

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

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## *Legislative Approach*

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

We support the three-tier model.

There is a place in the Act and subordinate regulations and codes of practices for principles, performance, process and prescriptive standards. The Act should be formed primarily around principles based and performance based standards. There will be a place for process and prescriptive standards in regulations and codes. Taking this approach will enable flexibility in the Codes to accommodate different businesses and industries and ensure that the Act will require minimal change over time.

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

The detail should be in the lower tier documents – most detail in the codes and least detail in the Act.

All should be written in plain English.

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

Australian Workplace Health and Safety Act.

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

Yes. The objectives should be clear and simple e.g. 'to protect the health and safety of;

- persons undertaking organised work.
- other persons at or in the close vicinity to a workplace.

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

Yes, the model OHS Act should include a set of principles. We recommend the principles published by the Federal Safety Commission as a very good reference.

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

The legislative approach should be guided by an over-arching aim of promoting a positive health and safety culture in workplaces, organisations and industries. To the extent possible, the legislative approach should address behavioural aspects of safety.

## **Scope, Application & Definitions**

- 7. 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 the industry specific legislation?**

See response to Q8.

- 8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g. could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?**

The model OHS Act should incorporate all industry specific safety legislations. Such legislation should be dealt with in regulations and Codes of Practice. In our view this is essential to gain the business effectiveness that the model Act promises to deliver

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

Yes. The regulations should prescribe the role and approach that regulators should take to promoting and enforcing the Act. A consistent approach by the regulators is highly desirable and this will only be achieved with co-ordination between the various regulators.

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

The general duties of care should be tied to;

- a) the conduct of work in respect of employees.
- b) the workplace in respect of non-employees.

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

Yes, (refer to b) above (Q10)). The 'workplace' would require careful definition (e.g. to include 'immediate vicinity').

We do not support tying general duties of care to conduct of the undertaking' as this will blur the line between the Act and public safety regulation.

- 12. 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, it must be sufficiently broad to accommodate changes in employment arrangements, workplace arrangements and hazards. Careful framing of definitions such as 'workplace' and 'control' (with examples of guidance) will be very important in achieving this.

- 13. 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?**

As noted in the response to Q12, the Act must be framed in a manner that ensures that any future emerging hazards will be addressed due to the broad, all-encompassing approach. Detail relating to emerging hazards should, where necessary, be provided in Codes of Practice.

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

The following terms will be critical to achieving national consistency;

- Employee
- Workplace
- Control
- Controller of Premises
- Hazard
- Risk
- Safe System of Work
- Consultation
- Reasonably practicable

Aspects of the Act (or regulations) dealing with construction work will include a number of terms requiring definition (e.g. 'construction work', 'high risk construction work').

The National Standard for Construction Work (NOHSC : 1016 2005) provides well constructed workable definitions for many of these terms, some of which have application beyond the construction industry.

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

An important issue is plain english expression of the scope, applications and definitions.

## ***Duties of Care – Who owes them and to whom?***

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

Yes, we consider this to be of high importance. ‘Control’ is fundamental in determining the nature and extent of a duty holders obligations.

The definition should be broad and tied to ‘capacity to control’.

The definition itself should not be prescriptive but should be supported by extensive examples of control e.g. Examples (positive and negative) illustrating the extent of control of;

- Directors of a company
- Owners of a building or space leased to a tenant
- Tenants who lease and office/ shop
- Control of a company over an employees home workplace (for work-at-home arrangements)
- Control of a company over ‘vehicle’ workplaces
- Various contracting arrangements (owner, property manager, commissioner of contractors, contractors).

The approach to defining control should consider a range of factors including realistic capacity to control. For example, in the case of employees working at homes, employer should have limited responsibility/ liability commensurate with the employer’s capacity to control. Whereas it is reasonable for the employer to establish health and safety guidelines, it is not reasonable, practicable or economically sensible for the employer to have a responsibility for monitoring compliance. This is a small but important point with the emergence of flexible working arrangements. It is important that the OHS legislation does not impose a disincentive for employers to allow/ encourage such arrangements.

### **17. 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?**

Control should be a major factor in determining duty holders and the extent of their duties.

The ‘Chain of Responsibility’ concept should be a feature of the model OHS Act.

An employer or controller of premises ought to be able to rely on specialist expertise, for example of an electrical contractor, and not be liable for the consequences of work that they neither directly control nor have specialist expertise in.

