



Submission to the
National Review
into Model
Occupational Health
and Safety Laws

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Submission to the National Review of Model Occupational Health and Safety Laws

The Australian Bankers' Association (ABA) is pleased to provide comments to the national review into model Occupational Health and Safety (OHS) laws.

The review includes an examination of the following areas:

- a) duties of care, including the scope and limits of duties;
- b) the nature and structure of offences, including defences;
- c) scope and coverage, including definitions;
- d) workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;
- e) enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;
- f) regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional cooperation and dispute resolution;
- g) permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;
- h) the role of OHS regulatory agencies in providing education, advice and assistance to duty holders; and
- i) other matters the Panel identifies as being important to health and safety that should be addressed in a model OHS Act.

1. Introduction

The ABA acknowledges workplace safety is a serious issue for the community and supports the general policy objectives to secure and promote the health, safety and welfare of people at work being contained in OHS legislation. OHS legislation should have adequate coverage so that it may apply to all risks to safety and health arising from workplace activities, and thereby should impose on those who are in a position to identify and assess and eliminate or control those risks, an obligation to do so.

Workplaces are changing with economic reform, advances in technology and new workforce participation dynamics. Along with these changes to our workforce are changes in community perceptions and expectations. The changing nature of the workplace and relationships within the workplace make it a challenge for legislation to strike the right balance between providing distinct, yet extensive duties to cover all workplaces and all hazards and risks. For this reason, the ABA believes that it is important for OHS legislation to be principles-based and accompanied by regulations, codes of practice and guidance notes.

It is vital that the OHS regime:

1. Clearly articulates the policy objectives of the system;
2. Ensures that the system is structured in a manner that can deliver these objectives through an explicit set of general duties; and
3. Recognises the rights and responsibilities of all people – employees, self-employed, controllers, suppliers, employers, etc.

The banking industry is strongly committed to ensuring the health, safety and welfare of employees, contractors and customers. OHS management is integrated with organisational activities and not only maintains individual banks' legislative OHS obligations, but also evolves to reflect changes in business and community expectations.

Some initiatives that the banking industry currently adopts as part of its OHS practices include:

- Continuous improvement in health, safety and welfare performance through systematic management of hazards and risks and regular review of overall progress with health, safety and welfare performance;
- Accountability assigned throughout banks to achieve health, safety and welfare targets and meet workplace objectives;
- Adequate resources and supervision allocated to ensure employees are provided with training to develop knowledge and skills to promote responsible health, safety and welfare in the workplace;
- Consultation with employees about health, safety and welfare issues;
- Safe and healthy premises, plant and equipment in the workplace;
- No tolerance for harassment and bullying in the workplace;
- OHS information disseminated to employees via training materials, handbooks, staff forums and intranet; and
- Rehabilitation and workers compensation systems that encourage recovery and return to work for employees who suffer from a work-related injury or illness.

OHS legislation should appropriately promote improved health, safety and welfare in the workplace as well as balance the compliance costs and regulatory burden imposed on businesses. It is important for the policy objectives of OHS laws to be harmonised across Australia, so that OHS management does not adversely impact on business efficiencies and workplace safety. Harmonising OHS laws means that businesses can move away from reacting to multiple statutes with different standards and rules, to being able to adopt a more proactive OHS management system that strives for best practice.

In summary, the ABA supports:

- *Implementation of OHS legislation that is nationally consistent.* National consistency will reduce the unnecessary administrative and compliance burden on businesses that operate across jurisdictions, as well as reduce complexity associated with understanding the various OHS duties across jurisdictions. Greater consistency across jurisdictions provides significant benefits to both employers and employees. National consistency is of utmost importance for banks, as generally they are national employers.
- *Articulation of the legislative objectives, duties, rights and responsibilities.* OHS legislation should clearly articulate the policy objectives of the system; ensure that the system is structured in a manner that can deliver these objectives through an explicit set of general duties; and recognise the rights and responsibilities of all parties.
- *Introduction of OHS legislation that adopts a risk management approach.* OHS legislation should seek to allow employers greater freedom to determine how health and safety risks are best controlled within their workplaces, as long as the objectives of the law are achieved. OHS legislation should also facilitate and encourage consultation between regulators, employers, employees and other workers to promote workplace health and safety.
- *Adoption of fair and reasonable offence and defence provisions.* OHS legislation should provide duty holders with adequate defences, and where the law imposes penalties on individuals, it must be demonstrated that they were accessories in the misconduct, rather than simply imposing strict liability. Model OHS legislation should establish clear, fair and reasonable offence and defence provisions, and contain the concept of "reasonably practicable".

- *Implementation of procedural fairness and prosecutorial independence.* One of the fundamental tenets of a fair and open criminal justice system is that prosecutors are independent. Model OHS legislation should provide for procedural fairness and prosecutorial independence.

2. Legislative approach

In Australia there are nine different jurisdictions and even more OHS statutes (including specialised OHS statutes). Disparity between the OHS laws and lack of harmonisation of OHS standards (including lack of uniformity of key definitions and duties, unreasonable offences and defences, inconsistent legal and regulatory procedures) continues to undermine a fair and safe workplace culture across Australia and contributes to unnecessary compliance costs for businesses.

Banks generally operate throughout Australia and as a result of the different OHS laws across the jurisdictions, the development of proactive OHS management systems is impeded and business is exposed to significant costs in terms of compliance and administration. Employees are also prejudiced as a result of the lack of national consistency.

