

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

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## SPECIFIC COMMENTS

### Legislative Approach:

John Holland (John Holland) believes that any model Occupational Health and Safety Act (OHS Act) should primarily consist of performance based standards that specify an outcome but maintain the ability of duty holders to apply non-prescriptive, cost effective measures to ensure compliance with any general legislative duties.

It follows that a parent OHS Act should be far less detailed than associated regulations and codes of practice. The Act might contain broad objectives and general duties of care that are based around performance standards whilst associated regulations might include some process based standards where required. Codes of practice might detail specific measures that can be taken to achieve a health, safety or welfare outcome where a duty holder is unable to devise their own measures. Compliance with the Act or regulations would be achieved by implementing measures that are equal to or better than those described in the codes of practice that demonstrate that a performance standard has been met.

John Holland believes that the inclusion of objectives within a model OHS Act is a positive step provided the objectives are unambiguous and accurately reflect the content of the Act. The objects in the Commonwealth OHS Act 1991 provide a good basis for the establishment of OH&S in any workplace within Australia. It provides for:

- securing health, safety and welfare of employees;
- protecting persons near workplaces;
- ensuring that expert advice is available on matters effecting health and safety;
- promoting health and safety with flexibility for individual workplaces;
- fostering co-operative consultative relationships between the employer and employee;
- to encourage and assist those with responsibilities for persons with obligations under the Act; and,
- Civil and criminal prosecution in respect to breaches of the Act.

A model OHS Act should not include Workers' Compensation (WC) and Injury Management/Rehabilitation (IM) requirements. The OHS Act ought to be primarily designed to facilitate effective risk management at work; whilst the remaining areas which deal with injury-related compensation and return to work should be dealt with in a separate single suite of legislation

## Scope, Application & Definitions:

John Holland agrees that OHS law across Australia is fragmented which leads, to confusion amongst duty holders and regulators alike with regards to legislative jurisdiction and practical issues such as rights of entry, powers of authorised officers and reporting mechanisms/requirements.

John Holland also notes inconsistency between sectors States and Territories in areas such as plant safety and consultative processes and mechanisms, but to mention a few,. As an entity with diverse business interests and pursuits, John Holland seeks a more consistent approach to the regulation of health, safety and welfare management issues across the country.

John Holland believes that a model OHS Act should cover all industries within the one Act. It should contain relevant objectives, general duties and performance based standards that apply to all workplaces. Specific industry issues can be accommodated through relevant regulations and codes of practice that are specific to that sector or industry.

John Holland believes that enforcement of the model OHS legislation should fall to a single regulator established by the Federal Government. This will provide for a consistent approach by authorised officers/inspectors both in compliance activity and advisory roles. The prospect of different state jurisdictions being free to interpret, enforce and prosecute in their own ways and in varying tribunals undermines the whole notion of a single regulatory framework..

**Q10:** The general duties of care should be tied to that entity that has effective operational control of the workplace. Those obligations should cascade down to also include contractors and sub-contractors; suppliers of plant and materiel and to employees.

**Q11:** John Holland believes the general duties of care should extend to members of the public for their protection from injury at a workplace and near a workplace. The duty to them should not apply where conduct of the public person has been malicious or deliberately reckless. The provisions should be mindful of the considerations with relation to the practicalities consultation, training and monitoring etc in terms of obligations to the public.

**Q12:** The scope and application should be broad enough to accommodate emerging work arrangements such as pyramid contracting where each contractor, commencing with the principal contractor has a duty to each other and to each other's employees. As new work arrangements evolve, the model Act should be able to accommodate the arrangements without constant amendment. The scope needs to be clear enough to provide requirements for contractors at a workplace for which they are not the workplace controlling body.

**Q14:** Certain terms require consistent interpretation across the country. These include; 'construction work', 'construction site', 'maintenance', 'repair', 'employer', 'employee', 'contractor', 'principal contractor', 'controller of the workplace', 'workplace', 'representative', 'occupier of premises', 'serious personal incident', 'dangerous occurrence, plant, and so on.

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

John Holland believes the model OHS Act should include a definition of control to remove ambiguity in contractual arrangements in particular. The definition or test should aim to identify what actions, resources or authorities determine "control" and "who" or "what entity" that control is vested in.

