

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

SPECIFIC COMMENTS

Legislative Approach:

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

Australian Vinyls believe that the OHS model Act should be a performance based structure, strongly supported by more detailed guidelines and codes of practice.

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

The Act should contain the overarching principles required for providing safe places of work, backed by the detail performance based subordinate legislation, codes of practice to demonstrate industry state of knowledge and guidelines.

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

No specific comment.

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

Australian Vinyls believe the Victorian OHS Act 2004 is a strong document that provides for the health and safety of Victorian works very well. We support the structure and wording of the Victorian Act.

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

Australian Vinyls believe the Victorian OHS Act 2004 is a strong document that provides for the health and safety of Victorian works very well. We support the structure and wording of the Victorian Act.

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

No specific comment.

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?

Subordinate legislation also needs to be aligned across the country, as this is typically where the detail should and does reside.

Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

The Act needs to be a high level documents which give power to subordinate legislation which can then cover the specific industry hazards and controls. This can then be supported by guidelines and codes of practice.

Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

This is definitely a requirement. It is vital for the productivity of the country to ensure we have our systems as aligned as possible. This will reduce unnecessary duplication of conflicting requirements between states for organisations which operate over state borders.

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

It should be tied to the workplace. This will allow for all types of conduct of work to be covered. The workplace then also needs clear definition to provide protection for workers who travel or work at other locations etc.

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

There are instances in a work place where a member of the public could be impacted by the nature or conduct of the work. The OHS Act must have regard to the protection of the public. The Victorian OHS Act 2004 has a duty owed to persons in the workplace, other than employees.

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?

The act should have regard, where possible for the changing nature of the workplace. Perhaps this could be achieved via the careful definition of the term “employee”, to encompass all types of employment arrangements.

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?

This area could possibly be provided for by the development of appropriately specific subordinate legislation or codes of practice.

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

Australian Vinyls believe there are some specific items in the legislation of Victoria which provide for safer workplaces, and these should be consistent across jurisdictions. These include “reasonably practicable” in its Victorian application, not just limited to its use in defence (as in NSW), definition of the following “workplace”, “employee”, “consultation”, “hazard identification” and hazard “control”.

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

No specific comment.

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

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

No specific comment.

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?

No specific comment.

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?

No specific comment.

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

No specific comment.

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

Australian Vinyls believe this is not a suitable reliance, since all personnel in a workplace should have the right to a duty of care. Perhaps this could be addressed through careful definition of and “employee” to incorporate all varieties of employment contracts.

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?

These people should have the same duties owed to them as a direct employee. All persons in a workplace must be entitled to a safe place of work, so far as is reasonably practicable.

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

No specific comment.

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

Australian Vinyls believe the model in the Victorian OHS Act 2004 is suitable for this.

Q24. To whom should these duties be owed?

These duties must be owed to all personnel at the workplace.

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

Australian Vinyls believe the model in the Victorian OHS Act 2004 is suitable for this.

Q26. Should the model OHS Act include duties of care for persons who are not performing work (e.g. visitors to a workplace, members of the public)? If so, what should the duties be?

There must be a duty of care to not injure others in the workplace. This could be linked to a “reckless endangerment” clause, but also fits with provided a safe place of work so far as is reasonably practicable.

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

Australian Vinyls strongly believe that line management must have accountability for safety and health. The provisions on a person with specific OHS responsibilities can result in perverse outcomes, as line managers deflect their accountabilities to someone else, who may not have the ability to influence decisions. OHS personnel should be in an advisory capacity to provide the best available advise to the personnel responsible for managing the work, and with it safety and health. This is a model we actively promote in our workplaces with success.

Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?

As stated above, this role should be advisory only and therefore have no direct liabilities, other than those which may arise from the Corporations Act 2000 (Cth) with respect to

Officers. They should clearly have the same obligations and liabilities of other employees also, such as reckless endangerment and following safety rules etc.

Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

Such appointed persons, as stated above, should have the same obligations as employees with respect to the negligence and reckless endangerment. They may also have additional responsibilities as Officers of the Corporation in some circumstances.

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

No specific comment.

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?

The Victorian OHS Act 2004 does define who owes duties well, however there is some confusion regarding how far down the line the duty of the “persons who control or manage workplaces” (s.26) extends. This needs further clarification.

Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

As per question 31, the extent of this duty needs to be more clearly defined. All employees should have a duty to take reasonable care for others who may be affected by their acts or omissions. Refer to Victorian OHS Act 2007 s.25.

