

11 July 2008

Attention: National OHS Review Secretariat
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ENA Submission to the National Review into Model OHS Laws

Please find attached the ENA Submission to the National Review into Model Occupational Health and Safety (OHS) Laws.

By way of background, the Energy Networks Association (ENA) is the peak national body for Australia's energy networks. ENA represents gas distribution and electricity network businesses on economic, technical and safety regulation and national energy policy issues.

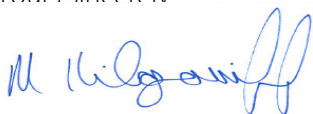
Energy network businesses deliver electricity and gas to over 13 million customer connections across Australia through approximately 800,000 kilometres of electricity distribution lines. There are also 76,000 kilometres of gas distribution pipelines. These distribution networks are valued at more than \$40 billion and each year energy network businesses undertake investment of more than \$5 billion in distribution network operation, reinforcement, expansions and greenfields extensions. Electricity transmission network owners operate over 42,000 km of high voltage transmission lines, with a value of \$10 billion and undertake \$1.2 billion in investment each year.

ENA published a *Policy for a National Framework for Energy Safety in Australia* in April 2008 (Attachment 1). This Policy is a statement on how the harmonisation of energy technical and safety regulation in Australia can be developed, implemented and incorporated into Australian law. ENA also published a *Proposed National Framework for Electricity Network Safety* in July 2008 as the recommended approach to national electricity network safety regulation (Attachment 2).

ENA supports an OHS structure where general duties of care are contained in principal legislation and imposed on employers, with appropriate sector specific regulation (eg energy) contained in subordinate instruments. Energy network safety should specifically be regulated using performance based regulations/standards, which adopt an 'all-hazards' approach to safety management, contained in a single piece of legislation in force throughout Australia, developed through the COAG process under the Ministerial Council on Energy. A safety case approved by the relevant regulator should also provide the necessary basis for compliance with the safe workplace obligations under OHS legislation.

Should you seek further elaboration on this submission, please do not hesitate to contact me on (02) 6271 1511 or mkilgariff@ena.asn.au.

Yours sincerely



Michael Kilgariff
Acting Chief Executive



**ENA SUBMISSION TO
NATIONAL REVIEW INTO MODEL OHS LAWS**

11 JULY 2008

NATIONAL REVIEW INTO MODEL OHS LAWS – SUBMISSION BY THE ENERGY NETWORKS ASSOCIATION

KEY MESSAGES

- ENA has published a *Policy for a National Framework for Energy Safety in Australia* – April 2008 (Attachment 1). This Policy is a statement on how the harmonisation of energy technical and safety regulation in Australia can be developed, implemented and incorporated into Australian law.
- ENA has published a *Proposed National Framework for Electricity Network Safety – July 2008* as the recommended approach to national electricity network safety regulation (Attachment 2).
- ENA supports a structure where general duties of care are contained in principal legislation and imposed on employers, with appropriate sector specific regulation contained in subordinate instruments.
- Energy network safety should specifically be regulated using performance based regulations/standards, which adopt an ‘all-hazards’ approach to safety management, contained in a single piece of legislation in force throughout Australia, developed through the COAG process under the Ministerial Council on Energy (MCE).
- A safety case approved by the relevant regulator should provide the necessary basis for compliance with the safe workplace obligations under Occupational Health and Safety (OHS) legislation.
- Recognising the close interrelation between energy network safety and OHS issues, the Ministerial Council on Energy (MCE) should develop regulations related to the energy network sector.
- Harmonised OHS law should create a single OHS agency, with the functions and powers of officers clearly identified. Alternatively, ENA would support a provision in the model OHS legislation providing that where one safety regulator approves a safety case for one jurisdiction, that approval should be applicable in every other jurisdiction.
- ENA is satisfied that As Low As Reasonably Practicable (ALARP) is a suitable standard that satisfies the twin needs of industry efficiency and the maintenance of a safe workplace. The concept of ‘reasonably practicable’ should not be defined.
- The graduated enforcement measures set out in the Braithwaite enforcement pyramid published on page 29 of the *Options Paper* generally remains the most obvious manner by which OHS provisions can be enforced, and that the various civil and administrative devices available to ensure OHS compliance; although ENA opposes the capacity of inspectors to be able to issue infringement notices..
- Unless it can be proved on the criminal onus that a company officer has through their own behaviour been directly attributable for the breach, then the mere fact that someone is a company officer should not mean that they are vicariously liable for offences committed by the corporation.
- The ENA preference is for a single national Occupational Health & Safety Act. However if that is not achieved, it is proposed that the Review recommend that jurisdictions pass Complementary or Mirror Legislation; or Template, Co-operative, Applied or Adopted Complementary Legislation.

**NATIONAL REVIEW INTO MODEL OHS LAWS – SUBMISSION BY THE ENERGY NETWORKS
ASSOCIATION**

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NATIONAL REVIEW INTO MODEL OHS LAWS – SUBMISSION BY THE ENERGY NETWORKS ASSOCIATION

SUMMARY OF RECOMMENDATIONS

Chapter 1 – Legislative Approach

1. That general duties of care should be imposed on employers in principal legislation, with appropriate sector specific regulation contained in subordinate instruments.
2. That the proposed *Occupational Health and Safety Act 2010* should specify the basic framework to be followed: the duties, the offences, and matters such as the creation of the regulatory authority to administer the scheme and the powers of officers.
3. That any objectives clause should specifically set out what the legislation intends to achieve.

Chapter 2 – Scope, Application and Definitions

4. That a safety case approved by the relevant regulator should provide the necessary basis for compliance with the safe workplace obligations under Occupational Health and Safety (OHS) legislation. Compliance with a safety case would be taken to be compliance with an employers duty to ensure a safe workplace that would otherwise be regulated by OHS legislation, to be assessed by a single national energy safety regulatory agency, and that more generally where energy safety legislation deals with a matter, that legislation should prevail over general OHS law.
5. That energy network safety should specifically be regulated using performance based regulations/standards, which adopt an 'all-hazards' approach to safety management, contained in a single piece of legislation in force throughout Australia, developed through the COAG process under the Ministerial Council on Energy (MCE).
6. That a national energy safety regulatory agency should be established with a similar structure to the National Offshore Petroleum Safety Authority (NOPSA).
7. That otherwise there should only be one general safety regulator in Australia.
8. That the model OHS legislation should include a provision where an approval for a safety case in one jurisdiction, would automatically apply in every other jurisdiction.
9. That there should be a uniform interpretation of a National OHS Act, preferably through memoranda of understanding to establish a uniform interpretation of similar rules.
10. That any MOU's or agreements between agencies relating to the common interpretation of harmonised OHS law should be freely available (eg, a regulator website) to ensure transparency in the administration of those laws.

11. That the general law (as well as any other statutory law of general application) is more appropriate to regulate obligations to members of the general public in environments where an energy network safety case does not apply.
12. That the obligation to observe the general OHS duties owed by an employer should be the responsibility of the person who would be identified in law as being the employer.
13. That there should not be uniform definition of key terms such as “worker”, “workplace” and “reasonably practicable”.

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

14. That OHS duties should be owed to those who are in an employee-employer relationship: that is, where a contract of service can be identified.
15. That the employer in control of premises at which work is being conducted should have the duty of ensuring a safe workplace for their employees.
16. That regulation should provide rules to be followed in high risk occupations.
17. That apart from a general duty for an employee to take all reasonable care to protect an employee’s own health and safety, the legislation need not spell out in detail employee OHS duties.
18. That the standard laws relating to negligence should apply to members of the public, unless there is an intention to criminalise unsafe behaviour by the public.
19. That it is inappropriate to identify a particular person to carry personal responsibility (and possible exposure to criminal prosecution) for the discharge of OHS obligations.

Chapter 4 – “Reasonably Practicable” and Risk Management

20. That the concept of “reasonably practicable” should not be defined.
21. That the *As Low As Reasonably Practicable* concept be regarded as a suitable standard for industry efficiency and the maintenance of a safe workplace.

Chapter 5 – Consultation, Participation and Representation

22. That as a general proposition it is desirable for an appropriate consultant to accompany a workplace representative dealing with an OHS issue, in a manner similar to section 32 of the *Occupational Health Safety and Welfare Act 1986 (SA)*.
23. That where work has been refused, an employer should have the right to deploy employees to perform other activities and there should be a clearly spelled out dispute resolution process to be followed.

24. That issues relating to remuneration as a result of the refusal of unsafe work should be dealt with under workplace relations legislation.

Chapter 6 – Regulator Functions, Powers and Accountability

25. That governance issues and the functions and powers of OHS officers should be defined by the terms of the principal legislation.
26. That regulations should establish the level of training an officer should possess.
27. That a harmonised OHS system with identical laws in force throughout Australia should have only one entity publishing guidance material.
28. That there should continue to be a right of appeal of an Inspector's decisions.

Chapter 7 – Compliance and Enforcement

29. That the concept of provisional notices, improvement and compliance notices should be utilised as the best manner of ensuring OHS compliance where summary compliance action is necessary.
30. That ENA supports the concept of Injunctions (where there are reasonable grounds to believe that OHS law is being, or may be, breached); and enforceable undertakings (on terms agreed between a regulator and an employer), being part of the enforcement mechanism available to regulators.
31. That the time to comply with notices should be an amount of time that is reasonable in the circumstances.
32. That it is undesirable for an OHS inspector to be able to issue infringement notices.