Further, John Holland believes that the term “control” should relate to the person or entity with direct influence over the particular circumstance in question. Therefore, there could be a person with control of a construction project and a person with control of construction work on the same site. Neither should be able to delegate or relinquish their control to the other.

Any model Act produced could benefit from the inclusion of specific regulatory guidance in to clarify “control” and in particular, the responsibilities of multiple parties involved with one workplace.

John Holland believes that primary reliance on an employment relationship is a valid basis for framing health and safety obligations when control is considered. This is extended to non-employees through the control of a construction project for instance where there is a principal contractor/sub-contractor arrangement.

The employer’s duty of care should be expressed in terms of reasonable practicability, that is, “*shall ensure the health safety and welfare of persons at work, as far as is reasonably practicable*”. It should not be expressed in absolute terms as within NSW for instance. The duty should extend to employees and non-employees at the workplace.

A model OHS Act should further include duties of care for employees and non-employees at the workplace, to the effect that they will not endanger the health, safety or welfare of others about the workplace and that they will take care of themselves to the extent that they have control over personal risks.

It should provide duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work.

The employer/controller of a workplace should remain the principal provider of workplace safety and health measures. With the addition of adequate consultative mechanisms, there is no need to appoint a “person” to a role within a workplace that comes with legislative responsibility.

John Holland believes that duties owed by persons in control of a workplace, plant or substances are not as clear as they could be. The duties, who they apply to and in what circumstances could be more clearly defined and demonstrated with the use of approved regulatory material. The model Act should also specify that persons in control of a work area or temporary workplace also have a duty. The emphasis should again be on reasonable practicability.

The concept of health and safety obligations for the whole of life arrangements for an item, structure or system is fraught with difficulty. It tends to draw in a range of duty holders who do not usually incur a present duty and who may not have the necessary competence or ability to fulfil those obligations. This may lead to a general push back on acceptance of duty and increased costs or delays. For example the Constructability of structures for instance places new obligations on designers and architects in many jurisdictions. These issues are adequately referenced in research conducted by the National Research Centre for Occupational Health and Safety Regulation – ‘*A review of regulatory approaches and enforcement strategies*’ which focuses on the regulatory regime for safe design.

**Q27:** The model OHS Act should not provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities. These would be restrictive in many industries. The responsibility rests with the employer (this may be a single person or a company or a joint venture).

**Q.32:** The model OHS Act should specify that persons in control of a work area or a temporary workplace also have a duty.

**Q.33:** The model OHS Act should clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system.

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

John Holland believes that the concept of reasonable practicability is now well established throughout the country, with little need to obtain legal advice on compliance measures required and the tests to be applied. In order to further reinforce the concept, a ‘reasonably practicable’ test should be included in a single Act. A “test” or examples of compliance assessment should be set out in the model Act or in subordinate legislation and should include an element of “control”.

To assist with comprehension and to further elaborate on duties, the terms “hazard” and “risk” should be defined and delineated in a model Act as well as a definition of “reasonably practicable” that includes risk management principles in its body. The risk management principles that form part of the reasonably practicable definition and exemplified test should be mandated within the model Act to reinforce a performance based regime and reasonably practicable approach to compliance.

### **Consultation, Participation and Representation:**

John Holland recognises that effective workplace consultation adds value to improving and maintaining workplace safety. A model Act should include a requirement for consultation between employers and employees as well as to contractors and sub-contractors. The model should allow for alternative, agreed methods of consultation and should be based on the model provided by Comcare. Consultative mechanisms would then form part of a risk management approach.

The Australian Industrial Relations Commission defines consultation as meaning to *“appropriately inform employees, inviting and considering their response. Sufficient action must be taken to secure employee’s responses and give the employees’ views proper attention. Consultation requires more than a mere exchange of information. Employees must be contributing to the decision-making process”*<sup>1</sup>.

The model Act should prescribe that consultation is required and with whom and should include reference to contractors. The Act should also include punitive measures for misuse of any powers/rights inferred upon health and safety representatives that deliberately cause disruption or dispute within the workplace.

The role of the representatives should be clarified as far as possible, including measures such as review of workplace procedures, input into changes to systems, substances or plant, investigation of health, safety or welfare issues and audit roles. These functions could be laid out within a code of practice or other document subordinate to the model Act.