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?

Victoria has attempted to cover this area through the duties on suppliers and designers. This appears to be a reasonable obligation.

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?

No specific comment.

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 be defined as each time the item changes ownership, this is to ensure that even second hand goods are suitable for their intended purpose and do not pose a risk to health and safety of the end user.

Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

No specific comment.

‘Reasonably Practicable’ & Risk Management:

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

Yes, this definition should follow the Victorian model, which also attempts to define the aspect to be considered in deeming something reasonably practicable. It should be incorporated in

the duty, not as a defence as it is in NSW. While legally this may not make a great difference it is a psychological difference in working within the legal framework.

Q38. If not, what alternative standard should be included?

Not applicable.

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

Refer question 37.

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

One's ability to control the situation must be part of the standard in determining reasonably practicable.

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?

Examples may be of use in the subordinate instruments, but should not cloud the Act.

Q42. Should 'hazard' and 'risk' be defined in the model OHS Act?

There are fundamental terms which must be defined and included in the Act. They form the basis of providing a safe place so far as reasonably practicable, having regard to the hazard, and likelihood, which then defines the risk. It should be noted that Victoria does not define these terms in the Act or in its subordinate legislation.

Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Refer question 37.

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

The principles of risk management are important, however what is often more important is the identification of hazards and the implementation of controls to reduce the risk so far as it reasonably practicable. This can often be done without the formal assessment step, as per the Victorian shift with the OHS Regulations 2007.

Consultation, Participation and Representation:

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

The Victorian OHS Act 2004 provides strong mechanisms for consultation. Unfortunately the Victorian OHS Regulation 2007 went a step further which can actually inhibit consultation in OHS Committees should employees, other than HSRs also be present, refer r2.1.5(2)(b). This clause should not be incorporated

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

All personnel at the worksite should have the consultation provision applied to them.

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

The level on consultation should be determined on the hazard or impact rather than the work relationship.

Q48. How should consultation be provided for:

- a multi-employer worksite;
- an employer with operations across more than one worksite;
- small business;
- remote workplaces;

- **precarious employment; and**
- **workers from culturally and linguistically diverse backgrounds.**

Victorian has attempted to address these issues with multiple employer designated work groups and multiple site designated work groups. This seems a reasonable manner in which to achieve consultation. Provided consultation takes place and there is some evidence of it, such as a diary notes for a small business where the employer spoke with all employees, this should be acceptable. Remote workplaces still requires some degree of oversight and this may be a useful manner to achieve consultation. Consultation should not be effected by precarious employment arrangements. Consultation, as with other communication, should be in a language understood by the intended audience. This may sometimes require translation into different languages.

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

There should be the ability to provide for HSRs and HSC. Where there is a very small business, such as maybe 3 or 4 people it is more of a burden to establish a work groups for HSR election and formal HSC. This may have a perverse outcome, in devaluing safety as a tick a box activity. There needs o be flexibility to develop processes which work at the workplace and therefore enhance safety.

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?

Australian Vinyls believes the model in the Victorian OHS Act 2004 is suitable and proven to work well in enhancing safety, communication and consultation.

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

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

Q54. What should the structure and functions of HSCs be?

Refer to the Victorian OHS Act 2004 model.

Q55. What training and qualifications should members of HSRs and members of HSCs have?

Refer to the Victorian OHS Act 2004 model.

Q56. Are there alternative mechanisms that should be considered?

No specific comment.

Q57. To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?

Refer to the Victorian OHS Act 2004 model.

Q58. Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?

No specific comment.

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

There was much consternation prior to the introduction of this provision in Victoria and it does not seem to have resulted in the concerns raised. If this provision helps people to work

together on resolving safety concerns, then it should be included however it must have a tight framework to prevent abuse or confusion of Industrial Relations issues with OHS issues. They are separate and should always be dealt with separately.

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

Yes, there must be training and a form of registration, that can be revoked for abuses, to ensure the process is fair for all and achieves the safety outcomes. Safety should never be an industrial relations issue.

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

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

Q64. When should issue resolution procedures be activated?

Refer to the Victorian OHS Act 2004 model.

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?

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

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?

Yes, all workers have a right to not do an unsafe task and a moral obligation to not let someone else do something unsafe.

Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

Yes. All personnel should have the right and moral obligation to cease an unsafe practice. Regard should be taken to resolving the situation. There does need to be a genuine belief that the task is unsafe and placing the worker at risk to their health and safety which has not been reduced so far as is reasonable practicable. Refer to the Victorian OHS Act 2004 model.

