



***A National Approach to
Occupational Health and
Safety***

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The Voice of Leadership

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Executive Summary

The Property Council appreciates the opportunity to respond to the National Review into Model Occupational Health and Safety Laws.

We believe that a nationally consistent approach to occupational health and safety governments is essential to the delivery of safer workplaces.

Safety is an utmost priority for the property and construction industries.

Our industry is keen to see proper protections introduced for employees, but without abandoning employers' rights to the presumption of innocence.

As the owners, managers, and developers of most of Australia's workplaces, the property sector is affected by occupational health and safety rules.

We consider the following reforms to be essential to ensure that all stakeholders are protected under a national OHS regime:

- a national Code for OHS;
- interstate commitment to national consistency;
- flexible rules that allow companies to operate safely and efficiently;
- open and transparent policy development drafted in consultation with stakeholders;
- an increased focus on education and incentive packages, rather than regulation;
- clear definitions of rights and responsibilities for employers and employees alike;
- the right to a presumption of innocence for people accused of an OHS breach; and the right to appeal decisions;
- a separation of the educational and enforcement roles of workcover authorities; and
- the removal of the capacity for unions to commence or profit from an OHS case.

The Property Council would be willing to meet with representatives of the Taskforce to examine these issues, and concerns about regulation in general, further.

Recommendations

1. In order to deliver certainty and national consistency:
 - a. all governments should, as a matter of priority, sign an Intergovernmental Agreement committing them to work towards a single national OHS regime;
 - b. this Agreement should endorse the creation of a National Occupational Health and Safety Code, for adoption under state-based regulation;
 - c. all jurisdictions should adopt agreed nationally consistent terms and definitions; and
 - d. local authorities should be prevented from introducing policies that undermine or contradict OHS regulations.
2. Governments should commit to an objective, fair, and balanced approach to OHS policy development that:
 - a. recognises that while occupational health and safety is paramount, the regulation of it should not unnecessarily limit innovation or efficiency;
 - b. does not create new rules based on a single incident;
 - c. is subject to effective, transparent consultation, particularly with the industries affected, rather than being developed in isolation;
 - d. gives preference to the use of existing rules; and
 - e. results in:
 - i. straight-forward policy that allows ready compliance;
 - ii. policy that does not contradict other statutory responsibilities. Compliance with the latter should be accepted as compliance with OHS requirements; and
 - iii. regulations that are not applied retrospectively.
3. Governments should consider alternatives to OHS regulation in order to encourage better performance by:
 - a. developing packages and incentive measures to educate and encourage employers and employees to improve workplace safety in their areas of responsibility;
 - b. ensuring that levies, such as the Victorian Government's fees for the registration of cooling towers, are used to deliver incentives and training, rather than going to consolidated revenue or unions; and

- c. encouraging increased research and development through:
 - i. direct funding to relevant research organisations, such as the CRC for Construction Innovation, to develop training packages or new techniques; and
 - ii. funding for the National Medical Health Research Council to revise and update its advice on safe levels of air-borne pollutants in buildings, to help owners improve indoor air quality.
4. A national OHS code should be developed that:
 - a. is drafted by a dedicated authority established by an intergovernmental agreement; and
 - b. only refers to Australian Standards:
 - i. for the purposes of information and advice;
 - ii. that have been developed by committees whose membership is balanced between those working in OHS and those likely to be affected by the changes; and
 - iii. that have been assessed for any costs and associated impacts before being released for public consultation. No standards for OHS should be published or become part of the regulatory regime unless that is done.
5. Establishing responsibility is an essential part of dealing with OHS. To ensure a fair system:
 - a. legislation must clearly define the rights and obligations of any person, corporation, or entity considered to be the controller or occupier of a workplace and establish exactly where those obligations lie;
 - b. particularly where there may be multiple parties and multiple duties of care, only one party should be considered to be responsible for the management or control of a workplace or a specific activity, with associated duties of care;
 - c. the concept of individual responsibility must be applied to OHS law and should be consistently applied in decisions, so that while individuals should be given reasonable protection from the negligence of others, they should also be held responsible for their own actions;
 - d. government policy should balance safety against reasonable levels of employer and employee responsibility;
 - e. it should be a defence if someone:

- ii. ensure that officials are appropriately experienced and have a competent understanding of the industries they are reviewing.
- 8. The model Act should specifically prevent unions or their officers from using OHS concerns for political or industrial purposes, or for financial gain. This should be achieved by:
 - a. removing the capacity of unions to commence proceedings on OHS cases;
 - b. preventing unions or their officers from receiving a share of any fines levied for OHS offences;
 - c. before any industrial action can be taken:
 - i. requiring unions to provide evidence supporting claims of safety breaches;
 - ii. requiring union officials to provide advance warning of any concerns they may have;
 - iii. ensuring that respondents have a reasonable opportunity to undertake remedial action; and
 - d. introducing financial penalties for unions and officials who undertake spurious or malicious actions on the back of OHS concerns.

