

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

SPECIFIC COMMENTS

Legislative Approach:

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

Act – Regulation – Code of Practice

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

The regulatory approach should be consistent with the ability to defend. Principle and performance based standards, where risk management principles are applicable, absolute obligations on employers should not be applied as the foreseeability and reasonably practicable defences (NSW) are ineffective.

Absolute obligation should be able to be applied where prescriptive standards have been set. This is on the proviso that following the standard set in the legislation forms a solid basis for a defence.

The NSW Generators' preference for the Act / Regulation would be Principles or Performance based, utilising risk management principles with an appropriate obligation. This would allow the industry to manage safety in a practical manner, whilst utilising the knowledge in the organisation to meet OHS challenges. The application of prescriptive measures in industries tends to add costly, and more importantly, ineffective control measures.

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

Yes, the model OHS Act should specify its objectives.

The Act provides a regulatory framework based on risk management principles, which eliminate or control OHS risks in the workplace, with the objective of eliminating injury and health related issues from work environment and activities.

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

Reference should be made to the construction of the document and the intended interpretation. There have been a number of interpretive disputes where disputing parties put their own interpretation and emphasis on words, sentences, paragraphs and chapters.

Reference should also be made towards Self Regulation.

Scope, Application & Definitions:

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

The duty of care should be linked to both conduct of work and the workplace. The term "work" should have a definitional or reference descriptor.

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, the duties for employers, contractors and third parties should be described in aim of minimising any misunderstanding.

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?

Risk Management.

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

A full set of definitions within a sole OHS Act are an important factor for achieving national consistency. Globally accepted definitions could be explored for suitability.

The NSW Generators has an interest in the definition for 'construction', 'construction work' and 'construction site'. The NSW Regulation 2001 definition for **Construction Work** is too broad and has implied that generators fall within the definition during maintenance.

Construction Work means any of the following:

- (a) excavation, including the excavation or filling of trenches, ditches, shafts, wells, tunnels and pier holes, and the use of caissons and cofferdams,
- (b) building, including the construction (including the manufacturing of prefabricated elements of a building at the place of work concerned), alteration, renovation, repair, maintenance and demolition of all types of buildings,
- (c) civil engineering, including the construction, structural alteration, repair, maintenance and demolition of, for example, airports, docks, harbours, inland waterways, dams, river and avalanche and sea defence works, roads and highways, railways, bridges and tunnels, viaducts, and **works related to the provision of services such as communications, drainage, sewerage, water and energy supplies.**

The NSW Generators considers the operation and maintenance of its activities closely align with other heavy industries, factories, petro chemical and steel production. The obligations of the Construction chapter in the NSW Regulation 2001 are not applicable to the activities carried out on power station sites.

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

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

The model Act should include a test for control. This would give greater clarity to roles and responsibilities. The control test should be sufficiently sophisticated to allow determination of control, part control, shared control and no control.

Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

The issue of control should be the primary test for the determination of a duty holder.

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?

The Act or subsequent regulation should give some scope to delegate or relinquish control. Examples of instances where control may be relinquished would include:

- Domestic Maintenance
- Principle control arrangements
- Engagement of specific area experts

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

Yes, employment relationships are a valid basis although safety obligations should not be limited to such relationships.

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?

By considering such persons to be performing work under the employees duties within the Act.

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

There is a need to include "reasonably practicable" and exclude "must ensure".

Q24. To whom should these duties be owed?

See above

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

Workers should have a specific and binding duty of care. This should cover:

- acting in a safe manner *to protect the employees own health and safety at work;*
- *acting in a manner that does not place the health and safety of others at work at risk;*
- *conduct activities to ensure compliance with the OHS Act;*
- *report any issues that may adversely affect the employers ability to comply with the act;*
- conducting activities in a manner that aligns with training;
- conducting activities as instructed / directed;
- involvement in Risk Management;
- follow all systems implemented for safety;
- do not misuse equipment designed for safety or emergencies.

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

No, the Act should only appoint a position that has OHS responsibilities if the Act also describes the authority relating to that position. For a position to have a level of accountability, the authority levels allocated would have to match that of the person in control of the work. With this in mind, the regulated appointed position should extend to Managing Directors, Chief Executive Officers, Managers and Supervisors and be commensurate to their levels of responsibility and authority.

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

The liabilities of the appointed persons are dependant on the ability of the position to have affect the workplace, control is critical here. Failure to provide prudent and reasonable advice may give rise to liability.

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?

All parties should participate in taking responsibility

‘Reasonably Practicable’ & Risk Management:

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

The Act should include a ‘reasonably practicable’ test that assists in guiding the organisation to the required level of risk management.

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

Refer to definition outlined in Victorian Act.

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?

Guidance material should map risk management and reasonably practicable. This type of material would be more advantageous outside of the Act. The notion of Foreseeability is necessary with risk management. Reasonably practicable solutions are needed for Foreseeable risks and those reasonably practicable definition or test must work for current and foreseeable risks.

