

**SUBMISSION FOR NATIONAL REVIEW INTO OHS LAWS
HARMONISING OHS LAWS**

Towards

MODEL PRINCIPAL OHS ACT

SUBMISSION FROM:

"National Safety Professionals"

TABLE OF CONTENTS

SUBMISSION FOR NATIONAL REVIEW INTO OHS LAWS

1. LIST OF CONTRIBUTORS	3
2. CONTRIBUTOR'S INDUSTRY SECTORS	4
3. QUALIFICATIONS OF CONTRIBUTORS	4
4. SAFETY EXPERIENCE OF CONTRIBUTORS	4
5. POSITIONS CURRENTLY HELD BY CONTRIBUTORS	5
6. PREAMBLE	6
7. CHAPTER 1: LEGISLATIVE APPROACH	7
8. CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS	10
9. CHAPTER 3: DUTIES OF CARE	17
10. CHAPTER 4: REASONABLY PRACTICABLE & RISK MANAGEMENT	25
11. CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION	29
12. CHAPTER 6: REGULATION - POWERS & ACCOUNTABILITY	38
13. CHAPTER 7: COMPLIANCE & ENFORCEMENT	-
14. CHAPTER 8: PROSECUTIONS	42
15. CHAPTER 9: OTHER ISSUES	52
Appendix 1 – Attachment 1 GAP Analysis OHS Laws	
Appendix 2 – Attachment 2 GAP Analysis OHS Laws	

LIST OF CONTRIBUTORS

SUBMISSION FOR NATIONAL REVIEW INTO OHS LAWS

Apps, David	Transport Infrastructure Development Corporation
Blight, Anthony	Private individual submission
Badger, Zoe	Mirvac Limited
Boyle, Mike	Thiess
Bransdon, Ron	Hansen Yunken SA
Brennan, Joe	S.M.A.R.T
Bromiley, Cliff	Stockland
Brown, Ryan	Private individual submission
Butler, Jeff	Private individual submission
Campion, Chris	Beyond Zero
Della Bosca, James	Delta Electricity
Dinsdag, Donald	University of Western Sydney
Flynn, Greg	Private individual submission
Galvin, Jim	University of New South Wales
Giffen, Doug	Boulderstone Hornibrook
Gomes, Marino	Suttons Group of Companies
Hargreaves Adam	LBB JV
Horky, Frank	LBB JV
Jones, Steve	Boulderstone Hornibrook
Jonson, Keith	Jonson Business Consulting Services
Jonson, Tamara	Boulderstone Hornibrook
Kelman, Ken	Transport Infrastructure Development Corporation
Knowles, Sam	Broad Group Holdings
Lane, Jeff	Boulderstone Hornibrook
Lawton, Jason	McMahon Contractors Pty Ltd
Mansfield, Gary	Kell & Rigby
McLeish, Ian	Boulderstone Hornibrook
Miranda, Ray	Thiess
Robins, Ted	ARENCO
Smith, Andrew	St Hillier's
Smith, Martin	Private individual submission
Stacy, Bob	Downer EDI
Tanner Phil	Westfield
Thompson, Bob	Thiess
Tidemann, Craig	Centennial Coal
Trethewy, Ross	Mirvac Limited

SUBMISSION FOR NATIONAL REVIEW INTO OHS LAWS **Contributor industry representation and expertise**

INDUSTRY SECTORS REPRESENTED by Contributors:

1. Architecture
2. Car Parks
3. Construction – Building
4. Construction – Civil and infrastructure
5. Construction – Residential Building
6. Construction - Tunnelling
7. Dam Construction
8. Drill and Blast
9. Facilities Management
10. Hospitality
11. Marine
12. Mechanical & Electrical Engineering
13. Mining – Coal: Underground and Open Cut
14. Mining – Metalliferous: Underground and Open Cut
15. Port Infrastructure
16. Power Generation
17. Process Engineering
18. Rail
19. Retail
20. Transport

QUALIFICATIONS of Contributors:

- | | |
|-------------------------------|--------|
| 1. Professor | N = 1 |
| 2. PhD | N = 5 |
| 3. Degrees – BA, BE, BSc LLB, | N = 17 |
| 4. Post Graduate Degrees | N = 6 |
| 5. Diploma's OHS etc | N = 14 |

Total Qualifications **N = 43**

SAFETY EXPERIENCE of Contributors:

Aggregate years of safety experience of contributors = **650+ years**

POSITIONS CURRENTLY HELD by Contributors:

1. General Manager/Group Manager Safety	N= 12
2. State Manager Safety	N= 5
3. Manager Safety/Senior Safety Coordinator	N = 9
4. Project Manager Safety	N = 1
5. Legal Counsel	N = 3
6. Safety Consultant	N = 4
7. Academic	N = 1
8. Other	N = 1
Total positions represented	N = 36

SUBMISSION FOR NATIONAL REVIEW INTO OHS LAWS

PREAMBLE

Australia holds occupational health and safety obligations under International Law. What is required of any Model Occupational Health and Safety Act is a clear threshold test for employers' obligations based on reasonable and practicable and a defined safety culture that is embodied not only through employer obligations but through employee obligations and employee rights.

Part 4 Article 16 of the International Labour Organisation's (ILO) Convention on Occupational Safety and Health requires employers to ensure, *so far as reasonably practical*, that workplaces under their control are safe and without risk to health. In Australia, the Duty of Care assigned to employers in some cases contradicts this Convention by adopting on the one hand a non-prescriptive risk management philosophy while on the other hand assigning absolute undertakings to *ensure* safety. In order to achieve widespread acceptance it is essential that the concept of a Model Occupational Health and Safety (OHS) Act within the Australian context aligns its approach with the ILO Convention.

In tandem with employers' duties, those of employees require equal consideration in the framing of any Model Occupational Health and Safety Act. Current legislative frameworks require employees to take reasonable care and to cooperate with employers, but empowering employees to look out for their fellow workers or to report unsafe conditions is not addressed. Yet, the empowering of employees in the management of OHS is well recognised as a positive aspect of organisational leadership and culture. The ILO Convention on Occupational Safety and Health goes some way to supporting such empowerment. Part 4 Article 19(f) supports the concept of reporting unsafe conditions and stopping a task if considered unsafe; and Article 17 provides protection for employees that raise a breach of statutory requirements or a serious inadequacy. Both concepts would go some way to supporting a positive culture of reporting OHS conditions in a workplace while protecting employees against prejudice.

Overall, to gain application across all jurisdictions the proposed Model OHS Act should define an *umbrella* framework for OHS. That is, a framework which does not address industry specific legislative requirements but rather provides a supporting top tier provisional framework for such legislation to be expressed by supporting regulations.

Chapter 1 - LEGISLATIVE APPROACH

See also Appendix 1 and Appendix 2

Question 1:

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

Answer:

It is the submission of this group that a performance-based standards approach to the Legislative framework be adopted. By adopting this approach, both small and large employers and their employees have the autonomy to arrive at an outcome that best serves the needs of that organisation, within the sector in which that organisation is working.

Question 2:

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

Answer:

The model legislation should consist of a model principal OHS Act, supported by regulations and codes of practice that apply to each state and territory, and can be adopted in each jurisdiction. In addition the model Act should reference existing applicable Standards..

Question 3:

What is an appropriate title for the model OHS Act?

Answer – “PRINCIPAL OHS ACT of AUSTRALIA”

Question 4:

Should the model Act specify it's objectives? If so, how and what should they be?

