

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

SPECIFIC COMMENTS

Chapter 1. Legislative Approach

1.1 Regulatory Structure

In response to Question one (1) of the issues paper, the regulatory approach should specify a general duty of care of all persons, whether it be the employer, employee, contractor and others who work on any premises or workplace.

It should also include a duty of care on designers, manufacturers and suppliers of plant, equipment and substances.

In response to Question two (2), Although risk management principles should be mentioned as an appropriate process-based standard in the new Act, the actual step by step process for a risk management approach should be contained in a corresponding specific regulation or standard. One of the reasons for this is that the Act should only touch briefly on the provisions required and not be too cumbersome so as to require amendments to it for any minor issue that may arise.

A regulation, would be more appropriate to deal with the specific provisions whether it be the risk management process, consultation options, role of regulatory inspectors.

Standards, codes of practice and guidance documents could provide a clear step by step process for all parties on particular OH&S subjects that are relevant to their workplace.

1.2 Titles, Objects and Principles

In response to Question three (3), the title should relate to the its intended coverage, whether it is workplace focused or occupational focused.

In response to Question four (4), the objects contained in the NSW Act could be used as a basis for the new Act, however, as previously mentioned, it should be worded to encompass all parties with respect to OH&S obligations.

In response to Question five (5), the principles contained in section 4 of the Victorian OH&S Act 2004, could be adequately incorporated into the list of objectives of the new Act. Therefore, having a set of principles is not necessary.

Chapter 2. Scope, Application & Definitions

2.1 Industry Sectors

In response to Questions seven (7) and eight (8), the model OH&S Act should replace general OH&S legislation of the Commonwealth, State and Territory Act. However, the model Act or Regulation/s should not include industry specific safety provisions. Such provisions should be contained in industry specific codes of practice and guidance materials. The reason for this is due to the many differences between industries and the operations and tasks particular to those industries, and the safety issues associated to each.

In relation to Question nine (9), there should be clear guidelines for communication and consistency between state regulator bodies, therefore the Act should contain clear and concise procedures. In a practical approach any project or activity should be conducted on a coordinated approach between the regulators. The Act should contain a direction that any matter arising be discussed on a national basis and subsequently discussed with industry stakeholders before establishing a policy on such issue.

2.2 Workplaces and Non-workplaces

In response to Question ten (10), the general duty of care should relate to the workplace, which would be a place where a person, employee or contractor, performs work for the principal person. In the case of an employee, duty of care would arise during their period of employed working hours in the workplace.

In response to Question eleven (11), a duty of care should apply to all persons who enter the premises/place of work of an employer, be it employee, contractor or visitor. However, the issue of contributory negligence should also apply, as non compliance with company safety policies and procedures should be recognised as a defence in any prosecution that may arise from an injury to such persons.

2.3 Responding to Change

In response to Question twelve (12), the scope of the model OH&S Act should include an obligation on labour hire operations and group training schemes with respect to OH&S obligations for their workers, particularly ensuring that their workers have undergone workplace safety induction training and are complying with workplace health and safety policies and procedures.

2.4 Definitions

In response to Question fourteen (14), the major terms necessary in the model OH&S Act would include the following:

- a) **workplace** – should relate to any place, whether or not in a building or structure where persons are required to work.
- b) **employer** – means a person who employs one or more other persons under contracts of employment or under contracts of training.
- c) **employee** – a person who is employed under a contract of employment or an apprenticeship or traineeship contract.
- d) **reasonably practicable** – is based on the following issues:
 - severity of the hazard,
 - probability of the risk,
 - current knowledge regarding the hazard and the risk,
 - availability of suitable hazard control/elimination methods,
 - cost of such control/elimination methods.

Chapter 3: Duties of Care – Who Owes Them and to Whom?

3.2 In response to Question sixteen (16) seventeen (17) and eighteen (18), the model OH&S Act should contain a clear control test to determine who is responsible for who with respect to the health and safety of persons at work. Consultation, implementation and evaluation of duty of care obligations apply to all, whether it be management, the employee/s or independent contractors.

