

SUBMISSION TO NATIONAL REVIEW INTO MODEL OHS LAWS

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Part 1 – Personal Submission

Extract from the “INQUEST INTO THE DEATH OF JOEL EXNER. FILE 1122/2003”.

“I would also like to comment that in this case, one discerning issue that did surface is the disadvantaged position that some workers find themselves in. On the one hand they may well have concerns regarding safety issues and on the other those very workers will be the least able to exercise any power of objection as they may have concerns for their livelihood. I appreciate that unfair dismissal laws exist (and this issue may be particularly contentious at the moment with new Industrial Relations Laws being considered), however, the responsibility for providing a safe place of work, under the provisions of the Occupational Health and Safety Act is clearly the responsibility of the employer. In this regard I must agree with the submissions of Mr. Aguis that **a culture of providing a safe working environment needs to be instilled in every industry and in every person working within that industry, whether employee, employer or sub-contractor.** Such a culture should not be conditional nor should there be any fear of incrimination”

Magistrate Milovanovich.
NSW Deputy State Coroner.
Westmead. 29th July, 2005.

To Whom It May Concern,

I am a safety manager employed by a large multi national corporation and have had substantial exposures to workplaces in NSW, Victoria, South Australia, Western Australia as a consultant in the safety industry. This experience gained as a consultant and as a safety practitioner in addition to the academic training I have received as a post graduate student, are the justification for the recommendations within the attached question and answer sheet.

Background

The genesis of this submission lies in the creation of a consultancy in 2004. To be effective we had to develop systems to address the need to effectively manage workplace safety in order to compete and in order to provide ease of delivery. As the co-developers of significant proprietary intellectual property that has been adopted within factories and businesses throughout Australia and New Zealand, we have had the pleasure of witnessing the positive impacts upon safety culture and awareness in many businesses that such systems have produced. The resultant improvements have been appropriate and to the satisfaction of regulatory authorities across all borders within the Commonwealth of Australia. In 2006 I commenced academic training and branched into a safety manager position in order to satisfy myself that the theory could be turned into effective practice within a substantial workplace.

Having now been on both sides of the safety fence, I am well placed to contribute to the panel in a practical sense on the needs and challenges that apply to businesses of all sizes and industry groupings. I have consulted with them and have worked as one of them. I have heard and understood the range of barriers that exist to achieving ideal safety results. Some of these barriers lie with resources, or lack of them, some with attitudes, some with culture, some with leadership, some with business integrity, some with luck. Every employer at some stage or another, no matter how motivated, has reported the frustration of trying to make safety a reality by design, particularly those trying to operate across state and territory borders. This is one of the problems standardisation of safety laws will address.

BEHAVIOUR BASED SAFETY

The results of the application of the theoretical knowledge gained through tertiary study are a testament to the effectiveness and the philosophy of Behaviour Based Safety (BBS), a concept

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espoused most notably by Kruse (1997). That BBS can be effective is beyond dispute. Unions do tend to look at BBS and contend, perhaps naively, that this is a blame shifting exercise. As a consultant and as a safety practitioner in a company that has used BBS to achieve significant safety gains, it is my contention that, as people become more comfortable and skilled at consultation, blame shifting soon disappears. Fixing the problems by cooperative endeavour becomes the priority. BBS calls for responsibility sharing, and not responsibility-shifting. For BBS to be effective, each stakeholder must be fully resourced and involved; and striving to optimise safety through consultation, observation, teamwork and feedback.

Having seen BBS work well in more than one company, it is my recommendation that experts in this field be asked their opinion about how best the principles of BBS can be incorporated into safety law to achieve an increase in safety performance. This is not something I believe will be achieved by lawyers or politicians because there will be no black and white issues in many cases. There will be more than one path to an improved or optimal result and that path cannot be anticipated or dictated by legislators because every business and culture is unique. What can be set are performance expectations.

Safety Needs Culture and Attitude Change and To Be Bottom Driven

With BBS the emphasis is on changing behaviour, attitudes and culture; also ensuring the employer is well informed and is accountable for actions and inactions. Within the workplace, each stakeholder needs to willingly accept and understand the responsibilities that come with earning a paycheque. The objective is a culture and system that is no longer top heavy or top driven and where decision-making can be made or shifted to any level that is appropriate.

Safety needs to be bottom driven by employees working confidently and without fear of recrimination to be truly effective. This involves trust on both sides. I have noticed that employers that work this way have had little to fear from their employees, and that the safety gains are far more rapid and sustained when the shop floor takes control. Much of the impetus will be as a result of, and influenced by, those that any safety shortcoming would affect, so concerns raised are invariably genuine. That this is an effective approach is supported by both research and statistics. The rapidly decreasing injury numbers at my employer support the effectiveness this approach can have; as do the rapidly decreasing financial costs normally paid in workers compensation premium. These sums are set aside to cover ongoing claims, for example, and the massive reduction in costs associated with the reduced need to replace injured workers is a significant financial reward.

Hundreds Are Killed Each Year

Whilst Australia is a relatively safe place to work by world standards, the fact remains that there is an unacceptable number of persons who contract work induced sicknesses, psychological damage or are killed or injured in the process of earning a living. Literally hundreds of persons die each year from work induced causes including vehicle accidents, crushing, electrocution, falls, exposure to carcinogens, inhalation of asbestos fibres, or through workplace violence and suicide. This last one is particularly tragic and overlooked; yet many persons, including self-employed farmers, kill themselves in despair as a way out of debt, or as a response to overwhelming workplace pressure and sometimes in an effort to provide for their family.

In such cases it must be argued that remedies, including financial assistance and advice could be considered a part of ensuring a duty of care. The examples of dominant or new players in the market acting to exert undue and unfair competitive pressure on incumbent players often results in such situations. This has been particularly evident in the transport and dairy industries and the community has suffered as a consequence. That many of these untimely deaths could have been avoided by a compassionate government or through an examination of predatory business practices

is obvious. Why does this relate to safety law? Simply, because these deaths occur as a result of corporations failing to assess, or have regard for, the consequences to health, and safety, of their actions.

Escaping Accountability and Prosecution

That the existing and repealed prescriptive laws throughout Australia have failed is evidenced by the ability of corporations and directors, such as those of the various James Hardie Enterprises to escape personal accountability for some appalling and morally bankrupt decision-making. These persons have escaped prosecution, and profited at the loss or damage to hundreds and perhaps thousands of the lives of their employees and their customers. Performance based legislation if enforced, would have demanded the directors and duty holders ensure that asbestos, like any other product, be safe for use, *even if not specifically mentioned as a hazard in the legislation*; also that the employer provide a safe workplace and systems of work. With workers standing in piles of asbestos on a daily basis, it is little wonder Bernie Banton, like 134 other of the 137 he worked with, is now prematurely dead.

Having regard to the existing state of knowledge (knowledge of the dangers of asbestos existed as far ago as the times of Pliny the Elder two thousand years ago) of the dangers of their product, it is almost certain James Hardie would have acted differently if they were operating under a prescriptive legislation that held each duty holder responsible for their actions and inactions. The loophole of not having a specific requirement to properly manage the risks associated with what was not generally known about asbestos would have been closed. These dangers, as shown in the subsequent inquiries and commissions, were fully known by the employer who did little to protect their employees.

With literally thousands of new compounds and tools invented every year, the onus has to be on the supplier and the employer to ensure the safety of the product before it is used or supplied.

Other Examples

Other examples exist within the transport and healthcare industries. Each persist with practices and substances that risk the health and safety of their employees. Contractors pursue personal and company profit; or to meet budget and service delivery requirements at the risk of the health and safety of their employees, and those they come in contact with. These still stand as low points in Australian business practice. The need to enact safety law designed to act as a protection and deterrent against such future exploitation is evident; the many preventable tragic deaths in both industries are powerful proof the existing system is failing, and a further incentive to build individual accountability into the legislation.

Hospitals and Fire Grounds Are Workplaces Too

Misadventure in hospitals in Australia also causes many premature deaths. It is a fact that these deaths all occur in a workplace. None of these events should escape potential scrutiny since all of the outcomes will at least be partly a result of a decision made and a course of action decided upon by an employer; also the allocation of expertise and resources, or persons working in such a way that people and their safety is jeopardised.

Brent James (*Executive Director of Intermountain Health Care in Salt Lake City, Utah*) lists six major killers of patients in hospitals and it would be wise to consider his opinion as they are appropriate to hospitals everywhere. "Top of the list is adverse drug events, drug reactions. Second

are hospital-acquired infections. Third is pressure sores. Fourth is something called venous thromboembolism, when blood in the body spontaneously clots and can cause damage when it blocks blood vessels. Fifth on the list are patient falls and injuries, usually associated with the use of restraints, either physical restraint, tying a patient in a bed, or chemical restraints where you sedate them. Number six on my list is blood product transfusions, inappropriate blood product transfusions". These six killers can all be anticipated and prevented with appropriate action, in many cases.

Furthermore, as the recent enquiry into the fires in the Eyre Peninsula in South Australia in early 2005 show, "miscalculations and miscommunications" were made by both the CFS and their subordinates, some of whom were paid officers. All levels contributed to the tragedies. Should these people be exempt from scrutiny because they are doctors, or nurses, or Fire Fighting officers, or administrators, or volunteers? Should that require higher standards of them because the community does have an inherent trust in a group with their heroic status?

For many years the police and Road Transport Authorities in many states have been called to account by OHS prosecutors and legislation and yet there does not seem to have been the same examination of hospital and fire fighting practices. In emergency situations the consequences can be far greater in terms of impact and severity. This sends a confusing message to the community if these organisations are treated differently.