Chapter 8 - Prosecutions

33. That prosecutions should only be initiated by the Crown, through the Director of Public Prosecutions.
34. That prosecution of OHS offences should be conducted as criminal matters proved beyond reasonable doubt.
35. That Appeals should follow the usual appellate structure applicable to cases conducted in the criminal jurisdiction.
36. That only a Director of Public Prosecutions should determine that a prosecution is both in the public interest and that there is confidence that a prosecution has reasonable prospect for success.
37. That compliance with an approved safety case and/or a recognised code of practice should mean an employer has met the requirements to comply with OHS law.

38. That offences dealing with the death or serious injury of a worker that can give rise to imprisonment should be a matter for the criminal law, and not for OHS law.
39. That OHS law should not create an offence such as industrial manslaughter.
40. That sentencing principles should rely on the concept of "individualised justice", in which a court imposes a sentence that is just and appropriate in all the circumstance of the particular case.

Chapter 9 – Other Issues

41. That model National OHS legislation should recognise the National OHS Framework as the manner by which guidance material should be produced.
42. That legislation should contain comprehensive guidelines on reporting requirements.
43. That model legislation should facilitate tripartite development of OHS policies in a manner that maximises the capacity for specific industry sectors to make an input into policy development.
44. That the issue of licensing and disciplining people working in high risk work activities is best developed through the COAG Business Regulation Competition Working Group.
45. That if states and territories do not agree to refer the power to make laws with respect to occupational health and safety matters to the Commonwealth, it is proposed that the Review recommend that jurisdictions pass either:
 - a) Complementary or Mirror Legislation, where each jurisdiction passes identical legislation; or
 - b) Template, Co-operative, Applied or Adopted Complementary Legislation in which one jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

NATIONAL REVIEW INTO MODEL OHS LAWS – SUBMISSION BY THE ENERGY NETWORKS ASSOCIATION

EXECUTIVE SUMMARY

The Energy Networks Association (ENA) is the peak national body for Australia's energy networks. ENA represents gas distribution and electricity network businesses on economic, technical and safety regulation and national energy policy issues.

Australia's major electricity network and gas distribution network companies are members of ENA, providing governments, policy-makers and the community with a single point of reference for major energy network issues. ENA commenced operation in January 2004 and is owned and funded by its membership. ENA is based in Canberra's parliamentary precinct.

ENA notes that in many areas of Australian public policy such as in OHS legislation, the registration of legal and health practitioners, consumer protection legislation and school curricula, the regulatory trend is moving towards national alignment.

ENA formed the view that the decision of the Ministerial Council on Energy (MCE – a committee of the Council of Australian Governments (COAG)) to transfer economic regulation of energy distribution to the Commonwealth through the Australian Energy Regulator (AER) would ultimately lead to the harmonisation of energy technical and safety regulation.

Thus, in 2004 ENA developed a policy objective of establishing a national operating framework for energy technical and safety regulation.

To explore this concept, ENA published a Discussion Paper in July 2007 on *The Technical and Safety Regulation of the Energy Sector in Australia* (the ENA Discussion Paper).

This led to the publication in April 2008 of a document called *A Policy for a National Framework for Energy Safety in Australia* (Separate Attachment 1). In a further development ENA prepared a *Proposed National Framework for Electricity Network Safety* as the recommended approach to national electricity network safety regulation (Separate Attachment 2).

As a general proposition, ENA supports a structure where general duties of care are contained in principal legislation and imposed on employers, with appropriate sector specific regulation contained in subordinate instruments.

Energy network safety should specifically be regulated using performance based regulations/standards, which adopt an "all-hazards" approach to safety management, contained in a single piece of legislation in force throughout Australia, developed through the COAG process under the Ministerial Council on Energy (MCE).

In particular, ENA believes that a safety case approved by the relevant regulator should provide the necessary basis for compliance with the safe workplace obligations under Occupational Health and Safety (OHS) legislation – that is, compliance with a safety case would be taken to be compliance with an employers duty to ensure a safe workplace that would otherwise be regulated by OHS legislation, to be assessed by a single national energy safety regulatory agency, and that more generally where energy safety legislation deals with a matter, that legislation should prevail over general OHS law.

This is because:

- of the limited, yet sophisticated, number of corporations which are subject to such regulation;
- some jurisdictions recognise, it is appropriate for energy safety legislation to prevail over general OHS legislation, as the energy specific suite is designed to specifically deal with the risks inherent in the sector, and
- the high commitment to safety displayed by the energy sector.

Due to the close interrelation between energy network safety and OHS issues, MCE process should develop regulations related to the energy network sector. This is because the MCE process and its participants have the knowledge and background to call up into regulation appropriate standards and principles that maximise both employee safety and energy network reliability.

ENA is also of the view that harmonised OHS law should create a single OHS agency, with the functions and powers of officers clearly identified.

Alternatively, ENA would support a provision in the model OHS legislation providing that where one safety regulator approves something like a safety case for one jurisdiction, that approval should be applicable in every other jurisdiction.

This is because increasingly, energy companies will be providing services to consumers across state boundaries. Safety and efficiency outcomes are maximised if such a company only has to operate under one safety case.

The idea behind a harmonised OHS Act is for one set of words to establish the rules to be followed.

It follows that optimally there should be a uniform interpretation of the text. Industry should not suffer from different interpretations made by different regulators from different agencies with different cultures, even though they are construing the same set of rules. It is presumed that interstate regulators would establish memoranda of understanding to establish a uniform interpretation of similar rules.

Uniform legislation should require that any memoranda of understanding, or other agreement between agencies relating to the common interpretation of harmonised OHS laws, should be freely available (eg, a regulator website) to ensure transparency in the administration of those laws.

With respect to written guidance, the Australian Safety & Compensation Council (ASCC) has developed a National OHS Framework to develop guidance material.

In the context of a harmonised scheme, it would be presumed that the National OHS Framework would produce guidance material that was designed to complement the model OHS law, so there is uniformity of advice provided throughout Australia.

ENA believes the model OHS legislation should recognise the National Framework as the manner by which guidance material should be produced.

OHS duties should be owed to employers to their employees, within workplaces that they control.

ENA is satisfied that 'As Low As Reasonably Practicable' (ALARP) is a suitable standard that satisfies the twin needs of industry efficiency and the maintenance of a safe workplace. The concept of 'reasonably practicable' should not be defined.

The *National Review into Model OHS Laws Issues Paper* indicates that there is inconsistency as to how this standard is interpreted. This is a function of inserting in legislation a term such as "reasonably practicable".

It is a term of indefinite ambit. As such, people of good faith can disagree about whether the taking of a particular step was "reasonably practicable" in a particular circumstance.

If certainty is required with respect to particularly high risk activity, it is appropriate to make process based regulations as well as, if seen desirable, the requirement to produce and adhere to a safety case, the making of code of practices for the purposes of high risk industries etc, with compliance with such codes and safety cases to be taken to have discharged the safety obligations of an employer.

As a general proposition, the graduated enforcement measures set out in the Braithwaite enforcement pyramid published on page 29 of the *Issues Paper* remains the most obvious manner by which OHS provisions can be enforced, and that the various civil and administrative devices available to ensure OHS compliance.

However, unless it can be proved on the criminal onus that a company officer has through their own behaviour been directly attributable for the breach, then the mere fact that someone is a company officer should not mean that they are vicariously liable for offences committed by the corporation.

The *Issues Paper* asks how best to deal with permits and licensing for workers involved in high risk work.

It is noted that on 26 March 2008, the Business Regulation Competition Working Group of COAG reported to the Council that work for vocationally trained licensed occupations be completed by September 2008. COAG also agreed to explore further enhancements to mutual recognition and possible national systems for trade licensing.

This is work being conducted within the overall COAG framework by the Ministerial Council on Education and Vocational Training.

ENA also notes that the COAG *Communiqué* for the meeting of 3 July 2008 agreed in principle to the creation of a national trade licensing system, for sign off in December 2008.

Of particular relevance to ENA members, the electrical trades are nominated as one of the first to be subjected to the national system.

ENA considers that for the time being the issue of licensing and disciplining people working in high risk work activities is best developed through this COAG work stream, rather than this reference.

Finally, the *Issues Paper* asks the best way to remove the overlap of federal and state legislation.

The ENA preference is for a single national OHS Act.

However, if Australian states/territories do not refer the power to make laws with respect to occupational health and safety matters to the Commonwealth, it is proposed that the Review recommend that jurisdictions pass either:

- Complementary or Mirror Legislation, where each jurisdiction passes identical legislation; or
- Template, Co-operative, Applied or Adopted Complementary Legislation in which one jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

To that extent, ENA notes the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*¹, paragraphs 5.1.7 and 5.1.8 of which read:

5.1.7 For the purposes of subclause 5.1.1, the adoption and implementation of model OHS legislation requires each jurisdiction to enact or otherwise give effect to their own laws that mirror the model laws as far as possible having regard to the drafting protocols in each jurisdiction.

5.1.8 The adoption and implementation of model OHS legislation is not intended to prevent jurisdictions from enacting or otherwise giving effect to additional provisions, provided these do not materially affect the operation of the model legislation, for example, by providing for a consultative mechanism within a jurisdiction.

The fact that jurisdictions will still be able to draft legislation using their own drafting protocols, or can have additional provisions included so long as it satisfies a (somewhat elastic) 'material affect' test, is unsatisfactory, and is a recipe for a slow loss of uniformity over time.

