

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

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## SPECIFIC COMMENTS

### Legislative Approach:

The VCSA believes the focus of national legislation should be more on **positive outcomes** and less on the processes.

### Scope, Application & Definitions:

The VCSA believes definitions need to be expanded to include the plethora of other possible employment relationships operating. Definitions should be uniform across all jurisdictions and tiered down into their legislation; for example certain provisions and powers relating to Health & Safety Representatives currently differ across States.

National definitions would benefit business, OHS regulators, unions and workers alike, wherein contemporary society business and job opportunities need to quickly adapt to opportunities where and as they arise.

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

The VCSA believes employment arrangements are quite different today than when Roben's philosophy was developed. Model legislation should better reflect the many tiered duties of modern contracting to clarify responsibilities and duties for principals, subcontractors, sub-subcontractors, sole traders, independent contractors, partnerships, incorporated / unincorporated companies, the client and the occupier.

The benefits of more clarity in this area would be :

- To clearly define obligations and duties at all levels;
- To facilitate contractual arrangements;
- Help identify maturity or sophistication of organisations' OHS systems to enable a better understanding of OHS responsibilities and to more clearly assign ownership of these responsibilities.

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## **‘Reasonably Practicable’ & Risk Management:**

The VCSA believes Victoria has been operating for 23 years under the ‘reasonably practicable’ model – it has stood the test of time and it is clearly defined in the Victorian OHS Act. The VCSA believes ‘absolute’ is too severe with the burden of proof going against the long standing philosophy of British Law of innocence until proven guilty. Such an ‘absolute’ legislative approach would have the affect of :

- Stifling learning outcomes;
- Jeopardising genuine improvement;
- Discouraging or preventing co-operative arrangements;
- Promoting litigation;
- Promoting a defensive and negative attitude to safety, i.e. including a provisional sum for potential prosecutions or for fighting litigation rather than investing in improved safety systems;
- Driving excessive and complicated administrative functions and paperwork exercises instead of focusing on improving practical outcomes.

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

The VCSA seeks clarification on how the duty to consult is applied throughout the various tiers of contemporary employment arrangements. For example in the Victorian OHS Act every employer is entitled to have a Health & Safety Representative on site. Designated Work Groups at present largely operate through industry custom and practice.

### Right of Entry

The VCSA believes the inter-relationship with industrial relations legislation requires some clarification on Right of Entry for industrial matters, as opposed to safety matters. Using Victorian and Queensland models as an example, the VCSA would recommend additional provisions to give 24 hour’s notice for matters other than those of ‘immediate risk’. This would enable businesses to appropriately respond or be prepared for such requests and also have appropriate people available to attend or respond.

The VCSA believes the Victorian training model of recognised Authority approved training as being appropriate training and qualifications for such persons.

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## Regulator Functions, Powers & Accountability:

### Internal Review Process

The VCSA advocates the adoption of an internal review process similar to that operating under the Victorian OHS Act, identifying this as an effective and timely method for seeking the review of Inspectors' and the Authority's decisions, rather than taking the matter in the first instance to a Civil Administrative Tribunal or a court process. This internal review process ensures inspectorate accountability.

## Compliance and Enforcement:

The VCSA is mindful of not wishing to apportion blame to individuals, however, where an employee failure has resulted in a serious incident this needs to be clearly identified with the aim of achieving a better learning outcome.

### Enforceable Undertakings

The VCSA believes the current Victorian Act is unhelpful in this instance, where an entity is required to plead guilty to the Authority before an enforceable undertaking is declared. The VCSA believes that the Queensland legislative approach is appropriate, whereby the offender is not required to admit fault or liability as a condition of entering into an enforceable undertaking.

Benefits of an entity willing to enter into an early enforceable undertaking would be:

- Saving of time and resources for the Courts, the Authority and the entity;
- Learning outcomes could be immediately communicated throughout the industry;
- Proactive undertakings would ensure funds were invested to improve safety in the industry and not seen to disappear into consolidated revenue;
- The current necessity to plead guilty under the Victorian legislation before an enforceable undertaking can be accessed restricts many positive practical OHS outcomes from being achieved in a workplace in a timely manner.