Answer:

Objectives should be specified in the model OHS Act. This approach would be consistent with the majority of Acts within the commonwealth. A gap analysis indicated that all states with the exception of Tasmania contained Objectives. These objectives, designed to give guidance to the legal, judicial system and also to enforcement agencies regarding the intention of the Acts.

Further, following the review of the gap analysis, it is the recommendation of this working group that the following objectives be adopted;

1. to promote and secure the safety, health and welfare of persons at work
2. to protect persons at work against hazards
3. to reduce, eliminate and control the hazards and associated risks to which persons are exposed at work;
4. to assist in securing safe and hygienic work environments
5. to involve employees and employers in issues affecting occupational health, safety and welfare
6. to provide for formulation of policies and for the coordination of the administration of laws relating to occupational health and safety.

These objectives, if adopted would combine those objectives from selected states and would further set the framework for the remainder of this submission, in particular, the adoption of the reasonably practicable principle when determining the control of risk and exposure to prosecution of parties

Question 5:

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

Answer:

Yes, the Act should clearly set out the principles. These should be a mirror image of the eight safety principles as set out in the 'Federal Safety Commissioners – Safety Principles & Guidance document' dated 2006

In suggesting improvements to the OHS Act general model, it is crucial to define what is 'reasonably practicable'. Section 20 of the Victorian Health & Safety Act 2004 attempts to qualify what the general duty provisions clearly mean as listed below:

- the Act takes into consideration the knowledge base of the persons (i.e. experience, training, qualifications, literacy or other) in relation to dealing with related hazards,
- the probability of the risk is captured,
- the consequences should the risk occur,
- how a person is armed to assess the risk, and respond in an appropriate manner to apply control mechanisms,
- the cost effective factors,
- it is also implied, but not stated that all parties **MUST** work collaboratively to manage risks, and interact within the established systems to achieve successful outcomes, aimed at risk management principles based all that is reasonably practicable.

Question 6:

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

Answer:

Currently, there is a perception (generally within industry) that we are developing a generation of safety dependent employees. This perception gains it's origins from the belief that while at work, employees take all direction from the employer and there is little or no scope for autonomy or responsibility on the part of the employee when considering actions or lack of actions, affecting safety implementation in the current duties of both the employer and the employee (In the majority of current legislative frameworks).

In an effort to remedy this inconsistency, the working group proposes the adoption of section d of the South Australian Act and section f of the Western Australian Act which is referenced in point 5 and 6 respectively of question 4 above, viz;

to involve employees and employers in issues affecting occupational health, safety and welfare.

to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health.

Further, this working group suggests serious consideration to the inclusion of Reasonably Practicable principles into the model OHS Act, similar to those included in the current Victorian Act Section 20 - The concept of ensuring health and safety

Chapter 2 – SCOPE, APPLICATION DEFINITIONS

This chapter considers further matters that are relevant to all parts of the model OHS Act, either by determining what it should contain or by assisting in its interpretation. This includes:

- What areas of activity the Act should cover;
- Where and whom it should apply; how it can accommodate ongoing changes (e.g. emerging hazards and risks, the changing nature of work); and
- How to define key terms.

2.1 Industry Sectors

Question 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 model OHS Act and industry specific legislation?

Answer:

To ensure its application across all jurisdictions the Model OHS Act should define an 'umbrella' framework for OHS. That is, a framework which does not address industry specific legislation but rather provides a supporting top tier provisional framework for such legislation. Industry specific frameworks should be addressed in a consolidated regulation(s) national and industry specific codes or other supporting documents which underpin a Model OHS Act.

Question 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)?

Answer:

Industry specific framework should be addressed in regulations and supporting codes which are supporting by the overarching legislative framework of the Act. In this way the Act retains greater flexibility while regulations or codes continue to be created and reviewed.

Question 9:

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

Answer:

In the interests of standardisation of OHS legislation and supporting codes or other frameworks across all jurisdictions it is necessary to provide defined provisions within a model OHS framework. This can include the mandatory requirement for a minimum representation of all jurisdictions in a committee forum designed to develop 'standardised' legislative frameworks, codes or other supporting material. This is paramount for businesses operating within a national framework.

The recent harmonisation initiative in Eastern States is a theoretical model from which lessons can be drawn in the development of such a consultative arrangement. Consideration should include mandatory membership of such a forum to include all jurisdictions, together with consideration of what constitutes a quorum and unanimous or majority decision making.

2.2 Workplaces and Non-Workplaces

Question 10:

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

Answer:

In order to address changing work routines the definition of a workplace as defined in any Model OHS Act should be tied to any place where work is to be performed by a worker or a person conducting a business or undertaking. In this way the Act will accommodate the increasing changes to what constitutes a work environment including: home based work; volunteer work; temporary workplaces, public places, vehicles or other.

The conduct of work should be included within the general duty of care for employees. Non-employees should be tied to the specific workplace.

Question 11:

Should general duties of care under the Model OHS Act be extended to members of the public? If so how?

Answer:

The current OHS Duty of Care legislative framework extends to visitors at a workplace. A Model OHS Act should extend to the public to the extent that:

- such persons are visitors to a workplace;
- work activities which impact on surrounding public space, e.g. operation of an overhead crane;

The above would include the conduct of the undertaking as applied to the specific workplace and its immediate surroundings. To extend duties beyond the above concepts would impact on the ability of employers to adequately control work or other conditions that impact on the public and is more than adequately addressed in current civil liability. Similarly, trespassers need to be treated under the same civil liability fundamentals.

Duty of Care should also reference Dangerous Goods and other similar legislation so a link exists.

2.3 Responding to Change

Question 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?

Answer:

The scope of a Model OHS Act should be sufficiently broad to encompass evolving work arrangements. Assuming a 'workplace' is appropriately defined, working relationships such as: contracting; subcontracting; apprentices; volunteer labour, labour hire; part/full time can be accounted for by appropriate definition of the employer's Duty of Care to employees and to contractors and other persons in respect of risks arising from conduct of the employer's undertaking.

Question 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?

Answer:

A Model OHS Act would maintain a requirement to identify hazards and assess risks in any workplace. The Act needs to remain as a broad top tier approach to OHS rather than identifying specific hazards – this detail should be applied to regulations or specific codes of practice to achieve flexibility.

2.4 Definitions

Question 14:

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

The following terms and their definitions are critical to achieving a national consistency:

Answer:

Assuming that the Model OHS Act is an umbrella top tier approach to the management of OHS the following definitions would need to be standardised nationally depending on the scope of the Act.

Competent person: For any task means a person who has acquired through training, qualification or experience, or a combination of them, the knowledge and skills to carry out that task.

Designer: Those whose profession, trade or business involves:

- (a) preparation of designs for buildings or structures, including variations to a plan or changes to a building or structure; or
- (b) arranging for people under their control to prepare designs for buildings or structures.

Hazard: Something which has the potential to cause injury or illness to people.

Incident: Any occurrence which results in actual or has the potential to cause injury or ill health or damage to the environment.