### **18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?**

Yes. Referring to our response to Q16, the examples that illustrate control (or lack of) should illustrate the circumstances and extent of delegation or relinquishment of control.

The concept of ‘Principal Contractor’ (Construction) should be incorporated into the Act and is an example where control would be largely relinquished subject to certain duties of the ‘Principal’ (or commissioner of the construction work) being discharged.

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

Yes, the model OHS Act should clarify responsibilities where multiple duty holders and multiple duties are involved. The main mechanism to achieve this will be to identify the nature of duties held by different duty holders (e.g. Project Manager/ Designer/ Principal Contractor or owner/ tenant). A carefully framed control test will greatly assist to clarify responsibilities of multiple duty holders.

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

See response to Q10.

**21. 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?**

See response to Q10.

Special consideration should be given to duties owed to trespassers. These duties should be lesser commensurate with the lesser degree of control able to be exerted compared with visitors for example.

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

No response.

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

We support the typically existing general obligation (ensure health and safety to the extent that is reasonably practicable) supplemented by specific duties related to plant, substances, systems of work and provision of information, instruction, training and supervision.

The Robens principle of 'reasonable practicable' is of paramount importance.

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

The duties should be owed to employees and to non-employees. The extent of the duties owed should depend upon the nature of the relationship between the employer and the individual. Relevant to this is having a definition for employee (refer to our response to Q14).

Duties should take account of the reasonable capacity of the employer to discharge the duty. For example, the duties owed to a person engaged from a labour hire agency should be close to but less than the duties owed to an employee as some of the duties will be owed by the labour hire agency.

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

It is important that the workers duties of care be specified. The model OHS Act should allocate responsibilities in a fair and equitable manner so as to encourage a 'total safety' culture in industry. The objective cannot be achieved unless all 'persons' (individuals and companies) that have the capacity to exert control over an outcome have duties specified by the Act.

We support inclusion of duties relating to not wilfully placing at risk the health and safety of other persons and not 'misusing' items provided for protection of health and safety.

Other duties we recommend are;

- Inform employer of any health condition, incapacity or other circumstance that could impact on the worker's capacity to safely perform a work activity
- Comply with requirements to participate in induction, training and consultation activities.
- Comply with reasonable directions of other duty holders

**26. 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. Duties similar to those outlined in our response to Q25 with reference to 'controller of workplace' rather than 'employer'.

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

Yes, in some instances. There is no need for appointment of individual people to specified roles (such as WHSO in Queensland) as primary duties should align with persons responsible in respect of employment arrangements and in respect of control of a workplace.

There is a need to specify appointment of persons in respect of control, for example Principal Contractors for certain types of construction work.

Other examples of appointment of persons with specific responsibilities (in respect of design and construction work) include Client (or commissioner of construction work), Designer, Project Manager. These concepts may have some similar application beyond the construction industry.

Importantly, this assists in clarifying 'control' in specific circumstances.

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

No response

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

No response

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

Yes, this is important to provide clarity to the officers and to promote compliance to the Act. The liability of officers should be limited to issues about which they have, or can reasonably be expected to have, direct knowledge and control.

**31. 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?**

Refer to response to Q16. Clear expression of duties of persons in control is essential. Definition of 'control' and illustration with examples will greatly assist this.

**32. Should the model OHS Act specify that persons in control of a work area or temporary workplace also have a duty? If so, whom?**

Yes. The model OHS Act should specify duties of persons in control of a work area or a temporary workplace. This duty should be to employees and non-employees. Again, the key to this is careful definition of 'control'.

**33. 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?**

It is important that the model OHS Act is clear about such duties. There should be some limitation of liability in respect of time.

Notwithstanding such limitation, designers and manufacturers (for example) should, (provided the designed/ manufactured items was being used for the purpose intended) be responsible for duties related to design/ manufacture failures or omissions.

**34. 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?**

No response

**35. How should the activity 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)?**

No response

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

No response

## ***'Reasonably Practicable' & Risk Management***

### **37. Should a test of "reasonably practicable" be included in the model OHS Act?**

Yes. A test of 'reasonably practicable' should be included in the model OHS as has been done in the Victorian and Western Australian Acts.

### **38. If not, what alternative standard should be included?**

Refer to question Q37

### **39. How should the standard be defined? What level of detail should be provided?**

The standard should be provided in considerable detail, mainly through guidance material citing examples (positive and negative).

