

1 How should duties arise under the model legislation?

- The model OHS Act should seek to regulate the 'conduct of work' and those able to directly control the conduct of work, so far as reasonably practicable.
- The model OHS Act should:
 - provide a duty owed by an employer to its employees;
 - treat labour hire employees working at a host employer as deemed employees of the employer (noting that their direct employer will owe the primary and concurrent duties); and
 - not deem contractors to be employees, but provide guidance for the relationship between a contractor and principal.
- Contractor's employees should not be 'deemed' employees of the principal.
- A separate duty should be drafted for principal contractors, requiring them to ensure so far as they can control it, the safe conduct of work of the contractor's employee, so far as reasonably practicable.
- The principal contractor shall be required to ensure so far as reasonably practicable that the risks which are not controlled by the contractor are eliminated or controlled so far as reasonably practicable.
- 'Control' over the conduct of work should be defined, and should extend the duty to circumstances where there is more than a mere theoretical or contractual ability to control the conduct of the work.
- Contracting parties should have the option of drafting a 'pre-work plan' setting out the responsibilities of each party regarding the safe conduct of work.
- This plan should have evidentiary value in resisting assertions that one party had 'control' over a certain matter.
- The allocations of responsibilities should be rebuttable where they are not reasonable.

2 Other key duties

- Workplace should be defined as a place where work is being conducted, or an ongoing course of work is being conducted.
- Duties should be owed in relation to the supply of plant, equipment and substances only by those with control over their design or manufacture.

3 Duties owed by employees

- Employees should be required to take reasonable care to look after their own safety, and the safety of others affected by the conduct of their work.
- Workers should be able to cease unsafe work, and not be penalised for doing so.

- Employees should not be victimised for raising a legitimate safety issue, and this should include the possible remedy of reinstatement if the employee is terminated by their employer for raising legitimate safety issues at the workplace.
- Such reinstatement should not be in the powers of the inspectorate as there is already an established forum with appropriately qualified experts to deal with the issue.

4 Director's duties

- Directors should be required to exercise reasonable care in the discharge of their duties.
- There should be no automatic attribution of responsibility via deeming provisions in the legislation or otherwise. It should be for the prosecution to prove the failing.
- This obligation should not extend to managers (as they already owe a general duty as employees to take reasonable care).

5 What should the compliance standard be?

- Duty-holders should be required to do all that is reasonably practicable, so far as they can control the conduct of work, to ensure it is safe and without risks to health.
- This standard should be an element of the offence, and a matter for the prosecution to prove.
- It should be codified in the model OHS Act.
- Consistency in the application of this standard is essential, hence guidance should be provided to the courts in determining what this means,

The prosecution should be required to prove a failure to do what is reasonably practicable in relation to each of the elements of that, defined, standard.

The prosecution should be required to prove control over the relevant conduct of the work by the duty holder.

6 The importance of unimpeded consultation with employees

- An employer should be required to consult directly with its employees, and not through third parties.

7 Regulator functions, powers and accountability

- There should be a single, central regulator.
- The regulator should only be permitted to make recommendations regarding prosecution to the relevant public prosecutor in each jurisdiction.

- The regulator should be required to publish guidelines setting out when it will undertake enforcement activity and when it will recommend a prosecution under the model OHS Act.
- The regulator should be required to publish the core competencies required of its inspectorate.
- Inspectors should be limited to undertaking their activities in those areas where they are certified as being industry experts.
- Inspectors should have the power to vary or rescind notices.
- Decisions of inspectors should be the subject of internal review.

8 Prosecutions

- Where a duty-holder is alleged to be in breach of an indictable offence, that duty-holder should have the right to a trial before a jury.
- Where the offence is triable summarily, then the accused can elect to have the matter heard in the summary jurisdiction (with reduced potential penalties).
- Criminal proceedings must only be commenced by the Director of Public Prosecutions (however described) in each jurisdiction.
- Proceedings under the model OHS Act must be commenced within 12 months of the alleged breach, or from the date of a coronial finding. No extension should be available.
- Guidance should be provided to the courts in the model OHS Act regarding the imposition of penalties.
- There must be no 'minimum penalty' proscribed in the model OHS Act.
- 'Prior offences' must only be admissible evidence where they are relevant to the breach currently alleged.
- There should be no separate offence for 'industrial manslaughter'.