The *Occupational Health and Safety Act 2000* (NSW) and the *Workplace Health and Safety Act 1995* (Queensland) place significant responsibilities on the employer in that both statutes specify that an employer must provide a safe workplace¹. Whereas, all other jurisdictions (including the Commonwealth) specify the need for the employer to take "reasonable steps" to provide a safe workplace.

It is important that OHS legislation establishes a practical, equitable and efficient OHS system. Promoting improved OHS outcomes requires OHS legislation that establishes and articulates duties for employers, employees and others in the workplace.

2.1 Legislative approach – recommendations

The ABA believes that:

- There should be national uniformity in OHS legislation. Arrangements should enable improved coordination by regulators. Ideally, there should be a single, national OHS law applying across all the States and Territories, and a single regulator responsible for administering the law and ensuring compliance with the law.
- The objective of OHS legislation should be to establish a practical, equitable and efficient system that secures and promotes the health, safety and welfare of people at work.
- OHS legislation should be simple and principles-based. An OHS regime should clearly establish and articulate the policy objectives of the system and ensure that the system is structured in a manner that can deliver those objectives through an explicit set of duties of care.
- OHS legislation should identify the principles, such as section 4 in the *Occupational Health and Safety Act 2004* (Victoria).
- OHS legislation should not be prescriptive or process-based. Rigid laws would not adequately address changing workplaces and community expectations.

¹ In Queensland a person discharges their obligations if they have adopted and followed a stated way that manages exposure to the risk or adopted and followed an alternative way that means they have taken reasonable precautions and exercised proper diligence.

- OHS legislation should be broad and flexible. An OHS regime should contain principles and general duties of care that apply across all industry sectors, workplaces and employment arrangements. Industry specific provisions should be contained in regulations, codes of practice or guidance notes.
- OHS legislation must be easy to understand in order for OHS standards to be effective and to facilitate improved OHS performance and desired OHS outcomes.
- OHS legislation should contain key definitions. Currently, OHS laws may use the same or similar terms, but the interpretation of these terms varies across jurisdictions. Key terms and concepts should be clarified and harmonised in the law.
- OHS legislation should recognise the rights and responsibilities of all parties. An OHS regime should clearly establish and articulate the rights and responsibilities of employers, self-employed, controllers, suppliers, employees, etc.
- OHS legislation should be administered through the normal court system consistent with principles of due process.
- OHS legislation should encourage parties to work together to achieve safe and healthy workplaces.

3. Duties of care

The 'Robens style'² framework places the OHS duties on various categories of duty holder. The advantage of this approach is that it can capture all workplaces and all hazards and risks. However, it is important that the general nature of the duties is not so broad that employers have difficulty in determining how and when to discharge a duty.

The Robens model was adopted at a time when 'standard employment' dominated workplaces. This is no longer the case, and complex employment relationships now permeate workplaces in Australia. Developments in labour flexibility over the last two decades have seen new organisational structures, growth in labour hire arrangements and expansion of outsourcing of business functions.

OHS legislation should explicitly set out the duties and responsibilities of each duty holder and apply the duties in an equitable manner. The general duties of care should meaningfully allocate responsibilities to duty holders by maintaining the broad legislative objective to improve the conditions in which people work, but also as far as practicable, clarify the responsibilities of parties in providing a workplace that is safe and healthy.

3.1 Employers

OHS legislation should require an employer to ensure a workplace or premises controlled by the employer is safe and without risks to health of its employees and others in the workplace, to the extent that is reasonably practicable. General duties of care should include:

- Provide and maintain safe plant;
- Provide for the safe use, handling, storage and transport of substances;
- Provide and maintain safe systems of work; and
- Provide information, instruction, training and supervision to ensure health and safety.

² The British framework for OHS regulation was introduced by the Robens Report in 1972. The Robens model is a three tiered approach with broad, overarching general duties contained in legislation, more detailed provisions contained in the regulations, and industry specific guidance contained in codes of practice. Johnstone, R (1997). *Occupational Health and Safety Law and Policy*, Law Book Company, Sydney.

Employers should identify, implement and document an OHS management system that is practical, relevant and suitable for their workplace. Employees should be consulted and information about the OHS management system should be readily and easily accessible to employees.

3.2 Workers and others

OHS legislation should contain obligations for employees, other workers and individuals attending a workplace to contribute to workplace health and safety by requiring them to take reasonable care to avoid harming themselves and any other persons through an act or omission at work.

3.3 Contract arrangements and outsourcing

OHS legislation has been based on traditional perspectives of the workplace – that is, there is one employer with employees at one workplace. However, the shift in workforce participation, such as the increased use of contract arrangements and outsourcing means there are more complex employment relationships.

For example, an 'agent' may be employed to place contractors into a workplace, such as a call centre operator, cheque processor or security officer for a bank. In this circumstance, the employee will be supervised and controlled by another employer at a workplace, which may or may not be a premises controlled by the bank. The employee will be employed under a contract with the agent, and the agent will have a contract with the bank.

It is important that OHS legislation adequately ensures that all employees are protected by the scope of the OHS duties. Typically, duty holders share a range of duties that apply simultaneously to the same workplace. It is important that to promote safe and healthy workplaces that each duty holder clearly understands their responsibilities.