Consultation, Participation and Representation:

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

No, entry to a worksite for the purpose of investigating OHS issues requires a substantial amount of training in OHS and OHS Legislation. The process is open to abuse by unions. For Example; checking union membership and chasing industrial relation issues.

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

If Union Officials are allowed access for OHS issues (The NSW Generators do not believe they should) then the official conducting the inspection should have the equivalent training and experience as a WorkCover Inspector.

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

If right of entry is exercised (The NSW Generators do not agree) contact is to be made with the most senior management representative stating the issue of concern. Union officials are to be chaperoned at all times by management representatives to ensure the safety of the official.

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

Powers should be exercised through the relevant regulatory bodies. Strong penalties for individual officials and unions for misconduct or unauthorised industrial activity should be considered.

Regulator Functions, Powers & Accountability:

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

Yes, the roles and functions listed on Page 26 appear reasonable.

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

Yes, such publications provide usable references for business operators when designing and implementing safety management systems.

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

Yes, as these documents provide considerable value to the persons designing and using safety management systems.

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

The Act or associated regulation should nominate how inspectors are appointed with particular regard to qualifications, experience and training. This should commensurate to the power, functions and accountabilities of inspectors.

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

The Inspector role should change focus to allow advice and assistance to be given. Where advice or cooperation is not received then alternative forms should be exercised.

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, an inspector should have the ability to remove notices or instruments when he/she are satisfied that an organisation has put appropriate measures in place.

Compliance & Enforcement:

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

The hierarchy of enforcement measures should be developed to ensure that a proactive relationship is developed between the regulator and industry. The model on page 29 appears reasonable for a start.

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?

Injunctions look to be a very heavy handed way of managing this issue. This causes undue legal costs and dysfunction to business.

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?

Enforceable undertakings provide a mechanism for improvement in procedure and work practices. The effort and resources of organisations are directed towards the OHS issue that has been identified and has the capability of benefiting the broader business community. Where this avenue is not taken, and legal proceedings are enacted, learnings from the issue get buried in legal manoeuvring with costs and resources being directed to the defence as oppose to the issue.

Enforceable undertakings should have limited usage in cases of fatality or serious injury. Public policy considerations direct that justice through the court needs to be done.

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

Not necessarily, the further this mechanism can be taken from the legal sphere the more useful it becomes.

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

Every effort in enforcement should be directed toward ensuring safer work places across Australia. Resources within regulatory authorities should be biased towards being proactive, with enforcement measures actively following the hierarchy of enforcement. Resource efficiency can be achieved through greater understanding of safety management and less resources applied to legal argument and defences.

Prosecutions:

Q110. Who should be entitled to commence criminal proceedings?

Regulatory bodies should only be capable of bringing prosecution. This eliminates political and industrial motivated cases being bought.

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

No greater than a 2 year period and shorter if possible. This allows access to staff involved in the prosecution as staff turnover is high in most industries. This also allows a defence to be developed or mitigation whilst evidence is still fresh.

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

The term 'reasonably practicable' requires expansion to include taking reasonable precaution or exercising due diligence. The Act requires a statutory test or guidance.

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

No, the burden of proof should not differ between different types of offences.

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

Defences on page 36 should be included. In addition, a defence should be included when an individual has acted outside of lawful direction and directly led to an incident or dangerous occurrence.

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

No, it should be the same for a corporation and an individual.

Q123. How should officer be defined?

In similar terms and language as an officer is defined in the Corporations Act 2001, with an safety descriptor.

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

Yes, the test should demonstrate that the acts or omissions had a direct influence over the outcome of the incident or dangerous occurrence.

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

Yes, same as above. In addition, defence that a person in the organisation acted against corporate direction or the actions that were taken were an isolated breach.

Other Issues:

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

Some restrictions should be placed on the creation of state regulation to ensure that those created align with the model Act. This would stop rogue factions influencing any proposed changes.

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

Broad ranging consultations to ensure rogue factions do not dominate results.

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

Yes, particular industries have unique issues that require controls that are suitable in those environments. It is essential that industries can develop measures peculiar to them.

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

All currently recognised licences and permits should be nationalised. Every effort should be made to standardise educational requirements and centralise administration.

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?**

As above.

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GENERAL COMMENTS

General Comments:

Construction Work –

Business Efficiency: OHS law is only one branch of law that impacts on the running of a business. The model OHS Act should minimise the inconsistencies that businesses face when establishing various business management systems. Some possible mechanisms are:

- Align duties for directors, officers and managers with the Corporations Act and Environmental legislation.
- Provide a “Safety Business Judgement Rule” test (drawing on the Corporations Act philosophy) as a mechanism for providing a defence to directors and officers. Such an approach could provide a linkage with reasonable practicable and due diligence.
- The reliance of directors and officers on the information provided by others is a factual reality of modern business. Such a practice should be well weighted in any test used to provide a defence against OHS prosecution.