Logic of the Submission

The Property Council believes there is an urgent need for the reform of occupational health and safety (OHS) regulations.

The existence of nine different jurisdictions for OHS invariably creates inefficiencies and poor public policy by governments.

They do little to protect employees or the occupants of buildings, but create significant compliance problems for employers.

The sheer volume and complexity of existing regulations and politically-focussed decision-making has placed considerable burdens on businesses.

This submission will explore the broad policy position of the Property Council of Australia, relating to:

- a national approach to OHS;
- policy development;
- alternatives to regulation;
- a Code;
- liability/responsibility;
- the burden of proof;
- institutional relations; and
- union involvement.

It will then respond to some of the 152 questions listed in the discussion paper that have relevance to the property sector.

1.0 A National Approach to OHS

Nine governments develop OHS legislation and policies for Australian workplaces, each taking a different view on risks and responsibilities.

This is made more complicated by hundreds of local authorities regularly applying their own strategies in areas that cut across OHS.

We are a long way from national consistency.

In order to simplify compliance and improve safety, Australian governments should introduce a national Code of fair and effective occupational health and safety rules that are applied through state legislation.

This is a workable approach to ensuring greater consistency, as shown by the application of the Building Code of Australia.

The development of such a Code should be a key priority of COAG and its constituent governments.

1.1 *Benefits of Nationally Consistent OHS Policy*

A nationally consistent approach to occupational health and safety would:

- reduce compliance costs;
- reduce complexity and improve certainty;
- ensure a more consistent approach to a company's policies for employee and building occupant safety;
- prevent the gradual creep of more and more stringent requirements as state jurisdictions attempt to outdo each other; and
- help to limit the current preference for ad hoc policy development based on industrial pressure or political expediency.

1.2 *Current Barriers to National Consistency*

The Property Council has recognised that there have been many barriers in the past to the greater adoption of nationally consistent OHS policies, such as:

- constitutional impediments to the involvement of the Federal Government in state-based issues;
- uncertainty about the power of the Federal Government to 'cover the field' in OHS regulation;
- state and territory authorities protecting their 'turf';

- union preferences for State based negotiation and inconsistent political influence resulting in different outcomes in each State;
- political opportunism; and
- an incorrect public and media perception of employers as being opposed to workplace safety.

These factors are not insurmountable, and should not be allowed to delay reform.

Industry looks to all jurisdictions to cooperate and deliver a system that protects all Australian employees and employers fairly and equitably.

1.3 Recommendation

In order to deliver certainty and national consistency:

- a. all governments should, as a matter of priority, sign an Intergovernmental Agreement committing them to work towards a single national OHS regime;
- b. this Agreement should endorse the creation of a National Occupational Health and Safety Code, for adoption under state-based regulation;
- c. all jurisdictions should adopt agreed nationally consistent terms and definitions; and
- d. local authorities should be prevented from introducing policies that undermine or contradict OHS regulations.

2.0 Policy Development

If there is to be any national consistency in occupational health and safety, there need to be restrictions on the ability of governments to develop new policy.

While the Property Council recognises that there will be a need to create new policies, these should be carefully considered and fully consulted.

Potential solutions should be objective, fair, and balanced.

Regulations and policies should be practical and deliver sufficient flexibility that they do not unnecessarily limit a company's ability to operate efficiently.

They should not be created as a result of a single incident nor should they be applied retrospectively.

Instead, regulators should undertake significant consultation with employers and employees working in the industry affected by the proposed rules and give preference to existing standards.

Ultimately, it should be relatively straight-forward for an official to comply with OHS requirements without contradicting a company's other statutory responsibilities.