The OHS duties mean that a risk management framework must be applied that identifies risks associated with the call centre and assesses and controls those risks. Where a risk is identified that cannot be eliminated, the risk may be mitigated, possibly through the development of safe working procedures and training. The risk assessment should take into account the physical environment, people who work there, tasks performed, equipment used and the interaction between these variables.

For example, the bank should ensure via its contract with the agent that these OHS duties are discharged by the agent or as otherwise stated in the contract arrangements or outsourcing agreement. The various OHS duties in relation to the contractor or sub-contractor should be the responsibility of the agent – that is, the agent should ensure that a risk assessment of the call centre has been conducted and necessary action taken. However, depending on the party that has control of the workplace where the call centre operator works other parties may also have OHS duties, such as the call centre may be located in a branch of the bank thereby controlled by the bank, at a premises controlled by the agent or at a premises controlled by another party.

The ABA believes that existing OHS laws generally do not provide adequate direction as to what is expected of the various duty holders insofar as they have control over the work of others. The capacity to have control over the activities that take place in a workplace will vary between different duty holders, determined in part by their capacity to control the relevant activities. This is confusing for employers and could lead to a failure to assume responsibilities for their employees.

While it has been generally accepted that the employer's obligations to its employees extend only as far as employees of contractors directly engaged by the employer under contract, decisions by the Industrial Relations Commission (IRC) in NSW and the Court of Appeal in Victoria indicates that an employer's obligations may extend to sub-contractors. Unless there is an allocation of realistic responsibilities and clarity given to the responsibilities of several parties, the management of contractor health and safety may be compromised.

The ABA suggests that responsibilities with respect to contractors should be clarified by specifying particular obligations, for example, regarding risk assessment, and who is responsible for the obligation – the contractor, the controller of the premises or the owner of the business undertaking. One option is to limit OHS obligations to the employer at law, provided that the “host employer” and the controller of premises provide adequate access to the workplace to enable the employer to comply with its obligations. It is also likely to be appropriate for the employer and the “host employer” to consult and come to agreement on how employees’ needs will be met, for example, in respect of the provision of equipment, such as ergonomic office chairs, where employees’ individual needs will be different.

3.4 Financiers

Financiers are considered to be those persons who are engaged in the business of financing premises, plant and equipment for a third party. In some jurisdictions, OHS legislation exclude financiers from the OHS duties of a supplier. OHS legislation provides for the duties of a supplier to be owed by the party from whom the items were purchased (i.e. the original supplier) and not the financier. These provisions operate so that the duty is owed by the original supplier to the third party, as if the financier were not involved in the transaction. While not expressly stated, these provisions appear to allocate the duties to those persons with knowledge and control of the items when supplying them. Whereas, in some jurisdictions there is ambiguity as to the application of OHS duties for financiers, and thus uncertainty in terms of financiers liabilities.

The ABA believes that OHS legislation should draw distinctions between the substance and the form of particular financing arrangements – that is, financing transactions where the substance of the transaction is to provide financial accommodation rather than equipment should not give rise to OHS obligations on behalf of the provider of finance.

Where a bank provides mortgage finance to a company, it is recognised that the “owner” of the building is the company (and not the bank) and therefore any relevant considerations in relation to control of the premises are based on the building owner or those contractual arrangements maintained with a possible tenant. However, where a bank maintains a finance lease for plant or equipment, even though the bank is a passive financier, the bank may be deemed to be the supplier (or “owner”) of the plant and equipment under some OHS laws.

Banks and other financiers play an important role in the provision of working capital and other forms of financial accommodation for a wide range of Australian businesses, including many small businesses. Commercial leasing and hire purchase facilities are important in assisting businesses acquire necessary plant and equipment in order to conduct their business activities. These types of facilities have certain financial benefits over pure lending facilities, accordingly, there are a number of operational and taxation reasons why a company may decide to maintain a finance lease for supply of their plant and equipment, such as office equipment, motor vehicles, machinery (e.g. tractors and earthmoving equipment), etc.

For example, in the instance of a long term finance lease or hire purchase contract, the equipment is generally investigated, selected and acquired by the customer. The acquisition is financed by the financial institution in a form that suits the particular businesses’ financial requirements, and provided the lessee or hirer performs its obligations under the financing arrangement, it is rare for the equipment to be returned to the financier at the end of the financing arrangement. The bank or financier is not in the business of supplying plant and equipment.

Under some short term leases and hirings the equipment is usually supplied by an organisation whose business it is to supply plant and equipment. Commonly, the equipment is acquired by the business direct from the supplier and at the end of the lease or hiring the equipment is returned to the possession of the supplier. The same equipment could be hired or leased many times over to different businesses.

The ABA believes that the company or individual that has responsibility for the actual selection and day-to-day control and management (including maintaining safety) of the plant or equipment should be deemed to have obligations under OHS legislation. Under normal lease and hire purchase financing arrangements this approach would leave the bank or financier free of those obligations.

In some circumstances a financier will have responsibility for the safety aspects of plant or equipment, however, this is not common. For example, in a situation where a bank or financier recovers possession of the plant or equipment either according to the terms of the contract or by entering into possession of the plant (e.g. as a mortgagee in possession) it would be expected that the bank or financier should take steps to ensure that the applicable requirements under the law are met while they have day-to-day control and management of the plant or equipment.

Without clarification, liability of the equipment financier may lead to a distortion of the market for financial services, as the additional risk assumed by the financier could lead to a shift to other forms of financial accommodation for business equipment acquisitions.

