

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?

The offshore Safety Case (SC) regime requires a series of performance standards which require active and visible measurement of performance against the applicable Management System (MS).

Current OHS legislation is all about telling us what but not how to do it. This is a critical issue to be dealt with. If we all followed the legislation to the letter we would still be hurting people. The new Act has to define more of the how and lead on the performance standards it expects.

The current Robens-based approach is fine – a high level Act setting out the expectations and road map, regulations because many areas of industry are not mature enough to self-regulate (a case in point is the offshore industry – the SC regime was designed to enable operators more autonomy in the form of self-regulation but now the regulator – NOPSAs – is moving more and more into a policeman role. Human nature) and Codes of Practice (CoP), etc. In some cases the quality of the CoPs I believe is of such a high standard – eg the WA Worksafe ‘Working at Height’ CoP – that it should have more weight legislatively.

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

As stated above the Act should be a road map with high level expectations and non-negotiables in it, pointing to the various regulations and CoPs.

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

Yes it should – they must be simple and practical:

To provide a framework which has certain mandatory standards which must be complied with and a philosophy of how these standards are to be implemented and their performance measured.

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

See Q.4 above – the bottom line is that the following principles must be captured:

1. That no one has the right to place themselves or their fellow workers unnecessarily at risk of harm
2. That all workers have a fundamental expectation of their right to either cease or not commence a task that they ‘feel’ is potentially harmful to them or their fellow workers without fear of retribution
3. That all employees must be trained to a level of OHS management that is commensurate with their role and employer’s expectations

4. That no employer shall expose a worker (employee or contractor) to hazards which are either unidentified or uncontrolled

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

The following is not really 'legislative' but it is I believe important enough to be incorporated in any future Act.

The supervisor is *the* most influential person at any workplace. The Act must acknowledge this importance and outline the base expectations of the role with respect to the management of OHS.

The primary issue we are dealing with in OH&S is behaviour and behaviour is inextricably linked to consequence. The consequences that affect one most in the workplace are those meted out by the supervisor – both positive and negative.

I firmly believe that more definition has to be placed upon supervision – that they must understand their legal Duty of Care (DoC) obligations and that they must be trained in the basics of hazard/risk management in the workplace.

My eldest son (18yo) has just commenced as a form worker – he has had no induction to the role, is told to use a range of power tools with no prior instruction, has no guidance in the use of or provision of PPE and is basically left either to his own devices or trained on the job by older hands who undoubtedly pass on their short cuts and bad habits.

This is not an isolated issue – it is happening in thousands of workplaces all over Australia every day.

Who do we blame? It must be the supervisor for not setting the standards. Is it his fault? No – more than likely there has been no training, let alone a job description outlining OHS expectations.

It is 'our' fault – nowhere do we describe either the importance of supervision in shaping behaviour and standards (the workplace culture) or what critical knowledge a supervisor must have as a minimum to successfully exercise their own DoC in the workplace.

Scope, Application & Definitions:

Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?

As per the response to Q.1 – the model I believe works well – it's simple & logical. The Act should be common to all jurisdictions and via its very structure - ie a roadmap - it will establish a transparent and readily understood relationship with the subservient regulations and CoPs.

Industry-specific legislation should I believe be a sub-set of the Act based upon the principles I've described in response to Q.5 above.

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)?

No it can't possibly hope to be all things to all industries. Yes it should point to where they are – ie Regs & CoPs – but not get into the detail.

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

If the Act is applicable to all jurisdictions – ie a Commonwealth Act that is embraced as the head document on OHS management by all States & Territories – then it will have to incorporate its own consultation provisions with these jurisdictions as a matter of course and an associated model for this which describes how this occurs across all (inter) jurisdictions.

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

They should be implicit in all aspects of society – not just the workplace. A driver has a DoC on the roads to drive with due care and within the road laws as much as a rigger has on a construction site to comply with regulations and exhibit best practice in the execution of their work.

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

As per Q.10 – yes. Again it is an educational challenge to raise the awareness of all members of the community. Why should the car drivers DoC be any different to that of the riggers? The Act should be equally applicable in all we do – both at work and at home. The challenge is obviously to create an Act which enables this and then supports the practicality of implementing it.

How? A good question. The first step is to apply the Act to the community. The concept of DoC may not in itself be well understood in the wider community but the principles behind it are – it is as I say a matter of education.

I suggest that law makers and legislators are the most appropriate people to collaborate on this.

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?