2.1 Recommendation

Governments should commit to an objective, fair, and balanced approach to OHS policy development that:

- a. recognises that while occupational health and safety is paramount, the regulation of it should not unnecessarily limit innovation or efficiency;
- b. does not create new rules based on a single incident;
- c. is subject to effective, transparent consultation, particularly with the industries affected, rather than being developed in isolation;
- d. gives preference to the use of existing rules; and
- e. results in:
 - i. straight-forward policy that allows ready compliance;
 - ii. policy that does not contradict other statutory responsibilities. Compliance with the latter should be accepted as compliance with OHS requirements; and
 - iii. regulations that are not applied retrospectively.

3.0 Alternatives to Regulation

Regulation should not be seen as the panacea to OHS concerns.

Education of stakeholders on new techniques and leading practices will go a long way to improving safety without the need to resort to punitive measures.

Nobody benefits when an employee is injured or killed.

Despite the rhetoric from some quarters, employers are generally not insensitive to the risks faced by their employees and, with guidance, are willing to take measures to improve safety.

Unfortunately, constructive advice and support appears to run a distant second to regulation and enforcement.

By giving both employers and employees the information and incentives they need to identify and minimise risks in the workplace, stakeholders would be in a better position to collaborate on improving safety.

Levies and fines collected from government programmes and OHS breaches should be used to develop these packages, rather than boosting government coffers or subsidising union officials.

Funding should also be provided to research bodies to ensure that stakeholders have access to the most up-to-date information on workplace risks.

3.1 Recommendation

Governments should consider alternatives to OHS regulation in order to encourage better performance by:

- a. developing packages and incentive measures to educate and encourage employers and employees to improve workplace safety in their areas of responsibility;
- b. ensuring that levies, such as the Victorian Government's fees for the registration of cooling towers, are used to deliver incentives and training, rather than going to consolidated revenue or unions; and
- c. encouraging increased research and development through:
 - i. direct funding to relevant research organisations, such as the CRC for Construction Innovation, to develop training packages or new techniques; and
 - ii. funding for the National Medical Health Research Council to revise and update its advice on safe levels of air-borne pollutants in buildings, to help owners improve indoor air quality.

4.0 A Code

The Property Council supports the idea of a national Code for OHS.

If there is ever to be national consistency, a Code that outlines the standards, roles, and responsibilities expected by government and the community will help to ensure clarity for stakeholders.

An intergovernmental agreement is needed to establish an authority that would be responsible for developing a national Code.

Such a body should have appropriate and effective representation from stakeholders to ensure that the Code is fair and reasonable.

If a new authority is not deemed necessary, the responsibility for this task should be delegated to a revamped Australian Safety and Compensation Commission.

Where Australian Standards are used to augment OHS regulations, these should generally be for the purposes of information and advice.

Standards should only be accepted if they have been developed by committees with broad membership, balanced between practitioners and those likely to be affected, and have been subjected to proper regulatory impact analysis.

4.1 Recommendation

A national OHS code should be developed that:

- a. is drafted by a dedicated authority established by an intergovernmental agreement; and
- b. only refers to Australian Standards:
 - i. for the purposes of information and advice;
 - ii. that have been developed by committees whose membership is balanced between those working in OHS and those likely to be affected by the changes; and
 - iii. that have been assessed for any costs and associated impacts before being released for public consultation. No standards for OHS should be published or become part of the regulatory regime unless that is done.

5.0 Liability/Responsibility

In order to ensure that respondents are appropriately accountable for their actions, it is important to provide clear definitions of the rights and obligations of everybody involved in an OHS incident.

It is not acceptable for work safety authorities or any other prosecutor to pursue a company or individual beyond their level of responsibility merely because of their capacity to pay compensation.

The property sector, like any other industry, has thousands of employees performing a myriad of roles.

In the absence of clear definitions of their responsibilities, it is difficult to ensure that people or companies who have a case to answer are appropriately prosecuted, without potentially capturing those who were not involved.

A single individual should only be held to have a duty of care to the degree they may have been involved, so long as those responsibilities are reasonably practicable.

The role that an employee may have had in causing their own injury also needs to be considered.

An employer should not be held accountable if a staff member were injured as a result of ignoring company policy or acting recklessly.

The key issue is 'control' – no individual should be held liable for an OHS incident beyond their reasonable ability to control or influence the outcome.

Nor should anyone be prosecuted purely on the basis of someone else's assumptions as to their level of knowledge or control.

This is an area where directors and executives are particularly at risk.

Criminal or civil liability cases against directors or executives should only be possible where a company officer can reasonably be expected to have had influence.