Non Disturbance Occurrence (see also Notifiable Incident – lack of consistency in what needs to be reported):

- (a) an incident that has resulted in a person being killed, or
- (b) an injury to a person that results in the amputation of a limb,
- (c) the placing of a person on a life support system,
- (d) any incident listed below that presents an immediate threat to life:
 - (i) the loss of consciousness of a person caused by impact of physical force, exposure to hazardous substances, electric shock or lack of oxygen,
 - (ii) major damage to any plant, equipment, building or structure,
 - (iii) an uncontrolled explosion or fire,
 - (iv) an uncontrolled escape of gas, dangerous goods or steam,
 - (v) imminent risk of explosion or fire,
 - (vi) imminent risk of an escape of gas, dangerous goods or steam,
 - (vii) a spill or incident resulting in exposure or potential exposure of a person to a notifiable or prohibited carcinogenic substance,
 - (viii) entrapment of a person in a confined space,
 - (ix) collapse of an excavation,
 - (x) entrapment of a person in machinery,
 - (xi) serious burns to a person.

Notifiable Incident: exposure of a person in the immediate vicinity of plant & equipment to an immediate risk to the person's health and safety through:

- (a) the collapse, overturning, failure or malfunction of, or damage to, any item of plant.
- (b) an implosion, explosion or fire.

A person who is in charge of prescribed equipment at an equipment site must notify the Authority immediately after the person becomes aware of an incident involving the equipment which results in—

- (a) the death of any person; or
- (b) a person requiring medical treatment within 48 hours of exposure to a substance; or
- (c) a person requiring immediate treatment as an in-patient in a hospital; or
- (d) a person requiring immediate medical treatment for: the amputation of any part of his or her body; or a serious head injury; or a serious eye injury; or the separation of his or her skin from underlying tissue (such as degloving [see definition] or scalping); or electric shock; or a spinal injury; or the loss of a bodily function; or serious lacerations.

Plant: Includes any machinery, equipment or appliance.

Risk: What can happen or the potential event(s), which may occur as a result of a workplace hazard.

Workplace: Means any place persons are required to be in the course of undertaking their work.

Work Activity: work task undertaken for or on behalf of a business enterprise or undertaking whether for profit or not.

Other standardised definitions required within Regulations should adopt those defined in the National Code of Practice for Construction Work (for construction related). Additional definitions not included in the Code may include:

Building & construction work:

- (a) the construction, alteration, extension, restoration, maintenance, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent;
- (b) the construction, alteration, extension, restoration, repair, demolition or dismantling of railways (not including rolling stock) or docks;
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:
 - (i) site clearance, earth-moving, excavation, tunnelling and boring;
 - (ii) the laying of foundations;
 - (iii) the erection, maintenance or dismantling of scaffolding;
 - (iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site;
 - (v) site restoration, landscaping and the provision of roadways and other access works.

Principal Contractor: the person or entity authorised on behalf of the Owner or Client as the Controller of a defined area and the construction works undertaken within that area to the extent necessary to discharge those responsibilities defined under relevant occupational health and safety legislation.

The NSW & VIC legislation requires appointment of the Principal Contractor for construction work (which can include maintenance depending on which definition is considered) by the Owner or responsibility reverts to the 'Owner'. This frequently creates difficulties in particular for in leasing where tenants may undertake such works within a tenancy without the knowledge of the Owner, e.g. shopping centre.

Alternatively in QLD the model requires appointment of the Principal Contractor by those commissioning the construction work – this overcomes some of the issues surrounding leases and tenants.

When a principal contractor must be appointed for construction work – this currently varies from QLD - \$80,000; NSW - \$250,000; VIC - \$250,000 and WA - \$0 and requires standardisation to provide business certainty.

Question 15:

Are there any other issues relating to the scope, applications and definitions of a Model OHS Act?

Answer:

In some jurisdictions where a principal contractor is not appointed for construction work responsibility for OHS reverts to the Owner. A standard definition of Owner is required under the Model OHS Act.

Chapter 3 - DUTIES OF CARE

Chapter 3: Duties of Care – Who owes them and to whom?

This chapter discusses and invites comment on:

- How to determine who should owe duties of care;
- Who should owe duties of care and to whom; and
- What the duties should be.

Question 16:

Should the OHS Act include a 'control' test or definition? Is so why and what should it be?

Answer:

The Model OHS Act should explicitly define workplace control so that responsibility bearers under OHS legislation are clear in determining their responsibility. The notion of a practical 'control test' would benefit individuals in determining their responsibility and a series of examples would benefit understanding. By way of describing such a test a controller is typically defined as the: 'test of the capacity of a person or entity to control or influence work or workplace conditions'. The test has been typically a matter for determination by a Court after a workplace incident has occurred signalling the necessity for a control test or definition to assist in crystallising such responsibilities.

Control is integral in establishing corporate liability for a number of other civil and criminal offences.

Question 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?

Answer:

Duty holders should be defined as those persons or entities that have the capacity to directly control or influence work or a workplace. Defences may include the extent of the control within the defined standards and knowledge in place at the time; and the capacity of the individual to influence control.

In determining the nature and extent of control requirements the Model OHS Act should consider the requirement to provide defined roles and responsibilities down to supervisor level and a specific organisational responsibility chart down to supervisory level for all workplaces.

Question 18:

Should the Model OHS Act include a control test or definition? If so why and what should it be?

Answer

Yes a control test or definition should be included to aid in clarifying the extent to which control may apply to Duty of Care responsibilities. It should include definitions which clarifies what is regarded as control over a workplace or place at which work is constructed on behalf of a business or its undertaking. Examples where control may not extend need to be conceptualised, e.g. travel to/from work on public transport or flying to and from work locations.

It is paramount that the 'sphere' of control is defined so there is some certainty for employers and employees alike..

Q 19 Shared responsibilities.

Answer:

Many situations arise where responsibilities are shared. It is recommended that attempting to define the line in the sand is not something that the Model OHS Act should do. Rather deal with this situation with the following –

. If more than one person is under a duty or obligation imposed, each person must –

- (a) clearly communicate roles and responsibilities of different parties or entities;*
- (b) satisfy the duty or obligation imposed on the person without regard to the fact that another person may also be responsible for satisfying that duty or obligation; and*
- (b) co-operate with any other person who is performing that obligation.*

Q 20 Is primary reliance on employment relationships a valid basis for framing safety obligations?

Answer:

No unless the definition of ‘employment’ is broadened to include those contracted or engaged in work in connection with a business activity carried on by an employer. This would include volunteer or contracted work where workers are taken to be employed by the employer for the purpose of that business activity

Q 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?

Answer: - See Answer to Q20.

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

Answer:

Yes. Duty of Care applies to those contracted or engaged in work in connection with a business activity carried on by an employer. This would include volunteer or contracted work where workers are taken to be employed by the employer for the purpose of that business activity.

Similarly, there needs to be consideration in relation to visitors and persons affected by activities at a workplace

Q23 Specification of employer’s duty of care

Answer:

Part 4 Article 16 of the International Labour Organisation’s (ILO) Convention on Occupational Safety and Health requires employers to ensure, *so far as reasonably practical*, that workplaces under their control are safe and without risk to health. In Australia, the Duty of Care assigned to employers in some cases contradicts this Convention by adopting on the one hand a non-prescriptive risk management philosophy while on the other hand assigning absolute undertakings to *ensure* safety. In order to achieve widespread acceptance it is essential that the concept of a Model Occupational Health and Safety (OHS) Act within the Australian context aligns its approach with the ILO Convention.

The issues paper itself does not accurately reflect what each state’s general duties reflect. It is suggested that there is an analysis of each states employer’s duties to gain common ground and deal with the divergences.