Summary

I have approached this review as an opportunity to address the problem of providing workplaces and jobs that are safe enough for each wife, husband, father, mother, brother, sister and workmate to have confidence that their loved ones will return undamaged at the end of the day's work. This notion is the background to this submission; the desire for people to go to work without risking their health and safety; protected by effective safety law and practices that do not place differing expectations upon employers based on their industry, position, location or size of operation. *The vision is to have this occur through a universal change to employer and employee culture so that business and society sees profits and production at the cost of injured workers as being unacceptable and un-Australian.*

Australian employers have struggled to deal with the challenge and responsibility of providing a safe workplace. It isn't easy because at some time a risk will be taken and the consequences rely upon luck. In some businesses there remains the culture of relying on common sense, and workers watching out for their own safety, i.e. "every man for himself". In others there has been a full acceptance of responsibility and a serious attack on the safety problem. It is noticeable that many companies with the foresight and maturity to allocate proper and adequate resourcing to the issue of worker safety are also well represented in the list of Australia's most successful and profitable. This is not accidental. There is sufficient evidence to support the argument that enhanced safety frees up financial resources, and that safety management becomes a profit centre in itself, as a consequence of reduced compensation premiums and reduced reliance on legal defences.

Many businesses that operate across state and territory borders have the problem of dealing with multiple legislative requirements. This can reduce the effectiveness and competitiveness of such companies, **who set up their systems to meet the requirements of the toughest laws they have to deal with**, which are usually those contained in NSW, ACT or Victorian legislation. Since many employers have already come to this conclusion, **that some jurisdictions have more strict requirements**, it is reasonable to expect others to meet these same levels of safety compliance. To do otherwise is short sighted. These businesses recognise there is no argument that supports having a high standard in one state or territory and a lower standard in another, based on legislation, nor is any such argument supportable where the definition of "reasonable and practicable" exists in law.

However, since this appears beyond the grasp of some to comprehend, it is simpler to make the law the same everywhere.

Therefore, good centralised safety legislation will consolidate the many and valuable gains that have been made since performance-based legislation first became a part of the scene, and that is the basis for my strongest recommendation – ***that any change or consolidation to safety law must accept the very best from every jurisdiction and must not be watered down by self interested governments or industry groups; particularly where one state or territory or industry group have already adapted to a tougher regime than elsewhere and are dealing successfully with it.***

Ken Malcolm
10/7/08

Part 2 Q&A Issues Paper

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

There is a need for Federal law on OHS. This must also not be an excuse to water down solid OHS legislative gains in NSW, Victoria and ACT, in particular as to do so would be counter productive to the process of ensuring an effective OHS regime. The principles involved in safety law are universal and some state laws have addressed a different approach based in scholarly evidence and not in a desire to have the state be the expert. There is a common law principle that has existed for some time in most jurisdictions that places an expectation upon the employer to bring their business towards best practice and that should guide the development of safety. Some jurisdictions place a financial penalty upon employers who gain a competitive advantage by not meeting expected safety standards within the industry or within society at large. Unequivocally, this law should be the product of involvement of all tiers of the community and not just as a framework decided upon by industry representatives, lawyers and politicians. Some of the expectations, for example, placed upon small employers who are not well resourced have the potential to be onerous. Therefore the law also needs to account for the resourcing of small business to ensure duty of care is met for the benefit of society and the employee as much as for the employer. This must be considered a compulsory part of opening and operating a business in much the same way a business must consider fully the implications of bookkeeping, taxation, legal, environmental, Workers Compensation, HR and other duties and the reach should be similar to tax compliance.

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

The legislation, at least for the act, should be deliberately vague and not to be prescriptive. Effective law is predictably more effective where there is an expectation of performance rather than meeting a pre-indicated set of parameters that may fall short of what is possible or what is reasonable. A preamble that is along the lines of "Ensure the worker and the public is kept safe through a system based in anticipation and prevention rather than retribution and cure" is as much as the law should demand. It should not aim to prescribe the levels of safety, as these are moving targets as technology and wisdom increases. The onus must be on the employer to always provide evidence that all hazards have, and are being actively considered; also that all stakeholders have the opportunity to be heard and their views considered when it comes to matters affecting their health welfare and safety and that appropriate weight is placed on such views. As to how this is achieved; it is acceptable currently that this can be dealt with through regulation, codes of practice, standards and industry guidelines – most of which have opportunities for all to contribute and influence.

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

The title could include, a reference to the universal nature of its application, year and a reference to each affected party e.g. "The Australian Federal Occupational Health, Safety and Welfare Act for the protection of Employees, Contractors, and Others in the Workplace, 2009.

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

Yes. The objectives should be stated. One objective is that of zero harm in the workplace and that everything that comes after is created to achieve this goal, including through best practice in identifying, managing and reviewing controls on hazards – without limitation. The act could refer to process in other ways, such as promoting a safe and healthy workplace, safe systems of work, adequate resourcing of OHS by both the Government and the employer, cooperative endeavors involving employers, employees, advocate groups and the definitions relevant to the application of the law.

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

Yes. Without limitation. The principles should be that safety is a fundamental part and primary consideration of doing business of equal or greater importance to taxation and environmental management. If the company cannot afford to have the employee work safely then it cannot be in business. The moral imperative is that the employer shall not derive capital growth or profits at the

expense of the safety of people. It would also be a useful thing to include a timeline for evaluation of the effectiveness of legislation. Large corporations set aggressive targets to reduce injury occurrence; it is not unreasonable for the Federal Government to treat legislation similarly.

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

Special consideration and resourcing from the Government could be provided to services such as Defence, Civil Defence, Fire, Ambulance, Police, Coast Guard, Fisheries/Customs and other organizations that regularly require employees and/or volunteers to put themselves in harms way for a community good. These should have additional resourcing to ensure an enhanced duty of care is provided in these circumstances.

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?

No. In order to ensure there is equality under law, the expectation on all employers, small or otherwise should be identical to that of another regardless of location. The expectations industry to industry must be the employers are required to ensure duty of care through actions that are reasonable and practicable according to criteria established in case law. Costs involved in ensuring this duty of care should be considered as part of necessary capital investment, no different to buying plant or paying wages. The Government may consider rebating this cost as an incentive, this would seem to be a good investment. Stipulating differing performance expectations industry-to-industry and state-to-state is not something that promotes equality or even equity under law.

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 expectation that a legislative panel can anticipate industry specific safety criteria and hazards is unreasonable. The system where industry itself produces material in order for industry members to meet their general legislative requirements is more appropriate; otherwise the primary legislative document becomes too cumbersome.

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

The expectations for protections in the workplace must ensure a worker employed in one state does not receive inferior or differing treatment to someone in a different jurisdiction based on geography or industry only. This is an inequitable treatment of employees against both actual and potential hazards and encourages employers to provide differing standards of care. Where a maximum fine of \$25,000 applies in the NT, a fine for the same offence attracts potential jail terms and multi million dollar fines elsewhere, even though the companies are similarly resourced or the same employer. The employers in such states can afford to risk manage safety, since there is no personal accountability, so rather than be encouraged to eliminate the hazards to the extent reasonable and practicable, they can weigh up cost of making the workplace safe against cost of fine. The employer can disregard the consequences beyond payment of a token fine if they take the route of non-compliance.

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

It is probably simpler to include the concept of those affected by the employer and the work performed by that employer. This would therefore cover conduct of employees off site, or those performing work on behalf of the employer. The concept developed within the transport industry and the chain of command has been effective at changing industry behaviour because of the risks of having drivers working unregulated. The effects this has on the safety of the general public are shifted off site, yet are within the sphere of influence of both the supplier and the consumer in addition to the transport company. The legislation should cover such events as spills, explosion, fire, manufacturing defect, engineering or structural design or building faults and also health concerns (such as food poisoning or product contamination as a start) and behavioural issues relating to the conduct of employer and employee such as bullying, harassment or vilification..

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

Yes. This should include the requirement to enable an employer to meet their duty of care. The public must cooperate in many cases to reduce the risks to an employee. By cooperating with any measure provided in the interests of safety, they will not increase the risk to themselves or others as a consequence of their own action or inaction. An example is to ensure they have formal permission to be on that work site in order for the employer to have the best opportunity to meet their duty of care – and to receive a site induction for controlled sites without public access. Visiting a supermarket could also be conditional on cooperating with traffic management or adhering to hygiene standards. Driving through road works could also be similarly controlled so that a measure of control can be exerted by that workgroup rather than relying on police presence.

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?

Yes. There is no reason any change in workplace arrangements should do anything other than enhance safety. In practical terms there is the temptation to place casual or temporary or similarly vulnerable employees in positions that offer more risks or are more unpleasant without proper training and induction. There should be a more inclusive arrangement to ensure the views of casual, contract, literacy or language challenged or temporary workers have similar rights to representation and consultation to those who are permanent employees and who are treated differently because of their permanent status. Perhaps there should be casual worker representative groups created.

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 requirement to proactively seek information about hazards in the workplace under reasonable and practicable application of Due Diligence and Duty of Care should cover this. To treat new and/or emerging hazards as if they are a special category to other hazards encourages the route of “wait and see” rather than active investigation. Any new hazard, particularly those with little existing information about them, should be rigorously inspected and evaluated prior to implementation or introduction. A good example is the recent identification of carbon fibres as a potential risk to health in the manner of asbestos.

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

Definitions, such as responsible person, risk, hazard, responsibility, reasonable and practicable and so on need consistency of understanding across jurisdictions. The inclusion of a definition section is appropriate.

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

The need to include the owners of premises in the mix is vital as the landlord/tenant arrangement can be used to effectively deny safe working environment. Arguing over who does what can deny duty of care. For example, the landlord must ensure the premises are safe and the tenant must ensure the premises are safe to the extent they assume control. Arguing over who should supply fire extinguishers and such like is counter productive and negates the concept the notion of duty of care. If the landlord has a premise with inherent safety issues (building integrity, vermin etc) then they must bring that under control either through the tenant or by doing it themselves.

The tenant controls plant, site traffic and so on except in shared tenancies where the landlord becomes proactive in delivering duty of care. This may mean facilitating solutions that may not necessarily be theirs to fund exclusively but for which they have enduring responsibility for maintaining a minimum standard. This could be handled via BCA (Building Codes of Australia). This would need some work to achieve the principles of ensuring safety in areas under their control or partial control.

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

Yes. It should not aim to be definitive or prescriptive and should be general. This should be in the nature of “You have control unless you can prove you don’t and even then it may be adjudicated you have it anyway” This causes each entity to examine closely all of their systems to deliver Due

Diligence and Duty of care. A title, status, ownership or management of premises, or employee, or process, or otherwise, if it can be proved I can exercise some degree of influence over the conduct of the work, or the environment it is carried out within, then I have a duty of care to consider the effects of my actions or inactions on the safety of those I owe the duty of care to.

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 defenses?

Explained in Q16. Why do we need to include the term “duty holder”? This further complicates and allows for grey areas. Responsible person includes the employer, directors, managers, supervisors and others in control or partial control and is a stronger and more useful descriptor.

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?

Duties can be delegated but not responsibility. The CEO, for example, must not be allowed to delegate responsibility to a subordinate or other and expect exoneration if the person who the tasks are delegated to fails to deliver the duty of care. This area includes a potential conflict of interest and could potentially encourage the responsible person to seek those who are incompetent, insufficient in experience or training or unwilling to devote sufficient time, energy and other resources to the problem. While it is unreasonable to expect any one person to manage or control all aspects of safety in many cases, the duty is to ensure the persons they delegate to have a reasonable expectation of fulfilling the duty of care requirements in such a way they receive adequate priority, resourcing and attention. The “duty holder” or “responsible person” must also understand that this in no way will absolve them in the event of misadventure and they will require evidence of their Due Diligence in order to mount a defence. There is sufficient evidence to show that the degree of senior management regard to safety is the greatest predictor of OHS success.

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. Either safety is delivered or it is not. The expectation on all with the power to influence or control to therefore do all that is reasonable and practicable demands performance and diligence from all. Therefore where there are multiple duty holders, the expectation is for that group to come to an arrangement to ensure the duty of care is met.

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

Yes and No. All must be considered whilst on premises and not just there to work.

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?

There is no evidence to support any notion that contractors or others employing or subcontracting persons as a labour hire provider or otherwise give greater consideration to the safety of themselves or others. It would appear it indeed can be more difficult as they have limited abilities to inspect the workplace or monitor safety. In these cases it is incumbent upon that group of employers to withdraw the labour so long as they do not have the ability to monitor the workplace. It is a struggle for any reasonable person to understand why a duty of care related to safety should lessen or be varied because a person is not an employee. All persons on premises controlled by an employer/duty holder should only be operating there under the auspices of a properly constituted and resourced safety management system. This includes students, apprentices and any other person with legal business. It is also advisable to include unauthorised visitors inasmuch as things which become unsafe for them are clearly going to be unsafe for authorised visitors, such as unfenced ponds, electrical hazards etc. This is with the possible exception of things related to passive security devices which are proportionate (fences, barbed wire, guard dogs) and not including over zealous security personnel.

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

Yes. Make it safe for everyone.

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

To the extent they have control or partial control, and have a reasonable and practicable ability (according to the legal definition) to anticipate and manage hazards.

Q24. To whom should these duties be owed?

The duty is owed to all. If it is unsafe for one, then it is unsafe for all. Those hazards or circumstances that damage one can damage another. An example is where heavy lifting or menial tasks are delegated to men, who whilst capable, become susceptible to wear and tear injuries over the long term. The problem is in the load and not the stature or physical conditioning.

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

In order to be most effective, the act must require workers to be accountable for acts and omissions that have an effect on the health and safety of themselves and others. There must be a duty to cooperate, to be active in the consultation process, and to not act in manner that complicates or defeats the employer's attempts to comply. The employee must be required to also report injuries, hazards and other incidents or near misses and to cooperate with investigations.

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?

Visitors need to meet the same duty to cooperate and to not place themselves or others at risk or to increase that risk by acts or omissions. They must also cooperate and not prevent attempts by the company to comply with their statutory obligation, subject to a refusal right where there is genuine belief that to do so would increase the risk to themselves and others. They must also report injuries, hazards and other incidents or near misses and to cooperate with investigations.

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

Yes. All responsible roles have the inherent requirement to ensure the safety of those under their control or supervision under their general duty of care so this already exists. Legislation may require a person or persons who have additional general responsibilities, such as workers compensation and return to work programmes to be identified on the OHS Policy Statement, therefore making this person's identity available for public display. This person should be conferred powers that allow them to make decisions and/or delegate tasks/resources in order for the employer and others to meet the duty of care and to act as an advisor/researcher.

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

The liability should extend to the extent that they recklessly or wilfully act, or fail to act, in a manner that increases risk or fails to adequately manage safety. A person who knowingly continues to "cover" for an employer by accepting less than adequate attention or resourcing of safety is acting in a way that defeats the objectives of the act. They are protected by the aspect of law that mandates they not be persecuted for bringing safety matters to the table. They therefore must be forceful in their representations to the employer. (Case law already supports this concept)

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

The duty holder must adequately inspect and supervise the performance of the appointed person, either by personal inspection or through government or privately supplied auditors who will be inspecting to an accepted, reasonable and practicable standard, such as ISO 18001 or AS 4801/AS4804 or at the very least, Safety Map. The appointed person should never be forced to assume the responsibilities of another duty holder.

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

Yes. Specifically to ensure there are reasonable attempts at compliance by tenants, contractors and others and an incentive to work cooperatively to deliver duty of care and evidence of Due Diligence. Whether the organisation is for profit or non-profit, those working in or for them require adequate and consistent protection whichever workplace they operate in, and the fact that this is a body corporate or non-profit should not remove duties to protect health safety and welfare.

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?

If they do, then it is clear this group is either not reading the relevant acts or not heeding it or not understanding how the act should be applied. Even engineers, maintenance workers and architects are largely uncertain about the extent of their responsibilities, often relying on “common sense” or a standard as a way of managing risk and seek to apportion blame when people do not handle risks inherent in the design, safely.

For example – a business needs an access to food oil storage tanks that complies with a standard. They erect a ladder that complies with the standard. The problem is the compliant ladder is covered with atmospheric oil and becomes dangerously slippery because both the rungs and the strings are covered with a lubricant. There is a significant fall from the ladder to the ground – enough to be fatal in most cases. The ladder complies but is extremely dangerous to use. The correct application of the standard is to create the access way within the standard that creates the least risk – such as stairs at 45 degrees angle or entry from outside the room at the height that needs to be accessed. This type of problem is what a compliance mentality and prescriptive legislation encourages – cheap and poorly thought out “solutions” that rely on worker behaviour rather than in them being inherently safe. WorkSafe Victoria recognises this problem and has invented an effective mnemonic “MRISC” which stands for “Maintenance, Repair, Installation, Service and Cleaning”. This is a good way to remind the designer/commissioner that these things must be considered in the process of plant and building design.

Most of the safety taught to this group of people is done as part of an apprenticeship or at some other early study stage and for many, this occurred in the distant past when the culture was much different. It is also apparent they can become dismissive of these problems because they are remote from the problem and do not interact with the hazards.

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?

It is self evident that people in control are people with the greatest responsibility and have a duty of care. The duties should be no different, however there may exist a mitigation if they have no ability to approve change or to purchase or commission solutions to problems. Any lessening of responsibility endangers people in unfamiliar surroundings or circumstances. While there are dangers in complacency and within the familiar, there are also dangers in the unfamiliar. These duties again should apply to all, as an employer conducting their business should harm no one. This includes security arrangements where staff applies physical force or damage or are themselves injured as a consequence of the behaviour of persons affected by drugs or alcohol or behavioural issues. The safety authority regardless of whether or not a criminal investigation related to the incident is carried out, should also investigate such injuries or incidents, as they are work related and often as a consequence of employees magnifying risk by allowing the supply of goods and services where there is reasonable likelihood of violent or other consequences (binge drinking).

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities that 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?

Yes. This issue relates to proper maintenance, servicing, repair, cleaning, installation, decommissioning, disposal and operation of a machine. It is not acceptable to install machinery which fails the test of safety when death, maiming or other injury is a likely consequence of uncontrolled interaction i.e. failure to properly guard or de-energise. Training people to deal with unsafe machinery is also unacceptable as supervisions is often problematic and also there is the potential for young or inexperienced persons to be left in charge of such machines. Where there are means available to make it safe, they must be done. The vendor and the buyer must also ensure that each has made the machine fit and safe for use.

This is one area a prescriptive measure must be introduced and strictly enforced and with the severest of penalties for the failure of this control. It is too easy currently for each group to blame the other and too hard to gain a conviction when each fails a duty of care. Lives are at stake.

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 obligation should be to supply and install equipment that is safe to use. If the design is unsatisfactory then that is not an excuse to install regardless. All should be able to demonstrate their duty of care and if they wish to supply new or used equipment, then they must price according to what it costs to make that machinery safe. For second hand equipment, the supplier/manufacturer has the obligation to consult to ensure the safety requirements are met and the purchaser must also be active in the process. The Victorian model of MRISC (Manufacture, Repair, Installation, Service, Cleaning) is appropriate and well thought out, however misses the design element and consultants can be used to ensure design faults are rectified. The paradox is that each of the parties concerned in the question would not hesitate to sue each other for non-payment, and therefore are happy to use and abide by those laws, yet would seek to push the onus for safety onto a third party and not abide by safety laws when it comes to making machinery they supply, safe. They must consider the cost of making the machine the cost of doing business. If they want to sell, export or import into Australia they must abide by Australian safety law. (Possible international treaty similar to rights of the child, labour, slavery, forced prostitution etc?)

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)?

Yes. Safety is not negotiable, nor should it be extinguished in a transaction. Cheapening the supply of plant and machinery by removing inherent protections required of new equipment is a short cut at the expense of worker safety. People supplying such items gratis or on the cheap are supplying people who may have little regard for the safety of the machinery. The supplier must always warrant its safety; therefore free machinery will be eliminated because of the cost of ensuring its safety – that has to be a positive. It is questionable that employers requiring such assistance are long-term prospects and unlikely to have a sound business plan or a business plan that values the worker, the environment and the community.

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

Enforcement and example for transgressors is vital. There are substantial personal rewards attached to being a business owner/manager and these rewards come with responsibilities. These rewards must not be attained at the expense of worker safety. The act must also not place disadvantage on those who meet or exceed their responsibilities by allowing their competitors to trade whilst not making similar considerations.

Q37/Q38. Should a test of “reasonably practicable” be included in the model OHS Act? If not, what alternative standard should be included?

Yes. The definition supplied WorkSafe Vic is instructive, easily understood and appropriate. The references to case law add weight and clarity to the definition and substantial employers have no real problem with the concepts. Standardising law will make it easier for these companies, even if the law is tougher, because it is certainty they want.

Refer http://www.ohsrep.org.au/storage/documents/position_reasonably_prac_web.pdf

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

The Victorian model is appropriate. The level of detail is sufficient and illustrative.

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

Yes

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?

Yes. The concept that inferior safety management is a reward in terms of cost savings is not borne out within academic safety circles or research and in the experiences of large employers who have vigorously attacked safety in a meaningful way. Since this perception appears to still have support at the smaller end of the scale, a significant education and information campaign coupled with the stricter enforcement of well thought out strategies, such as fining companies three times the

competitive advantage they receive from not producing a safety system to the required degree, will provide a bigger motivation to recalcitrant employers than just plain worker safety.

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

No leaning either way. In practical terms, the focus on the definitions of hazard versus risk is insignificant. The outcomes based approach renders such terms almost meaningless. You either made something or a situation safe or you did not. How you get there should be documented in order to demonstrate Due Diligence and to prove duty of care. The extent that is accurate will be determined by the courts and they also will determine if what is done is a mitigating factor. Focussing on the detail again provides fertile ground for obfuscation and for lawyers. More important is the ability for an inspector to assess and ask the questions "did you provide a safe system to deal with a situation, event or behaviour" and "have you reviewed the effectiveness of any control and have you dealt with it an appropriate level within the hierarchy and in consultation with those affected". This is more important to evaluate – not whether something is a hazard or a risk.

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?

Yes. This encourages better understanding of process. The experience in the safety consultancy business is there are many people who can tell you what to do but not many tell you how. The example supplied below describes extent of reasonable practicable.

http://www.ohsrep.org.au/storage/documents/position_reasonably_prac_web.pdf The hierarchy of controls and the process of Identify, Assess, Control and Review are unlikely to be improved upon so would seem a logical inclusion as they are effective templates.

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

Yes. They are simple and not over detailed. If there is a focus on outcome then these things could be used to guide a process. Although this detail usually appears in a regulation, the act is always stronger so if they state you must identify, assess, control and review and you must deal with hazards or risks either by elimination or dealing with them at the highest level of the hierarchy of controls that is reasonable and practicable, then you have a process to guide every aspect of every safety problem. However you do not wish to limit the inventiveness of those who find other ways to effectively deal with safety issues by sending them down a path that is not able to deliver results as effectively in terms of the use of time, resources or research and so prescriptive solutions, measures or techniques to meet these obligations should not appear.

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

Requirements to consult and to inform those affected by the conduct of that business, particularly in relation to exposure to all varieties of hazard is necessary because it delivers the best opportunity for ideal safety. Often it is not whether a solution is good that makes the difference, it is whether the workforce buys into the process or not.

Where there is interaction, the methods of control need to be discussed and agreed to, with the duty holder to have the final say, with the understanding the employee may reasonably refuse to work with a hazard (while not being penalised for so refusing pending independent evaluation of the risk or hazard by a third party), and the employer bearing the full consequences of ignoring advice or agreement in a manner consistent with strict liability enforcement. This means an employer is less likely to force people into dangerous or risky practice and the employee, bound by the provisions to cooperate, may still ask an umpire (WorkCover Inspector, Union Rep etc) for an independent assessment or advice with some confidence.

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

The opportunity should be available to all affected parties to discuss matters that affect their health and safety. Obvious current gaps include labour hire, temporary or casual workers, inexperienced or young workers and contractors where they may receive little instruction or training specific to a site.

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

Ideally yes. Practically no. The degree of consultation should meet the needs of all interested parties. This should meet the requirements of informed* parties (*informed by training, experience or access to all available information relevant to the issues being discussed and in proportion to the seriousness, urgency or severity of the situation) involved in the process. Some may wish for more or less detail. So long as the objectives of all parties and the qualitative end result of the correct degree of enhanced safety is achieved then this can be deemed to satisfy the provisions of consultations.

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.

These can all be addressed by ensuring lodgement of agreed basic documentation with a major duty holder. This documentation can be derived from a training programme such as that supplied by WorkSafe In Business P/L and which is called VAU training. This type of programme roots out language, literacy and comprehension difficulties

There are few other programmes that can deliver this process via a third party or supply the information and systems to supply consultation at every level that the employers themselves can deliver. However this is an “available state of knowledge”. People most at risk are those who are in remote workplaces, precarious employment, sub contracting and employed by entities that may not understand the significance of safety law, or if they do, are not sufficiently disturbed by the consequences of ignoring it. These people may receive less than adequate supervision and training in many cases. Whether this should happen or not should not even be a topic for discussion, it should. The delivery, methods, timing, frequency and content are what should be canvassed and minimum standards agreed upon.

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

Yes. Not universally, as the use and practicality of small employers – say 1-20 – is moot. Certainly there should be a choice available for employees to choose the method of safety review, implementation and evaluation, including the appointment of HSR and having a health and safety committee. It should not however be mandatory if the required result is being achieved to the satisfaction of the employees utilising a different method.

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?

There could be a requirement for documentation on a regular basis that provides evidence of activity. This can include copies of minutes, for example, or hazard registers and risk assessments indicating HSR or employee sign off. The employer should be required to resource appropriately and to respond to matters relating to safety explaining any reasons for not following a recommendation.

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

HSC should be set up in response to request by a majority of employees. This should be in circumstances that are neither dictated, nor vetoed by other stakeholders, including Employers, Unions, Employees and others. HSR should also be elected by discrete worker groups to represent them if that group requests such representation. If the group believes their interests are being adequately served, then they should not be compelled to elect a person simply because they are part of a group, particularly if the issue of competence is considered.

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

There are arguments for and against allowing all employees to vote. Many companies have agreements with employee representative groups that restrict such elections and representation to permanent employees. This ignores many who have tenure and status with legal comparability to permanence, yet are casual or temporary employees or contractors, for example. Is it acceptable to have this group unrepresented or with different weight attached to their views or specific

requirements? The answer is no if you want buy-in from this group. One solution would be to allow a designated person to specifically represent the interests and concerns of that group only on a committee.

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

The powers and functions should be to vigorously act on behalf and in the interests of their designated work group. It should also be to represent the safety committee as a body that acts neither in the interest of the employer or the employee, but in the interests of safety. The numerical weighting should ensure that this could be achieved, as the employee representatives by definition must dominate the numbers in a safety committee. What must be identified is the potential for a conflict of interest between duties as an employee and those of an HSR. Some HSR will not actively participate in a solution because they believe their role is limited to issuing a PIN or reporting a matter.

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

Anecdotally, the structure and function of a committee best lies in evaluating, reviewing or forming policy rather than to examine issues that occur on a daily basis. Committees that are relied upon to fix problems are acting in the stead of a manager or supervisor and the dangers of this course of action include a lack of timely intervention on safety matters and a an abrogation of responsibility by the supervisor/manager/employer.

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

Sufficient to understand their duty of care, their obligations as an HSR, the basic OHS laws, the role of consultation, an understanding of risk management and the hierarchy of controls. They must also understand their duties and obligations as an employee, particularly those in respect of adequately dealing with hazards and risks as an individual employee and the need for them to understand that contributing to the solutions as an employee for matters within their power to affect or influence outweigh those of being an HSR.

Q56. Are there alternative mechanisms that should be considered?

A non-representative group could be convened where there is a lack of capacity to understand or to contribute. This could include intellectually handicapped persons, students, apprentices or others with similar incapacity. This group could be represented by a Union, WorkCover representative, Employee Advocate (church or other similar group), regulatory authority (inspector) or volunteer.

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

Once again a performance based strategy for consultation could be developed, however the goal is to achieve effective consultation and the manner that this is achieved should not be unduly directed or influenced by the legislation as this places too much artificial restraint on those wishing to respond to each business's unique circumstances and requirements. Beyond ensuring it is reasonable and practical, the system of consultation will meet the requirements of the law if it effectively meets the requirements of employee and employer. It may even be ineffective initially as participants go through a learning phase, however intent is ok in this circumstance. Systems that do not provide objective proof of progression or effectiveness will fail the test, so the employer needs to be active.

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

Casual, apprenticed or inexperienced workers, contractors and visitors do not currently have their needs fully met. It is noticeable that HSR can also be gender-dominated, gender dominant or subject to other characteristic such as seniority, status, education or experience. In these cases self interest can also become problematic. The potential for inappropriate influence from Union and other organisations has been evident in the past and agendas other than safety can be the focus.

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

Unequivocally YES. It is arguable the right could exist for any person to enter and intervene where there is imminent risk of serious injury or harm. For inspectors, union and other officers of the crown

or employee representative group, this right should exist. Should others be designated or have rights such as a parent of a minor or inexperienced worker or other person with standing e.g. G.P., teacher, lawyer, religious minister or Member of Parliament? In the case of non-related but interested persons, could this be incorporated as part of their training? Inspection is generally an under-resourced area and many business owners would never currently have contact with a Worksafe inspector. To rely upon worker complaint or availability of inspectors is therefore futile if there is an expectation that OHS is to be handled by prevention rather than prosecution after the fact. As a parent of a son who was previously working in a small business in South Australia, I was concerned at the risks and shortcuts taken and it appears that some these risks have subsequently resulted in a serious incident. At the time I was unsure how to respond and concerned at the effects an intervention by myself would have on my son's employment. This was as a safety consultant and I was unsure! That confirms the assertion that factors of youth, educational ability, unlawful or unreasonable management practices, fear and language comprehension are crucial to providing a good end result.

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

Responding to a complaint, an incident or any time where there is a reasonable suspicion of a breach of the Act or where there is imminent danger of harm to persons or property should not necessarily rely on training and powers could be conferred to citizens in ways similar to citizen's arrest or "Good Samaritan". However if a person is routinely engaged in this part of OHS enforcement, it is advisable to have a reasonable level of competence, training and experience within the workforce. Personal characteristics, such as judgement, discretion, fairness and firmness would appear to be more important than academic learning, although, of course, this is also desirable. This person must have the ability to influence, as the test will be what happens when the inspector is not present.

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

Powers should be confined to those that were being acted upon under the reasonable suspicion random inspection or response to complaint reasons for entry and/or inspection. Additional breaches detected should be dealt with, but not necessarily by that officer i.e. mandatory reporting to the department who will then act according to normal protocols.

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

The strict enforcement of the duty of care provisions will ensure the duty holders have motivation to comply with suggestions or requests made on behalf or in the interests of employee safety and compliance to the legislation.. The duty holder still must have the option of refusing a course of action recommended by the employee, inspector etc because of a differing opinion of reasonable and practicable measures or a belief the issue is being handled appropriately. They must however understand that their interpretation may be tested in the event of an incident or further complaint to the authority.

Q64. When should issue resolution procedures be activated?

As soon as is practicably possible, however much evidence suggests that many solutions are ineffective if they do not engage all stakeholders in the process. Therefore unless there are serious and imminent risks to health and safety, which can be dealt with by isolation or ceasing of a system of work pending a solution be reached, the process should involve consultation and time to discuss the problem and to consider available alternatives. As is currently the case in many jurisdictions, either side has the option of calling in an inspector for mediation purposes, such as when there are potentially vexatious or frivolous requests made or the employer is recalcitrant or requiring employees to continue work whilst at risk.

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?

Regulations or code of practice

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

By containing a balance that deters vexatious or nuisance action, whilst ensuring the employer understands that complaints and disputes must be taken seriously. The act must also include the requirement that there is evidence kept of issue resolution processes and results and it must be a function of the inspector's powers in the first instance. It must also be understood the inspector must separate the issue of whether there has been an issue resolution process as distinct from whether the outcome is satisfactory. Therefore whether there has been an resolution procedure can be the province of the inspector with rights of appeal available in a more formal setting. The inspector's decision is to have weight and be enforceable as to ensuring issue resolution.

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. That the work is safe to the extent reasonable and practicable for the worker to perform should also be in the judgement of the worker, with the right to call in a workplace inspector for advice or guidance an available option. In the light of several deaths having this type of situation where one worker refuses a task and another performs it with fatal consequences, it is arguable that in most circumstances the fact that one worker refuses a task should mean that task is to be prohibited until the attendance by an inspector and the issues raised dealt with properly. Such a refusal must also not be considered grounds for discipline or adverse treatment of the worker or supporting personnel including supervisors or managers.

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. No limit should be placed except to the extent that risk and consequence play a part i.e. the decision is proportionate and appropriate considering the likelihood of occurrence and severity of consequence. Penalties or other remedies should apply to each side for failing to abide with an order to stop work or to properly demand it, or for doing so in a manner that violates the intent of such a requirement, which includes coercion by either side in order to gain a favourable outcome.

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. The worker must also remain available to carry out other duties that are appropriate to their skills, training or capacity. Sitting around 8 hours a day is inappropriate, however cleaning or maintenance duties may be appropriate as is attendance at the worksite as is reasonably required in order for other functions to be properly resourced including provisions for emergency, first aid etc. Refusal to abide by a reasonable request is certainly a reason to not pay and also grounds for discipline. Where there is an extended period of time required to fix a problem and the business has the potential to close or to be severely impacted, then the option should exist for other arrangements to be made including paid and unpaid leave, including, if necessary, the requirement to take annual leave.

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

Yes. Arbitration by a WorkCover inspector or a mutually agreed and acceptable and competent moderator in the first instance.

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

Specific reference to other legislation such as bullying, racial vilification, harassment, equal opportunity should be made. All with business on the premises or who may be affected by the conduct of an employee on company business should be accountable and protected in a proactive and well publicised process. The attitude shown by the employer in this instance will determine, to the greatest part, the success of a any programme to change culture.

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

Any person who has reasonable grounds to make a complaint can do so. Not only could this relate to actions taken against an individual employee, but is also moot as to how this could apply to

others in a workplace. For example, a person who is removed from a hotel bar; e.g. for reasons other than for being in violation of laws such as those relating to consumption of alcohol or behaviour, because of their colour, age (except being a minor), ethnicity, gender, sexual preference is being discriminated against within a work place. Should this person have the ability to complain of discrimination? Is this really that different to a school child being bullied or another person receiving such treatment in another workplace, such as an office. The duty of care is to treat equally and without discrimination. All persons with lawful business in the workplace or who may be affected by the actions of that employer are owed a duty of care, have the right not to be discriminated against, including for making a complaint about unsafe work practices.

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

Both. OHS law is criminal law and treatment of those who break it as criminals is an effective deterrent to many businesspersons who would otherwise choose to be less than duly diligent – regardless of good intentions to have a safe workplace. Violations of safety law are criminal acts in many countries and even emerging powers such as China are now treating the issue of worker safety more seriously and with criminal laws.

It is also an effective deterrent when the liberty, reputation, profits or capital gained as a consequence of enterprise are in jeopardy through deficient or illegal safety conduct. Civil law that comes into effect for righting civil wrongs through proof of conviction is a powerful tool in ensuring safety gains, particularly when severe injury or loss of life is involved. It is noticeable for many consultants that South Australia, for example, has a particularly unsatisfactory set of outcomes for workers hurt in the workplace and that employers do not place as much emphasis on compliance as in other states. There is no right to sue an employer for workplace injury or death. The consequences of such situations are devastating to family and workmates, who are often left without a breadwinner as well as a companion, father, mother etc. Where this occurs, it is reasonable to expect the right to sue for compensation and this should act as a spur to greater regard for safety and to be as effective in changing attitudes as it has been in Victoria, NSW and the ACT.

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?

The onus should be on the employer to demonstrate duty of care. Safety requires pro-activity and not a reaction to an adverse event. It is not unreasonable to expect actions to be documented to a known international standard, such as ISO 19001 or to AS 4801/4804 or to document actions to comply with electrical safety standards or chemical management or training to handle workplace hazards such as noise or manual handling in order to demonstrate proof. Safety needs safety issues to be anticipated, considered and dealt with prior to incident in order to prevent or minimise. A system that requires documentation also requires action to support the documentation and satisfies the twin objectives of proof and action.

Beyond reasonable doubt is too hard to prove, when it comes to someone's word against another. That is why the requirement to document is vital. This removes blame for the equation. Either a person has done something or they haven't and motive or intent is no longer the issue. Strict liability prosecution is appropriate when taking the consequences into regard. It is proportionate for employers to be offered opportunities to mitigate, through evidence of Due Diligence. It is also appropriate when human lives are involved.

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

Yes. To not do so is irresponsible.

Q76. What remedies should be available to the victims?

The employee needs the ability to seek representation, advice and independent assistance. The victim must be guaranteed privacy and the opportunity to seek compensation where the injury has long term and lasting effects, such as workplace health issues (e.g. asbestosis), death, dismemberment or lasting psychological injury that persist beyond the time or provisions of any workers compensation assistance. It is not acceptable to have a system where an employer can walk away from responsibility for actions that impact on a an entire lifetime, such as is the case in several jurisdictions. Consultants report employers relying upon "common sense" and the fact they

pay compensation levies as being sufficient consideration for workplace safety, so people who work in these diminished circumstances must not be denied the opportunity to seek appropriate redress if they lose a limb or gain a disease from practices that do not meet the test of reasonable and practicable or to the standard of their competitors.

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?

Yes. Two reasons. Cost and proximity to event. In many cases the ability to quickly deal with these issues based on resolution and not apportionment of blame is an effective strategy.

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

No. The requirement to provide evidence of a process is a normal part of business life, as is consultation, participation and the right to an advocate. The only exception could be in relation to resourcing of the process.

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

Of course. The ability to enforce its own legislation is a given. They should have powers to inspect, mediate, prosecute, instruct, advise (without prejudice), provide opinion, investigate and to mentor should be included. It is also advisable they have the ability to levy fines for certain strict liability offences without the need to go to court.

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

Yes

This serves two purposes. It holds the enforcement agency accountable to their stated intentions and their responsibilities and it also serves to provide notice and warning to others in the community.

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

Yes. These obviously assist in understanding. Anecdotal evidence suggest there are many who can tell you what you have to do, however there are many less who can tell you **HOW!** This is a source of frustration and it is useful to understand how a department is likely to enforce and interpret the legislation. The availability of interpretative documentation is also a source of confidence for small employers who are often not specialists in HR, particularly OHS.

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

The regulator should be empowered to consider an appeal, matters of dispute involving an inspector, such as over zealous enforcement. The application of subjective penalty measures, such as size of fine, imprisonment etc must not be allowed to be decided by the regulator or the inspector and should remain a function of the court system otherwise there is the potential to deny natural justice. The inspector should be free to enforce strict liability legislation.

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

Yes. Natural justice principles determine you should not be a judge in your own course. There will be the temptation to change interpretations or application of the law itself for reasons that would not stand up to scrutiny and fail the principles of reasoned justice. If the rules are deficient, then the enforcement agency can be part, but only part, of any process to enact change, however this could also indicate a lack of detachment as they should be enforcing and not making rules.

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

Inspectors should be appointed subject to training, experience, maturity, character, ethical standards and education. They should be accountable for their actions and inactions and the

decisions they make. Without regular scrutiny, there is a potential for corruption and/or abuse of power as a recent NSW Royal commission into the activities of the workplace inspection team showed, with particular reference to forklift licensing.

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

Yes. This should be the first option, unless the breach is of a strict liability or serious enough nature. The inspectors should see themselves more in a coaching role than a “parking inspector” role. The relationship that can develop between an effective inspector and a business is crucial to progress in many cases as the expert is a person able to advise on many OHS matters and to gauge whether progress is sufficient to demonstrate genuine efforts to comply with responsibilities.

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

Yes. The inspector is closer to the facts than the regulator in many cases, and notwithstanding the employer may attempt to take advantage of that relationship; the balance has to be between absolute impartial neutrality by the regulator and the inspector working to improve a safety result who may show lenience in order to fulfil the bigger picture. Often an inspector is in a better position to initially form an opinion about reasonable and practicable attempts to comply, for example. They should not be under pressure to adhere to artificially created standards of enforcement, such as periodical blitzes on items they normally ignore. Enforcement should be consistent, however as OHS is always a part of business, it is necessary to not be antagonistic or create ill will amongst the general community. Where “examples” are made, they should be easily understood and seen as part of “fair play”.

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. Everyone gets it wrong sometimes and if, in hindsight, an error is made, then more is gained from cancelling an instrument than by following an incorrect path for the wrong reasons – i.e. to be right no matter the cost or the effect upon the employer, employee or the relationship between the regulator and the business community.

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?

Independent assessment by a body consisting of a mix of employer, employee, community and legal representatives should produce assessments that fulfil the needs of the legislation. Certainly matters that are appealed for genuine reasons, including new information coming to light, perjury and malicious prosecution, should be able to be examined. Since these matters have the potential for damage to reputation to all involved parties; also the application of a criminal record, then these matters should have the same remedies available as other criminal law. The objective is not to secure a conviction, but to improve the safety result in the community. This can not be achieved through injustice.

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?

The powers could allow for the deputisation of suitably appropriate personnel to assist, without prejudice, the work of an inspector. These could include union representatives, HSR and employer representatives and safety experts, in disaster situations such as plane crashes, floods etc.

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

Yes. This makes sense. It is difficult to adequately resource enforcement if the need to prove beyond reasonable doubt always exists. The principles should allow for certain strict liability offences, such as failing to wear a seat belt on a forklift or failing to consult; however intent, recklessness, prior record and other factors should be weighed when considering penalty for other offences that are rather more subjective or the examination of “degree” is appropriate, such as failing a duty of care. Since many shortcuts are made by businesses to save money, it seems appropriate that gambling with worker safety on the basis of cost comes with financial penalty. The concept of cutting safety corners, as part of a strategy to gain competitive advantage, is one that

has to be demonstrably dangerous as an undertaking by a company and seen as anti-competitive. Personal attack under law is also a powerful disincentive to shortcuts. This is obvious in the regard given to safety law state to state. Those with the highest and most stringently enforced penalties tend to have a greater emphasis by the employer on setting up effective safety systems (anec. from 2500 plus visits to factories in SA, NSW, Vic, WA.)

Measures should include fines, publicity orders, imprisonment; confiscation, decommissioning or disabling of equipment. Allowing a business to operate when recklessly or indifferently risking employee's safety should attract similar penalties to insider trading, which has penalties including the loss of the right to act as a director.

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?

For ease of enforcement, escalation is automatic and statutory to take the discretionary aspect away from the inspector. Where discretion is to occur, it is at the escalated severity, rather than at the "first offence" category. Since escalation infers repeat offending then this consideration needs to be part of the act.

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

PINS are an extremely effective method of getting safety issues addressed with the involvement of the shop floor in both the reporting and remedy. Since a PIN generally includes a recommendation, the chances of control measures being adopted are magnified as they do not come from the management, or if they do, it is as a process of consultation since the PIN can only be lifted when the HSR is satisfied the provisions are met. They must be part of a new law. It is difficult to believe any employer would have an objection to this process as this is also a protective measure for them since the issues addressed usually involve problems that if ignored would have the potential to cause the employer to be at peril under safety law because most PINs can be expected to be dealing with real issues of danger and not technical compliance.

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

Yes. The experience and theory behind all safety is the need to consult with those people who are at most risk and those who best know the issue involved. A machine operator, for example, is most likely to be accurate in recommending solutions about the machine they use every day. Such recommendations should of course be tempered by the need to consult somewhat wider than is perhaps the scope of the average worker and their state of knowledge. A worker may want an interlock; the employer may be willing to replace the machine. Therefore solutions could involve outside consultation to discover best practice; also to resource research appropriately so as to open more opportunities for solutions. The objective is to have the best opportunity to remove any issues at the highest level of the hierarchy of controls.

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

The employer must respond to a PIN, but must not be compelled to accept or adopt any suggestion. This deters those seeking punitive or mischievous or vexatious application of PINs. Saying no should be ok or seeking to have a matter arbitrated must be an option however there must be a sting in the tail so that such PINs are not automatically disputed. This can be achieved by an understanding that by saying no they will need to accept they now need to prove that the duty of care has been met. If an incident occurs that would have been avoided or the severity lessened by the application of the remedy suggested, then the employer needs to understand this will be considered as part of any mitigation adjudication.

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

Yes. This should be tempered by "reasonable and practicable", with access to independent arbitration and the ability to dispute time frames. For example, requiring modifications for a piece of machinery could take some time depending upon availability of skilled personnel, engineers or supply of components.

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?

Since the PIN will almost always deal with a real issue, then the dispute is most likely to be about the method of dealing with the issue. A properly trained inspector should be able to provide timely dispute resolution, and, if agreed to by both parties, the involvement of an employee advocate group could also be engaged to hear the dispute where there may be financial cost to the company, particularly when it affects the viability of the company. Cost should not be a prevailing consideration when the risk to life and safety is real, apparent and imminent in which case the cessation of operation becomes the consideration rather than the continuing of work with risk to human life. Continuing to require persons to work in danger defeats the purpose and objective of the community and the legislation

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

Yes. Since the act deals with offences by all parties – employees and employers alike, there is no reason infringement notices could not be applied immediately, particularly when they appear to be in the reckless, indifferent or negligent category. By automatically requiring an improvement notice prior to an infringement notice reduces the effectiveness of the legislation and the reason many employers in SA are not diligent on their attention to OHS law. An inspector will want the discretion to either apply an improvement notice or a infringement notice based on several factors, not least cooperation, attempts to comply and previous history.

Types of offences could relate again to matters of fact – failing to have evidence of a safety system, failing to wear or supply PPE, endangerment through inadequate safety systems and other technical breaches.

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

Employers and employees alike want consistency. Why should an employer or worker in one state get more or less protection, and more or less enforcement or severity, based on geography? A centralised OHS law should be resourced and administered federally so it does not depend upon the whims of the state and territory governments. The state government could act as the enforcement arm, if so required, and they would appear to be well resourced to do so. Or in a position to increase activities quickly, whereas Federal enforcement would require a totally new bureaucracy and probable downsizing of state regulatory bodies.

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

Fines should be in amounts that reflect the real cost to society. A financial penalty to an employer of \$40,000 (as has been the case in SA) or a maximum of \$25,000 for a similar death in the NT does not place adequate value on the financial and social impact to society when a worker is killed or seriously injured in the workplace. The penalties that apply in Victoria, NSW and ACT should be considered as a bare minimum because they approach the degree that is needed to force change. They should also include serious jail time for criminally negligent or reckless Directors and managers individually. This must be for behaviour that has caused or contributed to the incident, including failure to adequately ensure supervision, training or resourcing of safety management. The financial impact on a family and fellow workers is devastating in EVERY case, and consideration should be given for a significant portion of any fine to be paid to the injured person or their family and not to the court alone, depending upon degree of involvement by the worker in the commission of the offence. A worker, for example, who broke several safety rules agreed and understood, should not receive a similar degree of compensation to a worker who has been killed or injured by reckless or indifferent regard for their safety.

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 ability to continue to run a business in contravention of an order or requirement under the act should be in question – much as is the crime of trading whilst insolvent. The damage cause by being required to comply with an order that increases safety should be weighed against the risk to a person's safety and well being by having it disregarded whilst the justice wheels turn. If the ability to

challenge is retained then perhaps that should be at the risk of double or increased liability if an incident occurs during the period devoted to the dispute, much as pleading guilty or not guilty has an impact on final penalty.

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?

Yes. This should be left to the discretion of the court or inspector. This should not be seen as an easy option, however the scope of crimes dealt with should not be limited artificially. A minor offence, which may be one of many, could be a trigger for an impatient judge and this would be seen as appropriate. A model employer with a more serious offence may undertake such a programme if it is deemed to serve the community best. Publicity orders must also reflect the changing nature of the mass media. An advertisement in the business section would not receive the same publicity as a notice placed in a newscast on a free to air channel, for example.

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

Yes. This is important in the process of rehabilitating workers or giving victims (including family, friends and workers) "closure". A company that has the option of not admitting fault or liability is not going to take this as seriously or understand that an enforceable undertaking is a strict measure i.e. they may consider this as a soft option. They have no liability, no fault and therefore have no reason to take it particularly seriously.

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

There should be an overriding stated objective of ensuring behaviour and activity from all parties that encourages them to be proactive in seeking a goal of zero harm. This cannot be achieved by prescribing what measures should be taken and under what circumstances, because all hazards, risks and circumstances cannot be considered or allowed for in a piece of legislation. The concept of guilt until you prove innocence is relevant for OHS, as is the concept that there is no end point for safety i.e.; no absolute compliance, only that of continuous improvement and the quest for the best systems. Either you have provided a safe workplace and systems or you haven't. This consideration, followed by the degree of effort that has gone into ensuring that duty of care should be the approach.

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?

Yes. How can actions taken or not taken and for which the consequences of those actions or inactions not being taken are the risk or occurrence of serious injury, death or severe damage to property or psychological wellbeing be anything other than criminal. There is also ample anecdotal evidence that confirms the difference in effort is directly related to the degree in which a responsible person can be held culpable. Continuing with defective systems and practices is a risk most business people will not take when it involves individual culpability. When this is allied with a diminishing of the potential to move freely overseas, as is the case with a person who has criminal convictions, you have powerful incentives to act.

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

All OHS matters should be criminal matters. Civil action should only be part of safety law as a consequence to a proven case of breach of safety law that impacts permanently upon an individual, such as loss of opportunity, amputation, death, permanent disability and other torts. Stealing a pen is a summary offence attracting a criminal record, why should putting a person's wellbeing, health or safety at risk be any different?

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

Not answered

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

Yes. Safety law is as much philosophy as fact, and the system that hears prosecutions must have a degree of practical experience within a work environment, as opposed to a purely academic or legal

background. A tribunal appointed with the need for experience in manufacturing and the service industry, for example, would have an appreciation for the both sides of the argument when dealing with subjective matters such as “reasonable and practicable”, as it applies to the changing dynamic that is worker/employee relationships.

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

A defendant should be afforded similar rights to any other criminal matter.

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

Yes. Where a person is facing a charge where the loss of liberty, fine or other action is a potential consequence, it makes sense to have an option to have the matter tried in front of a jury. Where such offences are created in the new legislation, such as corporate manslaughter, it is a certainty that a defendant will request a jury on many occasions. Where the charge is for a matter of strict liability, it will be unnecessary to argue anything other than mitigation, so a jury is clearly unnecessary for that type of offence.

Q110. Who should be entitled to commence criminal proceedings?

It is our contention that detection or reporting of OHS breach should not solely be in the hands of a workplace inspector and may variously include Union representatives, Federal, State and Territory Police, Local body inspectors, Federal safety officers and others the legislators may see fit to empower, subject to appropriate training. The decision to prosecute should still ultimately lie with the regulatory body acting upon advice or responding to a complaint from an inspector or another person.

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

Any person who has suffered a civil wrong should be entitled to bring a proceeding against an offending employer or officer of that company, such as a director or manager, subject to the requirement to prove on the balance of probabilities and not beyond reasonable doubt. This could include injured persons or the family of a deceased or injured person who has suffered loss including financial loss. It is important that this be included because there is no justice where those who cause harm do not accept or are not subject to measures that reflect society’s disapproval of their behaviour. It must be remembered that behind every safety tragedy there has been a defective process and the whole cost of this process should not lie with the individual or family affected and that those who have had the opportunity to act differently and have not, should be accountable for their decision making in proportion to their culpability.

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

The James Hardie case has shown how effectively a company can hide the truth about known hazards and the lack of any corporate remorse or willingness to accept any moral or legal responsibility for their actions. The statute of limitations, particularly when it involves death or serious injury should be similar to a statute of limitations for any other violent act, such as murder or war crimes.

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?

There does not seem to be a compelling reason to treat OHS breaches in a manner different to any other criminal breach, nor have society regard OHS breaches as any less serious, since the consequences are almost always injury or death.

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

Yes. Supply of documentary and other evidence in a form consistent with the requirements of published standards, codes of practice, industry guidelines, acts and regulations and which also meet evidence standards for other criminal matters shall be the standard for mounting a defence

and for a prosecution. Prosecutors should also provide evidence collected and this should be open to challenge; strict liability offences excluded.

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

The objective is to encourage employers to engage in developing and following systems that have a reasonable expectation for delivering a safety result. Merely purchasing an off the shelf system is not a safety programme or system. Documentary proof is usually indicative of an action. The reliance upon this evidence in determining degree of guilt or innocence further depends upon the veracity of the evidence, so the prosecutor must also investigate whether the evidence has been produced and gathered properly and has been subject to an audit by external and internal auditors to standard ISO 19011, for example.

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

These are reference components of a system that is "reasonable and practicable". The requirement to meet the minimum standards of these documents must therefore provide useful proof of efforts to comply and an opportunity to mitigate in the event of a failure. The prosecutor must be allowed to submit these as proof to support an assertion of a failure to implement a system to the degree reasonable and practicable. Nothing would prevent an employer from refuting this assertion if they have an alternative; it would be then up to the arbiter to make that determination. The law must not place total reliance on a standard, as adherence to a standard can in itself be dangerous. For example AS/NZS 1657 that relates to ladders, stairways and walkways. A vertical ladder may comply with the standard, however be dangerous because of compounding hazards, such as weather or other environmental conditions (oil or other deposits on the surfaces), whereas a stairway at 45 degrees is much safer, eliminates a vertical fall and lessens the consequence of a slip, trip or fall.

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

Yes. Incontrovertibly. When dealing with safety, the employer must be relentless in the pursuit of ensuring a safe workplace and safe systems of work including the need to remove or manage hazards aggressively and at the highest level in the hierarchy of controls; also to continuously review procedures. The requirement to be active in seeking better systems is also a vital component of advancing safety and to encourage those who develop such systems.

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

No. The standard should be a guide to a minimum set of requirements, but blind adherence to a standard negates safety and hinders progress. Any hazard an employer seeks to be managed through a standard should be subject to risk analysis and consultation and management at the highest level practicable within the hierarchy of controls. By definition, a standard lags behind the cutting edge of safety. It may be several years old and may have been surpassed in quality by other accepted practices or knowledge. Adherence to a standard, in itself, should never be considered safe conduct. It can be used as mitigation, and evidence of attempts to comply to the requirement of providing a safe system of work, however, as stated before, blind adherence to a standard can be dangerous, depending upon the unique circumstances in a workplace.

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. With duty of care, the requirement is to produce evidence of Due Diligence. A system created that is designed to meet the requirements of AS 4801 or AS 4804 will ensure all components are being addressed in order of priority. Any employer who is diligently engaged in improving safety management to the degree that is reasonable and practicable in the circumstances need not fear a prosecutor, except where they have relied upon deficient advice or have unreasonably delayed implementation of safe systems, or have strayed from the minimum requirements of a standard including the absence or lack of sufficiency of evidence of training, consultation and supervision. Strict liability offences (failing to wear a seatbelt on a forklift, failure to maintain a hazard register or failure to supply a MSDS to an employee) obviously have no defence and therefore proof useful to a court is not a factor.

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

The defences available must lie in evidence that the employer has been duly diligent. Evidence of Due Diligence must be a factor in the decision to prosecute. The populist temptation is to be punitive and to severely punish transgressors where a death, injury or serious risk to health is involved and such action may well be merited, but not always. The bigger picture must take into account the need for the business community as a whole to have confidence that their diligent attempts to provide a safe workplace and safe systems of work and environment will provide a defense and mitigation in the event of successful prosecution. To do otherwise is to encourage a fatalistic viewpoint that is in evidence within small to medium sized employers in particular. There must be a degree of hope that doing the right thing is its own reward and that efforts made before an incident outweigh by many times efforts made after an incident.

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

No. Whilst many larger employers have more resources available to them, the simple fact that a worker must have the greatest opportunity to return home in the same or better condition than when they went to work is the overriding consideration. To lessen that expectation because the employer is a small business is not acceptable. It is not unreasonable for the Federal Government to support this proposition with interest-free loans/grants/tax credits to ensure there is access to providing a system in each business so excuses are removed. Once again, similarly to obeying taxation law, OHS is a function of doing business and must be resourced and costed when preparing the initial business plan.

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

Yes. With rewards must come responsibility. The temptation to ignore safety to enhance personal and corporate gain is a path taken by many in the past, with tragic consequences (e.g. James Hardie, Major Retailers chain of responsibility legislation, transport industry). It is also a spur to examine the practices of subordinates in discharging duty of care. The corporation acts upon the direction given to it by the directors and responds to the priorities senior management places upon issues. Therefore directors who decide to risk safety shortcuts are doing so at the risk to their employees. This must also be to the risk to their own liberty, reputation and financial security. Such personal accountability components of safety law have proved remarkably effective in culture change in NSW, ACT and Victoria, in particular where there are severe risks to recalcitrant directors.

Q123. How should officer be defined?

Not able to recommend a definition.

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?

No. The standard of proof must be that they have done all that is reasonable and practicable to prevent harm and that there is documentary and other evidence that supports their actions if they wish to mount a defence. The strict liability provision in the second part of the question is valuable as the court then has the opportunity to examine the degree to which the effort was made was duly diligent. Evidence in many Australian businesses has shown that acceptance of this type of performance doctrine by senior officers of many companies has produced significant and lasting improvements within the areas under their control. They know that both the company and themselves are unlikely to be prosecuted where they have evidence of robust and active safety systems that involve all the components of a safe system, including proper supervision, consultation, training and hazard management.

Q125. Should the model OHS Act provide for a test for determining liability of an officer? If no, what should the test be or contain?

The liability should be determined by the degree to which the officer had influence – even partial. A director acting in the influence of safety would also be expected to be proactive, even if the particular safety concern is not part of their area of control. To act in the best interests of the

company, they must argue for safety at every juncture. This behaviour must be a separate consideration to "state of knowledge", as the expectation to fully understand their responsibilities must be part of their acceptance of the role and be part of Director/Officer training. The degree to which the senior management team and directors treat safety is often the degree that it becomes an effective and intrinsic part of the business operations and therefore the greatest determiner of the success of the programme. That the main reason the director/officer will initially act in self defence is not a problem, eventually what starts out as smart business, ultimately becomes "right and wrong" and a moral consideration, rather than a business consideration. The current state of affairs that in many cases, unacceptably high incident occurrence, death and illness does not seem to have been a deterrent to deficient safety practice and it has not been a moral imperative or smart business to fix the problems.

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

Evidence of Due Diligence as defined in WorkCover NSW document 126 (Due Diligence) is entirely appropriate as a defence and as a mitigating factor.

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

There is no evidence to suggest persons affected by deficient or negligent practices within volunteer and unincorporated associations suffer less severe consequences because they are hurt by a charitable organization and therefore must have the same protections.

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

There should be the potential for fines to be levied for any offence if that is an appropriate punishment or deterrent.

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

Yes. This is not a civil act; therefore it is appropriate to limit the size of fines. It is not appropriate to compare the size of fines in order to gain "consistency" where the need for deterrent or punitive sentencing is required owing to severity.

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

Yes. It has been traditional to set fines according to potential impact or consequence and this is appropriate. The levels should include the opportunity to set deterrent sentences, including fines and imprisonment. The focus on safety within jurisdictions that have large personal risks for failure to abide by the responsibilities they have as officer, managers, employers and employees (NSW, Victoria and ACT) has (anecdotally) the best rates of involvement and accuracy. Whilst complaining of the potential harshness of safety breaches, they are also active. Published WorkCover statistics (NSW) indicate a substantial and sustained drop in injury occurrence and severity since the adoption of a performance based legislative system.

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

Failure to wear a seatbelt could be similar to that of the same offence on the road. It can be argued that anything under \$1,000 for an employee and \$5000 for a director/officer/manager/supervisor and \$20,000 for an employer would not have a deterrent effect.

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

Yes. The option for imprisonment and severe fine should be available to be imposed for such offences, no matter who they are and this should include employees and the effects of their failure to cooperate or to increase risks to themselves and others. An injured worker should not gain exemption from prosecution because he or she is injured.

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

Yes. However is the goal a more consistent outcome of the treating of each case and the application of any penalties or is the goal to be appropriate to the individual circumstances and impacts upon that community and the family, for example. Therefore using the sentencing of a small employer as a guide to sentencing BHP, for example, may provide a consistent outcome, but it certainly won't provide a satisfactory outcome.

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

The range of options available should reflect the seriousness of the offence. These could range from the requirement to cease operation, restitution and support to affected persons, enforceable undertakings, publicity orders, imprisonment, loss of rights to be a director or company manager, community service and attendance at educational facilities in order to meet statutory requirements, such as HSR training.

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

Yes. The option should exist for those offences that defeat the intent of the law, including the failure to adequately resource safety systems. These should also include reckless, negligent or indifferent behaviour, such as failure to guard, failure to supervise, train or consult; where such failures are repeated or the consequences are likely to cause serious harm or injury to persons in areas under their control. This could include, as an example, work systems that are bound to fail; such as unreasonable work rosters that require workers to operate when in an unfit state because of fatigue. This could also include doctors on extended 24-hour rosters who will invariably make mistakes because of diminished capacity or drivers pushed to meet unreasonable deadlines.

The ACT model of 25 years imprisonment as a maximum has been much discussed, however when an examination of work practices in some businesses is made, the risks to the worker are unacceptable and yet within the power of the employer to improve. It is not uncommon to enter small factories where there are frightening disregards for the safety of the individual, such as open vats of boiling water/metal, unguarded or dangerous machinery and other situations such as working unprotected and unrestrained at heights and which rely upon worker behaviour rather than the workplace being made safe in the first place.

This is in the realm of callous disregard for consequences and this has been apparent within the construction industry, in particular, with many deaths recorded amongst young or inexperienced workers. In some cases the employer goes bankrupt, so no effective justice is done.

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

Yes. This can be addressed as part of another section, such as "failure to provide a safe system of work", which escalates to "failure to provide a safe system of work causing death or injury". One deals with potential and one deals with consequence.

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

Unlawful death should always be dealt with as a crime whether it takes place in a worksite or at another place. There seems no reason to exclude the handling of death in the workplace from the OHS act, particularly if there is to be consistency of application and understanding of the issues by the adjudicators. The OHS court needs the powers to deal with these issues.

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?

No. The judge should be able to determine culpability and consequences and come up with an adequate sentence. There are times when a death is truly a matter of unfortunate combination of factors and in this circumstance the employer can still be prosecuted but at a differing scale because the actions were not reckless, indifferent or negligent. The philosophy that every accident is preventable is admirable; however there will be circumstances that mean prosecution because of consequence, as opposed to the efforts made to prevent injury or harm, will result in an unjust outcome.

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

The ability to personally attach fines to both company and directors and to provide other sentencing options, such as imprisonment or the refusal of permission to open another enterprise either individually or by proxy while there are outstanding matters, will be a disincentive to avoiding enforcement of penalties of fines.

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. It is difficult to see how doing otherwise will force changes in attitudes or behaviours. To do otherwise also creates a competitive disadvantage to those taking their OHS responsibilities seriously.

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

Yes. They should be proportionate to efforts made to comply and the degree of seriousness taken by the employer and employee and allow for a degree of discretion on the part of the prosecutor and inspector to follow a course of action other than prosecution which better serves the community.

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

Should be limited to the Federal Government in consultation with the State authorities and with a due regard to the need to consult employers, legal persons, safety experts, employees, unions and other representative groups.

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?

Yes. This allows for more widespread application without tying up resources unduly.

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

It should not be the business of the regulator to evaluate or approve codes of practice. If this is the case then a regulator would find itself in the situation where it may be required to prosecute someone for something it itself has approved.

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

This is a question that has as its basis the notion there is such a thing as an unnecessary burden. The degree to which a minimum set of requirements to report injury and incident can be considered unreasonable is a barometer of the chances of legislation to achieve its objectives. It is reasonable to duplicate what should be a matter of course – appropriate and effective investigation into an incident or accident.

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

Provisions should include those that allow for the transparent investigation into the reason why a decision was made. This should allow appeal to a tribunal.

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

Yes.

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

The minister should always have recourse to advice through submissions made by those with an interest in changing the way the law is enforced, the way it is written and whether the content meets the objectives.

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

Yes, but only to the extent they get assistance to meet general duty of care and not to change the expectations to meet this duty of care, notwithstanding the complexity or degree of effort required to comply.

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

Not answered

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?

It is moot whether licencing and permits increase safety. It is arguable that this process actually encourages the regulator to consider the act of licencing and the issuing of a permit as sufficient proof of some sort of compliance to a safety process. As with many forms (e.g. JSA and SWMS) there is a tendency to produce or acquire these forms without taking into proper account the special circumstances of a particular task. Therefore the objective should not be to harmonise permits and licencing, but to firstly evaluate whether they are necessary in the first instance and whether they achieve any OHS purpose.

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?

The question fails to address the impact of many other laws that relate to safety, such as equal opportunity and racial vilification legislation, mining legislation, workers compensation levies, electrical acts and so on. A recent quote indicates that upward of 1200 separate pieces of legislation apply to safety, so the greater the scope, the less the need to overlap and the greater the opportunity to repeal much legislation that can be quite rightfully handled as part of safety legislation.