Industrial manslaughter cases should only be allowed to proceed where a director could be found to be 'reckless', not just 'negligent'.

5.1 Recommendation

Establishing responsibility is an essential part of dealing with OHS. To ensure a fair system:

- a. legislation must clearly define the rights and obligations of any person, corporation, or entity considered to be the controller or occupier of a workplace and establish exactly where those obligations lie;

6.0 Burden of Proof

OHS should be focussed on delivering protection for employers and employees fairly and equitably.

However, current regulation and practices tend to ignore basic human rights of presumption of innocence and the right to a fair trial.

Under current law an employee who is injured while stealing from his workplace must be considered innocent until the allegations can be proven.

His employer, on the other hand, is automatically considered guilty until she can prove she wasn't negligent or reckless.

This is a perverse outcome and a denial of natural justice.

Regardless of whether an OHS matter is a civil or criminal case, a respondent should always be entitled to the presumption of innocence.

OHS cases should be able to stand on their merits and a prosecutor should have to prove that a respondent is liable for an alleged offence, rather than the latter needing to provide defences.

Defendants should ultimately be accorded the same rights as those in criminal cases, particularly the ability to appeal a conviction to higher courts to ensure justice is properly served.

Furthermore, where an OHS matter is considered to be a criminal case, it should be heard by a properly constituted court, rather than an industrial tribunal.

6.1 Recommendation

The concept of 'burden of proof' should always be applied in OHS matters:

- a. the responsibility to prove a case should always lie with the prosecution. No person should be required to prove themselves innocent;
- b. there should always be a right of appeal to the State Supreme Courts, Federal Court (where applicable) and ultimately to the High Court in such cases; and
- c. properly constituted courts, experienced in criminal law and procedures should have exclusive jurisdiction to hear criminal OHS matters. Such cases should not be determined by industrial tribunals or commissions.

7.0 Institutional Relations

The review of OHS and a move towards a national model Act provides regulators with an ideal opportunity to restructure current institutions.

Greater institutional reform will deliver benefits for OHS.

The Property Council believes that particular attention should be paid to the roles and structures of the Australian Safety and Compensation Council and the various jurisdictional work safety authorities.

Institutional reform will allow regulators to achieve administrative efficiencies and to ensure that authorities are capable of providing a mixture of stakeholder support and enforcement.

OHS authorities should use the current review to seek greater collaboration on educating plaintiffs and respondents alike of their rights and responsibilities under OHS regulations.

7.1 Recommendation

The Review Panel should take the opportunity to propose structural reform of Australia's OHS institutions:

- a. the Australian Safety and Compensation Council should expand its membership to include broader industry representation, such as from the property sector, to ensure that it is properly and directly advised about the concerns of business;
- b. Work safety authorities should:
 - i. separate their education and enforcement roles, to allow businesses to seek advice without the threat of punishment; and
 - ii. ensure that officials are appropriately experienced and have a competent understanding of the industries they are reviewing.

8.0 Union Involvement

The Property Council and its members have become concerned about the significant conflict of interest that exists in some jurisdictions where union officials have the right to commence proceedings on potential OHS breaches.

Even more alarming is the ability of unions in some situations to profit from fines levied on respondents.

This does nothing to instil confidence in the protections available to employers and employees under OHS legislation.

Nor does it encourage employers to work collaboratively with employee representatives to resolve areas of concern.

The Property Council believes that if governments are interested in protecting employees and the occupants of buildings, the systems and regulations governing OHS must be impartial and objective.

This means that OHS concerns should not be able to be used:

- as a bargaining chip for negotiations on pay and conditions;
- to cause mischief for an employer; or
- for financial gain.

8.1 Recommendation

The model Act should specifically prevent unions or their officers from using OHS concerns for political or industrial purposes, or for financial gain. This should be achieved by:

- a. removing the capacity of unions to commence proceedings on OHS cases;
- b. preventing unions or their officers from receiving a share of any fines levied for OHS offences;
- c. before any industrial action can be taken:
 - i. requiring unions to provide evidence supporting claims of safety breaches;
 - ii. requiring union officials to provide advance warning of any concerns they may have;
 - iii. ensuring that respondents have a reasonable opportunity to undertake remedial action; and
- d. introducing financial penalties for unions and officials who undertake spurious or malicious actions on the back of OHS concerns.