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?

Yes, people should not be penalised financially if their workplace is unsafe and requires remedy. The payments should continue based on the normal wages, similar to how a compensation wage is calculated under the Accident Compensation Act in Victoria.

Q70. In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?

Where resolution cannot be reached by the parties under their issue resolution process, either party should be able to call the authority to attend and resolve the issue.

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

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

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?

Refer to the Victorian OHS Act 2004 model.

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

Refer to the Victorian OHS Act 2004 model.

Q76. What remedies should be available to the victims?

Refer to the Victorian OHS Act 2004 model.

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?

Refer to the Victorian OHS Act 2004 model.

Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

Refer to the Victorian OHS Act 2004 model.

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?

Yes. Refer to the Victorian OHS Act 2004 model.

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

Yes, it is important to know how the authority may interpret the written law.

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

Yes, it is important to know how the authority may interpret the written law.

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

No specific comment.

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

No, an inspector needs to not only be able to say something is not done correctly, but to also advise on how it can be done correctly. The aim is to provide safer workplaces, employers sometimes need help to understand what can be done to achieve this.

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

Refer to the Victorian OHS Act 2004 model.

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

Yes, refer to question 83. This real difficulty in this is ensuring the inspectors have the required competence to assist.

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

Victoria has established an internal review process which seems, as written, to provide a suitable remedy in this area.

Q87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

Yes, should the inspector genuinely believe they may have made an error in their initial direction. This can be a difficult area, as the inspector also should not be subject to duress in changing anything. It may be more suitable for an inspector to be able to refer their own decisions to an internal review system, which can then change as appropriate, should they feel they would like to revise their position.

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?

Refer to the Victorian OHS Act 2004 model.

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?

As per the Victorian OHS Act 2004 model.

Compliance & Enforcement:

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

Yes. Australian Vinyls believe the range of enforcement measures in the Victorian OHS Act 2004 are suitable in providing options to the regulator for all manner of issues.

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?

They should be contained in the legislative documents, so the entire picture is clear to all involved.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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?

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

No, there should be opportunity to resolve the issues prior to moving to an Improvement Order or direction or subsequent prosecution.

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

Not applicable.

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

Not applicable.

Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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?

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

This should be at the discretion of the Magistrate on sentencing of the enforceable undertaking.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

Prosecutions:

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?

There should be a mixture of both. However when Criminal proceedings can be undertaken they must be done under the fairness of the justice system. This must include the presumption of innocence and the right to be tried in a court, not a commission.

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

The areas that should be subject to criminal offences and penalties should be reckless endangerment. This law should apply to both employers and employees.

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

Where there is a possibility to be prosecuted for a criminal offence, natural justice must be applied. It is not suitable to try OHS offences at an industrial relations commission, they should always be tried in a court of law under the presumption of innocence.

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

No, all persons facing any charges under OHS should have the right to justice and therefore should be tried under the court system, not a speciality system which may have differing burdens of proof.

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

As per the justice system in Australia which allows appeals.

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

A defendant charged with reckless endangerment should have the right to trial by jury.

Q110. Who should be entitled to commence criminal proceedings?

Proceedings should only be brought by the authority, should any other people wish to bring proceedings this is allowed for in common law.

Q111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

No specific comments.

Q112. What should appropriate time limits be for the commencement of a prosecution and why?

No specific comment.

Q113. Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?

This area should be left to the rules of the courts where trial is to take place. This ensures there is appropriate judicial fairness.

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

Evidentiary procedures should be that of the court where the trial is. This ensures there is appropriate judicial fairness.

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?

Elements of proof should be that of the court where the trial is. This ensures there is appropriate judicial fairness.

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

They should define the state of knowledge, or the minimum requirement in the case of subordinate legislation.

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

Yes, this term has some definition in Victoria and it is required to ensure there is some form of defence available, given in criminal proceedings a defendant must be presumed innocent until proved guilty.

Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

The prosecutor should be required to prove a standard was not met to ensure there is some form of defence available, given in criminal proceedings a defendant must be presumed innocent until proved guilty.

Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?

No, the system must be fair and equitable and therefore should be balanced for all offences.

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

The defence should be available under the “reasonably practicable” test, however this should be in the requirement under law, not just in the defence, as is the case in NSW.

Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

No, the system must be fair and equitable for all defendants and therefore should be balanced for all offences.

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

Where it can be proven that the Officer was in control either by action or omission they should be liable.