The Tasmanian WHS Act goes into a greater detail and it has been argued that this legislation is helpful for employers when it identifies basic things like –

- Risk management

- Health monitoring
- Recordkeeping
- Provision of information in a language and form that is appropriate
- An assessment of the employees experience is taken into consideration when determining the extent of information, instruction, training and supervision provided
- Proper change management processes are used
- Monitor workplace conditions
- Workplace hygiene requirements

The above approach establishes expectations more precisely than being less concise and potentially lessens the need to provide greater detail of duties in regulations and codes. Certainty is valued.

A test for reasonable practical should also include:

- the likelihood of the risk concerned eventuating;
- the degree of harm that would result if the risk eventuated;
- what was known or ought reasonably to be known, about the risk and any ways of eliminating or reducing the risk;
- the availability and suitability of ways to eliminate or reduce the risk; and
- the cost of eliminating or reducing the risk.

Q24 Extent of duties

Answer:

In tandem with employers' duties, those of employees require equal consideration in the framing of any Model Occupational Health and Safety Act. Current legislative frameworks require employees to take reasonable care and to cooperate with employers, but empowering employees to look out for their fellow workers or to report unsafe conditions is not addressed. Yet, the empowering of employees in the management of OHS is well recognised as a positive aspect of organisational leadership and culture. The ILO Convention on Occupational Safety and Health goes some way to supporting such empowerment. Part 4 Article 19(f) supports the concept of reporting unsafe conditions and stopping a task if considered unsafe; and Article 17 provides protection for employees that raise a breach of statutory requirements or a serious inadequacy. Both concepts would go some way to supporting a positive culture of reporting OHS conditions in a workplace while protecting employees against prejudice.

Therefore the extent of any defined duties needs to take into the account the purpose of the legislation and to what extent those at the workplace can truly control those parties impacting on the workplace.

The extent of the duties should be confined to persons employed in, engaged in and affected by work. These people would include employers, persons performing gratuitous work, persons engaged at the workplace not the employees or subcontractors of the employer, principals, controllers of workplaces (with respect to visitors), contractors, self-employed persons, designers, manufacturers, importers, suppliers and installers, service providers, owners and employees. There is some interest in ensuring that the full supply chain participants contribute positively to the workplace and as such discharge their duties accordingly.

Q25 Duties of workers and others

Answer:

It is believed that employees' duties should encompass the following –

- Take reasonable care of their own and other persons health and safety that could be affected by an act or omission;
- Comply with any direction to the employer;
- Use safety equipment or clothing provided
- Not endanger themselves or others by presenting in an unfit state due to the effects of drugs or alcohol
- Not intentionally or recklessly interfere with, misuse or damage anything provided in the interest of health or safety
- Not intentionally or recklessly engage in any form of activity that causes or could cause damage to plant or equipment or put at risk the health or safety of any other person

Q26 Visitors, Public etc

Answer:

Visitors to the workplace are under the control of the workplace manager and as such should follow normal visitor protocols i.e. sign in / out, complete visitors induction or other and comply with any health and safety requirements or instructions

People in the vicinity of the workplace, for say recreation or leisure, are to be protected from injuries or risks to health from activities in the workplace for example, blasting or demolition.

The concept of trespass should still apply under civil law and not be included in the Model OHS Act.

Q27 Appointed Persons and Officers

Answer:

This concept should be supported if there is a demonstrated value to the workplace and there is evidence that their presence has resulted in a reduction in workplace injuries.

Q28 Liabilities

Answer:

Liabilities should be limited to their level of knowledge, skills, competency and most importantly their level of control over activities at a workplace.

Importantly, appointed OHS Representatives should not be liable for the same duty breaches as “employers”. “Employer” should remain determinable based on the ‘control’ test outlined in Chapter 3. There may be occasions when these roles may be filled by the same person, however it is unlikely that appointed OHS Officers will exercise ‘control’ over the workplace.

Inaction by appointed officers or any others at the workplace to address identified health and safety issues should be clearly understood and penalties considered but only when the test of control is applied.

Q29 Duty Holder vs. Appointed Persons

Answer:

The appointed person is the agent of the employer and as such should be jointly responsible for the duties of the employer. If this appointed person is to be effective then they need to have sufficient authority to perform their duties. It is suggested that appointed persons have some defences available to them if they perform as far as reasonably practicable their duties and use all due diligence to prevent a failure in performing their duties. Nevertheless, nothing the appointed does or doesn't do should remove the responsibility from the duty holder.

Q30 Duties for officers of body corporate

Answer:

This review of the OHS instruments affords an opportunity for the engagement of body corporate officers in health and safety issues at the workplace. Rather than being only concerned about governance issues. Consideration

should be given to specific duties for body corporates as applied in the NSW legislation. The Body Corporate should be specifically identified as a Controller with duties and should be required to appoint a consultant or train a member to ensure the Body Corporate is aware of its responsibilities.

Q31 Duties of persons in control

Answer:

Generally the provisions in most jurisdictions are similar with respect to the owner of the workplace in the case of leased, owned or provided work space. This duty is imposed on the Owner but a person who is working in such a workplace is also owed a duty by the controller to have a safe workplace and equally the employer is to ensure that workplace is also safe. A good example is the maintenance of the air conditioning system by the controller so as not to put at risk the health and safety of the tenants, while the employer is to ensure the monitoring is being done and the ecoli counts are not exceeding acceptable standards.

Consideration is required where the Owner may exercise no control whatsoever over a tenanted space yet works are undertaken within that space by the tenant and its request. Unless the works relate to base building the Owner is unable to exercise any control over the works.

Q32 Specification of duties to controllers of temporary and permanent work areas

Answer:

If there is to be a complete coverage of all workplaces for health and safety purposes, then all of the workplace participants that impact on the workplace need to have specified duties so that there is a clear path of accountability and responsibility. With this thought these controllers will be positively served with some clear expectations. This can be related back to the definition of a controller where clear responsibility lies over those undertaking work within an area (temporary or not) over which an entity or person exercises control of that work.

Q33 Obligations for various activities

Answer:

Yes! Research indicates design is implicated as a key cause of workplace injury. Therefore any Model OHS Act should include responsibilities for designers of plant and equipment; buildings or structures or products and materials. Currently inconsistency exists across all jurisdictions in this key area.

Q34 Cross jurisdiction issues

Answer:

Yes. A national consistency across all jurisdictions with respect to safe design would enable cross jurisdictional issues (within the Australian context) to be resolved. The capacity to resolve imported or international design deficiencies which impact on safety can be dealt with at a supplier or distributor level.

This concept is at the heart of having a common set of rules and mutual recognition between all states and jurisdictions that would certainly improve the capacity to do business in Australia. This was the goal of the NOHSC process but some jurisdictions continue to require differing standards and fail to recognise the expertise of other state and territory counterparts. There are many examples available both relating to the OHS regulators as well as Authorities such as the RTA who have a safety function.

Q35 Definition of supply

Answer:

Supply means the provision of an item, including plant, equipment, products or materials by way of sale, lease or hire, whether as a principal or agent.

Supply should occur every time an item is despatched to a workplace and as such established safeguards should be in place at all times. Issues such as supply of a Material Safety Data Sheet with every purchase are something that could be addressed by exception in the Regulations if it is of concern.

Q36 Other duties

Answer:

If any other duties are to be included in the proposed Act then they should be consistent across jurisdictions so that there is a common approach nationwide.

Chapter 4 - REASONABLY PRACTICABLE & RISK MANAGEMENT

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

Answer:

A test of reasonably practicable should be included in the model OHS Act. The current General Duties of NSW OHS Act contains the requirement ‘to ensure’ safety etc, which is an absolute duty.