An illustration of how this model of implementing notionally uniform legislation can work unsatisfactorily is the way in which the *National Standard for Construction Work* was implemented, as discussed in the *Master Builders Australia Submission to Review Panel for Occupational Health and Safety on the National Standard for Construction Work – Definitions of Construction in State and Territory Legislation* (June 2008).

ENA affirms its support for uniform legislation to be enforced throughout Australia. It hopes the Review will so recommend to the Workplace Relations Ministerial Council, with the intention of having relevant amendments made to the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

¹ Communiqué from Council of Australian Governments (COAG) meeting on 3 July 2008.

NATIONAL REVIEW INTO MODEL OHS LAWS – SUBMISSION BY THE ENERGY NETWORKS ASSOCIATION

Introduction

About ENA

The Energy Networks Association (ENA) is the peak national body for Australia's energy networks. ENA represents gas distribution and electricity network businesses on economic, technical and safety regulation and national energy policy issues.

Australia's major electricity network and gas distribution network companies are members of ENA, providing governments, policy-makers and the community with a single point of reference for major energy network issues. ENA commenced operation in January 2004 and is owned and funded by its membership. ENA is based in Canberra's parliamentary precinct.

Members Description

ActewAGL, Alinta, Aurora Energy, CitiPower, Country Energy, ElectraNet, ENERGEX, EnergyAustralia, Envestra, Ergon Energy, ETSA Utilities, Horizon Power, Integral Energy, Multinet Gas, NT Power & Water Corporation, Powercor, Powerlink Queensland, SP AusNet, United Energy Distribution, TransGrid, Transend Network and Western Power.

Energy network businesses deliver electricity and gas to over 13 million customer connections across Australia through approximately 800,000 kilometres of electricity distribution lines. There are also 76,000 kilometres of gas distribution pipelines.

These distribution networks are valued at more than \$40 billion and each year energy network businesses undertake investment of more than \$5 billion in distribution network operation, reinforcement, expansions and greenfields extensions.

Electricity transmission network owners operate over 42,000 km of high voltage transmission lines, with a value of \$10 billion and undertake \$1.2 billion in investment each year.

Growth in the industry, the emergence of an Australian energy market and companies operating across jurisdictions, has resulted in national consistency of technical and safety regulation being a major issue for energy network service providers.

The Road to Regulatory Harmonisation

In many areas of Australian public policy such as in OHS legislation, the registration of legal and health practitioners, consumer protection legislation and school curricula, the regulatory trend is moving towards national alignment.

ENA formed the view that the decision of the Ministerial Council on Energy (MCE – a committee of the Council of Australian Governments (COAG)) to transfer economic regulation of energy distribution to the Commonwealth through the Australian Energy Regulator (AER) would ultimately lead to the harmonisation of energy technical and safety regulation.

Thus, in 2004 ENA developed a policy objective of establishing a national operating framework for energy technical and safety regulation.

As part of that process, ENA published in July 2007 *The Technical and Safety Regulation of the Energy Sector in Australia* (the ENA Discussion Paper) on national energy technical and safety regulation to assess the issues associated with the ENA objective of establishing a national operating framework for energy technical and safety regulation.

The ENA Discussion Paper raised twenty seven questions for the consideration of the energy sector, in areas relating to:

- the level of technical regulation made by economic regulators;
- which entity (or entities) is appropriate to make technical and safety regulations for the Australian energy sector;
- the role and content of safety management documentation; and
- the role of Australian Standards and guidelines.

ENA invited interested parties to respond to the ENA Discussion Paper.

The consensus view of respondents is summed up by this ENA member's comment:

The desired end-point is a uniform national framework for Technical and Safety Regulation.

The focus in the first instance should be on establishing a harmonised national regulatory framework. Administration can be transferred from the jurisdictions to a national body at some later date if warranted.

...

There may also be benefits in establishing a single national regulator to oversee the framework; however this is a less important objective than ensuring that the regime itself meets industry requirements. A deficient regime will produce bad outcomes irrespective of whether it is administered by a single national body or by separate jurisdictional bodies.

This led to the publication in April 2008 of *A Policy for a National Framework for Energy Safety in Australia* (**Attachment 1**).

This policy advocates:

- a framework for national harmonisation of energy technical and safety regulation be established;
- for the gas distribution industry, recognition of performance-based standards, that are currently being prepared by Standards Australia Committee AG-008 Gas Distribution as the basis of national regulation for gas;
- for the electricity transmission and distribution industry, the development of documentation to guide the development of performance based regulation of electricity network safety management systems;

- the creation of a single national energy safety regulatory agency; as a transitional measure, existing jurisdictional regulators retaining their current role while the national energy safety framework is being developed and implemented; and
- that as a general principle, a safety case approved by the relevant regulator will provide the basis for compliance with the safe workplace obligations under Occupational Health and Safety (OHS) legislation. That is, compliance with a safety case would be taken to be compliance with an employers duty to ensure a safe workplace that would otherwise be regulated by OHS legislation.

Recent Developments within the Ministerial Council on Energy

At its 13 June 2008 meeting, MCE recognised:

- the importance of technical/safety regulation to ensure public safety;
- that workers should operate within a safe environment; and
- the requirement for safe and efficient energy services.

MCE also noted that harmonisation of such regulation is also important to:

- enable the efficient delivery of energy services;
- lower the compliance burden for multi-jurisdictional operators; and
- facilitate greater labour mobility and swifter emergency response, especially in the context of skilled labour shortages.

MCE resolved to establish an *Energy Technical and Safety Leaders Group* to develop proposals for a harmonised approach to energy technical and safety regulation. The *Leaders Group* will report back with an implementation plan to the December 2008 MCE meeting.²

The *Leaders Group* will consist of:

- electricity network owners and operators (from both transmission and distribution);
- gas pipeline owners and operators or industry association (from both transmission and distribution);
- energy retailers or industry association;
- electricity generators or industry association;
- energy technical and safety regulators (from both gas and electricity);
- unions; and
- energy users.

² Ministerial Council on Energy *Communiqué*. Canberra, June 2008.

The ENA Position

ENA believes that network safety should be regulated using performance based regulations or standards, which adopt an “all-hazards” approach to safety management, contained in a single piece of legislation in force throughout Australia, developed through the COAG process under MCE.

For the purpose of this submission, this concept is called relevant energy legislation.³

It is envisioned the standards being developed by Standards Australia Committee AG – 008 *Gas Distribution* would act as the basis for the regulation of the gas distribution industry.

With respect to electricity, ENA has prepared a *Proposed National Framework for Electricity Network Safety* as the recommended approach to national electricity network safety regulation (Separate Attachment 2).

It is a document that can be called up by relevant energy legislation. The Framework will be presented for the consideration of the *MCE Energy Technical and Safety Leaders Group* as the ENA proposal to harmonise network and employee safety.

The ENA view is that a regulator could accept safety cases (on the basis of such technical advice that is considered appropriate) based on these instruments, with breaches investigated and dealt with as being a breach of relevant energy legislation, and that more generally where energy safety legislation deals with a matter, that legislation should prevail over general OHS law.

This is appropriate in circumstances where:

- large corporations will ultimately be the entities providing cross-jurisdictional services to a national market;
- a common standard to apply universally across Australia is finally established; and
- it is accepted that jurisdictional regulators may not have the capacity or technical expertise to assess whether a proposed safety management scheme/safety case is suitable.

This legislation would sit within legislation that falls within the jurisdiction of MCE.

³ Such legislation could include suitable amendments to the *Australian Gas Law* (or Rules made under it) or the *Australian Electricity Law* (or rules made under it), nationally consistent legislation that for the time regulates what is regarded as being economic issues relating to the gas and electricity industries. Alternatively, it could be stand alone legislation, that is in force in identical terms throughout Australia, containing policies determined by MCE

The Maintenance of OHS Regulation within Relevant Energy Legislation

The ENA Discussion Paper considered whether compliance with a safety plan should be taken to have 'deemed to comply' with OHS obligations.

It noted:

There is some interrelationship between OHS and energy specific legislation.

For instance, in NSW, the statutory requirement for an employer to ensure a safe system of work does not apply with respect to electricity work carried out under a plan lodged under the Electricity Supply (Safety and Network Management) Regulation 2002.

In Queensland, there is a close relationship between the Electrical Safety Act 2002 and the Workforce Health and Safety Act 1995.

The OHS legislation provides that where that Act and the electricity safety legislation apply in particular circumstances, the electricity safety legislation prevails.

The Electrical Safety Act imposes a general obligation of electricity safety on electricity entities to ensure that works are electrically safe and are operated in a way that is electrically safe.⁴

All Australian jurisdictions require energy participants to develop a variation of a safety case before commencing commercial operations.

They are broadly based on *AS/NZS 4360 Risk Management*, and ensure the ALARP (*As Low As Reasonably Practicable*) principle is followed.

Victoria is one such example.

The *Electrical Safety Act 1989 (Vic)* and its subordinate instruments generally deals with asset and safety management issues, as is appropriate given the integrated nature of managing network assets, as the below table illustrates:

⁴ ENA Discussion Paper, p.69.