If the Act is worded in such a way that it embraces as a minimum the principles I have suggested in Q.5 then this issue becomes academic. Emerging hazards/risks will be identified in the day to day process of hazard management. We will always be behind the eight-ball with longer term health hazards that are currently not known to us – eg cancer-causing substances. The primary issue is that before we embark on a task – at any level – we display some healthy paranoia, constantly ask ‘what if?’ and plan it.

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

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 duty holder can be defined by the prevailing status of the management system. A company I work with has three levels –

1 – which is where they deem their MS* prevails completely – eg one of their operational sites = 100% control

2 – where they have partial control – eg a larger site where the work is done in multiple locations (fabrication, erection, painting, etc) – and parts of their MS are used.

3 – where the work being undertaken is obviously under the control of a contractor's MS – duty of care is expressed through the contract process – ie prequal of contractors to ensure they have both a system and implementation standards that are acceptable – and directly for their own employees working on that site.

* By MS I mean a system that is aligned with a recognised standard such as AS 4801 – but does not need to be certified as such.

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?

See Q17 response. The control can *never* be delegated or relinquished 100%. In each of the three examples above, especially in 3, there must be a process of due diligence which satisfies the client company that the appropriate MS and work practices are in place at the contractors premises.

If controls are delegated or relinquished without this process having taken place then the client company is in breach of its own duty of care and should therefore be liable.

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

Definitely it should. In plain language the above should be described so that both client and contractor is in no doubt what they are accountable for in this area. The key to success here is the communication and understanding of all parties of what is expected of them – we have to have our boundaries and associated metrics.

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

Again yes it is, as long as the process described above is effectively implemented.

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?

If the Act describes the above in no uncertain terms then this will be satisfied. Any person coming onto a site – be it office or operations (workshop, factory, building, mining, farm, etc) – must be embraced by the prevailing MS and associated duty of care of the owner of that MS.

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

I think that there is & that it is outlined in the response to Q.18.

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

Again I believe that it is a simple concept that is readily conveyed to all employers via the MS 'control' concept described above. I've worked with this for a number of years in the oil & gas industry both in Australia and overseas and given clear guidelines it is relatively easy to follow. The upside is that everyone is clear who has control and to what degree. The downside is that, particularly in another country, MS control at level 1 is both difficult and expensive to attain.

Q24. To whom should these duties be owed?

Any person who enters the site – from visitor to delivery person to subcontractor to employee.

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

I believe that a simple definition along the lines of – that they shall work within the prevailing MS, not put themselves or anyone else in danger and actively work to improve the MS through reporting, suggestions, etc. Would suffice. Not too different from what is currently in place. The over-arching caveat must *always* be that should they 'feel' that the work is unsafe then they shall cease or not commence that work until they are comfortable that the work is safe.

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?

Absolutely it should. DoC applies to all – no matter what their status. As a minimum they are required to comply with the safety procedures that prevail over the site they are at. This is obviously more difficult in a retail situation but where entry is controlled in some manner – sign in, visitors badge, induction, etc – it should be implicit in their access that they comply and have a DoC to conduct themselves in line with the MS requirements, not exposing themselves or others unnecessarily to hazards.

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?

No current provisions do not. How? – as per the responses above.

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?

Most definitely it should because this is where so many small business owners flagrantly flaunt DoC requirements – primarily through both lack of knowledge and/or the perceived cost of compliance. The DoC should be defined as being applicable as per the prevailing MS model in response to Q.17 above.

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

I don't think that it is necessary to differentiate between either timing &/or activities here. The bottom line is and always should be that wherever, as the current OSH Act in WA states, there is a hazard then employees must be protected from it. This is constant – the classic example, if I have interpreted the question correctly, would be a substance or process which has a long term deleterious effect on the health of an individual – ie asbestos, UV radiation, etc.

The Act should ensure that people are required to identify and communicate such long term hazards (to the extent that they are known) as an obligation. This should be enshrined in the OHS requirements at the design stage.

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?

Yes – see response to Q.18. Design, the ergonomics of it and the hazards which can inadvertently be ‘designed in’ are all the responsibility of the end user from a DoC perspective – from a constructability, operability and maintainability perspective (we should also be thinking about abandonment as well here). Processes must be in place to assure the end user that the appropriate design controls have been utilised and there is an acceptable QC process at point of manufacture.

In summary, as part of the client’s DoC – they must ensure that they have not created any ‘sleepers’ that may harm someone down the track.

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)?

Again the Q.18 response is applicable. At each ‘change of hands’ new players are introduced and each of these has their own DoC to fulfil. It may be as simple as a ‘certificate of compliance’ (against whatever the appropriate standard may be) as long as the newest person in the chain has undertaken their own due diligence with respect to the processes involved in that certificate being provided by the supplier. In a hiring situation currently a hirer of any quality will supply a certificate from a competent person appropriate to the equipment being hired – eg that a welding machine has an electricians tag stating that it has been inspected and is fit for use. Obviously this would not apply to hand tools but would to power tools.