The ABA suggests the OHS legislation should ensure that the company or individual that has responsibility for the actual selection and day to day control and management (including maintaining safety) of the plant or equipment should be deemed to have obligations under the law. It should be clear that where a bank or financier provides "financial accommodation" that this is not a circumstance whereby an OHS duty would be conferred.

3.5 Duties of care – recommendations

The ABA believes that:

- There should be an equitable and non-ambiguous delineation of responsibilities and clarification of OHS duties for various parties. It is important for duty holders to understand their rights and responsibilities and to be clear as to their duties, especially in circumstances where multiple duty holders and multiple duties are involved.
- OHS legislation should contain general duties of care for employers, workers and others. Duty holders should be all persons whose acts or omissions have the capacity to affect the health and safety of other persons, including members of the public, in a work environment.
- OHS legislation should require an employer to ensure a workplace or premise controlled by the employer is safe and without risks to health of its employees and others in the workplace, to the extent that is "reasonably practicable".
- OHS legislation should contain a duty for employees, other workers and individuals attending a workplace to contribute to workplace health and safety.
- OHS legislation should contain a "control test". A lack of a clear definition of control, or a test to determine its applicability, creates confusion for duty holders. Control should be used to determine who has a duty, the extent of the duty owed, apportion shared duties between duty holders where there is an overlap of responsibility and provide a defence (where there is an absence of control). Control should be defined and included as a factor to determine what is "reasonably practicable".
- The concept of "controller" should be clarified. Multiple liabilities should not be able to be pursued for a single factual incident. Guidance should be issued to raise awareness and understanding of the concept of "controller".

- OHS regulations and guidance notes should provide further details on how duty holders should apportion, and make decisions about, OHS hazards and risks. For example, guidance should outline obligations to employers, controllers and employees about general duties with respect to contract arrangements and outsourcing.
- OHS legislation should make it clear that where a bank or financier provides “financial accommodation” that this is not a circumstance whereby an OHS duty would be conferred.

4. ‘Reasonably practicable’ and risk management

OHS legislation should require a process of risk management, whereby duty holders must identify the hazard, assess the risk and, where appropriate, take the necessary steps to eliminate or reduce the risk. Currently, the requirement for a duty holder to manage risks and hazards differs across jurisdictions.

While OHS laws variously include the concept of “reasonably practicable”, most OHS laws do not clarify what “reasonably practicable” means resulting in some cases different interpretations within and across jurisdictions. In addition, in some cases it has proven difficult to establish a defence, as the court or IRC has tended to interpret the concept of “reasonable practicability” as requiring all possible steps.

The ABA believes that OHS legislation should clarify that risk management involves firstly risk elimination and if this is not “reasonably practicable” then risks should be reduced to the lowest level that is “reasonably practicable”. In explaining what constitutes reasonably practicable, regard should be given to elements, including:

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

The *Occupational Health and Safety Act 2004* (Victoria) and the *Occupational Safety and Health Act 1984* (Western Australia) contain the above elements in determining what is “reasonably practicable”.

Practical risk management requires the identification of risks that are likely to affect health and safety and over which the duty holder has a level of control. Some duty holders may have a limited control over persons who do not have duties under the OHS laws, such as members of the public.

Therefore, in addition to the above elements, the ABA believes that the element of “control” should explicitly be a major factor in considering liability, for example, the degree to which the company or individual holds the capacity to foresee and control the hazard or risk. Where a person had “no control” over an incident occurring, inherently the concept of knowledge of the hazard giving rise to the risk concerned should be considered by the court. In part, control is about whether the duty holder had the knowledge of the risk or hazard, the means of eliminating or controlling the risk or hazard and whether the risk or hazard was foreseen.

It is important for the OHS legislation to reflect the principle that risk management, in an occupational health and safety context, is about finding a workable solution for each workplace hazard or risk.

4.1 'Reasonably practicable' and risk management – recommendations

The ABA believes that:

- OHS legislation should adopt a risk management approach that follows a hierarchy of risk control, requiring risk elimination, and recognising that if it is not possible to eliminate the risk, then the risk should be managed as far as is "reasonably practicable".
- OHS legislation should clarify that ensuring health and safety means eliminating risks to health and safety as far as is "reasonably practicable", and if it is not reasonably practicable to eliminate, to reduce the risks to the lowest level that is "reasonably practicable".
- OHS regulations and guidance notes should contain risk management principles in relation to the OHS duties. Best practices for risk management should be included in information packages and decided upon in consultation between regulators and industry representatives.
- OHS legislation should define key concepts, such as "reasonably practicable", "foreseeable" and "control". These terms have been interpreted inconsistently within and across jurisdictions resulting in distorted obligations and employers that do not have a clear understanding of their OHS duties.
- OHS legislation should take into account an injured party's own contributory negligence. In circumstances where an employer has taken "reasonable steps" to comply with its obligations under the law and an employee or third party is injured due to that employee's or third party's own negligence, then the law should require a reduction of the employer's liability under the law.

5. Consultation, participation and representation

Consultation between employers and employees and other workers is essential for an effective OHS management system and for enabling participation of workers in the health and safety of their workplace. OHS legislation should contain a duty to consult. Currently, the obligations differ considerably across jurisdictions.