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<sup>1</sup> (Australian Workers Union v Campbell Mushrooms Pty Ltd 1183/96 Print N4852 (1996))

John Holland does not support the ability for trade union officials to hold a right of entry for OHS purposes. The Royal Commission into the Building and Construction Industry identified entrenched abuse of this right which resulted in disruption and delays. This diminishes and dilutes the ability of employers to effectively manage safety. If there were to be any right of entry to a workplace for the purposes of investigating an OHS breach for persons other than officers of the regulatory authority, then that right should only be extended to persons who have completed a prescribed level of training and who have a level of experience which qualifies them to become involved in OHS issues.

Any right of entry for trade union officials should be limited to workplaces where the relevant union is party to an industrial agreement that covers the site or the relevant part of the site; and then can only be exercised where normal grievance procedures have failed.

The right of entry for persons other than inspectors and investigators should only be exercisable after detailing a specific workplace OHS issue and registering it with the regulator. This measure aims to reduce industrial interference and seek to legitimise apparent OHS issues. In the event that the model Act includes a right of entry for non-regulators, there needs to be a mandated provision that any site entry is to be only when accompanied by a regulator's representative such as an inspector or investigator. An alternative to that is for a right of entry for a non-inspector to have powers of referral only, either to site management or the regulator.

With respect to issue resolution, John Holland believes that effective consultation at the workplace commences with direct communication between the supervisor and their crew and/or individuals within a crew. If the issue cannot be resolved via this initial consultative mechanism then it must be supported via trained health and safety representatives and/or health and safety committee involvement which are paramount to maintaining a safe and healthy workplace free of unnecessary disruption. The process for initiating and actioning the resolution process should be built into the health and safety representative training package. The competence of the health and safety representative allows them to identify the appropriate time and manner in which to activate a health, safety or welfare resolution process. In the event of disagreement, the status quo of being able to call upon a representative of the regulator should be maintained and included within the model Act.

The general duties of care afforded the workers by typical OHS legislation is sufficient to deal with discrimination or harassment/discrimination/unfair dismissal as a result of raising legitimate health, safety or welfare issues in the workplace. The 'model' Act will require a definition or note that rolls all similar terms into one (such as victimisation) and ideally include the provision of a breach for both upward and downward bullying.

**Q.49:** There should be a requirement for establishing HSRs and HSCs.

**Q.51:** HSRs should be appointed through democratic processes. Consideration should be given to where multiple employers are present. The Victorian and Commonwealth models are examples where these considerations are effectively provided.

**Q.52:** As indicated in Q51, provision needs to be inclusive of principal contractor or workplace controlling authority arrangements where multiple employers/employees are present. It is John Holland's view that employees in a DWG should be eligible to vote regardless of the employer.

**Q.53:** The Victorian and Commonwealth models provide for adequate provision for the powers and functions of the HSR. It is John Holland's view that these provisions be adopted in the new model.

**Q.54:** As with Q.53, established OHS models provide for equal numbers of employer and employee representatives. This should be preserved and should include provisions around members by employers/employees from non-workplace controlling entities.

**Q.56:** John Holland believes that participants of HSCs should only come from those employed at the workplace, and not included employee representatives other than those employed at the workplace.

**Q.60:** The model OHS Act should specify training and qualifications for such persons. Retraining provisions should be clarified, and provisions should be considerate to the practicalities of training requirements. Training should be at the discretion of the employer but only such that training is delivered by approved training organisation.

**Q.65:** If resolution procedures are to be specified, in whole or in part, they should appear in the model OHS Act or in the regulations.

**Q.67:** A model OHS Act should specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe; but preserve the provisions in the Workplace Relations Act which prevent misuse of this right.

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

As an aid to transparency, accountability and due process, the powers available to inspectors/investigators must be mandated within the model OHS Act. Ideally, a model Act will include enforcement and prosecution guidelines to aid industry. The model Act must include provisions that allow for the making of interpretative documents such as position papers, approved guidance notes and the like, under a “deemed to comply” arrangement. This will aid both industry and the regulator when assessing compliance and is critical when dealing with new, emerging or complex issues.