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

Control must be an element. As noted in the response to Q16, careful definition of control is of paramount importance.

It is also important that individuals and corporations be able to exert influence without assuming control (e.g. a client influencing a contractor without fear of then being deemed to have assumed a degree of control and therefore liability).

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

The guidance material referred to in our response to Q39 should not be in the Act itself but rather in guidance material.

### **42. Should 'hazard' and 'risk' be defined in the model OHS Act?**

Yes. The definitions in the National Code for Construction should be adopted.

### **43. 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, however it should not be sufficient simply to have followed risk management principles and processes to meet the test of 'reasonably practicable'. Also, there should be flexibility in methodologies for applying risk management principles and processes.

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

The linkage to risk management principles and processes should be through the standard for 'reasonably practicable'.

## ***Consultation, Participation and Presentation***

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

Consultation should be expressed in the model OHS Act as an explicit obligation for employers. There should be flexibility in the means of consultation with emphasis on performance standards rather than a more prescriptive approach. Guidance including case studies should provide examples of how the performance standards might be achieved.

The objective of the consultation provisions should be to actively engage employees/ workers in health and safety. This is not served by imposing beaurocratic processes.

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

Employer ↔ employee

Controller of workplace ↔ workers

Contractor ↔ sub-contractor (construction)

Building owner ↔ tenant

Designer ↔ manufacturer/ constructor

As a general principle the duties should be reciprocal although there would have to be differences to the specific obligations on, say, an employer vs. an employee.

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

Yes, but if performance standards are the emphasis of the legislation then it should not be necessary to be prescriptive In the model OHS Act as to specific methods/ levels of consultation.

### **48. How should consultation be provided for;**

- **a multi employer-worksite;**
- **an employer with operations across more than one worksite;**
- **small business;**
- **remote workplaces;**
- **precarious employment; and**
- **workers from culturally and linguistically diverse backgrounds.**

Response as per Q47.

It would be useful to support the Act with examples of difference means of consultation that might be suitable for particular situations.

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

This should be maintained as is typically in current legislation i.e. when requested by a majority of employees.

### **50. 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?**

Effective participation and representation of workers is of paramount importance. The model OHS Act should recognise this importance. The consultation process must include 'coalface' consultation in respect of systems of work. It would also be useful to incorporate requirements related to assessing the effectiveness of consultation.

The model OHS Act should allow flexibility in methods of participation and representation and not prescribe or encourage excessively beaurocratic approaches. This can be achieved by prescribing performance standards. Industry specific guidance can provide examples and case studies.

**51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established.**

It is reasonable to include circumstances (e.g. when requested by a majority of employees) where HSCs must be established. Most employers and employees establish consultative processes without legislative prescription and at thresholds well below what is typically prescribed in legislation. This should be encouraged.  
See also response to Q50.

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

No response.

**53. What should the powers and function of HSRs be?**

HSRs should not have power to issue Provisional Improvement Notices. There may be some compelling arguments for this power however in our view such power risks negatively impacting upon the co-operative, collaborative culture that a company needs to foster to encourage effective consultation and involvement of employees at all levels in health and safety.

Rather than 'power to direct cessation of dangerous work', the approach should be that the HSR is obliged to consult with the employer and/or controller if the workplace who then has a duty to investigate and advise the HSR of action taken. All employees have the 'last resort' option of contacting the regulator if unsafe conditions are not dealt with.

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

There should be maximum flexibility with the structure. The function should be determined by the HSC consistent with the principle of seeking improved health and safety outcomes for the employees and the workplace they represent.

It is essential that HSCs have management representation with sufficient authority to engage management with concerns and recommendations arising from the HSC.

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

No response.

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

Less formal 'working groups' should be encouraged as one of the means of consultation in the guidelines for an employer to meet general consultation obligations.

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

Performance based requirements in the model OHS Act.  
Specific requirements in the regulations.  
Supported by detailed industry specific guidance material.

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

No response.

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

No response.

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

No response.

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

No response.

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

No response.

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

No response

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

No response.

**65. 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?**

No response.

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

No response.

**67. 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, consistent with Article 13 of the ILO's Convention No. 155.

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

No response.

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

Yes. In such instances, the workers should be obliged to accept redeployment to other work.

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

No response.

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

A high level of protection should be afforded persons from discrimination or victimisation as a result of raising health and safety issues.