9.0 Discussion Paper Questions

1.0 Legislative Approach

1.1 Regulatory Structure

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

A model OHS Act should be comprised of a combination of principles 'process-based standards' and 'performance based standards'.

This would allow businesses the flexibility to implement OHS processes suitable to their operations, while eliminating ambiguity by specifying the level of protection expected by government.

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

The current 'Roben's style' approach should remain, in which the principal OHS Act sets out the general duties of care, while supporting OHS regulations contain more detailed provisions.

All legislation and regulations should be written in plain English.

2.0 Scope, Application & Definitions

2.1 Industry Sectors

Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

OHS legislation should incorporate all industry specific safety legislation.

Industry specific duties should be covered at a high level within the legislation and regulations, with greater detail contained within sector specific 'codes of practice'.

Such codes should be referred to in the OHS Act and Regulations, making them legally binding.

2.2 Workplaces and Non-Workplaces

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

This depends on both the nature of the relationship between employers and employees and the nature of the work being carried out.

The general duties of care should be tied to:

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

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

Any duties should be based on the capacity of an employer or property owner to control the risks and the responsibilities of a member of the public to behave appropriately.

Duties of care should not be extended to foolish or criminal behaviour.

Members of the public can present a significant OHS risk to property owners, managers and tenants.

As such the Act should outline their responsibilities, without triggering a requirement for the owner to train visitors on their OHS system.

These would include:

- a general duty of care not to impede the safety of themselves and others;
- an obligation to obey signage where installed; and
- an obligation to take safety direction from the controller of the premises or their authorised representative.

It is likely that a more careful definition of 'workplace' will be needed to cover such areas as 'immediate vicinity'.

12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

Yes, it must be sufficiently broad to accommodate changes in employment arrangements, workplace arrangements, and hazards.

2.4 Definitions

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

Terms relevant to the property sector which we believe are critical to achieving national consistency include:

- 'construction work' and 'high risk construction work';
- 'consultation';
- 'contractor' and 'principal contractor';

- 'control' and 'controller of premises';
- 'employee';
- 'hazard';
- 'reasonably practicable';
- 'risk';
- 'safe system of work'; and
- 'workplace'.

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

3.0 Duties of Care – Who Owes Them and to Whom?

3.2 Control

Q16. Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?

Yes. At the moment everyone from owners and investors to developers, contractors, and subcontractors all have liabilities.

These need to be defined clearly to allow occupational health and safety responsibilities to be allocated appropriately and dealt with fairly.

The definition should be broad and tied to 'capacity to control'.

It should not be prescriptive, but should be supported by extensive examples, illustrating the extent of control of:

- directors of a company;
- owners of a building or space leased to a tenant;
- tenants who lease and office/ shop;
- control of a company over an employees home workplace (for work-at-home arrangements);
- control of a company over 'vehicle' workplaces;
- various contracting arrangements (owner, property manager, commissioner of contractors, contractors).

This would serve to eliminate the ambiguity currently present in OHS legislation.

As a general rule people should only be held accountable to the degree to which they were involved in an incident.

For example, it is unreasonable, impractical, and economically nonsensical for an employer to be expected to protect the safety of an employee when they are working from their own home.

A clear 'control' test or definition would help to clarify the liability of an individual.

Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

Control should be determined according to actual control and expertise of an individual, and their ability to influence the outcome of an incident.

Contractual control should not be the only benchmark by which this is decided.

A clear definition of control would help to clarify every stakeholder's responsibilities.

Ultimately, people should be able to exert influence and help duty holders meet their obligations, without personally claiming control.

Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

Yes, control should be able to be delegated or relinquished resulting in the legal effect of there being no liability for the delegator.

For example, where an investor gives a contractor control over a building site despite being the owner of the property, or where a property owner commissions an expert lift contractor to carry out maintenance.

It should also cover situations where a legally binding agreement has been established, giving one party full control over a premises or workplace, such as where a property owner engages a property manager, or leases space to a tenant.

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

Yes. The model OHS Act should clarify responsibilities where multiple duty holders and multiple duties are involved.

This should be achieved through the 'control' test in the Act and by defining the roles of individual duty holders.

By doing this, it would establish the appropriate level of liability for duty holders and enable regulators to apply the rules consistently.

3.3 Work Relationships

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

Yes, but the OHS Act must take into consideration 'non-employee' relationships, such as those between a property owner/manager and a member of the public.

While this is not an employment relationship, actions of a member of the public may attract liability to the property owner.