The ABA believes that employers should consult with employees so that employees are able to contribute to decision making regarding the health and safety of their workplace. Circumstances when consultation could be required include:

- risks to health and safety arising from work are assessed or when the assessment of those risks is reviewed;
- decisions are made about the measures to be taken to eliminate or control those risks;
- introducing or altering the procedures for monitoring those risks;
- decisions are made about the adequacy of facilities for the welfare of employees;
- changes are proposed to the premises, systems, methods of work, plant or substance that may affect health, safety or welfare; and
- decisions are made about the consultation procedures.

Some OHS laws tend to concentrate on OHS committees and OHS representatives in respect of consultative mechanisms. In many cases, OHS committees and OHS representatives may be useful mechanisms for consultation. However, a mandatory or prescribed consultation approach does not allow employers sufficient flexibility to develop consultative mechanisms that best suit the workplace. Furthermore, OHS committees and OHS representatives may be mechanisms that achieve legislative compliance, but do not

necessarily engage employees in an effective manner. Employers and employees need flexibility to suit the changing nature of workforce dynamics and employment arrangements.

OHS laws also tend not to reflect the changing nature of the workplace. For example, currently consultation may not involve contractors or sub-contractors. Therefore, OHS legislation should better reflect the changing workforce and allow for participation of contractors, sub-contractors and other individuals who have a regular presence at a workplace in consultation on OHS matters where they are impacted by the outcome of the consultation.

5.1 Right to entry

Right of entry and investigative powers for union representatives differs across jurisdictions. While the ABA acknowledges that properly accredited union officials in their capacity as authorised representatives can constructively contribute to discussions about occupational health and safety, and assist in raising awareness of OHS matters, it is important that unions do not use their powers of right of entry to access workplaces and premises for reasons unrelated to occupational health and safety.

Union representatives should give the duty holder written notice prior to entry with details about the suspected contravention, and should generally be required to give written notice at least 24 hours prior to their intention to enter the workplace or premises. Immediate access without notice should only be permissible with a permit from the Industrial Registrar or similar. Such access should only be granted in circumstances where it is reasonably believed that if notice had been given, the duty holder would take steps to conceal a risk or hazard. However, the ABA notes that an OHS regime that provides for qualified OHS professionals (including OHS inspectors and OHS advice professionals) the right of entry without notice means that it is unnecessary for union representatives to duplicate this function of the OHS regulator.

OHS inspectors should also generally be required to provide a duty holder with at least 24 hours notice of their intention to enter the workplace or premises. However, a qualified OHS professional should be allowed to enter a workplace without prior notice for the purposes of investigating a serious incident or accident. In this instance, a notification should be provided to the employer as soon as practicable after entering the site.

OHS inspectors and union representatives that have been given access to a workplace or premises should be required to advise the duty holder of the nature of the suspected contravention. Where there is an actual breach, the time difference between the OHS inspector or union representative becoming aware of the breach, and then investigating the breach, could expose employees and others to unnecessary risk. If the duty holder was advised immediately, actions could be taken to remedy the risk or hazard.

In addition, OHS inspectors and union representatives should also be required to leave the workplace or not enter the workplace where the employer requests the OHS inspector or union representative to comply with a workplace health and safety requirement that applies to the workplace. This would ensure that an OHS inspector or union representative follows a reasonable request, from an OHS perspective, to enter a workplace. This refers to security entry procedures in a bank branch environment, where there is a risk for allowing entry without security clearance to secure areas of a branch, which would constitute a breach of security and safety procedures.

5.2 Protection from discrimination

OHS legislation should recognise the potential for persons to be victimised or otherwise dealt with adversely for raising a health and safety issue, carrying out health and safety functions, or refusing to undertake work they consider to be unhealthy or unsafe. In addition, OHS legislation should provide for measures by which health and safety issues may be raised by workers or their representatives and resolved. Workers and their representatives should not be reluctant to raise health and safety issues for fear of consequences, particularly in relation to their employment or other arrangements.

5.3 Protection for volunteers

OHS legislation should protect volunteers from being prosecuted for their acts and omissions, which have resulted in breaches of the law, when performing duties as volunteers. A "volunteer" is a person doing work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose, and that is done on a voluntary basis. Protecting volunteers from liability will foster greater corporate social responsibility and corporate citizenship, which is currently potentially undermined by the discouragement of engagement in voluntary activities by companies or employees of companies on the basis of mitigating against the risk of prosecution when voluntary activities are undertaken.

5.4 Consultation, participation and representation – recommendations

The ABA believes that:

- OHS legislation should contain a duty to consult. Employers should demonstrate that they have consulted with their employees and other workers. The duty to consult will build cooperation and partnership between employers and employees and other workers as well as encourage parties to work together to achieve safe and healthy workplaces. It is also hoped that consultation, cooperation and partnership can overcome adversarial approaches to workplace health and safety, which have featured from time-to-time.
- OHS legislation should enable employers to adopt flexible consultative mechanisms that best suit the operation and structure of the business.
- OHS legislation should not prescribe consultation mechanisms or specify the nature of consultation (i.e. when it should be undertaken, who should be consulted, the means of consultation, etc). It would be useful for guidance to clarify circumstances when consultation may be required.
- OHS legislation should not prescribe or require OHS representatives and OHS committees. Mandatory consultation approaches do not allow sufficient flexibility to develop consultative mechanisms that best suit the workplace.
- OHS legislation should allow employers and employees to agree on arrangements for consultation and representation that suit the needs of the particular workplace. It would be useful for guidance to clarify "other agreed arrangements" for consultation.
- OHS legislation could contain a reciprocal duty on employees and other workers to participate in consultation, such as section 32 of the *Workplace Health and Safety Act 2007* (Northern Territory). Employees and other workers should cooperate with employers' requests to consult on OHS matters. Both employers and employees must not obstruct attempts at consultation on OHS matters. Communication, both ways, will foster improved safety cultures.