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

No response.

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

No response.

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

No response.

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

No response.

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

No response.

**77. 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?**

No response.

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

No response.

## ***Regulator Functions, Powers & Accountability***

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

Yes. One of the main aims should be to achieve a consistent approach from regulators Australia-wide. The functions of the regulator should have a strong focus on education and fostering compliance using a range of strategies.

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

Yes. This is essential to create an Australia-wide approach to health and safety that is positive and engaging. Transparency is essential in the area of enforcement and protection just as it is in the area of duties. Furthermore the policies should address processes for recourse.

### **81. Should the model Act include provisions that allow the making of interpretive documents?**

Yes. Interpretative guidance is important to support effective compliance. Such guidance will often be most effective by being industry specific but in all cases it should be uniform across Australia.

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

No response.

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

Yes. This is important to encourage compliance and improvement. Advice will then be able to be freely sought without the disincentive of fearing penalty or prosecution.

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

No response.

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

No response.

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

No.

### **87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by an inspector? If so, why and in what circumstances?**

Yes, reasons should be specified.

**88. What provision should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?**

The model OHS Act provides a great opportunity to enhance clarity and transparency throughout the legislation. The Act should require regulators to provide reasons for key decisions including decisions to proceed or not to proceed with a prosecution.

**89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?**

The requirement in NSW on individuals to answer questions should not be incorporated into the model OHS Act.

## ***Compliance & Enforcement***

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

Yes, a hierarchy of measures is desirable in order that enforcement measures appropriate to the issue can be applied.

The 'pyramid' illustration on page 29 of the Issues Paper sets out a reasonable model with the following comments;

- a) It would be useful to illustrate 'Advice and Persuasion' as a much greater portion of the pyramid to reflect our preferred model of the regulators role.
- b) 'Non-disturbance Notice' should be included.
- c) Infringement Notices should be left out. They add an unnecessary administrative complication and there are sufficient workable alternatives. If infringement notices must be included, we would like to see their use limited (as in South Australia) to failure to comply with an Improvement Notice.
- d) Incapacitation should not include imprisonment.

### **91. Should there 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?**

Yes, in regulations and guidance documents.

### **92. What provisions should be made for PINs, improvement notices and prohibition notices for the model OHS Act?**

The model Act should make provision for improvement notices, prohibition notices and non-disturbances notices but not PINs

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

No, Other than by reference to relevant guidance documents.

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

Provisions must be made to allow for review of Improvement and Prohibition Notices and it is reasonable that the Notice stands until such time as the review is resolved. Clearly there would need to be short timeframes specified for the regulator to complete a review.

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

No. The timeframe should be specified by the issuing inspector. It would be useful to have a guideline to assist in achieving consistency in timeframes.

### **96. 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?**

See response to Q94.

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

No. See response to Q90.

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

Not applicable. See response to Q97.

**99. What amounts should be specified as fines for infringements?**

Not applicable. See responses to Q98, 97 and 90.

**100. 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?**

No response.

**101. 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, definitely. Enforceable undertaking is useful step between Improvement/Prohibition Notices and prosecution. The model OHS Act should aim to achieve health and safety outcomes in as positive a regulatory environment as possible. Prosecution will be an important and necessary avenue for the regulators but should not be used if an enforceable undertaking can achieve the outcomes required.

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

No, enforceable undertakings will be a more effective tool for regulators if they do not involve an admission of fault or liability.

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

No response.

## ***Prosecutions***

- 104. 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?**

Breaches should for the most part be subject to civil proceedings with a test in place for offences that should be dealt with as criminal offences.

The test for criminal offences should be based on intent (e.g. a deliberate act or omission that is known or should reasonably be known to be likely to put the health and safety of persons at risk).

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

See response to Q104.

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

No response.

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

Yes, it is appropriate for prosecutions to be heard by specialist courts or tribunals due to the specialist nature of the Act and regulations and in order to maximise the consistency of outcomes.

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

No response.

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

No response.

- 110. Who should be entitled to commence criminal proceedings?**

Only inspectors, the regulator or the Minister.

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

Only inspectors or the regulator.

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

Twelve months seems reasonable. Three years is definitely too long. Keeping the time frame to a sufficient minimum is advantageous to all parties and in the overall interest of efficient administration.

**113. Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?**

It will be beneficial and significantly aid consistent outcomes if the OHS Act includes specific provisions for the conduct of prosecutions.