Non-employees and members of the public should be held, where reasonable, responsible for their own actions.

Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Duties owed to non-employees should be determined according to what is 'reasonably practicable'.

These duties should be related to the degree of control able to be exerted.

For example, a trespasser on a property should not be entitled to the same protections as a contractor or volunteer.

Non-employees should be held responsible for their actions and their consequences similarly to any other stakeholder.

3.5 Duties of Workers and Others

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

The concept of individual responsibility must be maintained and properly and consistently applied.

While individuals should be given reasonable protection from the negligence of others, they should also be held responsible for their own actions.

The Act should include duties which require that people not wilfully place the health and safety of other persons at risk and not 'misuse' items provided for protection of health and safety.

The model OHS Act should allocate responsibilities in a fair and equitable manner so as to encourage a 'total safety' culture in industry.

3.6 Appointed Persons and Officers

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

No. This would create more liabilities for an individual than would arise under a general duty.

General OHS provisions should be sufficient to ensure employees and occupants are protected.

Q30. Should the model OHS Act include positive duties for officers of bodies corporate?

The liability of officers of a body corporate should be limited only to issues about which they can be reasonably expected to have direct knowledge and control.

Prescribing responsibilities directly to officers will add significantly to compliance requirements without specifically improving health and safety.

3.7 Duties of Persons in Control

Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

Please refer to Question 19.

The current provisions for persons in control of a workplace (and plant and substances) do not clearly express who owes a duty, to whom, and under what circumstances.

This creates ambiguity in situations where multiple persons have simultaneous control, such as where a property owner leases space, including items of plant/equipment to a tenant, or where a property owner engages a facility manager to maintain premises on their behalf.

Some clarity is needed by defining specific roles.

Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

The roles and responsibilities under OHS legislation should be clearly defined for all stakeholders.

3.8 Activities Which Impact on Health and Safety

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

It is important that the model OHS Act is clear about such duties, while placing time limitations on liability.

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

Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

Liability should be allocated to manufacturers or designers where it can be proven that they have been at fault.

However, we recognise that this is very difficult to do.

4.0 'Reasonably Practicable' & Risk Management

4.1 Concept of 'Reasonably Practicable'

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

Yes.

Q39. How should the standard be defined? What level of detail should be provided?

The standard should expand upon the Victorian model because it provides a clear definition of 'reasonably practicable'.

To improve the definition further, the Panel should consider the United Kingdom's industry specific guidelines, which also determine what should be considered 'reasonably practicable'.

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

Yes. Control should be part of the defined standard.

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

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?

One approach that could be followed is the UK's industry specific guidelines, as described above.

4.2 Risk Management

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

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

Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Yes. Reference should be made to Australian Standard 4360: Risk Management, which is widely used.

5.0 Consultation, Participation & Representation

5.2 Participation and Representation

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

HSRs and HSCs should not be union representatives, as they are not sufficiently objective to consider both sides of an OHS case fairly and even-handedly.

6.0 Regulator Functions, Powers & Accountability

6.2 Inspectors

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

Work safety authorities should ensure that officials have a competent understanding of, and expertise within, the industries they are reviewing.

Inspectors should be covered by codes of conduct and be responsible for decision-making to their level of authority.

There should be management oversight of the decisions made by inspectors.

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

There should be a strict separation of the education and enforcement roles of work safety authorities.

Businesses should be able to seek advice without the threat of punishment.

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

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?

Yes. Notices issued by inspectors are often not finalised.

Inspectors should be required to give written confirmation that a notice has been satisfied, so that a company can operate with confidence that an issue has been resolved.

Inspectors should also be subject to certain timeframes and make relatively quick decisions so as not to hold up the work of an organisation unduly.

6.3 Internal Review of Inspectors' Decisions

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?

The model OHS Act provides a great opportunity to enhance clarity and transparency throughout the legislation.

The Act should require regulators to provide reasons for key decisions including decisions to proceed or not to proceed with a prosecution.

Appeal rights should be available to stakeholders, for which the Victorian model is a good example.

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?

See above.

The prevention of a right to silence, as exists under the NSW legislation, should not be incorporated into the model OHS Act.

7.0 Compliance & Enforcement

7.1 Enforcement Measures

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

There should be grading of enforcement action to ensure that penalties are appropriate for any offences.

It would be useful to illustrate 'Advice and Persuasion' as a much greater portion of the pyramid on page 29 of the issues paper to reflect our preferred model of the regulators role.