- OHS legislation should contain provisions for right of entry. However, the law should not allow union representatives to use their powers of right of entry to access workplaces or premises for reasons unrelated to OHS matters. Unions should demonstrate that they are entering a workplace or premises because of an OHS matter – that is, authorised representatives of industrial organisations should be required to provide written notice prior to entry with details about the suspected contravention.
- OHS legislation should contain provisions for workers to refuse work that is unsafe, subject to “reasonably practicability”.
- OHS legislation should contain provisions to protect directors or other officers concerned in the management of a company who are volunteers from being personally liable for prosecution, such as the *Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008* (NSW).

6. Regulator functions, powers and accountability

OHS regulators are central to the successful operation of an OHS regime. Functions of OHS regulators should include:

- administering and enforcing the OHS legislation;
- providing advice on the OHS legislation and other supporting laws, to the Minister, employers, employees, and other workers on their rights and responsibilities under the OHS legislation;
- monitoring OHS standards;
- formulating and disseminating standards, guidance and other information, in consultation, to assist various parties to comply with their duties and obligations under the OHS legislation;
- fostering cooperative and consultative relationships between employers, workers and others on OHS standards;
- promoting education and training in OHS management by facilitating the development and provision of OHS training courses;
- promoting public awareness of OHS;
- initiating and encouraging research into OHS improvements; and
- collecting and publishing OHS statistics and data.

6.1 Regulator functions, powers and accountability – recommendations

The ABA believes that:

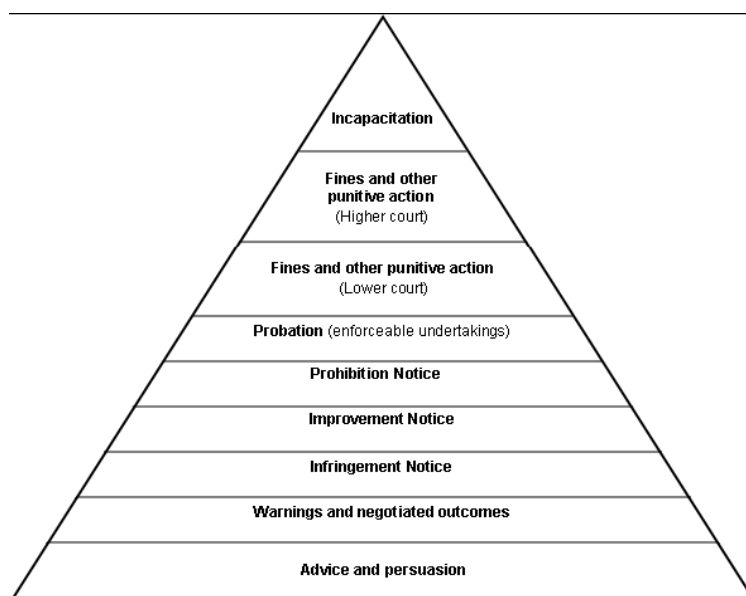
- OHS regulators and their officials (including OHS inspectors and OHS advice professionals) must be accountable. OHS legislation should provide for the establishment, functions, powers and accountability of OHS regulators.
- OHS legislation should provide for the appointment, powers and functions, and set out various conditions and limitations on the exercise and performance of those powers and functions of OHS inspectors.
- OHS legislation should contain provisions that explicitly require OHS regulators to execute functions, including education, advice and assistance to duty holders. However, OHS legislation should separate the enforcement/inspection and advisory functions of the OHS regulator, as there is a potential conflict of interest in failing to keep these functions distinct.

- OHS legislation should provide for the appointment and functions, and set out various conditions and limitations on the exercise and performance of those functions of OHS advice professionals. OHS advice professionals should have the capacity to provide advice and assistance and be able to engage with employers through non-mandatory notices and advice. An OHS regime should be based on cooperation and partnership and seek to improve OHS standards, not just through enforcement activities.
- OHS legislation should ensure that decisions by OHS inspectors are reviewable, including via internal review, external review and appeal. Review of decisions should be transparent. Employers should have the ability to appeal notices issued by OHS inspectors where they are of the view that the notice was unfair, unjust or unwarranted. Review should initially be an informal process whereby the employer is able to provide their reason for the request for review and the OHS inspector's superior is able to review the material and come to a decision. In the instance that the employer is not satisfied with the outcome, then the employer should be able to lodge a more formal appeal.

7. Compliance and enforcement

The primary objective of the OHS legislation and role of the OHS regulator should be to encourage and assist effective management of OHS hazards and risks. Enforcement and punishment should be secondary, and applied only as appropriate.

OHS legislation should contain a hierarchy of enforcement measures. An enforcement model that reflects the escalation of measures as contained in the Issues Paper would be a useful model³.



OHS inspectors should have the power to issue penalty, improvement and prohibition notices. All notices have an element of enforcement or sanction because compliance with a notice is mandatory and failure to comply is an offence.