Table 1: Victorian electricity safety regulation

Electricity Safety (Management) Regulations	Electricity Safety (Network Asset) Regulations
<p>Clause 15 Electricity Safety (Management) Regulations - Scheme Description</p> <p>A safety management scheme must describe (amongst other things) the installations or equipment to which scheme applies and a description of the design, construction, operation and maintenance of the upstream network</p>	<p>Clause 8 Electricity Safety (Network Asset) Regulations - Reporting of incidents</p> <p>A network operator must report prescribed incidents and make available information requested by the regulator</p>
<p>Clause 19 Electricity Safety (Management) Regulations - Safety Management Scheme</p> <p>A scheme must specify (amongst other things) the electrical work to be carried out, the applicable safety policy, the persons responsible for safety policy, the means of communication of safety policy and the key performance indicators of compliance</p>	<p>Clause 9 Electricity Safety (Network Asset) Regulations – Certain Plans Required and Information Given</p> <p>A network operator must have plans specifying (amongst other things) how electricity supply will be restored after an incident, how a network will be tested, inspected, maintained and operated and the long term strategies to prevent unauthorised persons climbing, minimum heights, protection of assets</p>
<p>Clause 20 Electricity Safety (Management) Regulations - Electrical work and design, construction, operation and maintenance of upstream network</p> <p>A scheme must specify (amongst other things) the means by which electrical work is made safe, how risks are considered, how technical standards are met and how the upstream network is made safe.</p>	<p>Clause 27 Electricity Safety (Network Asset) Regulations Inspection and Testing</p> <p>A network operator must have plans specifying inspection and testing before energisation; earthing systems and electrical protection equipment must be tested every ten years</p>
<p>Clause 21 Electricity Safety (Management) Regulations - Essential safety equipment</p> <p>A scheme must specify the systems to ensure operation of essential safety equipment systems to test and maintain essential safety equipment</p>	<p>Clause 28 Electricity Safety (Network Asset) Regulations - Operation and Maintenance</p> <p>A network operator must have (amongst other things) plans specifying operation and maintenance procedures to ensure that staff have the qualifications to perform their roles, must ensure staff are aware of and will follow the Blue Book</p>

Clause 22 Electricity Safety
(Management) Regulations -
Permit to work

A scheme must contain a permit to work system to ensure that unauthorised persons are prohibited from working and that authorised persons are competent

Clause 23 Electricity Safety
(Management) Regulations -
Emergency Preparedness

A scheme must contain a response plan addressing foreseeable issues, means of continuing safe work and means of continued safe operation of upstream network

Clause 25 Electricity Safety
(Management) Regulations -
Internal monitoring and reviews

A scheme must contain a process of monitoring audit and review of incidents corrective action process and systematic process improvement

Clause 26 Electricity Safety
(Management) Regulations -
Training

A scheme must ensure that only qualified, proficient and experienced persons work necessary training

Clause 27 Electricity Safety
(Management) Regulations -
Published technical Standards to be used

A scheme must ensure that only recognised technical standards are used

Clause 28 Electricity Safety
(Management) Regulations -
Records

Record keeping must comply with the requirement of regulators

Clause 29 Electricity Safety
(Network Asset) Regulations -
Standard of Up Stream network

An upstream network must comply with AS/NZS 60038

It conveniently sets out the method by which safety cases would be processed.⁵

Briefly, it requires major electricity companies to compulsorily submit an electricity safety management scheme with Energy Safe Victoria, satisfying requirements set out in regulations.

They are as exhaustive as those required by the *Occupational Health and Safety (Major Hazard Facilities) Regulations 2001* (Vic) (largely regarded by industry stakeholders as being best practice OHS regulation), and similar to that which must be made by operators authorised to operate offshore facilities under the *Petroleum (Submerged Lands) Act 1967* (Cth).

Energy Safe Victoria may:

- require the proponent to obtain an independent validation of the proposed safety management scheme (also known as a safety case); and
- ask the proponent to provide compliance audits.

However, the onus is clearly on industry to ensure compliance.

Sections 119 and 120 of the *Electricity Safety Act* read:

119. Duty of scheme operator

A scheme operator of an accepted electricity safety management scheme must manage the carrying out of electrical work by or for the scheme operator to minimise as far as practicable-

- (a) the hazards and risks to safety of any person arising from electricity; and
- (b) the hazards and risks to property arising from electricity.

Penalty: In the case of a natural person, 200 penalty units; In the case of a body corporate, 1000 penalty units.

120. Compliance with scheme is a defence

It is a defence to a prosecution of a person for an offence relating to a breach of a duty set out in section 119 if the person has complied with the accepted electricity management scheme in relation to that duty.

The law makes clear that market participants have a general duty to all people to ensure that transmission and distribution assets operate to ensure everyone is safe, irrespective of the legal relationship with the asset operator.

ENA believes that the OHS segment of safety regulation should be based in relevant energy legislation for these reasons:

⁵ *Electrical Safety Act 1989* (Vic) Part 10.

The argument for OHS regulation being contained within relevant energy legislation

It is theoretically possible that the requirements of a safety case could be contained in regulations made under national OHS legislation.

However, there are a number of considerations that could lead to a conclusion that energy sector technical and safety legislation should continue to be contained in industry specific regulation.

The limited number of industry participants that are the subject of regulation

The corporations participating in the energy networks industries are large sophisticated entities, but few in number.

ENA members operate over 800,000 kilometres of electricity lines and 75,000 kilometres of gas distribution networks, which serve over 13 million customer connections.

These distribution networks are valued at more than \$40 billion, and each year energy network businesses undertake capital investment of more than \$5 billion in network reinforcement, expansions and extensions.

TNSP members operate over 42,000 km of high voltage transmission lines, with a value of \$10 billion and undertake \$1.2 billion in investment each year.

Growth in the industry, the emergence of an Australian energy market and companies operating across jurisdictions, has resulted in national consistency of technical and safety regulation being a major issue for energy network service providers.

Figure 1: Engineering Construction Industry Activity – last 20 years

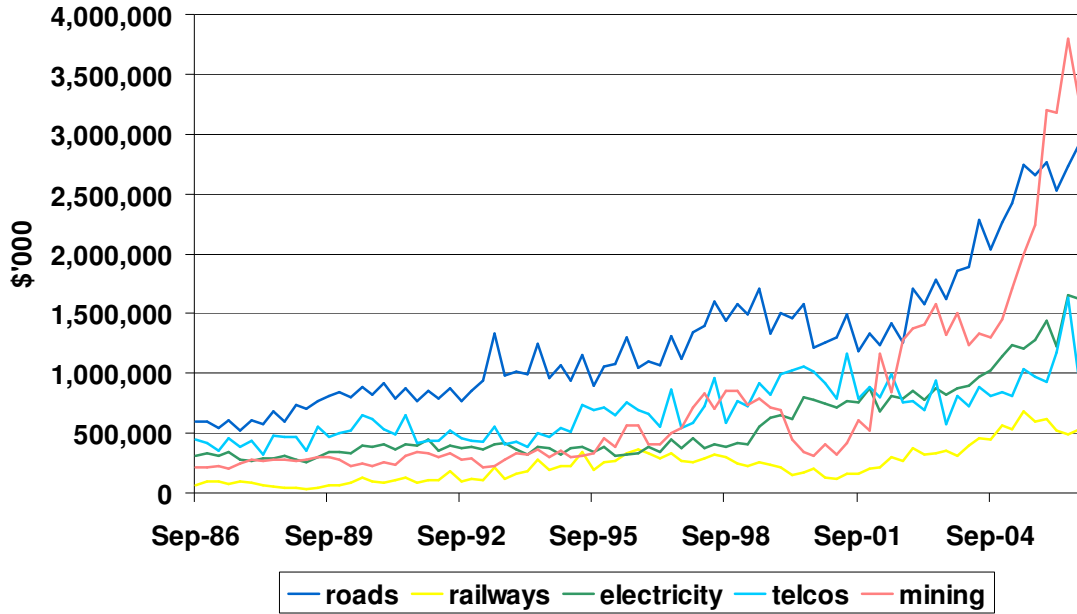
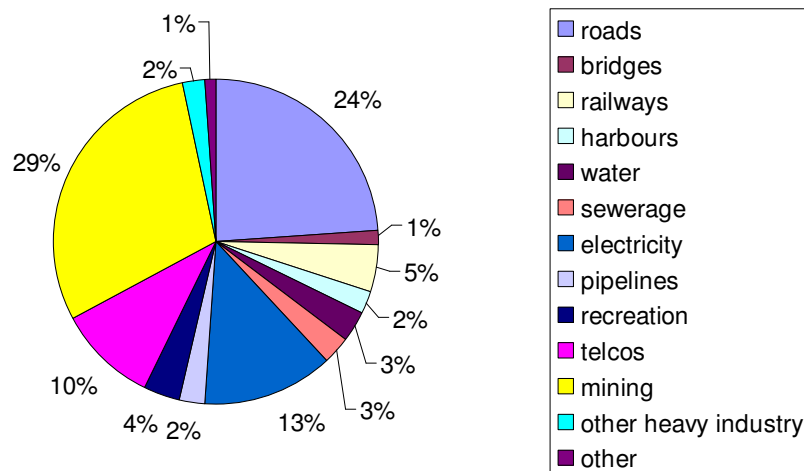


Figure 2: Electricity is the third largest engineering construction activity, after mining and roads - \$5.9 billion.



Source: Australian Bureau of Statistics, September 2006.

It should be noted that electricity safety legislation only covers large corporations maintaining highly sophisticated transmission and distribution infrastructure, which are often identified in enabling legislation.

It does not cover other corporations, which would most appropriately be covered by ordinary OHS legislation.

EXAMPLE: A corporation operating a large substation supplying power to a large shopping centre, would be subject to standard OHS legislation.

The High Level of Commitment to Safety

The safety case system of risk management emanated from the energy sector.

Following a disaster on the *Piper Alpha* platform on 6 July 1988, a regulatory suite was developed (originally in the United Kingdom) requiring the development of the administrative systems to drive good safety practices that focus on technical and managerial factors associated with hazards.