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

In my experience it is the fundamental understanding at all levels in the workplace of both the meaning of DoC and the consequences of not managing it effectively. Ultimately when an incident occurs resulting in serious injury or a fatality the prosecutor is interested in what *you* did to prevent this – no matter what the circumstances.

I think one of the key issues requiring to be addressed is this one, combined with a good working knowledge of hazard and risk identification and management – in self and others.

'Reasonably Practicable' & Risk Management:

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

Definitely – this is half the problem in the community – they do not understand what either hazard or risk is. They know what will hurt them but the culture is such that the likelihood (risk) of it doing so is very low and 'it won't happen to me'.

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 – the concept of ALARP has been in use for a long time and once described is generally easily understood because it is just that – practicable.

Courts spend a lot of time on what is 'reasonable' in their deliberations. Therefore ALARP should be an everyday expression linked to hazard management so that those in charge of workers understand that yes, there is a point at which the gain is outweighed by the cost and alternatives need to be found or ironclad processes implemented to reduce or control the hazard(s) if there are no alternatives.

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

Yes – the hierarchy of control is a simple model that most people can grasp. Our primary aim is to eliminate the hazard or risk. This is a key process which every task should have applied to it – from the project level where decisions at the design stage are made to eliminate or greatly reduce the need to work at height for example, to the individual worker who acknowledges that the task in front of them requires the help of another person, an EWP to execute it safely, etc.

The Act must set out expectations that are to be met by all management – whether it be a sole trader or a corporation – the risks are always there so therefore they must be able to show how they have identified and managed them.

This is obviously a challenge for the individual versus the corporation so it is imperative that the Act is flexible and practical enough to not place unnecessary administrative burdens on sole tradespeople.

Consultation, Participation and Representation:

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

The current Safety Case (SC) regime requirements manage this quite well. It describes the importance of consultation and processes that are expected to have been undertaken with members of the workforce – at the SC development stage and then during on-going operations.

A classic vehicle for consultation that involves those doing the job is the Job Safety or Hazard Analysis (JSA/JHA). A simple step by step process which identifies what can go wrong at each stage, what the control or barrier to be employed is and who ‘owns’ that control/barrier. OHS Committees and HSRs are also integral to effective consultation.

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

From a practical perspective they should apply in all but where there is only one person on the job – eg self-employed plumber. A safer work place is the culmination of corporate, industry, workgroup and individual experience. If consultation does not occur – even at the most basic level (eg conducting a pre-start meeting to discuss the events of the coming shift and associated hazards) this will pay dividends.

In short, consultation should apply to all work relationships where this is practical.

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

Yes – given the responses to Q 45 & 46 then necessarily the level and detail of the consultation must match the workplace situation. For any workgroup – of two or more people – then a pre-start would be the minimum mandatory process.

Q48. How should consultation be provided for:

A)– a multi-employer worksite; It would be unusual not to have one employer with the overarching MS control of the site. It is therefore incumbent upon them to assure themselves that those working on their site are managing OHS to an acceptable level. To achieve this they must have a process whereby the site as a whole has input via say a Site OHS Committee into which feed all the other workgroups. This is where Health & Safety Representatives (HSRs) are able to act as a conduit between workforce and management without fear of reprisal.

B) – an employer with operations across more than one worksite; The employer must have an appropriate MS in place that can manage such a situation from a practical perspective. It will obviously be dependent upon the size of the organisation. This MS shall determine whose MS has prevailing status – as per the response to Q.17 – and managed accordingly. If it were a category 3 site – ie MS control is totally under the owner/operator of the site, then the employer must have processes in place that enable him to satisfy himself that that MS is acceptable and no ‘bridging’ is required between the employers MS & that of the site.

C) – small business; This is where the impost of a MS needs to be customised for small businesses so that it is not seen to be a burden. Small businesses can easily provide for consultation with workers through regular minuted meetings, simple hazard and incident reporting processes and feedback.

Take the corner shop as an example – usually family owned and operated with a relatively low level of sophistication when it comes to systems. No money for training or time for analysis and meetings. Indeed probably not practical. But – they are confronted daily with manual handling, work at height (shelf access) and other basic hazards. To that end they should as a minimum be required to undertake a consultative process on hazard identification and management and impart the results of these to all employees. A difficult thing to manage, especially when children are used to serve.

We've got to start simply.

