

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

## SPECIFIC COMMENTS

Please complete this template to provide specific comments with supporting reasons against each chapter of the Issues Paper. If you are responding to a specific question in the Issues Paper, please include a reference to the relevant question number.

### **Legislative Approach:**

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

3 tier approach

The model ACT should consist of principles based standards and performance based standards which should not require amendments for long period. Review period 5 - 10 years. The regulations should contain process based standards for common hazards, consultation mechanisms, risk management and contain links to relevant codes of practice. Review period 3 - 5 years

Prescriptive standards should be outlined in codes of practice and Australian Standards which should be updated on as-needs basis by industry, union & regulator representatives. This will maintain a consistent approach while allowing new industries, work practices & hazards to be addressed.

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

Not detailed when it comes to addressing OHS issues specifically. It should contain duties of care, definitions, defences, powers of regulators, fines, principles and objectives. Links to relevant case law would be useful.

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

Occupational health, safety and welfare is appropriate as it covers the full intent of legislation though occupational limits scope. Perhaps workplace or work related.

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

Yes, as objectives clarify how the legislation will be interpreted by courts.

- (a) to secure the health, safety and welfare of persons at workplaces;
- (b) to protect persons at workplaces against risks to health or safety;
- (c) to eliminate, at the source, risks to the health, safety and welfare of persons at workplaces; and
- (d) to provide for the involvement of employees, contractors, labour hire contractors and employers and associations representing employees and employers in the formulation and implementation of health and safety standard

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

Yes, all the principles developed from Vic OHS Act review are appropriate. This will emphasise the requirement for businesses to comply with the intent of the legislation.

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

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### **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?**

No, if possible industry specific legislation should be agreed across jurisdictions and included in model regulations and codes of practice.

**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)?**

Yes, all industry specific legislation should be fully included or gradually phased in, in the model Act, regulations, codes of practice and guidance notes. Tripartite committees from specific industries should be formed to agree on content.

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

Yes, safety regulators should share information on breaches, improvement notices, incident data etc of companies who operate across jurisdictions. More opportunities for cross auditing, shared safety initiatives, public education, standardised methods for classifying injuries, dangerous occurrences.

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

Conduct of paid work will capture contractors, outworkers, work from home, work experience.

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

Yes. The conduct of work can have impact on visitors and members of the public in the surrounding environment. How – duties owed to third parties linked to the conduct of work.

**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 – smart definitions of worker, work arrangements, work relationships & remuneration types.

**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?**

Yes – nanoparticles for example. If reasonably practicable is the term used, then industry lack of knowledge of the hazard is a defence.

How – I don't see how the model Act can effectively address unknowns. The most effective way is for the tripartite body replacing ASCC to draft guidance notes ASAP and publish to industry.

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

Reasonably practicable

Worker

Workplace

Consultation

Control

Contractor

Labour hire employee

Outworker

Visitor

Volunteer

Use internationally recognised definitions where practicable.

**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?**

Yes

Authority, responsibility and ability/capacity to affect OHS outcomes

**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 extent someone can be held accountable is dependent on their authority (inherent or delegated) and resource capacity.

**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?**

Control can be partially delegated as long as appropriate authority is given to the delegate. It cannot be relinquished.

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

No

Conduct of work and control of work environment would be more suitable.

**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?**

Apprentices and trainees are equivalent to employees but have an increased requirement for supervision & training.

Duties owed to contractors and labour hire personnel are shared between principal contracting company or employment agency and the host organisation. The host organisation has a greater responsibility for labour hire than contractors as they have greater control of the work and work methods.

Volunteers are equivalent to members of the public or visitors. Normally volunteers are expected to organise their own worker's compensation or are covered by that of an educational institute or charitable organisation. An alternative is to pay volunteers a token amount and consider them employees.

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

Conduct of work  
Duties owed by those who have control

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

Yes, from case law

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

The employer shall take all reasonably practicable steps to ensure health, safety & welfare of direct & indirect employees, visitors and members of the public

**Q24. To whom should these duties be owed?**

All those performing work for direct or indirect payment.  
Visitors, members of the public

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

Take all reasonably practicable steps to not endanger himself or others  
Cooperate with all OHS controls implemented by employer  
Not to interfere with any safety controls  
Raise OHS issues through supervisor or health & safety committee

**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?**

Yes, provide a healthy & safe work environment through restricted access, supervision & instruction

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

Yes

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

Depends on the level of authority and control. They cannot be fully liable.

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

Employer –employee

**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?**

Yes – hazardous facilities, major constructions from design to demolition need OHSE plans for their estimated life  
Plans must include inspection, maintenance,

**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?**

Depends whether designer met specifications as agreed in contract

**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)?**

Every time

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

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

yes

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

Yes

**Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?**

Yes

**Q42. Should ‘hazard’ and ‘risk’ be defined in the model OHS Act?**

Yes

**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 – risk management principles are useful as a tool but should replace a standard as they can be poorly implemented and may not lead to reaching a standard.

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

Yes

## Consultation, Participation and Representation:

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

Mandatory for introducing new plant, procedures & substances. Mandatory for organisations with more than 10 staff

Health & Safety reps and/or health & safety committees with power to issue provisional improvement notices or similar.