Section 28 contains a defence “...if the person proves that:

- (a) it was not reasonably practicable for the person to comply with the provision, or
- (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.”

This approach effectively moves the onus of proof of an offence (for breach of a general duty) to the defendant, who has to establish the section 8 defence.

The general duty should be to ensure safety so far as is reasonably practicable.

The legislation should contain a test for “reasonably practicable”. Currently, case law is used to establish this concept. Each case turns on its particular facts and the courts do not consistently apply the standard.

The Act should be similar to at least Western Australia and Victoria in providing guidance on what is reasonably practicable.

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

Answer:

No answer as Q37 is in the affirmative.

Q. 39 – How should the standard be defined? What level of detail should be provided?

Answer:

The standard should be similar to the guideline issued by the National Transport Commission “Meaning of So Far As Is Reasonably Practicable (SFAIRP) – Consultation Draft March 2007, and Victorian WorkSafe, “How WorkSafe applies the law in relation to reasonably Practicable – November 2007. Further, the Act should be specific so that the courts embrace the standard when considering OH&S matters rather than their own interpretation.

Q40 – Should control be an element of the standard? (see chapter 3)

Answer:

Yes it should. It is agreed that the recommendation made by Chris Maxwell QC, March 2004 be adopted (excerpts reprinted below).

“As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control, such as when employees are normally working neither at their home base nor at other premises or sites within the control of the employer” – Robens Committee.

“In days gone by, the typical workplace was controlled by a single employer, with whom each member of the workforce had a contract of employment. Today, the picture is altogether different. It is now common, especially in larger undertakings, for workers in a given workplace to be engaged under a range of different employment arrangements with different employers. The corollary is that there will often be a range of dutyholders whose safety duties under the Act apply simultaneously to the same workplace.

“Each of these overlapping duties is subject to the practicability qualification...” and there is “...little or no guidance as to what is expected of the various dutyholders.”

“Unions and employers alike have submitted that the existence of multiple overlapping duties breeds confusion and frustration, and leads ultimately to a failure of responsibility.”

“The reality is that the capacity to control the activities which take place in a workplace will vary amongst the different dutyholders. And what their respective employees “might reasonably expect” of them by way of the exercise of due care will be determined, in part, by their capacity to control the relevant activities.”

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?

Answer:

It would be helpful for the test or examples to be provided, but not in the model OHS Act or in subordinate instruments. The Act should permit guidelines to be made to which prosecutors and Courts must have regard. Those guidelines should contain the test or examples.

Q42 – Should ‘hazard’ and ‘risk’ be defined in the model OHS Act

Answer:

Should the SFAIRP principle be adopted and a standard/guideline be issued which binds the Courts processes, then there would not be a need for “hazard” or “risk” to be defined in the Act. Further the definitions of ‘hazard’ and “risk” as in AS/NZS 4360 are very broad and would provide Courts the scope to apply their own interpretation with varying outcomes.

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?

Answer:

Most definitely. The current guideline issued by the National Transport Commission “Meaning of So Far As Is Reasonably Practicable (SFAIRP) – Consultation Draft March 2007, and Victorian WorkSafe, “How WorkSafe applies the law in relation to reasonably Practicable – November 2007 both contain references to risk management principles and process.

It is due to both these guidelines that the SFAIRP principle is aligned to, therefore that same alignment should be carried through with the new legislation.

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

Answer:

No. It would not be sensible for a failure to comply with risk management principles and processes to be a criminal offence. Risk management requires individual circumstances to be taken into account in assessing, managing and

controlling risks. It is a dynamic process that should not be impeded by being enshrined in legislation.

Chapter 5 – CONSULTATION, PARTICIPATION & REPRESENTATION

5.1 DUTY TO CONSULT

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

Answer:

- Need for cooperation between employer and employee to achieve safety outcomes
- Method of consultation should be based on those agreed between employer and employee
- more flexibility in the legislation to address the complexity of the relationships that exist in construction
- Method of agreed consultative arrangements to be documented
- Process for dealing with disputes between parties in relation to consultation need to be clearly outlined
- Allowance for “other agreed arrangements” to be determined between employer and employees with no interference from other parties
- Act should provide reference to guiding principles for consultation with employees and other parties
- Training requirements to assist with effective consultation. To include training for HSC/HSR and ‘other agreed arrangements’

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

Answer:

- Consultation should be encouraged between all stakeholders in a given workplace. However, the Act should provide the flexibility for the employer and employees to agree on the involvement of other parties in the consultation process.

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

Answer:

- Yes. In relation to employees engaged by subcontractors to Principal Contractors there needs to be a recognition of the need for subcontractor employers to consult with their workers

Q48. *How should consultation be provided for:*

Answer:

- 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.
- Consultation should be provided in accordance with those agreed between the employer and employees consistent with the recommendations in supporting guidance information (eg Code of Practice).
 - For construction it should be recognised that there are many points at which consultation can take place, eg Induction; tool box talks; during safety inspections and subsequent discussions' information sessions

5.2 PARTICIPATION AND REPRESENTATION

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

Answer:

- Yes
- HSRs should be limited to employees at the workplace and be elected by the majority of employees.

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?*

Answer:

- The Act needs to clearly state the need for employers and employees to work together, co-operatively, in relation to matters affecting health, safety and welfare at the work place
- Establishment of HSC or HSR or other agreed arrangements

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

Answer:

- The Act should require the establishment of HSC or HSR. However, where the number of employees at a worksite is greater than 20 the requirement should be to establish a HSC only where the majority of employees agree to this (ie as per the current NSW OHS Act)

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

Answer:

- guidance on good practice consultation with third parties, Only those employees who are working at the work site

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

Answer:

- Powers limited to 'recommendations' to employer. Disputes to be directed to WorkCover

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

Answer:

- Equal number of employer/employee reps
- Provide for consultation in accordance with best practice guidelines

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

Answer:

- HSC / HSR training as per current requirements under NSW OHS Act
- Training needs to address 'safety culture, time management, investigation techniques, more emphasis on communication and general motivation/leadership skills development

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

Answer:

- ‘other agreed arrangements’ (need to provide guidance on the type of processes that would fall under this category)

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

Answer:

- Requirements should be stipulated in the Act to ensure the requirements agreed to in the Act do not get significantly changed through the State based Regulations

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

Answer:

- Representation must take account of language difficulties. Communication methods also need to take account of literacy levels at the workplace

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

Answer:

- Yes but only for WorkCover officials. For many years employers have protested against the unions camouflaging industrial issues as safety issues. Any changes to legislation need to provide sufficient safeguards to ensure this cannot occur. Safety legislation has become increasingly onerous on employers and the unions have a past record of using safety as the issue/ reason to apply industrial leverage on employers
- Safety legislation must continue to provide for workers to be able to (i)
- raise OH&S issues with management either directly or through the HSC or HSR, (ii) refuse to work in an unsafe situation and (iii) be involved in consultative arrangements with their employer re OH&S.
- Unions, on the basis of looking after the welfare of their members, have a right to include OH&S in that charter. However current Industrial legislation allows them to exercise that right but within the requirements

of industrial legislation. Their ability to have an alternate Right of Entry enhances their potential to disrupt normal operations if they so desire. Therefore, we should return to confining the right of entry of industrial unions to industrial legislation.