Although persons in senior management positions may be the ones who decide on the purchase of new equipment and/or changes in new work procedures to improve productivity as well as safety levels, they are not always directly involved in the implementation and day to day operations of work activities.

Therefore, it would be essential that any control test recognises and allows for responsibility to be delegated to others who are directly involved in the work activities and decisions made at the task level. Therefore, it becomes the direct responsibility of the frontline management, employees and/or sub/contractors involved in the task/s.

If an injury was to occur, the circumstances surrounding the incident would determine the degree of accountability on the affected parties.

In response to Question nineteen (19), where more than one person is found to have a duty of care responsibility or one person has a multiple duty of care obligation the model Act should specify how the responsibility is shared in the former scenario and how it dissected in the latter circumstance. In the situation where there is more than one person involved, no matter what their role, the responsibility should be equally shared. In both cases a test should be applied to determine if appropriate safety measures have been successfully implemented and whether they are being complied with by the affected parties.

3.3 Work Relationships

In response to Questions twenty (20), twenty-one (21) and twenty-two (22), the answers to these questions have already been addressed in 3.2

3.4 Duties of Employers

In response to Question twenty-three (23) and twenty-four (24), the specific duties of employers should be the four dot points contained on page 14 of the Issues Paper. As mentioned earlier, these employer OH&S duties would cover all persons who work or are invited to enter an employer premises.

The employer should not be, and should not to be seen to be, the sole person responsible for health and safety in the workplace. No matter how good the intentions of an employer may be to make a workplace safer and to remove or significantly reduce the risk of injury, it will not be successful if there is not genuine commitment from all parties affected.

In situations where an employer is prosecuted, qualifying the duty of care should place an obligation on the prosecutor, principally the regulator, to establish it was reasonably practical for the accused to comply not for the accused to prove that it was not reasonably practical to comply.

3.5 Duties of Workers and Others

In response to Questions twenty-five (25) and twenty-six (26), employees and contractors should be required to not only comply with their current duty of care legislative obligations, but should also be held accountable for the safety of others who may be at risk of injury from their own actions. It should be a reversal of a vicarious liability against an employer where a worker is responsible for an incident to which they are responsible, whether intentionally or unintentionally.

In relation to visitors and members of the public, subject to them conducting a safety induction if they enter the site, they should also be held accountable for any non-compliance with safety policies and procedures.

3.6 Appointed Persons and Officers

In response to Questions twenty-seven (27), twenty-eight (28) and thirty (30), the model OH&S Act should not make it compulsory for a business to appoint a person to be the safety officer. It should be one of a number of options available. If the business is large enough to appoint a person without disruption to its operation then that person should be adequately trained in OH&S. That person would then have the responsibility of ensuring the legislation is reasonably complied with by all parties.

If there is more than one appointed persons, then the same training and responsibilities should apply.

3.7 Duties of Persons in Control

In response to Questions thirty-one (31) and thirty-two (32), most of the current legislation in each state and territory specifies the duties of controllers of premises. The New South Wales, Queensland, Tasmanian and Western Australian legislation appears to have the most appropriate wording which adequately addresses the obligations of the controllers of premises. However, the model OH&S Act should also specify that the obligation applies to controllers of particular work areas and temporary workplaces.

3.8 Activities Which Impact on Health and Safety

In response to Questions thirty-three (33), thirty-four (34) and thirty-five (35), The responsibility for an item, such as a piece of machinery, should principally remain with the designer and manufacturer of the item, except for when the owner at a particular time will be responsible for the proper use and maintenance of the item in accordance with the manufacturers specifications. The same would apply for a building or structure. Therefore, there should be a clear set of OH&S guidelines for the whole life of the item, structure or system.

Where the manufacturer is an overseas operation then the appropriate Government department as well as the Importer would be responsible for ensuring that the item satisfies the relevant Australian Standards. The importer/supplier should also be responsible for ensuring that they provide to their customers information and training with respect to the correct installation, operation and maintenance where required.

Any failure in the design or a manufacturing fault of the product should follow should relate to those particular parties.

Whenever an item changes hands between businesses, the responsibility regarding evidence of past maintenance and previous problems should be provided to the purchaser.