D) – remote workplaces; As per B) above, when an employer of reasonable size has personnel working in a remote location then DoC should require the appropriate processes to be in place – eg remote worker procedure – and an assessment of the prevailing MS (if any) where the work is being conducted. The planning process must involve those undertaking the work.

Very hard to apply to say a lone prospector in the middle of the WA bush. Perhaps there should be a minimum number of employees where certain requirements under the Act are mandatory. At least that way we can dictate minimum standards that are both practical and of value to those they are being imposed upon – and yes mandatory is the only way we are going to make any inroads to this massive public education task.

E) – precarious employment; and Nothing special other than the employer having a process in place whereby those undertaking the work are involved in the planning of it – eg JS/HA or pre-start meeting. Discussing the task and actively looking at what can go wrong and how, is a key process in workforce consultation.

F) – workers from culturally and linguistically diverse backgrounds. An employer who has a multilingual/cultural workforce must identify this as a potential hazard and manage it accordingly with signage, interpreters, competency-based inductions and regular fora for the discussion of OHS issues.

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

Yes – but again there should be guidance with respect to minimum numbers – as exists now. Both HSRs and HSCs are keys to effective consultation.

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?

As per Q.49 – HSRs & HSCs are critical for effective consultation as long as they are not politicised.

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

I believe that the current process describing the election of HSRs and the establishment of HSCs as described in the Petroleum (Submerged Lands) Act – (P(SL)A) – is both effective and practical and a good model to base this upon.

I have attached a copy of an HSR Guide that I developed which will answer many of the following questions.

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

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

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

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

Q56. Are there alternative mechanisms that should be considered?

I don't believe so – if managed as intended the HSR process is an extremely valuable one. Not only does it enhance the consultation process but I have seen many HSRs over the years become competent professional OHS advisers.

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

Act should state the requirement for HSRs and the fundamental requirements – ie election, free from prosecution, role purpose etc. The Regs should detail the role and its boundaries etc.

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

I have limited knowledge of many industries within Australia outside the major construction and on/offshore oil & gas industry but what I have seen is that the larger companies tend to have reasonable systems. The degree and effectiveness of their implementation is the real variable.

It is the small business sector that is the least compliant – OHS is still very much seen as unnecessary – from both a time and cost perspective. This is the area that requires the most work on representation. But – they have to have at least a basic system in place and that has to be implemented, measured and managed.

The Act must define minimum standards/expectations for all businesses

Regulator Functions, Powers & Accountability:

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

Yes it should – if they don't then how do we know what the rules are?

The aim is to have regulator and business in a partnership to improve, not as adversaries.

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

The primary problem in this area boils down to the level of remuneration. Like parking inspectors, regulators attract a certain type of person. Particularly given the current employment market where wages within industry are far higher than within government. NOPSA have had limited success in recruiting a higher calibre of inspector with higher wages. They have been able to do this by charging operators within the industry not insubstantial annual fees.

Perhaps a levy – such as the Emergency Services levy – could be imposed on businesses of a certain size to help alleviate this problem.

The issue of appointment, qualifications, powers, functions & accountabilities of inspectors should be left to the individual regulators for this very reason, The Act should only state that the inspectors should be 'competent' in the area they are being employed to help regulate.

This lack of perceived competence is often the cause of some angst amongst operators/businesses.

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

No – again it is up to the individual regulator. It is a minefield if it is attempted to be managed at the federal level.

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

An inspector should have similar powers to any worker – ie to be able to stop a job if they feel that there is a risk of harm in continuing. Apart from that inalienable right they must act within the boundaries laid down by their employer but also have the right to challenge.

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?

Inspectors must have a degree of autonomy to undertake their work efficiently. That is why the caveat within the Act should be that they are deemed to be competent in the area they are regulating.

Inspectors do not always get it right or issues are rectified within a short space of time – yes an inspector should have the power to vary or cancel as appropriate.

Compliance & Enforcement:

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

Yes it should – and I believe it should be severity based – but – potential not necessarily actual, as stated in the response to Q 138.

This is a difficult one because if the event was not realised – eg the fatality – then how does one prosecute? But that is the essence of good OHS management – the near misses don't happen if all is being managed as intended.

Because of this subjectivity the boundaries necessarily have to be fuzzy. Not good for a legal outcome unfortunately but there are many precedents being set.

The hierarchy suggested in the Issues Paper looks like a solid place to start.

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?

As I believe that the Act should primarily be a high level road map then it should briefly describe these and only point to the detail.

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

Again these are within the realm of the regulations and the Act should discuss the principles involved and the reasoning behind them and then point to the regs. Much easier if they are basically the same Australia-wide with just local appendices.