³ Gunningham, N. and Johnstone, R (1999). *Regulating Workplace Safety – Systems and Sanctions*. Oxford University Press. New York. In this model 'incapacitation' means preventing the offender from continuing to operate.

The ABA believes that as improvement notices and penalty notices are issued in real time, the OHS regulator could make better use of OHS improvement notices and penalty notices as opposed to prosecutions. However, while this may drive improved levels of compliance, it does not necessarily result in improved safety cultures. Consultative measures allow duty holders to focus on prevention activities, rather than using resources to defend a prosecution.

OHS inspectors should have the ability to issue provisional improvement notices (PINs). PINs can be a useful means of formalising the OHS improvement process by giving businesses the opportunity to take corrective action prior to the application of penalties and facilitating businesses to become more proactive, rather than reactive. However, a qualified OHS professional should follow an agreed, documented process issued by the OHS regulator.

OHS regulators should also have the ability to provide advice of a non-mandatory nature and issue oral warnings or safety directions. OHS regulators should be able to give guidance in relation to specific risk controls and strategies to promote workplace health and safety. (However, as previously stated, such advice should be given by a dedicated team of OHS advice professionals, separate from the OHS inspectors. These two functions are clearly distinct.)

OHS inspectors should also be able to issue enforceable undertakings, whereby duty holders could enter an agreement on a plan of action and implementation timeframe to improve workplace health and safety. If the enforceable undertaking is not adhered to, or complied with, penalties and, in some cases prosecutions, could result. This approach would move the compliance focus to an outcomes focus, given that undertakings could cover a broader range of measures than the remedies that can be ordered by the court. Importantly, this approach would focus attention on what needs to be done to improve workplace health and safety.

7.1 Compliance and enforcement – recommendations

The ABA believes that:

- OHS legislation should contain a hierarchy of enforcement measures. An explanation of the concepts should be contained in guidance.
- OHS inspectors should be able to issue notices. Notices should contain suggestions of how compliance can be achieved, however, this should be done in consultation with employers and reflect the circumstances of the workplace – that is, suggestions for compliance need to be flexible, yet relevant. Notices should contain timeframes for compliance, but again, this should be negotiated so that it is relevant to the circumstances of the workplace. Provisions should be made to allow for the review of notices.
- OHS legislation should not enable union representatives to issue notices, as there is a potential conflict of interest in allowing unions to be involved in both industrial relations matters and OHS compliance and enforcement activities. Instead, union representatives should work with the OHS regulator. It is important that powers of union representatives are clearly differentiated from OHS inspectors.
- OHS inspectors should have the ability to provide advice of a non-mandatory nature and issue oral warnings or safety directions. Oral warnings should not be taken to be advice (such as that offered by OHS advice professionals). Oral warnings should be used to rectify unsafe situations, especially where there is an immediate and serious risk to a person's health or safety and it is not practical to issue a notice. In this situation, a written notice should follow. However, oral warnings should also be used for minor risks or hazards that may be easily remedied and therefore do not require a written notice.

- OHS inspectors should be able to issue enforceable undertakings. Enforceable undertakings provide an alternative to prosecution. The offender is required to agree to take action to remedy the offence, and once entered into, undertakings can only be varied or withdrawn with the consent of the regulator or court.
- OHS inspectors should be able to modify, amend or cancel any notice or instrument issued by them when new information comes to light. Decisions should be subject to review.
- Employers should be able to lodge an application for an internal review and/or appeal. The effect of lodging an application should mean that the operation of the notice is on hold until review and/or appeal is completed. For example, if an employer does not undertake actions suggested in the notice within the identified timeframe in the notice, if an application has been lodged, this should not result in non-compliance.
- OHS legislation should require regulators to publish compliance, enforcement and prosecution policies. Guidance notes should provide interpretation of key issues and provisions, with examples, especially as relevant for certain industry sectors.

8. Prosecutions

OHS legislation should contain provisions for prosecution of breaches of OHS standards, where other compliance and enforcement options have not been successful or are considered to be inappropriate. While prevention should be the focus of OHS legislation, prosecution and imposition of penalties is, unfortunately, a necessary part of an OHS regime.

Breaches of OHS legislation are serious offences. Criminal law is complex and the importance of properly protecting the rights of individuals must be paramount. A prosecutor has very extensive and strict legal and ethical obligations to the court and to the defendant. For these reasons, the ABA believes that criminal proceedings should only be taken by those expert and experienced in the role of the prosecutor understanding and complying with the legal and ethical rules and requirements of a prosecutor.

Furthermore, a prosecutor must also be, and be seen to be, impartially and objectively presenting all facts, issues and known legislation and cases for the consideration of the court. The adversarial nature of the role of the unions in the workplace undermines the perception of independence and impartiality of a prosecutor when that role is undertaken by unions.

8.1 Offences

Offences should reflect a hierarchy of criminal, civil and administrative remedies. OHS legislation should require criminal offences to a standard of beyond a reasonable doubt, and civil penalties with proof of breaches on the balance of probabilities.

Administrative remedies, such as notices, should be utilised by OHS regulators as an alternative to prosecutions.