This system of safety management has been embraced by the energy sector – the area from which this system of safety management was originally developed, and there is a high commitment within the energy sector generally to maintain and enhance safety outcomes (cf a ‘tick a box’ compliance mentality) as can be measured by relatively low injury levels in the energy sector:

Table 2 – safety statistics for the gas and electricity industries⁶

Financial year	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06 ⁷
Number of claims	765	595	575	585	630	510	555	600	440
Incidence per 000 employees	18.4	14.1	13.6	13.4	13.4	10.0	10.3	12.0	7.5

⁶ Drawn from National On-Line Statistical Data Base (NOSI) accessed 28 June 2008.

⁷ Preliminary figures.

Inadvertent capture of electricity and gas industry participants in occupational health and safety legislation

The safety case system used in the energy sector is carefully designed to ensure worker safety.

Nevertheless, it can be caught by general OHS regulation.

For example, the *National Standard for Construction Work*⁸ is an instrument that, under the national OHS framework, is to be implemented by regulation.

As the standard says:

This *National Standard for Construction Work* [NOHSC:1016 (2005)] aims to protect persons from the hazards associated with construction work. It assigns responsibilities to individuals to identify these hazards and either eliminate them or, where this is not reasonably practicable, minimise the risks they pose.

The genesis for this standard was the NOHSC's recognition in October 2002 that the construction industry warranted a high priority in Australia's efforts to reduce workplace death and injury. This was followed in March 2003 by the *Final Report of the Royal Commission into the Building and Construction Industry*, which recommended that uniform national occupational health and safety (OHS) construction standards be developed under the *National OHS Strategy*. In November 2003, the Workplace Relations Ministers' Council agreed that the NOHSC should undertake the recommended work to develop national material for the construction industry.⁹

The definition of construction work reads as follows:

4. Meaning of construction work

4.1 **'Construction work'** means any work on or in the vicinity of a construction site carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any structure, and includes:

(a) the demolition or dismantling of a structure, or part of a structure, and the removal from the construction site of any product or waste resulting from the demolition or dismantling;

(b) the assembly of prefabricated elements to form a structure or the disassembly of prefabricated elements, which, immediately before such disassembly, formed a structure;

(c) any work in connection with any excavation, landscaping, preparatory work, or site preparation carried out for the purpose of any work referred to in this definition; and

(d) any work referred to in this definition carried out under water, including work on buoys, obstructions to navigation, rafts, ships, and wrecks; but does not include the exploration for or extraction of mineral resources or preparatory work relating to the extraction carried out at a place where such exploration or extraction is carried out.

⁸ NOHSC:1016(2005).

⁹ Ibid P1.

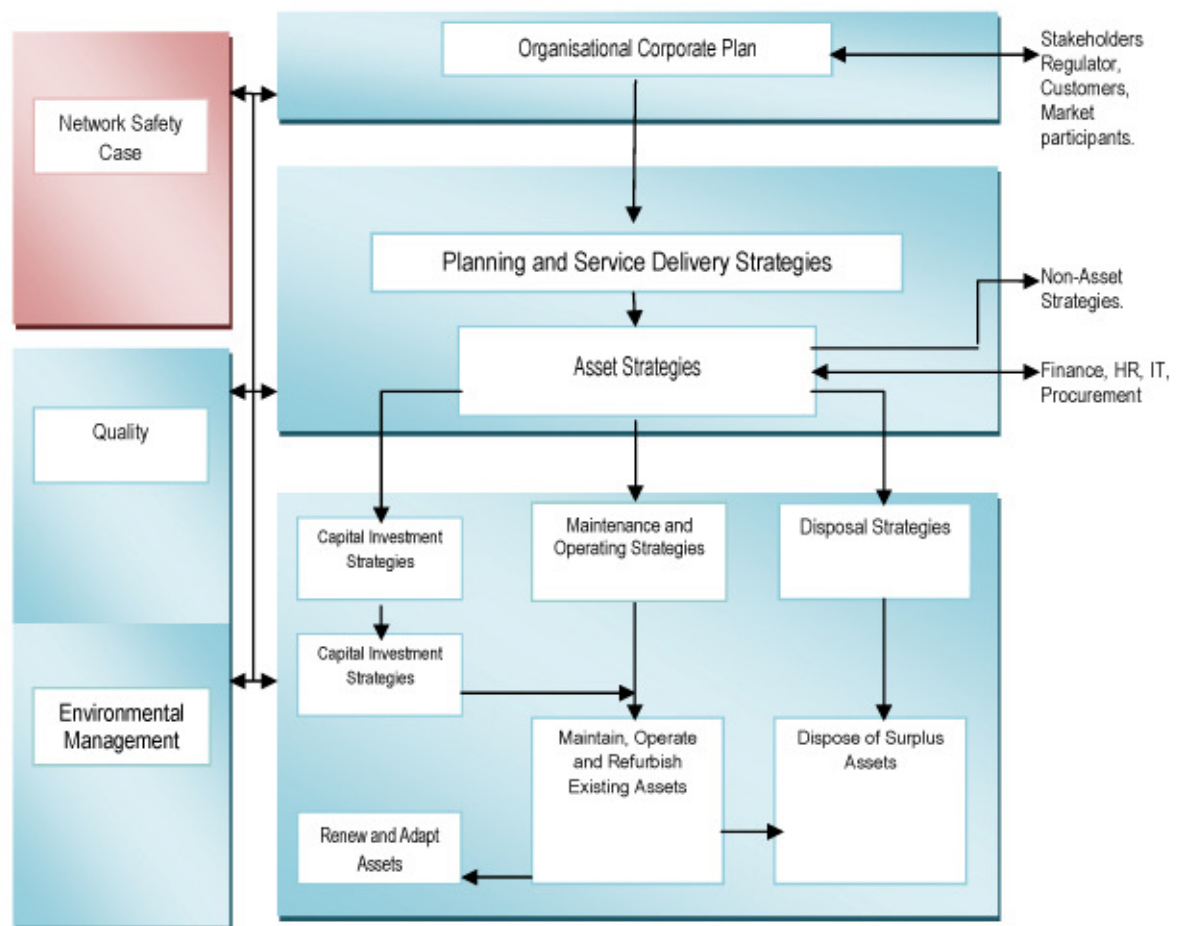
This definition deliberately excludes the mining industry, but includes the electricity sector.¹⁰

This is highly undesirable, as while the Standard may be appropriate for a general construction context, it is not appropriate for the electricity transmission and distribution sector, which has specially designed methods to manage risk, contained in safety cases when performing construction work on or near energised electrical installations and services.

The holistic nature of asset management within the Australian energy transmission and distribution industry

The provision of energy services to Australian consumers is complex, as this figure illustrates:

Table 1: Relationship of the Network Safety Case to Asset Management Schemes¹¹



¹⁰ The electricity sector is particularly caught as working on or near electrical services falls within the definition of high-risk construction work: see paragraph 5.1

¹¹ Model shown is based on the *TransGrid 2007-2011 Network Management Plan*. It provides a framework for the strategic planning and management of TransGrid's physical asset resources and is based on the New South Wales Government's Total Asset Management (TAM) Model.

Table 1 illustrates how asset and employee safety management is managed by subordinate instruments made under industry specific legislation.

This makes sense, as asset management forms part of an integrated whole. As such, regulation should as far as possible be housed in one suite of legislation.

Moreover, as previously discussed, some jurisdictions have legislative suites that recognise it is appropriate for the effect of general OHS legislation to yield to energy sector specific safety legislation.

For example, subregulation 207(5) of the *Occupational Health and Safety Regulation 2001* (NSW) exempts industry participants who have lodged a plan under the industry specific *Electricity Supply (Safety and Network Management) Regulation 2002* (NSW) from the provisions of regulation 207.¹²

Most relevantly, this regulation prohibits the conduct of work while a particular installation is energised.

In the distribution context, that could mean shutting down the distribution of electricity to consumers.

Safety plans developed by distributors are designed to ensure worker safety while an installation is energised, and consumer electricity supply thus maintained.

ENA is therefore of the view that the public interest would be served by having energy safety dealt with under regulations that are agreed, in the context of co-operative federalism, by MCE, rather than the Workplace Relations Ministers Council.

This is because the MCE process, and more particularly its participants, have the knowledge and background to call up into regulation appropriate standards and principles that maximises both worker safety and the continuation of energy supply to consumers.

It follows that insofar as it relates to an energy sector safety case, the regulation formulation process set out in Part 5.3 of the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Safety*, signed on 3 July 2008 would not apply.

In making this submission, it should be made clear that worker safety is not compromised.

¹² Subregulation 207(2).

An examination of the ENA *Proposed National Framework for Electricity Network Safety* attached to this submission shows that:

- the ALARP principle is maintained¹³;
- the requirement to have regard to AS/NZS 4801-2001 *Occupational Health and Safety Management Systems – Specification with Guidance for use* and AS/ZS 4360:2004 *Risk Management* is retained¹⁴; and
- employees must participate in the formulation of any relevant safety plan, thus giving effect to Australia’s international obligations.¹⁵

The proposed structure would in fact enhance worker safety, not diminish it.

¹³ See Part 5.1 and 6.5 of the *Framework*

¹⁴ Part 3

¹⁵ Part 5.5

Chapter 1 – Legislative Approach

Preferred Outcome

As a general proposition, the energy transmission and distribution sector accepts a structure where general duties of care are imposed on employers contained in principal legislation, with appropriate sector specific regulation contained in subordinate instruments.