Chapter 4: 'Reasonably Practicable' & Risk Management

4.1 Concept of 'Reasonably Practicable'

In response to Questions thirty-seven (37) and thirty-eight (38), the model OH&S Act should contain the 'reasonably practicable' test, but that it should be clear that it be allowed to be applied flexibly as it will depend upon the circumstances in each case. The criteria from the Western Australian and Victorian legislation would appear appropriate starting points for its definition.

In response to Question thirty-nine (39), control should be included as a part of the standard as the focus would be on the person, or persons, who are in control and whether their duty of care responsibility satisfies the 'reasonably practicable' test.

4.2 Risk Management

In response to Questions forty-two (42), forty-three (43) and forty-four (44), definitions of hazard, risk and 'reasonable practicable' should be included in the model OH&S Act. The definition of 'reasonably practicable' should include a reference to the risk management principles, but should refer to them in the corresponding regulation or code of practice.

Chapter 5: Consultation, Participation & Representation

5.1 Duty to Consult

In response to Question forty-five (45), the model OH&S Act should contain clear options available to employer and employees for the purpose of consultation over any OH&S issue affecting the business. The Act should specify when consultation should occur as well as the obligations on employees and others to provide feedback to the employer on areas for possible safety improvement that is feasible and reasonably practicable.

The model OH&S Act should have a clear definition of consultation,

There should also be an obligation on designers, manufacturers and suppliers to consult with others down the 'chain of responsibility'.

In response to Questions forty-six (46) and forty-seven (47), the consultation provision should also include others working at a site as they may be aware of potential hazards unbeknown to the employer and employees working at the same site. This could also include visitors because as the saying goes '*cannot see the forest for the trees*', such persons may be more aware than those performing work at a site. The level of consultation with non-employees will depend be limited due to the control and time restraints on the parties, compared to consultation arrangements between employers and their employees, therefore each different work-relationship will require its own level of OH&S consultation.

In response to Question forty-eight (48), the relevant consultation options for different workplaces, will depend upon their size, location and structure. Literacy and numeracy will also create challenges of how to not only ensure that the information is relayed but also how it is interpreted and understood. Appropriate training and interpreter services may be required from the regulator to limit the cost (or no cost) and inconvenience to all parties.

5.2 Participation and Representation

In response to Question forty-nine (49), Health and Safety Representatives (HSR) and Health and Safety Committees (HSC) should not be the only options available for OH&S consultation purposes in any workplace.

In response to Question fifty (50), consultation options should be mentioned in the model Act, however, the provisions regarding those options should be contained in the corresponding regulations. The regulations should prescribe the powers, role, function and structure of the consultation options.

In response to Questions fifty-one (51) and fifty-two (52), the appointment of HSR's and HSC's should be appointed if requested by the employees and if agreed by the employer. The election of persons to a HSC shall be subject to the approval of a majority of the employees of the business or a majority of the employees in that section or department

In response to Questions fifty-three (53) and fifty-four (54), the functions of HSR's and HSC's would be as listed on page 22 of the Issues Paper. HSR's and HSC's would have the power to organise risk assessments on site, investigate workplace incidents and make reports and recommendations to management. The structure of HSC's would be a management representative and an employee representative from each section or department.

In response to Question fifty-five (55), HSR's and members of HSC's should be adequately trained in an approved, relevant and recognised OH&S course or program.

In response to Questions fifty-nine (59) and sixty (60) right of entry should be restricted to regulator inspectors who are qualified and experienced in all aspects of the relevant industry. This is to assist all parties to addressing any OH&S concerns whilst recognising the peculiarities of the business. The inspector should also be a person who has been adequately trained in all aspects of OH&S.

In response to Questions sixty (60) and sixty-one (61), a regulator inspector should only enter premises where a death or serious injury has occurred or to investigate a complaint from a current worker. The specific details regarding the complaint must be provided to the occupier of the premises in a written notice of at least 24 hours prior to their entry.

In response to Question sixty-two (62), the inspector should have the right to inspect and take copies of records, but only those that are relevant to the incident or alleged complaint. Providing there is no disruption to production the inspector should have the right to inspect the relevant section or equipment of the premises and speak to workers, which relates to the incident or specific complaint.