The VCSA believes the practice of companies using Corporations Law to avoid penalties and avoid legal process needs to be urgently addressed. The ability to prosecute Responsible Officers presiding at the time of the alleged breach needs to be included, **regardless** of their current company / entity and personal standing.

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## Infringement Notices

The VCSA believes legislated Infringement Notices provisions in some jurisdictions act effectively to deter some lesser breaches (e.g. not wearing PPE) and keeping these matters out of potential court proceedings. There is provision in the Victorian Act, and if used appropriately, could be a useful tool noting that uniformity across all jurisdictions is sought.

Use of Infringement Notices should also be subject to an appropriate Internal Review process. The Victorian model provides an effective and timely method of challenging an Inspector's interpretation or decision and could be adopted.

## **Prosecutions:**

The VCSA would recommend the appointment of a judicial panel with expertise in and understanding of specific industry issues to deal with summary matters. Currently judges and other judicial bodies are expected to make a legal impartial finding on some very complex matters. Further it is difficult for them to specify a particular court penalty or to make comment given legal privilege afforded to individuals and entities.

The VCSA believes the current Victorian model is the preferred model with regard to prosecution with sequential steps. There exists the basic premise of innocence until proven guilty. This should remain unimpeded.

The VCSA believes the Department of Public Prosecutions or a similar separate authority is a necessary ingredient in the legal process when proceedings are being challenged by third parties.

The VCSA understands the Court's deliberations apportion culpability and weigh this up against ability to pay, however, the public perception is to equate quantum amount of a fine with culpability. The degree of culpability needs to be visible, clearly understood and not open to public perception.

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## Other Issues:

### Safety in Design

Australian and overseas research indicates that a significant number of deaths and injuries in the construction industry are design related.

Research conducted by NOHSC (1989-1992 statistics) found 18% of 256 fatalities in the construction industry were design related (NOHSC 1999).

A study conducted between 1 July 2000 and 30 June 2002 concluded that 44% of 41 fatalities in the construction industry (excluding Queensland) were design-related (ASCC 2005).

The report also concluded that 37% of all work related fatalities (77 in total) in Australia between 1 July 2000 and 30 June 2002 were related to workplace and industrial design issues (ASCC 2005).

Designers now have a duty of care in the majority of jurisdictions across Australia to consider the health and safety of the construction worker, the maintenance worker and the end user.

However the duty of care placed on designers varies across the jurisdictions. The following summary details the designer's duty of care across the jurisdictions;

- Western Australia, OHS Act 1984 Section 23 - Construction Worker, Maintenance Worker, End User
- Western Australia OHS Regulation 1996 s3.140. - Construction Worker, Maintenance Worker, End User
- Western Australia 2008 Code of Practice
- South Australia OHS Act 1986 Section 23 A – Construction Worker, Maintenance Worker, Demolition Worker, End User
- Victoria OHS Act 2004 Section 28 – End User
- Northern Territory OHS Regulation 133A Part 2 Clause 9 (b) - Construction Worker, Maintenance Worker, Demolition Worker
- Queensland 1995, OHS Act Section 30B, - Construction Worker, Maintenance Worker, End User
- Tasmania WHS&A 1995 Section 14 -Construction Worker, Maintenance Worker, End User
- New South Wales – No specific legislation for designers of buildings or structures

Emerging evidence suggests that the benefits of safe design includes :

- reduction of injury and illness to building workers
- improved usability of buildings or structures
- improved productivity – during construction and maintenance
- better prediction and management of production and operational costs over the lifecycle of a structure
- compliance with legislation
- innovative designs and lessons learned can be implemented across the organisation (ASCC 2006)

The VCSA believes the current Western Australia model is the preferred model to assist industry stakeholders to further improve health and safety standards through safety in design.

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## Other Issues

Harmonisation of activities outside the Act, e.g.:

- Certificates for High Risk Work should be Nationally consistent – this may mean that for example forklift licenses must be held in all states or that earth moving certificates are removed or included, but on a National basis.
- Operational Safety Zones, or No Go Zones – areas of operation adjacent to electrical assets should be Nationally Consistent. Currently EnergySafe Victoria seem to have the highest standards of information and guidance.