The principal Act (which could be called the *Occupational Health and Safety Act 2010*) should specify the basic framework to be followed: the duties, the offences, and matters such as the creation of the regulatory authority to administer the scheme, and the powers of officers.

So as to aid in the interpretation of legislation, any objectives clause should specifically set out what the legislation intends to achieve.

Recommendations

- 1. That general duties of care should be imposed on employers in principal legislation, with appropriate sector specific regulation contained in subordinate instruments.**
- 2. That the proposed *Occupational Health and Safety Act 2010* should specify the basic framework to be followed: the duties, the offences, and matters such as the creation of the regulatory authority to administer the scheme and the powers of officers.**
- 3. That any objectives clause should specifically set out what the legislation intends to achieve.**

Chapter 2 – Scope, Application and Definitions

Retention of Industry Specific Legislation

ENA has already expressed a position advocating the retention of OHS regulation in industry specific legislation.

Preference for a Single National Regulator

The issues paper asks whether the model OHS Act should contain provisions for improving coordination between safety regulators within jurisdictions.

The ENA view is that the assessment and acceptance of safety cases made for energy networks should be made by a body not dissimilar in structure to the National Offshore Petroleum Safety Authority (NOPSA).

This is because ENA doubts that generalist OHS bodies would have the technical capacity to make decisions on safety cases, or consider safety issues over and above the most basic 'trip and fall' form of safety incident.

This is particularly the case in small jurisdictions, which do not possess the economies of scale necessary to have available personnel with sufficient skills to make competent and informed technical decisions.

Otherwise, ENA is of the view that there should only be one general safety regulator in Australia.

When developing a national energy market for Australia, COAG commissioned what was known as the *Parer Committee*. It produced a report called *Towards a Truly National and Efficient Energy Market*.

One of its major findings was that there were too many regulators. The report said:

The multiplicity of regulators creates a barrier to competitive interstate trade and adds costs to the energy sector...Submissions to the Review indicated significant disquiet about the present regulatory burden on energy businesses from national and local regulators, in particular different compliance regimes and the need to develop separate customer management systems for each state and territory to address different regulatory requirements. The National Retailers Forum for example has stated:

A retailer wishing to compete in those markets open to competition is...required to obtain **a separate retail licence in each state, with different licence conditions attaching to each of these licences. Moreover the codes and guidelines...that sit under these licences differ in their requirements. The result is that business processes and systems must be tailored for each jurisdiction. The inefficiencies that result from this inhibit a retailer's ability to compete efficiently. Energy efficient codes duplicating general competition regulations exacerbate this problem.** (Emphasis in the original)¹⁶

Under a heading *Cooperative Approaches are not an Alternative to a National Regulator*, the Parer report indicated:

¹⁶ COAG Energy Market Review Final Report *Towards a National and Efficient Energy Market* 2002 pp.74-5

Cooperative approaches, under which existing regulators work together to achieve consistency in regulation and avoidance of duplication would not achieve a satisfactory outcome...The Panel's assessment however is that such cooperative approaches are a suboptimal solution. It is in effect a status solution. It is in effect a status quo solution, with no drivers for national solutions. As Delta Electricity states:

Although the various state and federal regulators meet at regulators forums to share views, this does not ensure a consistent national approach to the regulation of the network businesses in the NEM.

There is little evidence that work on the harmonisation of regulatory requirements would progress as expeditiously as if under the leadership of one agency. Differences, or perceived differences in the actual application of any 'template' arrangements would remain and there would be no clear way forward for rectifying that concern. (Emphasis added)¹⁷

The Parer report recommended the creation of a single regulator to deal with what are called 'economic' regulatory issues. The Australian Energy Regulator has now been established to perform these functions.

ENA hopes that a consensus will develop so that similarly one general safety regulator is created for Australia.

If so, such an agency could be created in the model OHS laws.

Uniform Interpretation of Uniform Rules

ENA supports a provision in the model OHS legislation providing that where one safety regulator approves something like a safety case for one jurisdiction, that approval should be applicable in every other jurisdiction.

This is because increasingly, energy companies will be providing services to consumers across state boundaries. Safety and efficiency outcomes are maximised if such a company only has to operate under one safety case.

The idea behind a harmonised OHS Act is for one set of words to establish the rules to be followed. It follows that optimally there should be a uniform interpretation of the text. Industry should not suffer from different interpretations made by different regulators from different agencies with different cultures – even though they are construing the same set of rules.

It is presumed that interstate regulators would establish memoranda of understanding to establish a uniform interpretation of similar rules.

Uniform legislation should require that any memoranda of understanding or other agreement between agencies relating to the common interpretation of harmonised OHS law should be published on a freely available medium (eg a regulator website) to ensure transparency in the administration of those laws.

¹⁷ Ibid p.87

Application of OHS Laws to the general public

As discussed earlier in this submission, energy network companies are under a general duty to ensure that assets operate safely, and harm no-one including members of the general public.

This is appropriate given energy assets are commonly located in public places.

This is also the reason that safety of the general public is a consideration when a proponent is developing an energy network safety case.

It is part of the “all hazards” approach to safety adopted by the energy sector.

However, it is more problematic whether OHS provisions should apply more generally to workplaces not covered by an energy network safety case. The better view is that the general law (as well as any other statutory law of general application) is more appropriate to regulate obligations to members of the general public.

Application of OHS Laws to Subcontractors and Labour Hire Companies.

ENA notes that most safety cases made for the purposes of specific energy network safety legislation requires subcontractors to have in place processes that are in conformity with the safety case.

However, more generally, the obligation to observe the general OHS duties owed by an employer should be the responsibility of the person who would be identified in law as being the employer.

Definition of specific terms

Finally, the *Issues Paper* asks whether there should be uniform definition of key terms such as “worker”, “workplace”, “reasonably practicable” and so forth.

There is some scope for not defining these provisions.

This is because, particularly if they are to form the basis of criminal prosecution, the terms should retain their plain English meaning, so that what is ‘reasonably practicable’ (for instance) can take the meaning that is appropriate in the circumstances.¹⁸

If there is a need to create greater certainty for specific high risk occupations, then suitable regulation can be contained in the requirements of safety cases (as occurs in, for example, energy network safety legislation), or, more generally, in regulations made under the principal act or codes of practice.

¹⁸ The meaning of “reasonably practicable” would be similar to the view expressed by Barry Sherriff in *Practical Guide to Victorian Occupational Health and Safety Legislation* (Part 1 p.11), as extracted at paragraph 559 of Maxwell C. *Occupational Health and Safety Review* (2004)

Recommendations:

- 4. That a safety case approved by the relevant regulator should provide the necessary basis for compliance with the safe workplace obligations under OHS legislation. Compliance with a safety case would be taken to be compliance with an employers duty to ensure a safe workplace that would otherwise be regulated by OHS legislation, to be assessed by a single national energy safety regulatory agency, and that more generally where energy safety legislation deals with a matter, that legislation should prevail over general OHS law.**
- 5. That energy network safety should specifically be regulated using performance based regulations/standards, which adopt an 'all-hazards' approach to safety management, contained in a single piece of legislation in force throughout Australia, developed through the COAG process under the Ministerial Council on Energy.**
- 6. That a national energy safety regulatory agency should be established with a similar structure to the National Offshore Petroleum Safety Authority (NOPSA).**
- 7. That otherwise there should only be one general safety regulator in Australia.**
- 8. That the model OHS legislation should include a provision where an approval for a safety case in one jurisdiction, would automatically apply in every other jurisdiction.**
- 9. That there should be a uniform interpretation of a National OHS Act, preferably through a memoranda of understanding to establish a uniform interpretation of similar rules.**
- 10. That any MOU's or agreements between agencies relating to the common interpretation of harmonised OHS law should be freely available (eg, a regulator website) to ensure transparency in the administration of those laws.**
- 11. That the general law (as well as any other statutory law of general application) is more appropriate to regulate obligations to members of the general public in environments where an energy network safety case does not apply.**
- 12. That the obligation to observe the general OHS duties owed by an employer should be the responsibility of the person who would be identified in law as being the employer.**
- 13. That there should not be uniform definition of key terms such as "worker", "workplace" and "reasonably practicable".**

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

OHS duties should be owed to those who are in an employee-employer relationship: that is, where a contract of service can be identified.

The employer in control of premises at which work is being conducted should have the duty of ensuring a safe workplace for their employees. The duty should not be delegable.

ENA notes that most safety cases made for the purposes of specific energy network safety legislation requires subcontractors to have in place processes that are in conformity with the safety case. However, as a general proposition, a subcontractor has the responsibility of ensuring the occupational health and safety of their employees.

As a general proposition, the principal Act should only specify the broad duty for an employer to maintain a safe workplace.

It is the function of regulation to provide rules to be followed in high risk occupations.

Apart from a general duty for an employee to take all reasonable care to protect the employee's own health and safety (and of other employees), the legislation need not spell out in detail employee OHS duties.

Application of OHS Legislation to Visitors

As a general proposition, the ordinary rules of negligence are probably best placed to govern the behaviour of visitors, unless there is an intention to criminalise unsafe behaviour of visitors to a workplace should some sort of accident occurs.¹⁹

The concept of a "responsible officer"

The *Issues Paper* asks whether a "responsible officer" should be appointed to ensure OHS compliance.

As a general proposition, ENA believes that it is the corporation that is the employer.