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

Answer:

- This question is contingent on there being a Right of Entry in relation to OH&S matters and on this basis and the comments against Q59 is superfluous

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

Answer:

- This question is contingent on there being a Right of Entry in relation to OH&S matters and on this basis and the comments against Q59 is superfluous

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

Answer:

- This question is contingent on there being a Right of Entry in relation to OH&S matters and on this basis and the comments against Q59 is superfluous

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

Answer:

- Provision for employers to have a documented procedure, agreed between the employer and employees (through the process of consultation) for complaint resolution including a clear chain of command and escalation procedures where issues cannot be resolved
- Clarify provision for protection for workers who make a valid complaint
- A requirement for Employers to consult with employees on their right to stop work at any time due to unsafe practices/ conditions
- A requirement for Employers to document issues, resolve them in a timely manner and report them back to the workforce in a communicated forum.

- Provision to ensure that complaint resolution is a constructive and consultative process
- Encourage internal complaint resolution rather than regulatory
- This would be greatly aided by a the 'duty of care' section of the act making further provision to encourage that all persons are responsible for safety and should be allowed as much authority to stop an unsafe job.
- In the *Protection of the Environment Act*, greater emphasis is placed on the role of the individual to be responsible, to report and to be prosecuted. The OHS Act needs to consider the provision of a similar approach to complaint resolution and individual responsibility to *duty of care* to encourage open and transparent reporting of health and safety issues and increase the success of complaint resolution.

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

Answer:

- When an employer or employee feels there is a risk to health and safety which cannot be resolved by the HSC/HSR process and/or discussion with the employer

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

Answer:

- There should be appropriate provisions in both the Act and Regulations.
- Unless there is an appropriate directive in the Act, Industry will be less empowered to make positive and effective changes to complaint and issue resolution.
- The Act should specify the requirements and the regulations outline how these requirements will be achieved

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

Answer:

- Include a provision to ensure the complaints/issue resolution procedure is agreed upon through workforce consultation and documented in the employer's Safety Plan
- Continuation of the function and protection of the Safety Committee as a tool for issue resolution and consultation and decision making

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?*

Answer:

Yes, providing that this requirement is clearly communicated to employees, along with their obligation to report unsafe situations in a timely fashion, to reduce lost productivity and to allow a quick response from the employer to rectify and make safe.

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?*

Answer:

- Yes, again. An analytical response from a safety professional would quickly pinpoint the problem, possible outcomes if not rectified, how the problem could be reduced/eliminated, possible training or resources required to rectify

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?*

Answer:

- Only in situations where the employer is unable to redeploy the workers to other parts of the worksite that are safe

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

Answer:

- Yes

5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION

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

Answer:

- Provision should be made for the 3 specified in the NSW act part 2 div 3 ;23
 - (a) makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health, or
 - (b) is a member of an OHS committee or an OHS rep, or
 - (c) Exercises any functions conferred on the employee under Div 2
- Right of employees to refuse to undertake work they consider unhealthy or unsafe.

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

Answer:

- Every body should be able to bring an action including reps

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

Answer:

- both could be available but only one chosen

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?*

Answer:

- Authorities such as WorkCover and therefore the civil standard would be used by them as they do not have the legal background.

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

Answer:

- Most definitely yes - victims may intend seeking employment with another company and find their history has travelled with them and is a

barrier to gaining employment, the protection must be ongoing.

Q76. What remedies should be available to the victims?

Answer:

- Pursue a civil case independently if satisfaction has not been achieved via the authorities

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?

Answer:

- Yes

Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

Answer:

- Act to clarifying that all persons at a place of work should be encouraged to take an active role in protecting themselves **and others** against risks to health or safety in the workplace. Current NSW OHS Act states: *“an employee must, while at work, take reasonable care for the health and safety of people who are at the employee’s place of work and who may be affected by the employee’s acts or omissions at work”*. However, this requirement does not adequately deal with the need for employees to take an active role in reporting safety issues, created by others or through unintentional ‘acts or omissions’ by the employer, directly to the employer or through other consultative mechanisms.

Chapter 6 – REGULATION FUNCTIONS, POWERS & REPRESENTATION

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

Answer:

- Yes
- Need for WorkCover to play a greater role in assisting employers to achieve required safety standards
- WorkCover should seek to develop a more collaborative relationship with workplaces and employers
- Advising employers, workers and others on their rights and obligations under the Act
- Formulating and disseminating standards, guidance and other information to assist persons to comply with their duties and obligations under the Act
- Fostering cooperative and consultative relationships between employers, workers and others on OHS
- promoting education and training in OHS by facilitating the development and provision of OHS training courses
- Promoting public awareness of OHS
- Initiating and encouraging research into OHS improvements; and
- Collecting and publishing nationally developed OHS statistics and data on a more regular basis

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

Answer:

- Yes.
- Also more information on what is required for companies to meet all due diligence

Q81. *Should the model Act include provisions that allow the making of interpretative documents?*

Answer:

- Yes
- In some situations there is a need to better understand what is meant by the Act/Regulation. For example in NSW there is no clear definition for 'Work Activity.' Risk Assessment is also confusing and there are many variables on how this is achieved in Construction or other workplaces with a high level of outsourced labour. Similarly, the requirements as to when a SWMS is required is ambiguous across jurisdictions, 'Position papers' or 'enforceable notes' in such instances would provide clarification for those employers that are duty bound to comply

Q82. *Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?*

Answer:

- WorkCover has a role to monitor workplaces to ensure that risks of harm are properly controlled. Inspectors can verify this by visiting workplaces and performing inspections but only tend to do this as a result of a complaint or when an incident has occurred. Inspectors should be required to visit sites for the purpose of assisting the employer to achieve the required levels of safety and provide advice in relation to specific matters. However, in doing so the employer should be indemnified in some way from possible legal action by the regulator when safety issues are identified during such visits unless there is imminent danger or persons at risk.

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

Answer:

- At present the extent of WorkCover's advisory role is largely limited to publications and a call centre. More direct methods of providing assistance and support to industry should be adopted by the regulator. Case managers/industry sector advisors are examples of ways in which the regulator could provide more specific assistance to employers.
- There is a need to separate the advisory services from the enforcement services although the mechanism for this should be something that is reviewed between the regulator and industry advisory groups

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

Answer:

- As per current requirements for NSW

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

- Yes
- Need to make provisions within the Act to indemnify inspectors from legal sanctions when providing advice to employers in good faith only when such advice is based on their expertise or competency.

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

Answer:

- No

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?*

Answer:

- Not without following strict processes, as outlined in the Act.

Q88. *What provisions 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?*

Answer:

- Outcomes of reviews should be available to employers concerned in relation to matters for review. This provides an opportunity for employers to submit additional evidence to WorkCover that could prevent matters from going before the courts.

Q89. *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? Issues*

Answer:

- The regulators exercise of powers and functions should be transparent, readily identifiable and capable of being challenged in a fair process
- accountability arrangements for OHS regulators and their officials (including inspectors) operate
- Role regulator should include the need to encourage and facilitate compliance with OHS legislation through the provision of education, advice and assistance to employers
- WorkCover should provide more assistance to employers on what they need to do to comply rather than what the employer should not to do
- WorkCover needs to focus more on those employers that are demonstrating blatant disregard for safety. In the past, WorkCover have traditionally targeted the larger construction companies whilst the majority of subcontractors do not receive the same level of attention
- WorkCover need to enforce the safety laws with individual employees. Very few fines are ever handed out to employees and it is generally the principal contractor or employer who is targeted. Fines should be considered against employees or workers where the Employer or Controller can demonstrate that they have done all that is reasonably practicable to provide safe systems of work including adequate instruction, training and supervision. Examples may include where it is obvious that an employee has deliberately ignored the safety framework provided.
- The regulator needs to take into account the total effort of the employer at any given work site to provide and maintain the required level of safety. Generally, if someone is injured the efforts of the employer to establish and maintain a safe workplace are not always taken into account
- Right of employer to enter into discussions with WorkCover regarding appealing against any notices issued

No submission on Chapter 7: Q's 90 -109

Chapter 8 - PROSECUTIONS

8.3 WHO MAY COMMENCE PROSECUTION AND RELEVANT PROCEDURES?

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

Answer:

All criminal proceedings should be initiated by and restricted to the OHS Statutory Authority or with written consent of a Minister of that Government agency, and not by an Industrial Organisation.