The appointment of inspectors, their functions, powers, qualifications and professional standards of behaviour must be mandated within the model Act. Industry needs to deal with competent professional people that understand the workplace and the dynamics within it. The model Act should also include notes or guidance on when and how to make formal complaint against an inspector to aid accountability. Further, there should be an appeal mechanism in place which provides for a review of the inspector/investigator decision.

John Holland identifies that inspectors should have the authority to amend, cancel or withdraw notices, orders, requests or directions issued but only with the consent of the workplace manager.

John Holland recognises that only some notices, orders, requests and direction issued by some jurisdiction have a legislated right of review. In NSW for instance penalty notices and section 62 notices do not have a legislative right of review by the regulator, as prohibition and improvement notices do. For those notices in NSW that do have a legislative right of review, there exists the legislative right to have a magistrate further review the regulator’s decision. John Holland believes that the right of review should be legislated for all notices, orders, requests or directions issued by any inspector or authorised officer in any jurisdiction and further, that a second tier of review should exist within a model Act.

**Q.79:** The model OHS Act should provide for the establishment, functions, powers and accountability of regulators.

**Q.80:** The model OHS Act should require that regulators publish enforcement and prosecution policies.

**Q.83:** The advisory and enforcement functions of an OHS regulator should not be separated. Stakeholders must be able to review advisory and enforcement functions of the OHS regular such as it applies to legislation.

**Q.85:** The review of the Victorian OHS Act clearly demonstrated a preference for the duty holder to be able to receive advice from the inspector/investigator. This works well, however, it can also have implications where poor or inaccurate advice is given. It is John Holland's view that an inspector/investigator is able to give advice on request of the duty holder.

**Q.87:** An inspector should be able to modify, amend or cancel any notice or instrument issued by the inspector.

## **Compliance & Enforcement:**

The model OHS Act must include a hierarchical approach to enforcement similar to the Gunningham & Johnstone model. The point of entry to the hierarchy and the method of doing so must be clearly articulated to allow for transparency and due process by the regulator. This could be via approved published guidance material similar to that discussed in chapter 6. Under a model OHS Act, the regulator (or each of them) could be compelled to publish prosecution and compliance assessment guidelines.

John Holland believe that notices issued at a workplace are a valuable tool toward achieving compliance and best practice and accept their use when issued by credible, competent persons, authorised to do so.. Where a duty holder disagrees with the circumstance or detail of a notice, there must be a legislated right of review and a clear process for challenging the notice.

Time to comply with a notice, order, request or direction should be negotiated with the issuing inspector/investigator, on the proviso that no one is placed at risk, prior to rectification. John Holland acknowledges that a review request should not stay a prohibition notice but identifies that a judicial process must be incorporated within the model Act to allow for disagreement with the regulator.

John Holland also acknowledges that penalty (or infringement) notices can be a very effective tool for behavioural change in the workplace. They also allow for the speedy disposal of matters in any workplace, negating the time and resources involved in having a matter heard in a court of law. , However, caution should be exercised such that they only be issued in circumstances where an inspector/investigator clearly identifies a breach. There has been a long history of inspectors using penalty notices for punitive measures on minor breaches that should only warrant a warning or improvement notice. The administration of penalty notices should be contained within the model OHS Act or the subordinate regulations.

John Holland acknowledges that injunctions can be a beneficial to workplace compliance and should be included within the model OHS Act. Similarly, the ability for a court to offer an enforceable undertaking is a sound alternative to conviction as it generally maximises limited financial resources and benefits others depending on the nature of the undertaking. Entering into an enforceable undertaking should not be an admission of guilt.

**Q.90:** The model OHS Act should include a hierarchy of enforcement measures in order of escalation.

**Q.95:** The period in which PINs, improvement and prohibition notices should not be set, rather, these should be commensurate with the breach circumstance and within the confines of 'reasonably practical'.

**Q.96:** The lodging of an application an internal review should affect the continued operation of notices (with provision) until resolved.

**Q.97:** The model OHS Act should provide for infringement notices.

**Q.98:** The administration of infringement notices should occur under OHS Law and should not be separate to individual legislation.

**Q.99:** A schedule of fines for infringements should be developed and be tabled in the Model OHS Act. This should include both employers and individuals.

**Q.100:** The model OHS Act should provide for injunctions to ensure compliance with the model OHS Act.

## **Prosecutions:**

Legal proceedings should be undertaken in Courts rather than industrial tribunals..