7.3 Measures Exercised Beyond the Workplace

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

The use of enforceable undertakings should be available as an alternative to prosecution for an offence under the Act.

The specific undertakings should be determined on a case by case basis.

Q102. Should the giving of an enforceable undertaking result in an admission of fault or liability?

No.

8.0 Prosecutions

8.3 Who May Commence Prosecutions and Relevant Procedures

Q110. Who should be entitled to commence criminal proceedings?

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

Only regulators or ministers should be entitled to commence civil or criminal proceedings under OHS legislation, not unions.

The nature of the role of union officials is such that they could never be sufficiently objective to act fairly in potential breaches.

Responsibility for instituting proceedings should remain solely with government.

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

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

Decisions and prosecutions should be processed quickly and without unnecessary delay.

The Victorian model is a good example to follow.

8.5 The Burden of Proof and Defences

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

Yes. A more detailed definition would provide more assistance to industry.

Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

For all cases the prosecutor should be required to prove whether the standard was met.

A respondent should be entitled to a presumption of innocence.

Q120. What, if any, defences should the model OHS Act provide?

The burden of proof in OHS should always be with the prosecution.

No individual or company should be required to prove themselves innocent.

If this condition is met, there would be no need for specific defences within the model.

Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

The burden of proof should be the same for corporations and individuals.

The prosecution should be required to prove the case against a respondent.

8.6 Liability of Officers

Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

Officers should only be considered liable where they have some personal involvement and have failed to show reasonable care for their employees.

Q124. 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?

No individual should automatically be considered guilty.

A prosecutor should be required to prove a case against a respondent.

Q125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

Yes. The Victorian model for guidance is a helpful example of what could be included.

Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

This is only relevant in the NSW model and implies that an officer is required to prove their innocence.

This should not be the case – an individual should be entitled to the presumption of innocence.

8.8 Workplace Death and Serious Injury

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

Any OHS breaches should be dealt with under OHS legislation and not under the Crimes Act.

Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

Penalties should be applied more to an individual's extent of responsibility for the offence than to the consequences of the breach.

9.0 Other Issues

9.3 Notification of Incidents and Reporting

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

Firstly, consistency is paramount.

Reporting should be on-line to the maximum extent possible.

This will reduce administration and facilitate generation of useful reporting including statistical information.

The scope of reporting should initially be limited to, 'serious' incidents as is typically required at present.

Real time statistical data should be made readily available to corporations and the public including the workers compensation data currently published by ASCC.

9.4 External Appeals and Issue Resolution

Q146. What provisions should be made in the model OHS Act for the external review of regulatory decisions?

There should always be a right of appeal to the State Supreme Courts, the Federal Court (where applicable), and ultimately to the High Court in OHS cases.

Properly constituted courts experienced in the criminal law and procedure, rather than industrial tribunals or commissions, should have exclusive jurisdiction to hear criminal OHS matters.

Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

Where an issue is relatively minor, conciliation or arbitration should be available.

However, there is currently no framework for this.

9.6 Mutual Recognition

Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?

All relevant areas for OHS should be subject to formal mutual recognition provisions, including licences, codes of practice, and registration.

Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:

- *better OHS outcomes;*
- *greater efficiency and effectiveness;*
- *lower regulatory compliance and enforcement burdens; and*
- *improved harmonisation of the requirements for such permits and licensing for industry across Australia?*

The most effective system would be a model Act or Code that is picked up through state legislation.

At the very least a full system of mutual recognition should be introduced.

9.8 Interaction of Federal and State Laws

Q152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

One system should be applied through state law, as occurs with the Corporations Act.

Governments should consider and resolve all ways that liability could be created between states, territories, and the Commonwealth.

Appendix About Us

A1 *The Property Council of Australia*

The Property Council of Australia is the peak industry association for the property industry.

Our mission is to champion the interests of the property sector.

Our membership comprises the leading institutional investors, developers, financiers, owners and managers of investment property in Australia and is responsible for the lion's share of property investment in Australia.

In addition, the Property Council's members include all the major construction, professional, and trade services suppliers working within the property and construction sectors.

Our members currently own and manage more than \$360 billion of domestic assets and include all the major construction, professional, and trade services suppliers working within the property sector.

The property and construction industries have a strong desire for an efficient and fair system to protect occupational health and safety.

A2 *Contacts*

The Review Panel is encouraged to contact the following Property Council staff, should it require further information.

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