Q123. How should officer be defined?

Officer should be defined as per the Corporation Act 200 (Cth).

Q124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation?

Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

As with criminal law, if the officer is charged they should have all legal remedies available for their defence including being deemed innocent until proven guilty.

Q125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

This should be determined on a case by case basis.

Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

The defence should be available under the “reasonably practicable” test, however this should be in the requirement under law, not just in the defence, as is the case in NSW.

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

This should be the same as for Body Corporates, as all personnel should have the right to a safe place of work so far as is reasonably practicable.

Q128. For which offences should monetary penalties (fines) be imposed?

Refer to the Victorian OHS Act 2004 model.

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

Yes, the possible penalty should be known up front.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

The Victorian OHS Act 2004 model is comprehensive and suitable in this area.

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

The level of penalties should be determined by all of these factors during sentencing up to the maximum stated in the Act.

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

No specific comment.

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

For instances of reckless endangerment, incarceration should be a possible penalty, however this must be determined in a Criminal court, with the defendant entitled to all legal defences and the presumption of innocence. For other offences the option of Enforceable Undertakings is a solid basis, as this can direct the funds to fixing health and safety issues rather than contributing to consolidated revenue. It can also have more impact than a fine in changing an organisation where their "brand" is important.

Q135. Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?

Reckless endangerment should have the provision on imprisonment. The maximums for this offence could be commensurate with the corresponding criminal offences, such as manslaughter, or assault.

Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?

The offence that should be able to be applied for death or serious injury should be reckless endangerment.

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

By making the breaches clear in the OHS Act it removed any confusion as to whether Criminal offences can apply.

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?

Penalties should have regard to both the consequence and culpability.

Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

No specific comment.

Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?

Yes, however all persons must be entitled to a defence on the assumption of innocence until proven guilty in a court of law.

Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?

No specific comment.

Other Issues:

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

Yes. This is to ensure consistency between the states, as we have seen on numerous occasions (such as Major Hazard Facilities, Security Sensitive Ammonium Nitrate etc), it is possible for all states to implement vastly different laws, even when based on very specific national models or COAG agreements.

Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?

No specific comment.

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

National codes should be developed and adopted by the states without amendment, to ensure consistency.

Q145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?

The Act should define a reporting system and this system should be adopted by all states without amendment. This will reduce the current regulatory burden which exists with differing requirements across the country. This model could be based on the Victorian OHS Act 2004 reporting requirements, with exception of site preservation for s37(1)(b), which may not be possible due to time taken for the health effect to manifest.

Q146. What provisions should be made in the model OHS Act for the external review of regulatory decisions?

The Victorian OHS Act 2004 provides a suitable model for this.

Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

The Victorian OHS Act 2004 provides a suitable model for this.

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

The Victorian OHS Act 2004 provides a suitable model for this.

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

Yes, as hazards related to specific industries may differ greatly from other industries. WorkSafe Victoria has done this with the Major Hazard Facilities Advisory Committee with some success.

Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?

Licensing for high risk works should be subject to mutual recognition.

Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:

- better OHS outcomes;**
- greater efficiency and effectiveness;**
- lower regulatory compliance and enforcement burdens; and**
- improved harmonisation of the requirements for such permits and licensing for industry across Australia?**

Each Authority should manage this in their own jurisdiction as per the requirements set out in the OHS Act.

Q152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

Duplication or additional legislation for no safety benefit can result in perverse safety outcomes by reducing the credibility of the system. An example of where this may occur is the application of Construction provisions on Major Hazard Facilities in Victoria. While Construction, Mining and Major Hazard Facilities are all clearly High Hazard Industries, the Construction part of the OHS Regulations 2007 recognises that Mining does not need to follow this part, but Major Hazard Facilities do, even where there is a demonstrable difference in safety performance in the favour of Major Hazard Facilities. This becomes an issue when lower level systems (such as Construction Induction Cards) must be implemented which will not enhance safety, to simply comply with the law as written, since the facility must already have a comprehensive training and induction system as part of an established and verifiable Safety Management System.

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

GENERAL COMMENTS

General Comments:

Australian Vinyls strongly supports the model currently in place in Victoria, and this has been proven to work well since introduction, both from an injury statistic and from an application basis. This difficulty in this area is ensuring that the inspectors are suitable knowledgeable and able to assist employers and employees with practice solutions of OHS issues. It is not reasonable to expect inspectors to be knowledge in all areas, though it is reasonable to expect them to be expert in specific areas and able to seek guidance or assistance in other areas.