1. When criminal proceedings are brought against an employer or an employee, there is no one side to a Statutory Authority in the criminal proceedings.
2. In allowing the OHS Statutory Authority to commence criminal proceedings, it provides anxiety to some employers and employees.
3. When an Industrial Organisation initiates criminal proceedings, it is usually against an employer, as there is a one sided view in not bringing criminal proceedings against an employee.
4. Industrial and other Organisation should not have the opportunity to Prosecute

Q111. *If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?*

Answer:

The following entities should be entitled to commence civil proceedings (for compensation for loss due to another party's proven negligence)

- The injured party
- Any first tier related party to any deceased person

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

Answer:

The following Extract should be adopted from WorkCover's Report on the review of the Occupational Health and Safety Act 2008 (May 2006)

107A Time for instituting proceedings—special provision for work incident notification

- (1) If an act or omission alleged to constitute an offence against this Act or the regulations gives rise to an incident (a **work incident**) to which section (Notification of incidents) applies, proceedings for the offence may be instituted:
 - (a) within 2 years after the occurrence of the work incident, or
 - (b) within 6 months after WorkCover first becomes aware of the work incident, whichever provides the longer period to institute proceedings.
- (2) It is to be conclusively presumed for the purposes of this section that WorkCover does not become aware of a work incident until whichever of the following happens first:
 - (a) notice of the incident is given in compliance with section 86, whether or not that notice is given within the time required under that section,
 - (b) WorkCover gives the employer or occupier concerned notice in writing that is expressed to be notice for the purposes of this section and indicates that WorkCover has become aware of the incident.
- (3) The Chief Executive Officer of WorkCover may for the purposes of this section give a certificate in writing certifying as to when WorkCover first became aware of a work incident as provided by this section.
- (4) Proceedings for an offence against this Act or the regulations cannot be instituted under this section more than 2 years after the occurrence of the work incident unless the Chief Executive Officer of WorkCover has certified in writing that the proceedings are in the public interest.
- (5) A certificate given by the Chief Executive Officer of WorkCover under this section is conclusive evidence as to the matters certified and cannot be challenged, reviewed or called into question in any proceedings before any court or tribunal.
- (6) For the purposes of the application of this section to a mine, a reference in this section to section 86 is to be read as a reference:
 - in the case of a mine to which the *Mines Inspection Act* applies - to that Act or to such other provision of that Act as may be prescribed by the regulations, or
 - (b) in the case of a mine to which the Coal Mines Regulation Act applies or to such other provision of that Act as may be prescribed by the regulations.
- (7) This section applies despite anything in any other Act.

Answer:

Should adopted WorkCover NSW as it provides a reasonable time frame work for time limits of when a proceeding should occur.

Q113 *Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternative should that be left to the rules of criminal law and rules of the relevant court or tribunal?*

Answer:

The conduct of prosecutions should follow the rules of the court and the Rules of Evidence or the tribunal system hearing the matter. This is to reduce the potential for trivial appeals based on changes to procedural matters.

In all cases both criminal and civil there should be the opportunity for victim impact statements to be tendered to the court or tribunal.

Q116 *What should be the evidentiary status of codes of practice, regulations and other subordinate Instruments.*

Answer:

Code of practices are currently developed through an Industry Reference Group and Chaired by WorkCover (NSW) and are considered guidance on how the Act or regulation may be interpreted in relation to a safe system of work. The process of review of a code of practice should extend to the industry sector(s) to which it relates.

Australian Standards should only be used as evidence when listed in the OHS Regulation and has been reviewed by the industry that could be affected in a prosecution. The current review should be chaired by an OHS Statutory Authority with the inclusion of an Australian Standards Panel

A breach should be deemed if the Employer or Employee

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

Answer:

"YES"

Part 4 Article 16 of the International Labour Organisation's (ILO) Convention on Occupational Safety and Health requires employers to ensure, so far as reasonably practical, that workplaces under their control are safe and without risk to health. In Australia, the Duty of Care assigned to employers in some cases contradicts this Convention by adopting on the one hand a non-prescriptive risk management philosophy while on the other hand assigning absolute undertakings to ensure safety. In order to achieve widespread acceptance it is essential that the concept of a Model Occupational Health and Safety (OHS) Act within the Australian context aligns its approach with the ILO Convention.

Reasonably practicable provides employers and controllers with the opportunity to demonstrate to the Court the capacity of the systems of work, training, supervision and other provided.

Q121 *Should the burden of proof or defence be different for a corporation and an individual (officer or employee)*

Answer:

Criminal law principles in Australia are founded on the notion of innocence until proven guilty as such for all OHS criminal charges the burden of proof must rest with the Crown to prove guilt. The test for Corporation or an Employee should be that a breach is proven beyond reasonable doubt.

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

Yes but the liability should not be automatic. Part of the Model OHS Act should be to ensure that officers of a company are personally accountable for the OHS of their workforce. Therefore personal liability should form part of the model legislation.

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

In NSW liability extends to directors and "persons concerned in the management of the company". This definition is somewhat vague in that it is unclear whether liability extends to an officer concerned with the management of some defined portion of the company's affairs (e.g. a safety officer or personnel officer) or rather to management of the totality of the operations of the company.

Under the Victorian, WA and NT legislation, liability extends to 'officers' as defined in the Corporations Act (this extends to persons who make or

participate in making decisions that affect the whole or substantial part of the business of the company or who have the capacity to affect significantly the company's financial standing) whereas in Queensland and Tasmania it is more limited and only includes 'executive officers' (for Qld) and 'directors' (for Tas). In SA a person must be appointed as a 'responsible officer' and this person can only be a director, CEO, senior executive officer or an officer if none of the preceding persons are eligible.

The definition of 'officer' as per Corporations law should be the applicable definition for the purposes of the Model OHS Act.

While the definition of 'officer' under the Corporations Act is not absolutely clear, it is a definition that has been considered by case law and it also makes sense to use this definition as it would then be tied to a well-considered definition in another piece of Commonwealth legislation (the Corporations Act). The extended definition of 'officer' in the Corporations Act also makes it clear that while a person may not be a director or formally part of the executive of a company, if the person exercises some form of de facto control or acts in the capacity of a 'shadow director', this person may still be considered to be an officer of the company. In *Adler v ASIC* (2003) 46 ACSR 504 Rodney Adler was not a director of the company in question but by reason of his directorship of the holding company of the company in question and being on the investment committee of the holding company, he was held to be an officer of the company in question. This makes all persons properly responsible for the management of a company potentially personally responsible for OH&S breaches.

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

Answer:

Under the NSW, Qld and Tasmanian legislation an officer (as defined in each piece of legislation) is automatically guilty of an offence if the company is found to be guilty of an offence. Therefore there is a reversal of the criminal onus of proof. However, in Victoria, WA and NT there is no automatic liability and a level of neglect of the officer still needs to be proved.