In response to Question sixty-three (63), the primary process for resolving OH&S issues should be through an agreed disputes procedure. The disputes procedure could be very similar to that which applies in most industrial instruments. However, in the event of the matter remaining unresolved at the workplace level the parties could agree that the matter be referred to the state regulator.

In response to Question sixty-four (64), once a matter has been unable to be resolved at the task or production level the matter should then be referred to the HSR, HSC or other investigative process agreed at the workplace.

In response to Question sixty-five (65), the step-by-step resolution procedure should appear in the corresponding regulations.

In response to Question sixty-six (66), the model OH&S Act should specify that agreement must be reached between the employer and a majority of the employees over the content of the resolution procedures.

In response to Questions sixty-seven (67) and sixty-eight (68), to refuse or cease to undertake work should not occur as a unilateral decision. The HSR, HSC or other agreed consultation arrangement at the applicable site should first be advised of the alleged unsafe matter and following an investigation determine if work should cease. The reasons for the decision under the consultative process to continue or cease work should be provided to all parties affected.

In response to Questions sixty-nine (69) and seventy (70), the answer would be no.

5.3 Protection from Discrimination and Victimization

In response to Questions seventy-one (71) seventy-two (72) seventy-three (73) and seventy-four (74), the model OH&S Act should make reference that an employee cannot be victimised or discriminated against a person because they are HSR or on a HSC and performs a function of that position or makes a complaint about a legitimate OH&S issue relevant to the workplace or is an employee who reports or raises an OH&S concern.

There is current federal legislation dealing with discrimination unlawful dismissal matters. Therefore, the model OH&S Act should only refer to such legislation.

In response to Questions seventy-five (75) and seventy-seven (77), no.

Chapter 6: Regulator Functions, Powers & Accountability

6.1 Role and Functions of Regulators

In response to Question seventy-nine (79), the model OH&S Act should include the obligations, powers, function and role of the regulator with respect to health and safety. It should require it to act as a body that is responsible for advising and assisting employers, employees and others, to meet the requirements of the Act and regulations.

The list of powers and functions shown on page 26 of the Issues Paper should be included and expanded in the model OH&S Act.

In response to Questions eighty (80) and eighty-one (81), Yes.

In response to Question eighty-two (82), an interpretation of the legislation should not be made by an inspector. The regulator's legal department should assess all the details regarding a matter before the potential issuing of a notice or prosecution is instituted. Also before this happens the regulator should allow for the parties directly affected to provide feedback on the matter.

In response to Questions eighty-three (83), No.

6.2 Inspectors

In response to Question eighty-four (84), Yes. However, as previously mentioned in this submission, inspectors should be fully experienced in the licencing and specific legislative obligations (e.g. in the case of the meat industry, food safety and hygiene requirements, AQIS provisions and environmental obligations) of the establishment that they are investigating.

In response to Question eighty-five (85), Yes. The model OH&S Act should indicate that an inspector should specify that they are required to work through an issue with the parties to achieve an amicable result. The inspector should also be open and transparent as to any complaint or concern that has been raised in relation to the workplace. The Act should also mention that an inspector is required to provide any information, documentation (project material etc, mentoring services) and other contacts that will assist the parties to resolving any OH&S matter.

In response to Question eighty-six (86), No. It is vitally important that there is consistency with any advice or interpretation from the regulator.

In response to Question eighty-seven (87), again, for consistency reasons, no notice or instrument should be issued without it being directed by the regulator. Any amendment or cancellation of a notice or direction should rest with the regulator and not an inspector.

6.3 Internal Review of Inspectors' Decisions

In response to Question eighty-eight (88), this was answered in response to the previous question.

Chapter 7: Compliance & Enforcement

7.1 Enforcement measures

In response to Question ninety (90), There should be a clear step-by step outline of the levels (using the hierarchy levels on page 29 of the Issues Paper, excluding Infringement Notices) of enforcement and when they are activated. This should avoid confusion and fear by the parties as to where they stand in relation to the level of enforcement to be applied and may result in greater compliance and implementation for change. All avenues of assistance and negotiation should be exhausted before any notices are issued or court action is taken.

