunteer Officers should be exempt. VECCI has among its membership charities, clubs and child care centres which are managed by volunteers. As a matter of public policy persons who put themselves forward to serve in this capacity should be afforded protection from prosecution resulting from their decisions as volunteers.

Q129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?

Maximum fines are generally supported, subject to the following principles:

Generally speaking, if a matter is dealt with in the lower Court hierarchy (ie. Magistrates Court etc.), then, the maxima should be lower than if it is dealt with in a higher court (ie. County Court etc).

Corporations should have different maxima than individuals.

Indictable offences determined summarily, should have a lower maxima.

Q130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?

Generally, the levels of fines/penalties should be commensurate with the gravity of the offence.

Q131. Should there be a statutory minimum fine for some offences? If so what?

No.

Q132. Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?

In general prosecutions are for failure to identify and control risk to a degree reasonably practicable. Outcome should not be at issue in the determination of guilt but might be considered by a court in determining the penalty.

Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?

VECCI support a national register of outcomes that is administered by each jurisdiction across various provisions of the model legislation, which would publish cases and outcomes.

Q134. What penalty options should be available in addition to or instead of fines?

A range of specific OHS alternative sanctions could be available, including:

- Health and safety undertakings (s.137, *OHS Act 2004 Vic*),
- Adverse publicity orders (s.135, *OHS Act 2004 Vic*),
- OHS improvement projects (s.137, *OHS Act 2004 Vic*).

The court of general jurisdiction should be able to:

- Find a charge proven, but have the option to record not record a conviction.
- Allow a defendant to enter into a good behaviour bond or community sentence, intensive supervision orders.
- Order compensation/restitution.

Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

VECCI would suggest the offence of Reckless Endangerment⁵ is an appropriate means of dealing with persons who endanger others even without injury being actually incurred.

⁵ Section 32 of Victorian OHS Act 2004

Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

Imposing a penalty should be left to the courts and not prescribed in the Act.

Other Issues:

Q142. Should the power to make regulations be limited and if so, in what way?

VECCI has already stated that Regulations should only address matters that are required to be contained in subordinate legislation.

The case for developed of a regulation must be evidence based. That is, what is the evidence that a problem exists that warrants regulatory response? What is the dimension of the problem and why is regulation the most effective way to deal with that problem? Strong underlying public interest considerations must exist. There must be genuine regulatory impact statements undertaken also.

Concerns have been raised by industry with the volume and complexity of OHS regulations underpinning the various State, Territory and Commonwealth acts. As a general principle, the volume of OHS regulations should be kept to a minimum. The principles of good regulation making should be included in the model Act as a legislated restraint on making regulations.

Q144. What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?

VECCI has recommended that the need for a status below regulation is not required because in practice state of knowledge material is given equal weight by courts.


If constraints on regulation making are applied in the model Act there will be a tendency to resort to codes as a means of prescriptive control.

If codes are to exist there should be a provision in the model OHS Act to accommodate the development and review of Compliance Codes which would be developed through tripartite mechanisms.

Codes should be released for public comment with an accompanying regulatory impact statement. The model OHS Act should impose an obligation on policymakers to follow these processes in the developments of Codes of Practice.

Q148. Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?

The model OHS Act should provide for the establishment of a tripartite advisory body (whether that is a Commission or Advisory Committee) with expertise in OHS. The role and



function of the tripartite body should be articulated in the model OHS Act and be clearly distinguished from the role and functions of the OHS regulator.

The model OHS Act should not facilitate tripartism in relation to the administration of OHS regulation, rather it should facilitate tripartism in relation to policy advice. No tripartism in the administration of it (the regulator)

Q149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

Yes there should be provision to establish tripartite committees that deal with OHS matters in particular industries. The Act need only provide the regulator with the capacity to establish such committees.