I consider that the NSW, Qld and Tasmanian model should not be used. In short, they go too far. It is a basic human right that a person cannot be found guilty of an offence unless it is proved against them. Also, by

keeping the ordinary onus of proof (i.e. a person must be proven guilty) does not necessarily make it difficult for a prosecution to be brought against an officer of a company. WorkSafe inspectors in each state have very wide powers to compel the production of evidence (both through compelling the production of documentation and the giving of oral evidence by any officer) and therefore won't be significantly hindered in prosecuting company officers simply because the onus of proof has not been reversed.

The real question is what the test should be for finding an officer personally liable. The WA test has a lower threshold than that in Victoria and NT, it simply requires neglect (or that the offence occurred with the consent or 'connivance' of the officer), whereas the NT test requires wilful neglect. In my opinion the Victorian test is the better model which provides that it must be proved that the officer did not exercise reasonable care and in considering this question the Court must look at:

- what the officer knew about the matter concerned;
- the extent of the officer's ability to make decisions that affect the company in relation to the matter concerned; and
- whether the act or omission is also attributable to an act or omission of any other person.

In my opinion the Victorian model is the fairest test and ensures that officers of the company must act with reasonable care to discharge their duties under the OH&S legislation. On other words, in order for personal liability to be found against an officer of a company there needs to be an act or omission by the relevant officer which contributed to the contravention of the legislation. In my opinion this model gives clearer guidance as to when an officer would be properly found to be in breach of the legislation.

Q. 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?*

Answer:

Yes - see above answer.

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

Answer:

Yes. Under the NSW, Qld and Tasmanian legislation there are defences as to personal liability. In NSW and Qld there is a defence where an officer can demonstrate that he or she was not in a position to influence the conduct of the company in relation to the contravention or used all due diligence to prevent the contravention. In Tasmania the second defence is the same but the first one is that the contravention occurred without the officer's knowledge and the officer was not reasonably able to have acquired that knowledge.

The specific defences, under the NSW and Qld model should be used. This seems a fairer test whereas the Tasmanian test leans too far towards a lack of accountability on the part of officers of the company – i.e. an officer can escape liability if the contravention occurs without his or her knowledge (albeit subject to a test of reasonableness). The purpose of the legislation should be to ensure that officers take proactive steps to ensure that the company is fulfilling its OH&S obligations.

Q. 127. *What should the approach to officers of unincorporated associations or volunteer officers be?*

Answer:

In Victoria there is a specific defence for volunteer officers such that a volunteer is not liable to be prosecuted for anything done or not done by him or her as a volunteer.

This should be an exception to the personal liability model as it would be bad policy to subject a volunteer officer to personal liability in circumstances where they only act as an officer on a voluntary basis. To have these persons subject to personal liability would discourage people from taking up voluntary officerships.

Q128. *For which offences should monetary penalties (fines be imposed?*

Answer:

All offences should have a monetary penalty imposed as the only way to make companies take notice is to hurt the bottom line.

Fines for serious incidents causing death/serious injury/disability or major disruptions to the public should not be based on the minimum/maximum model that we use now but should be based on:

% of annual turnover for the previous 12 months from the date of the incident.

% of profit (before tax/after tax?) for the previous 12 months from the date of the incident. (This method is not recommended as small companies can have negative profits)

Using the model of jail if a conviction is exercised is not ideal. If a director/ senior management of a company is convicted then the more appropriate result should be to disqualify them for a period of no less than:

5 years if heard in county court

15 years if heard in a high court

Q129 *Should maximum fines be provided in the model OHS Act, or is there an alternative approach?*

Answer:

The model act should encompass fines, it's in one place, easy to find, easy to decipher.

However, they should be based on only the minimum amount and the court in which they are being heard ie:

Min \$50,000 county court

Min \$500,000 high court

Q130 *Should the level of fines be different for the various offences? If so, for what offences and at what levels?*

Q131. *Should there be a statutory minimum fine for some offences? If so, what?*

Q132. *Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?*

Answers:

Failing to comply with an improvement or prohibition notice, or a court order

Min \$50,000 county court

Min \$500,000 high court

Breach of general duties of employers, self-employed persons, manufacturers and suppliers to safeguard the health and safety of workers and members of the public who may be affected by work activities

Min \$50,000 county court
Min \$500,000 high court

Other breaches of 'relevant statutory provisions' under the Act, which include all health and safety regulations. These impose both general and more specific requirements, such as requirements to carry out a suitable and sufficient risk assessment or to provide suitable personal protective equipment:

Min \$10,000 county court
Min \$100,000 high court

Contravening license requirements or provisions relating to explosives. Licensing requirements apply to asbestos removal, and storage and manufacture of explosives and dangerous goods. All entail serious hazards which must be rigorously controlled.

Min \$50,000 county court
Min \$500,000 high court

Breaches in the act or relevant statutory provisions that result in death/serious injury/disability to a worker or members of the public.

% of annual turnover for the previous 12 months from the date of the incident.

% of profit (before tax/after tax?) for the previous 12 months from the date of the incident. (This method is not recommended as small companies can have negative profits)
(either/or and it doesn't matter which court it is heard in)

Each time there is a recurrence the fine should double ie:

First offence	\$50,000
Second offence	\$100,000
Third offence	\$200,000
Fourth offence	\$400,000

Once it gets to the third offence the court should disqualify the directors for periods of no less than:

5 years if heard in county court
15 years if heard in a high court

Q133 Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?

Answer:

A Public Register of Convictions could be developed for all cases that have resulted in a conviction being recorded and available on local WorkSafe websites.

The database should cover the following:

Find cases using a single item of information (e.g. defendant's name)

Find cases using multiple search items

Find cases by geographic area (e.g. region)

Find cases by industry (e.g. construction) or the main activity (e.g. plastering)

A record of all improvement and prohibition notices should be developed as well. With the current WorkSafe departments becoming more consultant than finding the issues and giving advice, a database should be setup to assist companies.

If a company was to make it onto the Public Register, then that company should be automatically excluded from tendering with government bodies and related agencies for a period no less than 12 months.

Being named on the register will mean the defendant will be made to do a paper for inclusion on the database on how the incident has been rectified and what has happened to the business since the incident and what has happened to the persons involved in the incident

No submission on Q's 134 to 141

Chapter 9 - OTHER ISSUES

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

Answer:

No

Q. 143 *Should the 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?*

Answer:

I don't consider this a significant issue providing a consistent position is taken.

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

Answer:

Refer to

WORKSAFE WESTERN AUSTRALIA COMMISSION

"Guidelines for the development of Industry Codes of Practice for Approval under the Occupational Health and Safety Act 1984"

This articulates provisions well.

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

Answer:

A standardised system adopting the Victorian process would achieve this.

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

Answer:

Certain aspects of decisions following internal reviews can be appealed in the Supreme Court.

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

Answer:

This should be considered. Factors include:

1. Expertise of tribunal members
2. Alternative mechanisms for further escalation

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

Answer: Yes and adopt the Victorian model

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

Answer:

Yes. This is an important opportunity to ensure appropriate levels of expertise.

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

Answer: Training, competencies, licensing, permits, incident data

Q. 151 *What is the most appropriate way for a model OHS Act to provide 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 the requirements for such permits and licensing for industry across Australia?***

Adopt the principle of mutual recognition