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

Yes, this will aid compliance, assist consistency in prosecution outcomes and contribute to efficient proceedings.

**115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so which elements and how?**

No response.

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

Subordinate instruments should be specifically addressed in evidentiary procedures (refer Q114). As a general principle, compliance with subordinate documents should represent evidence of compliance with relevant elements of the Act.

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

Yes, our view is very strongly that this is an appropriate standard. It is important that guidance be provided.

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

The onus of the proof should be on the prosecutor.

**119. 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 response.

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

The following defences should be included;

- having done all that was reasonably practicable.
- having had no control over the causes and no obligation under the control test to have control.

Note: the control test should recognise circumstances where corporations and individuals have capacity and may exert influence without assuming any degree of control.

- in the case of an officer refer also to our response to Q125.
- having a reasonable excuse.
- having followed a relevant regulation or code of practice.

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

Additional defences should be available to an individual. See our response to Q120/Q125.

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

No, not necessarily.

**123. How should officer be defined?**

Officers should be defined as 'all persons involved in the management of a corporation'. We do not support the concept of a 'responsible officer'.

**124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributes to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?**

Liability of an officer should be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation.

It is not reasonable for an officer to be automatically guilty of an offence simply because the corporation was guilty. It is important that the Model OHS Act maintains in all instances that guilt must be proven by the prosecution.

The laws must be seen to be fair to all persons if the broad objective of fostering a positive, proactive behavioural based approach to achieving health and safety objectives is to be realised.

**125. 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 model OHS Act must include a test.

An approach along the lines of the current Victorian test will establish a fair approach without diminishing the onus of an officer to take the duty seriously i.e. requiring proof that the officer did not exercise reasonable care with consideration of;

- what the officer knew
- the extent of the officer's capacity to make decisions relevant to the offences
- whether the act or omission is also attributable to acts or omissions by other persons.

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

Yes, specific defences should be available. An officer should, for example, be able to defend on the basis of lack of knowledge coupled with no reasonable opportunity to have acquired that knowledge.

**127. What should the approach to officer's unincorporated associations or volunteer officers be?**

Officers of unincorporated associations and volunteer officers should be treated as special cases in the model OHS Act. Otherwise the legislation would likely have an impact on an individual's willingness to, for example, do volunteer work for a charity organisation. Such officers should still carry liability where 'reckless intent' is proven.

An option could be to maintain the same level of liability but allow the associations or organisation to indemnify their officers.

It is also desirable, regardless of liability, to include clear guidelines (with examples) to illustrate the obligations of such officers.

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

No response.

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

Yes, maximum fines should be specified for corporations and individuals.

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

The level of fines should be higher for corporations than for individuals and should be higher for repeat offenders. Proportionality should apply in respect of degree of control including in respect of a corporation's penalty in respect of an act or omission by an employee.

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

It is reasonable to set a statutory minimum fine for some offences or set out in clear terms discount factors, for example; for first offences, for degree of control, for degree of recklessness, for degree of knowledge of potential severity of consequences, for early guilty plea, for partial following of relevant requirements from regulations or codes of practice.

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

Yes, it should depend on culpability and it should depend on repeat offences. It should not depend on outcome (e.g. death).

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

A national register of decided cases will assist in communicating knowledge and motivating improved compliance as well as more consistent outcomes.

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

The model OHS Act provides an opportunity to broaden the penalty options. For example, greater use of enforceable undertakings would be helpful. Another option is publicity orders which would act as a significant deterrent to corporations.

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

Imprisonment should not be a penalty provided for in the model OHS Act except for extremely serious cases of reckless endangerment i.e. knowingly directing an individual to undertake an activity in the full knowledge that the activity represented a serious safety risk to that person. Better options are training orders and, for more serious offences, training orders coupled with disqualification from being able to hold specified positions (e.g. supervisory or management).

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

No. The offences should arise from the breaches that gave rise to the serious injury or death. Inevitably it is the incidents that have serious consequence that will be subject to detailed investigation and prosecution by the regulator. Other incidents that, through good fortune, have lesser consequences, may be caused by breaches that are more serious including in respect of a person's culpability.

It is unrealistic to propose a legislative environment where consequence is not a factor, however to the extent possible, the model OHS Act should focus culpability on causes rather than consequences,

Penalties for causing serious injury or death are not an effective deterrent in the modern Australian context as they are insignificant against many other deterrents (concern for employee welfare, reputation, productivity).