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

Absolutely – it's not a game of keepings off. We are trying to raise the level of compliance through education rather than big sticks. It must be part of the educational process.

Regulators need to work with rather than against.

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

Inspectors must be given reasonable autonomy but there have to be the normal checks and balances within the system to ensure QC is managed effectively. The inspector's supervisor should be involved – perhaps, due to the subjectivity that may enter in to the process, a mandatory supervisory review process is entered into when a degree of severity is reached, plus an ad-hoc QC check.

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

Yes – as there currently is in WA. Without a deadline would it ever be closed out?

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?

This really needs to be managed on a case by case basis depending upon the severity of the reason for the notice. Basically as long as there are positive steps being taken toward closing out the relevant issue(s) then yes, an internal review can be agreed. Appeals should be a right of the receiver of the notice, particularly give the variables in inspector's experience & abilities.

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

Only by way of describing process. The regulations should deal with the details.

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

Potentially both – depending on the location. In Commonwealth waters then federal or have this clearly delegated to the state/territory.

Prosecutions:

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

I firmly believe that we should be actively moving down the path of corporate manslaughter. More and more regulators are targeting individuals – CEOs, Managers, supervisors and workers. NSW is at the forefront of this but I don't know how effective it has been to date. Again the question has to be asked – what did *you* do to prevent this?

DoC requires that all individuals conduct their work in a safe manner. The higher the role the greater the due diligence should be.

When a CEO allows a system to exist in his or her company that does not apply the principle of ALARP or expect and monitor effective work planning, including workforce training, then they have not discharged their DoC commensurate with their role. Should an incident occur as a result of this then they should be held accountable accordingly.

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

Corporate manslaughter and serious injury due to a lack of a systematic and documented approach to the management of OHS.

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

Whatever penalties are meted out should be personal. It's the only way to ensure that individuals will change their behaviour and ultimately the culture in the workplace – consequences that are certain, soon and timely.

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

I don't know whether the Act should specify such things. It is not primarily about punishment – it is about the provision of a roadmap to excellence in the 'what and how' of OHS management.

What it should be is the vehicle for certain breaches to be delivered to the criminal courts.

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

See Q.104 response.

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

Crimes Act

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?

Each offence should be looked at for its potential. We undertake incident investigations based upon this because if only one or two things were different then a fatality or serious incident may have occurred.

A load falling from height and landing next to a worker should be treated as if it landed on them. What's the difference other than the actual outcome? The primary issue is that somewhere along the line the incumbent system has failed and only luck has prevented a death.

Other Issues:

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

These are an excellent tool that I believe are currently managed well by the relevant jurisdictions. I would not advocate any provisions in the Act other than where they sit in the scheme of things and their value to industry.

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

Yes – in the oil & gas industry the National Oil & Gas Safety Advisory Committee (NOGSAC) is in place and although it is not a major contributor the model is sound. It is based upon tripartism.

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

Yes – it is a fundamental aspect of consultation. A good example is the regulation of tilt-up panel construction in WA after several fatalities.

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?**

The bottom line is that we need Australia-wide tickets – just as the recent COAG decision has been made for drivers' licences. Some tickets are recognised across the country but all should be.

Once that is in place a common set of procedures for permits & licences naturally follows.

An upside of this is that regulators can cross-pollinate their inspectors as there should be few differences in the regulations they are enforcing.

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?

As per the response to Q.7 – the Act should become the lead document for all jurisdictions with regulations and CoPs as common as is practicable. There will be some places where a particular regulation or CoP will not apply in another – eg Hobart to Darwin – due to local conditions, but the majority should be applicable.

A scaffolder working in Karratha should have the same ticket(s) and work under the same regulations and CoPs as a scaffolder in Wollongong – the only differences should be by exception with respect to local anomalies.

If this is put into place overlap disappears and all else stems from a common base.

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

GENERAL COMMENTS

As you will gather from my responses I believe that the key to creating a successful Act is that the emphasis must be placed in the appropriate areas and that the principles behind the Act are simple and practical.

Whilst I appreciate that the Act is a high level document it should be a roadmap to all other processes and need not be a complicated legal-ese document.

We have a great opportunity to create a regime that focuses on what really matters on the proactive side of the OHS management – five key elements:

1. a practical and flexible system
2. leadership
3. planning
4. education
5. measurement

Of these five elements number 2 – leadership – provides the greatest challenge. The other elements are relatively easy to develop and implement as they are primarily process.

If we accept the premise that OHS management is about behaviour which in turn is a product of consequence then an Act that does not acknowledge this and set out the appropriate expectations and guidelines is doomed to fail.