John Holland maintains that the burden of proof that all measures that were reasonably practicable were not taken lies with the regulator. That is, the prosecutor must prove that the required standard was not met. The elements of an offence should be consistent where possible across the range of duty holders.

The officers of a corporation should only be liable to prosecution where there it can be shown by the regulator that the officer has not done all that was reasonably practicable to prevent the breach or that there was serious and wilful neglect or negligence. The model Act should give consideration to defining officer as those with the ability to influence the conduct of the undertaking of the corporation, including financial decision making on behalf of the corporation. It should be an automatic defence for the officer if the officer was not in a position to influence, ie a silent director or a husband and wife structure with one or the other not actually conducting or arranging work.

Consideration of jail terms should only be in the case of wilful misconduct with intent, which culminates in the death or serious injury of a person. All cases of breaches under a model Act should be dealt with according to that Act.

**Q.110:** Criminal proceedings should only be initiated by the authority.

**Q.112:** Twelve months should be the appropriate time limit for the commencement of a prosecution.

**Q.117:** The term "reasonably practicable" is an appropriate standard for the model OHS Act.

**Q.121:** The burden of proof should be the same for a corporation and an individual.

## Other Issues:

John Holland recognises that a model OHS Act should include wide powers to make regulations under the principal Act and that some breaches of a lower order should be encompassed in them. This includes administrative breaches such as failure to register plant or failure to ensure persons performing high risk work are licensed. These administrative breaches should not be constructed so as to form a breach of the principal Act. Permissioning frameworks for licenses (asbestos removal for instance) should remain with the regulations to enable prompt changes as technology develops and emerging issues require regulation.

The value of approved codes of practice is well recognised by John Holland. A model Act should continue to allow for the provision of approved codes of practice that are based on 'deemed to comply' principles. It is important to include consultation when developing codes. This should be mandated within the Act.

John Holland's recent experience in the Comcare system has clearly demonstrated the value that is provided by the reporting of incidents. A well resourced and constructive approach from the regulator means that incident notifications become an opportunity for the employer and the regulator to work together to identify systemic failure and opportunities for improvement. This works effectively where the employer has confidence that the regulator understands OHS management issues, and where the approach to prosecution is such that the employer can be candid in communicating with the regulator. We strongly support the Comcare reporting/investigation model.

John Holland operates across Australia and as such, has experienced issues with licensing of workers to perform high risk activities and licenses to perform works such as asbestos removal or demolition. It is appropriate in John Holland mind that a model Act, in place across the whole of Australia and administered by the Federal Government is the most cost and resource effective way to reduce the regulatory burden on large employers, by providing consistent workplace requirements and laws across the country.

The development of a single Australian Occupational Health and Safety Act, Australian Occupational Health and Safety Regulations and approved Australian Workplace Codes of Practice will reduce administration of legislation, allow for employers and principal contractors to devise and maintain national OHS management systems, reduce costs and red tape and allow for a consistent approach in compliance and advisory roles across the board.

The structure of the existing Commonwealth, State and Territory legislation is predominately the same. The new Act should follow these with respect to provide clear objects of the act, interpretation that provides unambiguous clarification of the Act terminology, meanings, general duties, workplace arrangements including a universal approach to consultative arrangements, guidance in relation to powers of representatives and authorities, penalty provisions and other elements as discussed in this submission.

The Act should be arrangement in logical sequence and ideally make cross reference to subordinate legislation. This could be in the form of a scheduled attachment or 'in clause' reference.

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

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## GENERAL COMMENTS

John Holland is fully supportive of a national approach to OHS laws in Australia. The existing Commonwealth, State and Territory legislative laws varies considerably which in turn imposes a significant administrative burden on those companies and organisations operating in a multi national role.

The principles of OH&S are fundamentally the same in all jurisdictions. A standard unified approached to OHS laws in Australia will ensure that all workers and affected persons be treated in the same way and to the same standard.

The cultural impact on having unified OHS laws in Australia will be significant. The result of these initiatives will improve the overall compliance and work practices, and will better enable authorities to work towards a common ground. The flow on effect will be an improvement in the standard of laws which, all of which are designed to preserve the health and safety of persons at a workplace.