One of the strategies embodied within the model OHS Act could be to broaden the regulatory approach with more emphasis on the hundreds (or thousands) of incidents (breaches) that occur before the one that causes serious injury or fatality.

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

Such breaches should be dealt with in the OHS Act.  
See response to Q136.

**138. 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?**

See response to Q136.

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

No response.

**140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?**

No response.

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

No response.

## **Other Issues**

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

The power to make regulations should be limited in the interests of consistency across Australia. Very limited deviations should be allowed from uniform model regulations.

**143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?**

Yes, there should be provision in the regulations for summary offences with lower penalties. Such breaches should not be taken to be a breach of the model OHS Act.

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

No response.

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

Firstly, consistency is paramount.  
Reporting should be on-line to the maximum extent possible. This will reduce administration and facilitate generation of useful reporting including statistical information.  
The scope of reporting should initially be limited to, 'serious' incidents as is typically required at present.  
Improvement Notices and Prohibition Notices should also be reported on-line.  
Real time statistical data should be made readily available to corporations and the public including the workers compensation data currently published by ASCC.

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

There is merit in establishing a Workplace Health and Safety Tribunal modelled along similar lines to the Western Australia Tribunal.  
There should always be a right of appeal to the State Supreme Courts, the Federal Court if applicable and the High Court.

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

Yes. Provisions should be included for the resolution of OHS issues by conciliation and arbitration.

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

Yes. Mechanisms for effective consultation will be essential. Tripartite mechanism should be an important part of the consultative framework.

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

Yes. Industry-specific committees will assist with effective consultation. For example, the construction industry has particular issues deserving of a framework that ensures effective representation of industry, possibly even sectors of the industry (e.g. low rise residential vs. commercial building vs. civil vs. process engineering).

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

Mutual recognition should become essentially irrelevant. Each of the regulators should be accredited to undertake training and issue licences. All training and licences should be applicable Australia-wide. The course frameworks and requirements will be consistent as will the regulatory framework. This applies similarly to incident notification, reporting requirements, licensing of high risk work and licensing of plant.

The variations referred to in the Issues Paper (e.g. for classification of high risk work) must be removed. If not, the model OHS Act will fail to achieve its potential and risk adding a further complication to an extraordinarily complex legislative landscape.

**151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engages 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?**

Refer to our response to Q150. The objective must be total consistency across Australia.

**152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?**

The objective should be to remove all inconsistencies. This can be achieved through a uniform Act and uniform Regulations, Code of Practice and Guidelines. There is no difference in the risk of working at height or working in trenches in the east, west, north, south or central of Australia, and obviously no need for different regulations and guidance material. The current differences create confusion and business cost and do nothing to improve health and safety.

## **General Comments**

1. We strongly support this initiative to harmonise Australian OHS legislation. We recommend that it be as far-reaching as possible to encompass codes of practice, guidance material and enforcement protocols.
2. The formulation of the model OHS Act should be guided by an over-arching principle of promoting a positive health and safety culture in workplaces, organisations and industries. The framing of the legislation should recognise that this can be achieved most effectively in environments that foster trust, and encourage collaboration, be it between (for example) an employer and employees or a regulator and a corporation.
3. A greater emphasis on personal responsibility will assist greatly in improving health and safety outcomes in Australia.
4. The regulation of the model OHS Act should place an increased focus on consultation and education. This will require separation between the advisory and enforcement roles of the regulator.
5. We urge the adoption of the concept 'to the extent reasonable practicable' in the legislation in respect of obligations and defences.
6. We urge the adoption of the principle 'innocent until proven guilty', with the onus on the prosecution to prove an offence beyond reasonable doubt.
7. Particular provisions will need to be included for the construction industry including provision for specific duty holders including 'commissioner of construction work', designer, principal contractor, and project manager. We would appreciate the opportunity to be consulted in respect of the framing of the duties of the duty holder.
8. Careful framing of critical definitions such as 'control' and 'reasonably practicable' is of high importance. We recommend guidance material providing examples. This will greatly assist compliance, business efficiency and, most importantly, health and safety outcomes.
9. The model OHS Act provides a unique opportunity to build clarity into the legislation. In addition to the importance of clear and comprehensive definitions, 'Plain English' should be adopted throughout.