In response to Question ninety-one (91), Yes. Such provisions should be contained in corresponding regulations.

7.2 Measures Exercised at the Workplace

In response to Question ninety-two (92), as mentioned in answer to the previous question, such notices would be included in a detailed outline in the corresponding regulations.

In response to Question ninety-three (93), Yes.

In response to Question ninety-four (94), The model OH&S Act should specify that issued notices can be reviewed subject to a report provided to the regulator stated the reasons for the review. The regulator should be obligated to provide reasons why it should/should not be reviewed.

In response to Question ninety-five (95), Yes. However, there should be a right for it to be extended where the recipient has provided a response to the regulator stated the reasons for an extension and/or argument against the notice.

In response to Question ninety-six (96), Yes. It should remain suspended until the review and/or appeal has been completed.

In response to Question ninety-seven (97), No.

7.3 Measures Exercised Beyond the Workplace

In response to Question one hundred (100), No

In response to Question one hundred and one (101), No. This provision is subjective and could create significant cost to a business as it may go beyond the particular issue that prompted the matter.

Chapter 8: Prosecutions

8.1 Criminal or Civil Liability

In response to Question one hundred and four (104), the model OH&S Act should only provide for civil proceedings and penalties.

8.2 Where Prosecutions Should be Heard

In response to Question one hundred and six (106), prosecutions should be heard in the Magistrates Court with appeals being made available to the Federal Court.

In response to Question one hundred and seven (107), it should be mandatory that magistrates and judges be experienced in all facets of OH&S legislation. Therefore, having a specialist court or section in these courts experienced in OH&S matters would be appropriate.

8.3 Who May Commence Prosecutions and Relevant Procedures?

In response to Question one hundred and eleven (111), considerations for a prosecution should be referred to the Director of Public Prosecutions as it is an independent body. The regulator, union, industrial court or Government Minister should not be the prosecutor.

In response to Question one hundred and twelve (112), the period should be a minimum of 6 months, but no longer than 12 months. The main reason is to limit the cost incurred by the parties, and the delay in achieving a result in the matter. Difficulty also arises for witnesses recollecting the incident, which could be distorted with the effluxion of time.

In response to Question one hundred and thirteen (113), the rules and procedures should be left to the rules of the relevant court?

8.4 Evidence

In response to Questions one hundred and fourteen (114) and one hundred and fifteen (115), No.

In response to Question one hundred and sixteen (116), codes of practice, guidance information and other regulator publications should not be able to be used as evidentiary material in a prosecution. They should be recognised as purely information used to assist parties in a workplace to remove or reduce the risk of illness or injury. Such documents should have no legal standing with respect to possible litigation.

8.5 The Burden of Proof and Defences

In response to Question one hundred and seventeen (117), Yes.

In response to Question one hundred and eighteen (118), the prosecutor should be required to prove that the defendant had not done all that was 'reasonable practicable' to in the circumstances of the matter. This is because the onus is on the prosecutor not the defendant. The principle should be that a person is innocent until proven guilty.

In response to Questions one hundred and nineteen (119), No.

In response to Questions one hundred and twenty-one (121), No.

8.6 Liability of Officers

In response to Questions one hundred and twenty-two (122), Yes. However, there would have to be a direct link between the alleged offence and the failure of the officers to take reasonable care would have to be proved to be a wilful act.

In response to Questions one hundred and twenty-three (123), No.

In response to Questions one hundred and twenty-four (124), Yes. The prosecution must prove the act or omission of the officer contributed to the offence of the corporation.

In response to Questions one hundred and twenty-five (125), No.

In response to Questions one hundred and twenty-six (126), No, as it would restrict the defences available to the officer.

In response to Questions one hundred and twenty-seven (127), The approach should be the same for both corporations and unincorporated associations and volunteers.

8.7 Sentencing Options

In response to Questions one hundred and twenty-eight (128), fines should apply in the following circumstances:

- a) repeat offenders who ignore directions from the regulator and the courts;
- b) serious injury or death in circumstances that the injury or illness was foreseeable;
- c) reckless endangerment
- d) wilfully committing a proven illegal act
- e) unjustifiably impeding or assaulting an inspector;
- f) unlawfully discriminating against a person because of their legitimate involvement in OH&S activities.