Election guide in regulations

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

Employees, labour hire, on-going volunteers, contracted employees, shift workers

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

Yes – face to face meetings may not be suitable for all work relationships but they could be included through email, intranet.

### Q48. How should consultation be provided for:

– **a multi-employer worksite**; separate committees for each employer group with shared issues at a combined OHS committee

– **an employer with operations across more than one worksite**; separate committees at each worksite with reports to head office

– **small business**; elected health & safety representative

– **remote workplaces**; conference call or teleconferencing for meetings

– **precarious employment**; safe work method statements to ensure all workers are given an opportunity to agree controls

– **workers from culturally and linguistically diverse backgrounds**. Use community representatives to communicate at meetings

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

Yes – one or both depending on the size of the organisation

### 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?

Penalties where organisations do not consult meaningfully. OHS management systems should describe how consultation will occur and systems audits and surveying staff demonstrate its effectiveness. Records of consultation to be kept.

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

HSRs mandatory for workplaces with 10 or more employees

HSCs & HSRs mandatory for workplaces with 50 or more employees

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

All employees, labour hire, contracted employees

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

Issue provisional improvement notices  
Investigate incidents  
Be consulted on new plant, equipment, substances, processes  
Be informed of all injuries  
Ask for regulator to conduct OHS inspection  
Conduct OHS inspections  
Raise and resolve OHS issues with management  
Represent staff in regards to OHS

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

HSC should consist of HSR, management representative(s), staff representatives from different parts of the organisation. Preferable between 5-10, meet every 2 months  
Communicate with all parts of the organisation to determine if there are any OHS issues  
Investigate incidents  
Be consulted on new plant, equipment, substances, processes  
Be informed of all injuries  
Conduct OHS inspections  
Recommend OHS training  
Recommend PPE  
Recommend corrective actions  
Report outcomes to staff

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

Cert IV OHS would be ideal as members gain a worthwhile qualification that will benefit their career  
5 days training courses discourage a lot of people – perhaps a day per week would be more achievable

**Q56. Are there alternative mechanisms that should be considered?**

No

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

Requirement, powers & functions in Act  
Specific requirements for training, election, structure in regulations

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

Yes –shift workers, casuals, part time staff, labour hire. Communication strategies for each group. These should be implemented by HSC members.

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

Yes, regulators and union officials if they have members at the workplace.

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

Union officials – Cert IV OHS or be accompanied by a trained and experienced OHS advisor

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

Union officials if requested by HSR or union members if HSR or HSC have been unable to resolve the issue

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

Access to information relevant to OHS issue, copies of relevant documents with privacy and commercially sensitive information obscured, access to workers.

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

OHS arbitration  
Regulator advice in person or email

**Q64. When should issue resolution procedures be activated?**

After HSR & HSC have failed to gain resolution.

**Q65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?**

Regulations

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

Strengthen consultation processes and educate HSRs & HSC members

**Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?**

Yes if the cease work is immediately followed by resolution at HSC, or regulator intervention

**Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?**

Yes. Where continuing work may result in serious harm

**Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?**

Yes, salary plus shift allowances and normal overtime. The loss of income should not influence the return to unsafe work.

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

Yes, the regulator should uphold or dismiss the PIN after his investigation.

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

HSRs & HSC members should be protected from dismissal/discrimination for undertaking their role

All workers should be protected from dismissal/discrimination for raising OHS issues.

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

Any worker

Yes

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

Civil proceedings

**Q74. Who should have the burden of proving relevant elements of offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?**

Civil standard

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

Yes

**Q76. What remedies should be available to the victims?**

Reinstatement

Damages for loss of income, career, psychological pain

**Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?**

Yes, conciliation then arbitration if that fails

## **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 –similar detail to NSW Act

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

yes

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

Yes – to encourage open discussion when advice is sought or offered. Enforcement functions to be used for potentially serious breaches or failure to follow up on advice.

How – different teams to prevent confusion but with regular cross-over to develop experience in both functions

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

Yes – different teams and change focus of training to prevention, grounds for prosecution

**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

Improvement notice

Infringement notice

Prohibition notice

Prosecution

**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?**

Requirements for appropriate use of enforcement measures contained in model Act

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

Yes – recommendations will often expedite compliance while leaving the organisation the freedom to achieve compliance by other means

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

Provisions as found in Victorian model allowing appeals against an inspector's decision

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

Yes

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

OHS law

### **Prosecutions:**

**Q101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?**

Yes, particularly when the maximum penalty may have little effect on the offending organisation. Death or serious injury of workers.

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

Death & injury – criminal offence

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

Setup separate OHS courts to achieve better consistency in outcomes.

**Q110. Who should be entitled to commence criminal proceedings?**

Regulators and unions

### **Other Issues:**

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

Yes – use of specialist safety court with review of decisions by tripartite group

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

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## GENERAL COMMENTS

Please list any general comments you would like to make on any other matters not already highlighted in the Issues Paper. Ensure your general comments fall within the Terms of Reference of the National Review into Model OHS Laws (refer to Appendix A of the Issues Paper).

### **General Comments:**