Within the concept of the corporation, it is the corporation's management as a whole that should be responsible for the implementation of systems to ensure OHS compliance.

Given a corporation possesses legal personality, the corporation should therefore have legal responsibility for the discharge of OHS obligations.

In the absence of aggravated behaviour directly attributable to an individual, it is inappropriate to identify a particular person to carry personal responsibility (and possible exposure to criminal prosecution) for the discharge of OHS obligations.

¹⁹ Interference with energy infrastructure is an offence. For instance section 65 of the *Electricity Supply Act 1995* (NSW) penalises "interference" with assets. However, this anticipates some degree of aggravated behaviour on behalf of the visitor, and not just "mere" negligence.

Recommendations:

- 14. That OHS duties should be owed to those who are in an employee-employer relationship: that is, where a contract of service can be identified.**
- 15. That the employer in control of premises at which work is being conducted should have the duty of ensuring a safe workplace for their employees.**
- 16. That regulation should provide rules to be followed in high risk occupations.**
- 17. That apart from a general duty for an employee to take all reasonable care to protect an employee's own health and safety, the legislation need not spell out in detail employee OHS duties.**
- 18. That the standard laws relating to negligence should apply to members of the public, unless there is an intention to criminalise unsafe behaviour by the public.**
- 19. That it is inappropriate to identify a particular person to carry personal responsibility (and possible exposure to criminal prosecution) for the discharge of OHS obligations.**

Chapter 4 – “Reasonably Practicable” and Risk Management

The Definition of ‘Reasonably Practicable’

As previously discussed, ENA believes the concept of ‘reasonably practicable’ should not be defined.

The *Issues Paper* indicates that there is inconsistency as to how this standard is interpreted.

This is a function of inserting in legislation a term such as ‘reasonably practicable’.

It is a term of indefinite ambit. As such, people of good faith can disagree about whether the taking of a particular step was “reasonably practicable” in a particular circumstance.

As previously submitted, if certainty is required with respect to particular high risk activity, it is appropriate to make process based regulations as well as, if seen desirable, the making of code of practices and other subordinate guidance material.

ENA is satisfied that *As Low As Reasonably Practicable* (ALARP) is a suitable standard that satisfies the twin needs of industry efficiency and the maintenance of a safe workplace.

Recommendations:

20. That the concept of ‘reasonably practicable’ should not be defined.

21. That the *As Low As Reasonably Practicable* concept be regarded as a suitable standard for industry efficiency and the maintenance of a safe workplace.

Chapter 5 – Consultation, Participation and Representation

Employee Participation

As a general proposition, the consultation requirements contained in Australian OHS legislation are satisfactory.

Right of Entry

As a general proposition it is desirable for an appropriate consultant to accompany a workplace representative dealing with an OHS issue, in a manner similar to section 32 of the *Occupational Health Safety and Welfare Act 1986 (SA)*.

Refusing Unsafe Work

ENA supports the right of a person to refuse unsafe work, although the employer should have the right to deploy employees to perform other activities.

Where work has been refused, it is desirable for a clearly spelled out dispute resolution process to be followed.

Issues relating to remuneration as a result of the refusal of unsafe work should be dealt with under workplace relations legislation.

Recommendations:

- 22. That as a general proposition it is desirable for an appropriate consultant to accompany a workplace representative dealing with an OHS issue, in a manner similar to section 32 of the *Occupational Health Safety and Welfare Act 1986 (SA)*.**
- 23. That where work has been refused, an employer should have the right to deploy employees to perform other activities and there should be a clearly spelled out dispute resolution process to be followed.**
- 24. That issues relating to remuneration as a result of the refusal of unsafe work should be dealt with under workplace relations legislation.**

Chapter 6 – Regulator Functions, Powers and Accountability

OHS Inspectors

OHS Inspectors have the capacity to exercise significant powers and functions.

As such, their functions and powers should be defined by the terms of the principal legislation, as should “governance” issues (such as issuing identity cards, search and entry powers &c.)

A head of power should also be established, allowing the head of a regulatory agency to establish the level of training an officer should possess.

Publication of “guidance”

There is a case for publishing enforcement and prosecution policies, so that there is some certainty as to when regulatory agencies will exercise these punitive powers.

However, a National OHS Framework which presumes:

- the development of national codes (from which approved codes of practices are made)
- national guidance material (from which guidance material is made); and
- regulatory interpretative documents

already exists.

A further capacity for individual jurisdictional regulators to make interpretative documents would go towards undermining the concept of harmonised legislation –harmonised interpretation of identical legislation is a necessary outcome that must flow from harmonised legislation.

There is perhaps some case to permit the ASCC to publish national guidance material and regulatory interpretative documents (although if these lower level documents have no legal standing, query the need to create a statutory capacity to make them), but not individual jurisdictional regulators (assuming for the time being the retention of such entities).

A harmonised OHS system with identical laws in force throughout Australia should have only one entity publishing guidance material.

The rigour of many eyes considering one single source of guidance materials could aid in maintaining guidance quality.

For example, it is noted that NOPSA had to withdraw guidelines relating to vessels falling within the offshore petroleum OHS regime as legal advice received indicated that the Guidance Notes did not correctly interpret the existing legislation.²⁰

²⁰ NOPSA *Newsletter* Issue 66 June 2008 p.3

The Provision of Advice and Assistance by Inspectors

The Issues Paper asks whether the role of an Inspector to provide advice and assistance should be strengthened.

As indicated by the Brathwaite “enforcement pyramid” published on page 29 of the *Issues Paper*, advice and persuasion is the first tool available to an inspector.

It is to be hoped that an Inspector would use common sense, and offer advice where that is appropriate, and the officer competent to provide it. It isn't something amenable to legislative command.

As is the case now, there should be a right of appeal of an officer's decisions. It is appropriate for the matter to be considered by some civil tribunal (such as the Administrative Appeals Tribunal or their state equivalent) or alternatively the Magistrates' Court.

Recommendations:

- 25. That governance issues and the functions and powers of OHS officers should be defined by the terms of the principal legislation.**
- 26. That regulations should establish the level of training an officer should possess.**
- 27. That a harmonised OHS system with identical laws in force throughout Australia should have only one entity publishing guidance material.**
- 28. That there should continue to be a right of appeal of an Inspector's decisions.**

Chapter 7 – Compliance and Enforcement

In the abstract, and subject to the matters discussed below, the graduated enforcement measures set out in the Braithwaite enforcement pyramid published on page 29 of the *Options Paper* remains the most obvious manner by which OHS provisions can be enforced.

Civil Compliance Mechanisms

ENA is satisfied that generally speaking, the concept of provisional notices, improvement and compliance notices currently utilised is the best manner of ensuring OHS compliance where summary compliance action is necessary.

Equally, ENA has no objection to the concept of:

- Injunctions (where there are reasonable grounds to believe that OHS law is being, or may be, breached); and
- enforceable undertakings (on terms agreed between a regulator and an employer)

being part of the enforcement mechanism available to regulators.

The time to comply with notices should be an amount of time that is reasonable in the circumstances. Because of the indefinite number of fact situations that can exist, it is not appropriate to require compliance within an arbitrary time set in regulation.

Infringement Notices

There is some doubt as to whether it is desirable for a capacity for an inspector to be able to issue infringement notices.

This is for three reasons.

The first is the imposition of such summary punishment can go towards the breaking down of the relationship between the regulated party and the regulator.

As discussed in the previous chapter, there is desirability for inspectors to provide advice. They also have the power to issue improvement and prohibition notices, where action is necessary to protect employees in the work environment. Having the power to impose monetary penalties does not assist the creation of harmonious working relationships.

Second, the ability to impose summary penalties is effectively “guilty until proven innocent”; whilst there will undoubtedly be a pathway created by which a recipient can avail of internal appeals to the regulator, and then subsequently the Magistrates’ Court, they are both cumbersome and costly paths to traverse.

Finally, the object behind the creation of a scheme of sanctions is to change normative behaviour. There is scant evidence that the imposition of infringement notices by itself has changed behaviour within the OHS jurisdiction.

Given the other civil/administrative tools available (discussed earlier), and the capacity to prosecute (to be discussed shortly), query the desirability of allowing a public servant to be able to administer summary penalties.

Recommendations:

- 29. That the concept of provisional notices, improvement and compliance notices should be utilised as the best manner of ensuring OHS compliance where summary compliance action is necessary.**
- 30. That ENA supports the concept of Injunctions (where there are reasonable grounds to believe that OHS law is being, or may be, breached); and enforceable undertakings (on terms agreed between a regulator and an employer), being part of the enforcement mechanism available to regulators.**
- 31. That the time to comply with notices should be an amount of time that is reasonable in the circumstances.**
- 32. That it is undesirable for an OHS inspector to be able to issue infringement notices.**

Chapter 8 - Prosecutions

Usual Rules of Court to Apply

Where the model OHS law creates offences, they should be conducted as criminal matters proved beyond reasonable doubt, in ordinary criminal courts – Magistrates' Courts (in the case of summary offences) and District/County/Supreme courts (where the matter is indictable, where, in cases where innocence is pleaded, a trial by jury is appropriate), with the usual rules of evidence applied – a party alleging a fact must be able to prove it, without any reversal of the onus of proof.

Appeals would follow the usual appellate structure applicable to cases conducted in the criminal jurisdiction.

It necessarily follows that the usual practice adopted by a jurisdiction with respect to the laying of prosecutions is appropriate.

Director of Public Prosecutions to Approve Prosecutions

This will invariably include the need for a Director of Prosecution to determine that a prosecution is both in the public interest and that there is confidence that a prosecution has reasonable prospect for success.