In response to Question one hundred and twenty-nine (129) and one hundred and thirty (130), fines should be structured on a tiered basis, which would be based on the severity of the breach.

In response to Question one hundred and thirty-one (131), No.

In response to Questions one hundred and thirty-three (133), a national data-base or register regarding decisions, whether they are in favour of the prosecution or the defendant, should be established to ensure consistency and fairness.

In response to Question one hundred and thirty-five (135), terms of imprisonment should only be applied in proven cases of wilful action leading to serious injury or death.

8.8 Workplace Death and Serious Injury

In response to Question one hundred and thirty-six (136), No.

In response to Question one hundred and thirty-seven (137), in OH&S legislation.

In response to Question one hundred and thirty-eight (138), No.

Chapter 9: Other Issues

9.1 Regulation Making Powers

In response to Question one hundred and forty-two (142), Yes. The creation of a regulation should be limited to circumstances where specific provisions are required to address an issue where no OH&S minimum provision exists in Australia. The establishment of a new regulation should be subject to preliminary open discussion with affected parties. Any regulation should be open for review and proper interpretation clarification if problems arise.

In response to Question one hundred and forty-three (143), No.

9.2 Codes of Practice

In response to Question one hundred and forty-four (144), Codes of Practice should only be used as a guidance document for industry parties. The model OH&S Act should specify this as the purpose of codes of practice. It should also state that not only is consultation required with industry stakeholders but that it is also necessary that any code is approved by all relevant parties before it can be gazetted.

Most importantly, the model OH&S Act should state that codes of practice cannot be used as evidence in prosecutions.

9.3 Notification of Incidents and Reporting

In response to Question one hundred and forty-five (145), the model OH&S Act should make reference to the requirement for notification of incidents, however the specific provisions should be contained in a corresponding regulation. The Act could state who is to be notified in the event of an incident or accident.

9.4 External Appeals and Issue Resolution

In response to Question one hundred and forty-six (146), as mentioned in section 8.2 of this paper, OH&S matters could be referred to an OH&S specialist section of a local court or the federal court.

In response to Question one hundred and forty-seven (147), conciliation of matters could be heard by a tripartite committee. However, failing resolution of the matter to would be referred to an OH&S specialist section of a local court or the federal court.

9.5 Tripartite Mechanisms

In response to Question one hundred and forty-eight (148), Yes. If each state was to retain an administrative function under the model OH&S Act, then a tripartite body should be responsible for the administration of OH&S regulation subject to request for information from industry stakeholders.

In response to Question one hundred and forty-nine (149), Yes, It is important that any OH&S issue that affects a particular industry is discussed and feedback provided through a tripartite committee dealing with that particular industry/ies. No OH&S matters should be progressed by the regulator until they have been addressed and agreed through the tripartite committee.

9.6 Mutual Recognition

In response to Question one hundred and fifty (150), all of the areas mentioned in the Issues Paper should be subject to formal mutual recognition provisions.

In response to Question one hundred and fifty-one (151), the model OH&S Act itself should not prescribe the provisions regarding the certification of workers performing certain types of work. Corresponding regulations should prescribe the specific requirements, definitions and type of work requiring a certificate of competency and how it is maintained, replaced or cancelled. The issuing of such certificates should be contained on a national register available to business to access relevant information.

9.7 Interaction of Federal and State Laws

In response to Question one hundred and fifty-two (152), the model OH&S Act should, where there is inconsistency, be framed so that it takes precedence over any state or territory law dealing with an OH&S matter. The new model Act should also allow for the creation of agreed regulations where there is no inconsistency between states and with the model Act. but requires national uniformity.

The new provisions should not create a greater burden on workplaces, but be easy to understand, and where applicable, cost effective.

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

GENERAL COMMENTS

Please list any general comments you would like to make on any other matters not already highlighted in the Issues Paper. Ensure your general comments fall within the Terms of Reference of the National Review into Model OHS Laws (refer to Appendix A of the Issues Paper).

General Comments: