

NATIONAL REVIEW INTO MODEL OHS LAWS

1.2 Title, Objectives and Principles

Q3. In keeping with the spirit of the Act, consideration should be given to adopting the title of “National Workplace Health and Safety Act.”

The term “Occupation” tends to imply the Act refers to specific occupations as against all workplaces in general.

Q4. The Model OHS Act should take the form of a National OHS policy, and as such should specify the objectives of the Act. This would assist in the interpretation of the spirit of the Act when challenged in a court.

The objectives could take the same format as an industry OHS Policy and specify the objectives as being the Governments commitment to ensuring no work activity will cause injury to another person due to unsafe acts within that work activity.

2.1. Industry Sectors

Q7. It is my strong belief that all on-shore industry sectors including the NMSF are under the national OHS framework and state legislative inconsistencies reviewed to allow this to happen. Currently workers moving between sectors are at high risk of non-compliance to current legislation whilst they adapt to the various requirements of industry sectors.

One of the main areas of concern is the inconsistencies between the Road Management Act (Vic) 2004 that is controlled by Vic-Roads, in the fact that signage requirements under this Act require a contractor to erect signage for the safety and guidance of road users that extend to providing a safe workplace for workers.

WorkSafe commenced a campaign for Safety of Workers and Traffic (SWAT) that seems to have been lost in the system given that they have no powers over signage on the roads only over the workplace that the signage and or activity creates. (See also 2.4.definitions)

This would also assist in the transport industry that constantly moves between states and industry sectors.

Q8. The OHS Act should remain broad in its description allowing jurisdiction over land based industries to prevent the opportunity for legal challenges to specific industry interpretations.

Various industries would be better governed by regulations with reference to codes.

Q9. The model OHS Act should be just that, an Act to govern the people, regulators should be appointed with nationwide powers. All prosecutions should come under federal jurisdiction.

2.2. Workplaces and Non-Workplaces

Q10. The general duties of care should be charged to the originator of the work to ensure the design of the work creates no unmitigated risks followed by the general duty of care of employers, self employed persons and employees.

Q11. The OHS Act must contain a duty of care to the public with the definition of a “Work-Place” the same as defined in the Queensland’s Workplace Health & Safety Act 1995.

This may go some way into having a single regulative body where workplaces interact with other state authorities such as the road authorities.

Currently there is confusion as to who is responsible for such things as inappropriate signage on road works and whether this signage is expected to just provide a safe workplace for road workers with no consideration for members of the public, or even as to where the workplace begins and road authorities jurisdiction begins.

A truck driver's workplace is his truck. If he or his employer transports dangerous goods in/on this workplace in an unsafe manner, then this should be defined as an "Unsafe Workplace" likely to cause injury to the truck driver/employee or to other members of the public.

2.3. Responding to change.

Q12. The definition of worker should be taken from current tax law interpretations, this would best address the problem that now exists from the use of agency labour, and who is defined as the "employer". If a worker receives instruction from the company placing them at risk, then for the purpose of OHS, that company is the employer.

If a contract of employment arrangement exists, then the person should be considered to be an employee of the contracting company.

As the Full Court said in BWIU v Odco , "The element of consideration which is essential to a contract of employment, being the promise by the presumptive employer to pay for services as and when the service is rendered, is absent'. I do not think that when [the labour company] pays a worker, it does so as agent or intermediary for the client."

If a contract for services exists, then the person should be considered to be an employee of the person for whom the contract has been made.

There is a common law distinction between employees and independent contractors. The former have "contract of service" and the latter "contract for services".

A factor in determining whether a person is an employee rather than independent contractor is whether there is a right to control and supervise the performance of the services by the person for whom they are provided.

The master/servant relationship has existed for many years and the scope of the duty owed is well entrenched.

If a person is engaged as an independent contractor, then that person should have in place the necessary evidence to show a commitment to OHS, equivalent to or greater than the employer to whom they are contracted to.

2.4. Definitions.

The definitions of "workplace" and "worker" need to be clearly defined, given that a workplace is created when work is to be carried out regardless of the type of work or the time the work will take, this includes a taxi driver who's workplace is the road, or a person who mows the side of the road.

The definition of a worker is a person who for remuneration or reward, (be it monetary or otherwise) is engaged to perform works.

3.2. Control

Q16/17/18 In Victorian legislation The OH&S Act imposes a general duty on a 'person who has control of premises' used by people as a place of work to ensure that the premises without risks to health.

'Control' refers to the ability of a person to compel or direct corrective action to secure safety.

This definition should be better defined given that the "owner" of a contract has control over the contract, and in most cases has a clause that allows them to terminate it; this gives them control over all matters regardless of appointing a principle contractor.

Q19. There should be national legislation that prevents the owner from contracting out of proportionate liability.

3.3. Work Relationships

Q20. Employment relationships should not form part of any basis for framing safety obligations.

Q21. Refer answer to Q12.

Q22. It is important not to broaden the concept to effectively cover the various work arrangements

3.4. Duties of Employers

Q23. Section 21 of the Victorian OHS Act 2004 gives a good definition of the duties of employers to employees, but section 22 of the same Act states;

"the duties of an employer under those sub-sections extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control."

This paragraph seems to leave an avenue open for employers to appoint independent contractors and form an agreement to give this independent contractor control of safety matters solely for the purpose of contracting out this responsibility.

Q24. The duty of care of an employer or "the owner of the works" should be owed to ALL persons who have a lawful reason to be in or around the worksite environment.

3.5. Duties of Workers and Others

Q25. The Victorian OHS Act 2004 gives a good definition of the responsibilities of employees, but could be better enforced.

Q26. The Victorian OHS Act 2004 gives all responsibility towards other persons by the employer, but should include a responsibility for persons other than employees to have the same responsibilities as employees.

3.6. Appointed Persons and Officers

Q27. The model OHS Act should adopt the principal of the Queensland model in that employers employing over 30 persons (including sub-contractors) should engage an OHS advisor for the purpose of ensuring the contractors complies with the company's policies and the Act. The Act should also place a responsibility for all contractors to have at least one independent audit conducted on all works over \$250,000.

Q28. The liabilities of such a person should not be that they may be prosecuted for breaches of the Act by the employer unless this person is found to be negligent in not advising the employer of breaches that he should have been aware of.

Q29. The relationship between the appointed OHS advisor and the duty holder should allow for the advisor to provide reports to the authorities should breaches be detected without fear of retribution by the employer. It could even be considered that these persons be approved by WorkSafe and given powers to instigate legal action for serious reaches of the Act.

Q30. I feel that the idea of requiring all companies to appoint a responsible officer as is required by the South Australian OHS&W Act should be adopted with greater powers for directors of companies to take responsibilities for actions taken against companies declared insolvent for the purpose of not paying penalties for legal actions taken for breaches of OHS laws.

3.7. Duties of Persons in Control

Q31. The VWA states that “Employers cannot contract out their duties in relation to matters of which they have control. Industry agreements such as ‘hold harmless’ clauses do not remove or mitigate the duties of an employer to an independent contractor.’ It is important to clarify that any agreement purporting to limit or remove that control has no effect upon the duty.”

The Victorian OHS Regulations states that “The owner is the principal contractor of the workplace where the construction project is to be carried out unless the owner appoints a principal contractor for the construction work performed for or on behalf of the owner.”

The legal fraternity give advice that the control of OHS matters should be given to contractors by the owner via a contractual agreement.

I feel this issue does not go far enough towards deciding who owes the duty. It could be better explained by stating;

“The owner is the principal contractor of the workplace where the construction project is to be carried out unless the owner appoints a principal contractor for the construction work performed for or on behalf of the owner.’

The Principal contractor shall be liable for all OHS matters over which the principal contractor has control whilst construction works are performed for or on behalf of the owner.

The owner shall conduct a proper evaluation to establish that contractors have appropriate OHS management systems in place and have considered health and safety issues in relation to the contract work by:

- Evaluating and verifying the contractor's OHS management system and performance.
- Determining the contractor's understanding of the OHS requirements of the contract
- Reviewing how contractors will manage OHS issues associated with the contract works and services

Should the owner retain the right to terminate the contract for any reason the owner shall be considered to be the Principal Contractor unless the owner ensures monitoring and supervision of the contract to ensure that the contractor's operations over which they have control are conducted in accordance with legislative and contractual requirements by:

- regular reviewing of contractor health and safety documentation
- regular site inspections to monitor compliance

- reviewing contractor health and safety performance
- incorporating health and safety as part of regular contract review meetings
- ensuring corrective action is taken

Q32. A person in charge of a work area or a temporary workplace should have the same general duty of care as other employees unless the employer is considered “to far removed” from the workplace to be considered to have “control”.

The employer should not deliberately set up a business in such a manner that would remove them from “control” of OHS matters, unless the control has been assigned to a person who has agreed to take over this control.

3.8. Activities Which Impact on Health and Safety

Q33. /34. /35. / 36. The model OHS Act should clearly state that any person who designs, manufactures, imports, or causes a structure or item to be commissioned should be required to supply a HAZOP assessment regardless of whether the structure or item has been imported from overseas or designed / manufactured in Australia.

4.1. Concept of Reasonably Practicable.

Q37. Although the definitions should be clearly defined in the Model OHS Act and NSW be encouraged to include the wording “reasonably practicable” the concept will continue to rely on case law such as;

- *Esso Australia Pty Ltd (DPP v Esso Australia Pty Ltd)*

[2001] VSC 263

- *Holmes v R E Spence & Co Pty Ltd [1992] 5 VIR 119*
- *R v Australian Char Pty Ltd [1999] 3 VR 834*
- *Chugg v Pacific Dunlop Ltd [1999] 3 VR 934*

Q38. Reasonably Practicable seems to be based more on a persons having knowledge of a risk rather that “being required to identify risk.”

I feel that in cases where a corporation creates a situation likely to cause risk, (such as the construction of a building or structure) then that corporation should be required to identify ALL risks that the activity may create, and mitigate those risks, whether by engagement and monitoring of a fit and proper contractor or by direct control of the risk mitigation process regardless of cost.

This policy should include all work activities created by State and Federal Governments, and then it should be generally regarded that it would be Reasonably Practicable that the corporation creating the activity would have knowledge of the risks this activity would create.

Q39. Should a standard be developed for this risk mitigation process, it could be developed along the lines of the National Safety Council’s risk assessment procedure.

Q40. Control should be an element of any standard with the duty holder is identified.

Q41 A test or example for assessing compliance would be difficult to include given that we continue to be governed by case law.

Q42. Hazard and Risk definitions are currently identified in current regulations and would only require national recognition.

Q43. Definitions of reasonably practicable would be hard to define as it also would be reliant on current case law.

Q44. Risk management principles should be identified in regulations or guidance notes. They should be a national standard and compliance to them would be considered to be seen as complying with the Act.

5.1. Duty to Consult

Q45. The Occupational Health and Safety Act 2004, (Act No. 107/2004, Part 4 s35, gives a clear definition of the duties of Employers to Consult, but could include the need for the creator of a situation likely to cause risk to consult with a "Competent Person" to identify the risk or hazard likely to be created.

Q46. As above

Q47. The levels of consultation should remain consistent.

Q48. Consultation for multi-employer worksites, an employer with operations across more than one worksite, small business, remote workplaces, precarious employment, and workers from culturally and linguistically diverse backgrounds could be conducted through suitably qualified independent consultants who would report back to the workforce.

Q49 to Q58. Health and Safety Representatives should be required when no OHS advisor has been engaged by the employer, (full or part time) or when the work force exceeds a certain number and an employee requests it.

The powers of the HSR should be restricted to

All HSR should have a minimum of OHS training that should be nationally recognised.

Q59. It should be of the highest priority for the right of entry to be restricted to inspectors empowered by legislation only. All other persons requiring entry should do so only when accompanied by an inspector empowered by legislation.

The Act should clearly spell out that an inspector cannot refuse to accompany any person who request entry and gives reasonable notice of becoming aware of an unsafe act or practice at the workplace. Should an inspector not be able to attend within a reasonable time the inspector should be empowered to delegate authority to a third party.

Q60. Give that the Model OHS Act would be a National system all inspectors should have appropriate training and qualifications. Should any other party be delegated then that person (not organisation) should have received the same training as the inspector, by approved by the regulatory authority and whilst delegated to conduct the works of the inspector be given the right of entry and the power to stop unsafe works until an inspector is able to attend.

Q61. The right of entry by an inspector should not have any restriction placed upon them; if they feel they need or want to go onto the workplace they should have the right.

Q62. The powers of the current VWA inspectors seem to be sufficient to set a standard by.

Q63. Part 4 of the Victorian OHS Act 2004 gives a good definition of the duties of employers in relation to consultation, and could form a base for the model Act. That said I feel the consultation process should be an "agreed" process. When an employer has a significant shift in employer numbers or an activity created by the employer such as a large construction, then the consultation process should be reviewed and agreed by a majority of the employees.

It would be equally important that the power to agree to a consultation process not be delegated to a union or any other industry body.

Q64. The issues resolution process should be activated as soon as an employee makes the person who has control of an activity likely to cause injury or illness to any person, aware of that activity. It is important that the cessation of any unsafe activity not be considered to cause cessation of all works unless directed by an officer of the regulatory authority.

Q65. The issues resolution procedure should not form part of the model OHS Act per say but rather the Act should state that a “agreed issues resolution procedure” shall form part of any work agreement be it for monetary gain or any other consideration.

Q66. I feel if the above procedure is adopted it should spell out the spirit of the Act.

Q67. Given that the current OHS Act 2004 states that “While at work, an employee must take reasonable care for his or her own health and safety;” I would have thought rather than ask if a worker should have the right to refuse to work unsafely the model Act should be placing a penalty for a worker who does not refuse to cease work when they consider the task to be unsafe. This of course would tie in with the dispute resolution process.

Q68. The problem that exists with current HSR’s is that any person can be elected often without the knowledge of the task they are expected to deliberate on.

Should the employer engage the services of an OHS advisor then that person should be licensed by the regulatory authority, (just like high risk licences) and the HSE should then request the advisor stop the unsafe activity (for which he should be granted the power) until such time as the inspector is able to attend or the dispute resolution process has been exhausted.

If the employer chooses not to engage an OHS advisor then the HSR should have the power to request an inspector attend or the dispute resolution process be commenced. If the employee believes they face a penalty (see Q67) then the worker/s should cease the activity with no requirement for the HSE to direct them to do so.

The power to direct an activity or whole of works cease should ONLY be given to advisors who hold a licence issued by the regulatory authority, (like the Queensland WHOS)

If an employer or their representative give instructions that an unsafe act continue and an employee receive an injury because of that activity then that person should receive a mandatory jail term.

It would also need to be included that if this advisor directs work to cease it should be considered that the regulatory compliance officer has directed it to be so.

Q69. If the above system be adopted then payment of wages should be limited to the cessation of an activity, or the advisor would be bound to make the authorities aware that the employers activities are found to be continually unsafe, whereby they should be required to undertake an independent compliance audit and show cause to the authority why they should be allowed to continue any activity and wages should continue to be paid until the matter is settled.

Q70. Any time an activity is requested to cease or an employee refuse to undertake an activity for safety reasons then the agreed disputes resolution should be invoked.

5.3 Protection from Discrimination and Victimisation.

Q71 to 78. Again there should not be a circumstance where a person could be victimised if the OHS advisor was given the responsibility described above and the Act place penalties as set out in Q68.

Q79. It would be important that the powers and responsibilities of the regulators be spelt out. If the regulators be made aware of an employee who continually conducts activities in an unsafe manner, via audit reports or reports from approved OHS advisers and does not act in a timely manner to prevent the death of an employee, they should be able to be subjected to civil litigation.

Q80. As I see it the only way the industry can be rid of potentially unsafe contractors is to allow the regulators to publish the enforcement policies and ensure those policies are enforced regardless of costs or lack of prosecution staff.

Q81. I don't believe the Act could make interpretative documents given that under the adversary system that we operate on case precedent would always apply.

Q82. The powers of an inspector should not be extended to the insistence of prosecution but limited to a recommendation for prosecution.

Q83. To limit the cost associated with running a regulatory authority the functions should be limited to enforcement only. Advisory services should come from licensed advisors approved by the authority.

Q84. The model Act should be required to have guidelines associated to ensure funding is made available to appoint sufficient inspectors based on industry activities just as police numbers are set by head of population.

If this was the case the powers afforded to Victorian Inspectors should be modelled.

Q85. The simple answer is NO. Advice and assistance should come from the private sector via licensed advisors regulated by the regulatory authority.

Q86. Under no circumstances should an inspector be independent to the regulator.

Q87. As with the Victorian process an inspector should have the power to repeal the PIN notices issued by them, but for all other actions the power to modify, amend or cancel any notice should be by recommendation to the authority.

6.3. INTERNAL REVIEW OF INSPECTORS DECISIONS

Q88. The Victorian Act gives right of appeal on inspectors decisions. This is set out on the entry report provided with every visit. I feel this is a good way of recording findings and explains the review process.

Q89. The powers, functions and accountability of regulators and inspectors should follow those of the VWA.

7.1. Enforcement Measures.

Q90. Whilst the idea of having the hierarchy of enforcement measures appears a good idea on face value, it could be argued that should an inspector make a decision on the severity of a situation the person receiving the notice may challenge the category of the notice creating a backlog of appeals.

Q91. If the idea of using a hierarchy of enforcement measures be adopted I feel it would be better placed in a guidance document so people would be aware of the type of notice they may receive for various offences.

7.2. Measures Exercised at the Workplace.

Q92 to 96. The description of a default notice should be changed to be uniform across all states and territories to be that of a PIN.

The issuing of these notices should apply when the dispute resolution procedure is invoked. They should only be issued by an inspector or a person authorised to do so by the regulatory authority, and should remain in force whilst the dispute resolution procedure is in action.

Should the dispute resolution procedure fail to resolve the situation the inspector should deliberate as to whether the PIN be removed or escalated into further action.

Should the inspector be required to deliberate and form the opinion that it requires stronger action the PIN should then take the form of a "compliance notice" that would explain how and when the employer can rectify the non compliance.

If the system of "on the spot fines be introduced it should apply to this type of notice only.

Failure to comply would attract court action based on their failure to provide a safe workplace, unless the receiver challenges the compliance notice through the current court system either way the magistrate would deliberate and impose a penalty.

If a prohibition notice be issued, it should remain in force until any appeals through the courts have been resolved.

Any internal review should only be against the issuing of a PIN by a person authorised to do so by the regulatory authority, and the inspector should be the person to conduct the review.

The purpose of this would be to clearly set out the three step process.

- a) Dispute resolution procedure invoked and PIN issued by a person authorised to do so by the regulatory authority. (*issue solved no further action*)
- b) Issue deliberated on by Inspector and compliance notice or prohibition notice issued. (*fine issued by inspector or court challenge commenced*)
- c) Magistrate's decision as to legality of notice. (*fine or notice lifted*)

Q97. Yes the model Act should provide for infringement notices and should directly relate to the issue of a probation notice.

If an employer attracts a prohibition notice then it should be deemed that an infringement has been committed, the choice of paying an on-the-spot fine or challenging the notice through the legal process is decided by the recipient.

Q98. The administration of infringement notices should form part of the OHS law, fines or penalties should be deemed to be a penalty due and payable under tax law. Should a director place a company in liquidation to avoid payment then the penalty should then be payable be the director/s.

Q99. This is a hard question to answer. If an amount is specified, employers could factor in the benefits of paying a small fine to increase a risky production schedule and gamble on not getting caught.

7.3. Measures Exercised beyond the Workplace.

Q100. The model OHS Act should not provide for an injunction to compel a company to comply with the Act. The spirit of the Act is that all parties will comply with the Act or risk prosecution; it cannot be presumed that a company or individual will not.

The Act should be structured in such a way that gives the presumption of innocence that all parties will abide by the Act until it is proven that an offence has taken place.

Given that the authority is the only party to issue a compliance order, the only injunction that could be applied would be if a company sought to have works continue against a prohibition notice whilst a challenge to this notice was heard. In such cases it should be deemed that the granting of an injunction is to prove the substance of the prohibition notice is unfounded.

Q101. The provision for enforceable undertakings could for a part of the penalty system, but should have strict guidelines as to who is eligible to undertake such an undertaking. I feel that to be eligible a company must be able to demonstrate a commitment to the undertaking. It should not be a substitute to a penalty infringement.

Q102. I do not believe that a company who agrees to an enforceable undertaking should automatically be considered to give an admission of guilt as such an undertaking removes the right to have the issue dealt with by due process of law.

Q103. Issues as addressed.

8.1. Criminal or Civil Liability

Q104. All breaches of duties or obligations under the model OHS Act are criminal offences.

In all other Acts if a person commits an act likely to cause harm to another it is classified as a criminal offence. It should be classified as such in all OHS laws.

I fail to see that if a person beats another it is a criminal offence in that they have caused grievous bodily harm, and a workplace where a worker gets injuries due to the employer failing to prevent such injuries.

Q105. Civil proceedings should be restricted to the laws of tort.

Q106. In all cases the OHS prosecutions should be heard in a magistrate's court where it would be decided if the offence warranted escalation to trial.

Q107. It would not be appropriate for a tribunal to hear what is considered to be a criminal offence.

My understanding is that we work under the adversary system of justice. Should these cases be sent straight to a tribunal, I would argue that this would be leaning towards the inquisitorial system of justice, and could lead to a legal argument that the initial hearing was outside the adversary system and therefore could not lead to a term of imprisonment regardless of the outcome.

Q108. Any appeal resulting from action commenced by an inspector should follow the current system in place under current Victorian legislation.

- a) An inspector issues a notice.
- b) Recipient complies with notice or requests internal review by the authority.
- c) Breaches of OHS regulations brought before Magistrates court.
- d) Magistrate refers matter to higher court for trial or imposes penalty.

e) Appellant lodges appeal based on errors in law by the magistrate.

Q109. Any prosecutions referred to trial should be by due process of law.

It is important that the Model OHS Act is based on the fact it is a law not to protect the worker and others from injury by the actions or inactions of an employer or the creator of a work activity.

Any injury resulting from this should be treated the same as if a person beat another with an iron bar. The only difference I see should be that if a monetary penalty is imposed then it is deemed to be a payment owed to the crown and collected as if it is money owed to the taxation department with no possible escape from payment.

8.3. Who May Commence Prosecutions and Relevant Procedures?

Q110. The only persons who should commence criminal proceedings are those authorised by the authority, this should include state and federal police, or the coroner.

Q111. The Model OHS Act should not or could not remove a person's right to civil litigation.

The problem as I see it is that matters such as some states allowing proportionate liability to be contracted out and do not allow for personal injury, also proportionate liability has particular relevance to contracts where subcontracting is contemplated.

The Model Act should be clear as to where, (based on case law) the liability placed on the "principal contractor" versus the "owner" of the contract.

Should this be done I believe the civil litigation should be commenced by the aggrieved party only and not by a union or any other organisation.

Q112. The time limit for commencement for prosecution should remain open or be set as the "life" of the complainant".

Given that the spirit of this new Act is "Health" and Safety, the actions or inactions of a company may cause a long term illness that may not become apparent for many years.

Q113. The provisions for the conduct of prosecutions should be left to the rules of criminal law and the rules of the relevant court.

8.4. Evidence

Q114. I don't believe the Model OHS Act should be the place to set out the rules of evidence specific to OHS given that the Act is based around criminal law and current rules of evidence should apply.

Q115. Short answer NO.

Q116. The VWA seems to be going down the path of issuing "guidance notes" as against codes of practice; I feel this is a good idea as they are as the name states, "guidance notes".

I would think (I am not a solicitor) that the ACT is the governing document, should you abide by a regulation formed from the Act then the evidentiary status of guidance notes should have little or no standing in criminal proceedings.

8.5. The Burden Of Proof and Defences.

Q117. The wording "Reasonably Practicable" forms the most important standard for the model OHS Act. As any person would know it is impossible to have a workplace that is without risk that is why risk assessments are conducted.

I refer to a study conducted by the Australian National University, National Research Centre (*Working Paper 27*) The Relationship between 'Reasonably Practicable' and Risk Management Regulation, September, 2004 where the matter has been well and truly canvassed: (I Quote)

Reasonably Practicable' – Legal Meanings

The common law 'calculus of negligence'

The 'reasonably practicable' qualification is a statutory codification of 'the calculus of negligence' in common law negligence actions.

To be successful in a common law negligence action against an employer, an employee must prove

- (i) that the employer owed the employee a duty of care (it is well accepted that the employer owes the employee such a duty);*
- (ii) that the employer's acts or omissions breached the standard of care required to discharge that duty to the employee;*
- (iii) that the breach in fact caused the worker's injuries, in the sense that, on the balance of probabilities, the defendant employer's act or omission materially contributed to the harm suffered by the plaintiff employee; and*
- (iv) that the injury or damage was not too remote in the sense that the damage was reasonably foreseeable as a consequence of the employer's negligent acts or omissions.*

If these four elements are proved by the injured worker, the worker can then ask the court to award the worker 'once and for all' lump sum monetary compensation for economic and non-economic loss which will, as nearly as possible, put the worker in the same position as the worker would have been in had the worker not sustained the injuries.

*Proving that the duty owed was breached requires the court to determine, on an objective basis, first, whether the risk was one that the defendant should have considered taking measures to guard against; and second, the measures that a reasonable person in the position of the defendant should have taken to control the risk (see *Davies and Malkin*, pp. 2003, 42-62).*

(End Quote)

Q118. I believe that the burden of proving whether a standard was met should not fall on the duty holder but more on the regulator to prove the standard was not met, and again I refer to the Australian National University, National Research Centre (*Working Paper 27*) The Relationship between 'Reasonably Practicable' and Risk Management Regulation, September, 2004

"In passing we note that recent legislation, in response to the Ipp Report (2002), now specifies that a defendant is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable and not insignificant (a higher threshold than the far-fetched and fanciful test): Civil Liability Act 2002 (NSW) s 5B(1); and Civil Liability Act 2003 (Qld) s 9(1). These provisions do not apply to employer-employee cases, but it may be that they nevertheless are influencing the way in which courts are applying the foreseeability test at the breach stage."

Q119. I don't believe that the burden of proving elements of an offence should differ between different types of offences.

Q120. The model OHS Act should not be the place to set out defences for what is a criminal act.

Q121. The burden of proof or defences should remain the same for an individual or corporation to prevent the formation of business around the Act definitions to escape prosecution.

8.6 Liability of Officers

Q122. If a corporation contravenes, whether by act or omission, any provision of the Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, should be considered to have contravened the same provision, if that persons is in control of the decision making process of the corporation.

An “employee” of a corporation will not have a role in corporate governance unless they can influence the decision-making process.

Each director of the corporation, and each person concerned in the management of the corporation should maintain this responsibility even of the corporation is dead (liquidated) and penalties should remain payable regardless of the officers financial situation. (Declared bankrupt).

Q123. The definitions of “officer” should be derived from the Corporations Act.

Q124. The liability of the officers of a corporation should be subject to the proportion of liability created by the officers control of the decision making process creating the breach.

The presumption of innocence should be afforded to any person or corporation.

Q125. Not sure how to answer this but one would assume that a test for determining liability should be based around a number of factors.

- a) The knowledge the officer had or should have had of the decision making process of the Corporation and the effects of that decision.
- b) The direct control the officer had over the decision making process leading to the breach.
- c) The source the officer used in obtaining information of the decision made.

Q126. The only defenses I believe each director of the corporation, and each person concerned in the management of the corporation is that

- a) He or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision,
- b) He or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

Q127. Firstly I believe there needs to be a clear definition of unincorporated associations and volunteer organisations.

In the case of unincorporated associations, employing personnel, the owner of the business should be considered to be same as that of an incorporated company.

In the case of a volunteer organisations working only with unpaid volunteers, the officers should be exempt from prosecution unless under the common duty of care they have been found to breach the Act.

Q128. I think there should be provisions for monetary penalties to be imposed, perhaps by on-the-spot fines, but the amounts set should be on a scale of persons that can or were affected by the breach and the severity of the consequences should the breach have not been detected. (ie)

$$\begin{array}{|c|} \hline \textit{Consequence} \\ \hline \end{array} \times \begin{array}{|c|} \hline \textit{Exposure} \\ \hline \end{array} \times \begin{array}{|c|} \hline \textit{Probability} \\ \hline \end{array} = \begin{array}{|c|} \hline \textit{Penalty} \\ \hline \end{array}$$

Q129. Maximum penalties should be provided.

Q130. See Q128.

Q132. The level of penalties should depend on the above formula and be scaled for repeat offences.

Q133. All penalties should be subject to case law and be consistent throughout all states and territories, and published on a national website.

Q134. As in some states enforceable undertakings for minor breaches should be available.

Q135. There should be provision for terms of imprisonment in cases where breaches result in a death, multiple deaths or situations causing long term illness reducing quality of life.

8.8. Workplace Death and Serious Injury

Q136. I don't think specific offences causing death should be specified but ANY offence resulting in a death, multiple deaths or situations causing long term illness reducing quality of life should be considered as serious.

Q137. Crimes Act.

Q138. The consequence, exposure and probability should be considered in determining all penalties and the same formula should be applied in all cases throughout the country.

8.9. Enforcement of Penalties.

Q139. Should a monetary penalty be imposed by the court it should be considered to be a debt to the crown and as is with the taxation law should be collected as if it were a taxation debt.

Q140. If a term of imprisonment be imposed it should be considered that the term shall be served in full with no remissions or parole.

Q141. Prosecutions under National OHS laws should be considered to be under a federal system and not governed by any state laws.

9.1. Regulation Making Powers

Q142. The power to make regulations should be limited to a National OHS commission and administered by the states.

Q143. Providing the penalty has been calculated through the consequence, exposure and probability process and found to have a minor consequence, it could be considered to be a summary offence and a lower penalty apply.

9.2. Codes of Practice.

Q144. Codes of practice should be replaced with guidance documents to prevent employers using the defence of "meeting the requirements of the code".

9.3. Notification of Incidents and Reporting.

Q145. All employers of 2 or more persons should be required to keep KPI's that show trends for injuries or potential for injuries.

Random surveys of these trends should be published on the National OHS Commission website. All employers should be able to show a mitigation strategy for how they address trends applicable to their industry through regular independent audits.

9.4. External Appeals and Issue Resolution

Q146. Provisions should be included in the Model OHS Act for a review process of any Act or regulation when requested by any Union or industry body and based on the provision of the Act being declared a "Bad Law".

Q147. No

9.5. Tripartite Mechanisms

Q148. No Comment

Q149. No Comment

9.6. Mutual Recognition

Q150. Areas of OHS that could benefit from mutual recognition include

- training, education and competence requirements,
- authorisations, licences, permits and registrations,
- incident notification and reporting requirements and
- Plant and equipment.

Q151. The ONLY way the Model OHS Act can provide improvement for permits such as high risk industry licences is to conduct a survey of all industries to set a National Standard for competency based on industry requirements of the standard required to make a person employable to conduct those works competently and safety.

This training should then be provided by RTO's and regulated by the National Safety Commission. Tafe schools should be closed unless they can provide training at the industry required level.


The model OHS Act should apply severe penalties for RTO's who are found to provide certification to persons who do not meet industry requirements.

9.7. Cross-Jurisdictional Cooperation

9.8. Interaction of Federal and State Laws

The model OHS Act should replace the Commonwealth OHS Act and override ALL State and Territory OHS Acts. If prosecutions need to be instigated it should be on the basis that here is a breach of Commonwealth OHS law.

State laws such as the Road Management Act and Road Safety Act should be overridden by the Model OHS Act, where it is deemed that a worksite/place has been created, regardless of whether it is a truck driver on the highway, a road worker on the same highway or a farm employing members of the family.



The regulatory Authority should be the National Safety Commission, inspectors should be appointed by this department and safety advisors to industry should need to obtain National recognition from this department to qualify to issue PIN notices or instruct work to cease until an inspector can attend.

General Comments:

The model OHS Act would do well to be modelled on the current Victorian Act, but needs to have Federal powers. It should have a mandate that prevents further governments from changing the structure unless the same type of National review is conducted and every State and Territory agrees that change is required.

A National Standard for training and assessment is required, a workplace needs to include interstate drivers such as truck drivers and inspectors need to have the power to investigate unsafe work practices across borders.

Union and industry bodies should have no power to instigate legal action (outside of civil action) for suspected breaches to the Act.

Safety advisors engaged by industry should be afforded the opportunity to obtain a licence to issue PIN notices or to be requested by an Inspector to attend a worksite to prevent unsafe work from continuing until an inspector is able to attend.

Under these circumstances they should have the power to gather evidence on behalf of the inspector and give evidence in court.