The DPP has the experience to determine whether the grounds for prosecution are present, and, because the Director exercises this responsibility for nearly all government authorities, there should be greater consistency as to identifying a clear public interest in exposing people to penalties.²¹

In particular, it is not desirable for a regulatory agency, or any other third party to have a statutory right to commence prosecutions.

This is because, as discussed earlier, regulators have ample civil and administrative powers to ensure the safety of workplaces.

Prosecutions, particularly those in which the accused could face deprivation of liberty, should only be embarked by the Crown, through the Director of Public Prosecutions. In the usual case, cases should be brought within 12 months from the time of the alleged commission of the offence.

²¹ See in particular the considerations to be taken into account when launching a prosecution contained in Part 2 of the *Prosecution Policy of the Commonwealth* (1984, as amended from time to time)

Defences

As discussed earlier, there is some desirability for the concept of “reasonable practicable” to be undefined in legislation, so that the term can take a meaning that is appropriate given the facts of the particular case.

That said, it is recognised that compliance with a:

- safety case (in the case of parties such as energy network operators following an approved safety case); or, more generally
- an approved code of practice, published by the ASCC

would mean that an employer has entered a “safe harbour” – they would be taken to have met with the requirements to comply with OHS law.

Liability of company officers

In the usual case, companies employ people. Unless it can be proved on the criminal onus that a company officer, through their own behaviour was directly attributable for the breach, then the mere fact that someone is a company officer should not mean that they are vicariously liable for offences committed by the corporation.

As a general proposition, ENA believes that offences dealing with the death or serious injury of a worker that can give rise to imprisonment should be a matter for the criminal law, and not for OHS law.

In particular, OHS law should not create an offence such as industrial manslaughter.

The liberty of a company officer should be judged against the laws against which the general community is judged. A person should not be liable to prosecution for an indictable offence merely because of a position held within a company, unless particular aggravating behaviour can be proved against the person.

It is noted that the July Report to COAG of the Business Regulation and Competition Working Group noted that COAG had agreed there is a case for statutory reform so as to promote a consistent and principled approach to the imposition of personal criminal liability for corporate fault. The Group will report to the October 2008 COAG as to the applicable principles to be applied.

However, workplace health and safety has been exempted from the process. This is regrettable as the principle of when a company officer should be vicariously liable for the acts and omissions of a corporation should be universally applicable across the law.

Sentencing Principles

Ordinary sentencing principles rely on the concept of “individualised justice”, in which a court imposes a sentence that is just and appropriate in all the circumstance of the particular case.²²

There is nothing that suggests that those who breach OHS provisions should be liable to be sentenced in a manner that differs from the principles that govern the infliction of penalties against any other statute.

Recommendations:

- 33. That prosecutions should only be initiated by the Crown, through the Director of Public Prosecutions.**
- 34. That prosecution of OHS offences should be conducted as criminal matters proved beyond reasonable doubt.**
- 35. That Appeals should follow the usual appellate structure applicable to cases conducted in the criminal jurisdiction.**
- 36. That only a Director of Public Prosecutions should determine that a prosecution is both in the public interest and that there is confidence that a prosecution has reasonable prospect for success.**
- 37. That compliance with an approved safety case and/or a recognised code of practice, should mean an employer has met the requirements to comply with OHS law.**
- 38. That offences dealing with the death or serious injury of a worker that can give rise to imprisonment should be a matter for the criminal law, and not for OHS law.**
- 39. That OHS law should not create an offence such as industrial manslaughter.**
- 40. That sentencing principles should rely on the concept of “individualised justice”, in which a court imposes a sentence that is just and appropriate in all the circumstance of the particular case.**

²² See discussion in Australian Law Reform Commission *Same Crime, Same Time: Sentencing of Federal Offenders* Report 103 (2006) esp. para 5.21

Chapter 9 – Other Issues

Development of codes of practice and Other Guidance Material

The *Issues Paper* asks how codes of practices or compliance codes should be made under harmonised legislation.

As previously discussed, the ASCC has developed a National OHS Framework to develop guidance material.

In the context of a harmonised scheme, it would be presumed that the Framework would produce material that was designed to complement the model OHS law.

ENA believes the model OHS legislation should recognise the National Framework as the manner by which guidance material should be produced.

Reporting systems

ENA believes that so as to enhance worker safety, there should be a robust reporting system in place, so that trends can be tracked and, where necessary, remedial regulation developed.

ENA believes that legislation should contain comprehensive guidelines that identify what it is that employers should report. It could possibly be the case that regulations should specify the data set to be reported.

As far as practicable, reports should not duplicate data that requires to be reported to other authorities, such as workers' compensation regulators.

The Facilitation of Tripartism

ENA believes that model legislation should facilitate tripartite development of OHS policies in a manner that maximises the capacity for specific industry sectors to make an input into policy development.

To facilitate this, there are some grounds to consider expanding the membership of the successor body to the ASCC anticipated to be created in the *Intergovernmental Agreement for Regulatory and Occupational Reform in Occupational Health and Safety* signed on 3 July 2008 (the OHS IGA).

Permits and Licensing of People Involved in High Risk Work

The *Issues Paper* asks how best to deal with permits and licensing for workers involved in high risk work.

It is noted that on 26 March 2008, the Business Regulation Competition Working Group of COAG reported to the Council that work for vocationally trained licensed occupations be completed by September 2008. COAG also agreed to explore further enhancements to mutual recognition and possible national systems for trade licensing.

This is work being conducted within the overall COAG framework by the Ministerial Council on Education and Vocational Training.

ENA also notes that the COAG *Communiqué* for the meeting of 3 July 2008 agreed in principle to the creation of a national trade licensing system, for sign off in December 2008.

Of particular relevance to ENA members, the electrical trades are nominated as one of the first to be subject to the national system.

ENA considers that for the time being the issue of licensing and disciplining people working in high risk work activities is best developed through this COAG work stream than this reference.

Model OHS provisions could subsequently be developed to support any uniform laws developed as a result of decisions made by this Ministerial Council.

Best Way of Ensuring an Absence of Overlap

Finally, the *Issues Paper* asks best way to remove the overlap of federal and state legislation.

In the case that states and territories do not agree to refer the power to make laws with respect to occupational health and safety matters to the Commonwealth²³, it is proposed that the Review recommend that jurisdictions pass either:

- Complementary or Mirror Legislation, where each jurisdiction passes identical legislation; or
- Template, Co-operative, Applied or Adopted Complementary Legislation in which one jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

An example of the latter is the *Natural Gas (ACT) Act 2008 (ACT)*²⁴ which picks up South Australian template legislation in this fashion:

8 Application in the ACT of National Gas Law

- (1) The National Gas Law set out in the schedule to the South Australian Act, as in force from time to time—
 - (a) applies as a territory law; and
 - (b) as so applying may be referred to as the *National Gas (ACT) Law*.

This is the manner by which the Australian gas and electricity industries are brought to national regulation. It is a model perhaps suitable in this jurisdiction.

²³ Under Pl. 51 (xxxvii) of the *Constitution*

²⁴ Act 15, 2008

To that extent, ENA notes paragraphs 5.1.7 and 5.1.8 of the OHS IGA, which read:

5.1.7 For the purposes of subclause 5.1.1, the adoption and implementation of model OHS legislation requires each jurisdiction to enact or otherwise give effect to their own laws that mirror the model laws as far as possible having regard to the drafting protocols in each jurisdiction.

5.1.8 The adoption and implementation of model OHS legislation is not intended to prevent jurisdictions from enacting or otherwise giving effect to additional provisions, provided these do not materially affect the operation of the model legislation, for example, by providing for a consultative mechanism within a jurisdiction.

The fact that jurisdictions will still be able to draft legislation using their own eccentric drafting protocols, or can have additional provisions included so long as it satisfies a (somewhat elastic) “material affect” test is unsatisfactory: it is a recipe for a slow loss of uniformity over time.

An illustration of how this model of implementing notionally uniform legislation can work unsatisfactorily is the way in which the National Standard for Construction Work was implemented, as discussed in the Master Builders Australia *Submission to Review Panel for Occupational Health and Safety on the The National Standard for Construction Work – Definitions of Construction in State and Territory Legislation* (June 2008).

ENA affirms its wish for uniform legislation to be enforced throughout Australia. It hopes the Review will so recommend to the Workplace Relations Ministerial Council, with the intention of having this part of the IGA amended.

Recommendations:

- 41. That model National OHS legislation should recognise the National OHS Framework as the manner by which guidance material should be produced.**
- 42. That legislation should contain comprehensive guidelines on reporting requirements.**
- 43. That model legislation should facilitate tripartite development of OHS policies in a manner that maximises the capacity for specific industry sectors to make an input into policy development.**
- 44. That the issue of licensing and disciplining people working in high risk work activities is best developed through the COAG Business Regulation Competition Working Group.**
- 45. That if states and territories do not agree to refer the power to make laws with respect to occupational health and safety matters to the Commonwealth, it is proposed that the Review recommend that jurisdictions pass either:**
 - a. Complementary or Mirror Legislation, where each jurisdiction passes identical legislation; or**
 - b. Template, Co-operative, Applied or Adopted Complementary Legislation in which one jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.**

SEPARATE ATTACHMENTS

Attachment 1 – *ENA Policy for A National Framework for Energy Safety in Australia* – April 2008.

Attachment 2 – *ENA Proposed National Framework for Electricity Network Safety* – July 2008.