In a criminal prosecution, the prosecutor must prove that the statutory elements of the offence are established to the criminal standard – that is, “beyond a reasonable doubt”. The elements that the prosecution must establish are as follows:

1. the defendant was an employer;
2. there was a real risk to health, safety and welfare;
3. the risk arose at the defendant's place of work;
4. the persons exposed to risk to their health, safety and welfare were employees of the defendant; and

5. there was a causal connection between the defendant's failure and the risk to health, safety and welfare – that is, the failure is the “substantial or significant” contributing factor to any injuries.

The first four of these elements are generally readily established where an incident occurs in the workplace. However, the fifth element is significantly important, yet in the current OHS laws and case law has not been given significant attention in some jurisdictions.

8.2 Defences

Defences should be clear and available. The scope of the general duties and defences has resulted in an allocation of responsibilities that is inappropriate in some jurisdictions (particularly in NSW given the absolute nature of the duty of care, and inadequacy of the defences available).

OHS legislation should clarify the concept of “reasonably practicable” as part of the offence. In doing so, that would create a defence for the duty holder – that is, it was not “reasonably practicable” for the duty holder to comply with the requirement to prevent the risk. The law should establish that where the contravention was due to causes over which the duty holder had no control and against the happening of which it was impracticable for the duty holder to make provision, this should constitute a defence.

However, if the law does not contain the “reasonably practicable” qualifier, it will be necessary to ensure that a “reasonable steps” defence is explicitly available. For example, where an employer has taken “reasonable steps” to comply with the law, this should constitute a defence. In this instance, “reasonable steps” would need to have regard to various matters including risk assessment and the elimination or control of risks; instruction, training and supervision of employees and other workers; obligations on the employer to obtain information; consultation with employees and other workers; and particular risk control measures for premises, plant and equipment.

OHS legislation should seek to ensure that “reasonably practicable” steps are taken at the prevention stage, rather than simply at the stage of defending a prosecution.

8.3 Third parties acting unlawfully

Security is a priority for the banking industry. Banks have invested heavily in security devices and their branches are ‘target hardened’ to reduce the risk of robbery. Bank robberies have declined significantly since the late nineties. For example, in 1998 there were 326 armed attacks, whereas, for the past four consecutive years (2004-2007), incidents of armed attacks have been well below 100 in a given year. An Australian Institute of Criminology paper concluded that robberies of Australian banks has declined since the 1980s, but it also noted that compared to the 1980s, armed robbers tend to operate in gangs, are less likely to be armed with guns, appear to engage in less planning, and are more likely to fail⁴. Notwithstanding, while the banking industry and NSW police have been working to reduce the incidence of bank robberies, these criminal acts persist.

The ABA believes that OHS legislation should unambiguously deal with a risk that was substantially caused by the intervening act of a third party acting unlawfully, such as a bank robber.

⁴ Borzycki, A (2003). *Bank Robbery in Australia*. Trends and Issues in Crime and Criminal Justice. No. 253. Australian Institute of Criminology. May 2003. <http://www.aic.gov.au>

8.4 Burden of proof

It is important that the law supports procedural fairness and ensures that prosecutions follow due process. In any proceedings for an offence against a provision of the OHS legislation, the onus of proving that an individual or company breached the law should lie with the prosecutor. It is unreasonable and inappropriate for OHS legislation to contain a reverse onus of proof, as is currently the case in NSW.

The ABA considers that a reverse onus of proof is unfair and fundamentally flawed, and coupled with the absolute nature of the duty of care in the *OH&S Act 2000* (NSW), means that the law is unrealistic, unachievable and undermines the concept of promoting workplace safety cultures. It is unreasonable for a bank manager to be subject to criminal prosecution for the injury or death of a person, where injury or death has been caused by a third party within the workplace.

For example, a bank robber in the course of an armed robbery of a bank kills an innocent bystander in the branch. In this instance, currently in NSW the IRC would regard this as a hazard and a breach of the employers' general duty. The bank branch manager, who has done nothing more than their job to the best of their ability, could also be subject to criminal prosecution, and would now bear the onus of proving their innocence in order to secure an acquittal. If the bank manager does not, they would be convicted and fined and the prosecutor will receive a portion of the fine. However, if the bank robber is later apprehended by the police and prosecuted, the armed robber will be presumed innocent until proven guilty. Neither the police nor the prosecutor will receive any financial benefit if a conviction is secured. There is no sound basis for the onus of proof being different when it comes to the employer being prosecuted under OHS legislation.

The ABA acknowledges that a determination of the facts relevant in the circumstances should be made by the court. Clarifying the concept of "reasonably practicable" as part of the offence will ensure procedural fairness as it means the prosecutor must demonstrate that the duty holder did not take reasonable steps in discharging their OHS duties. This is the position in most jurisdictions in Australia.

It is appropriate that for criminal offences that the onus of proof lies with the prosecutor, not the defendant. Currently it is difficult for employers to be confident in a system of justice that essentially presumes them to be guilty of offences that can give rise to significant penalties, as is currently the case in NSW.

8.5 Proceedings

It is important that the law supports prosecutorial independence. Currently, the *OH&S Act 2000* (NSW) does not provide for prosecutorial independence (i.e. WorkCover NSW and the unions are able to make decisions relating to the investigation, evidence gathering and prosecution of OHS matters as well as receive a financial benefit ('moiety') in the result of a successful prosecution).

NSW is the only jurisdiction in Australia which permits unions to bring prosecutions for alleged breaches of OHS legislation. Unions are not required to demonstrate that the prosecutions are in the public interest, meaning that there is the likelihood of industrial relations matters becoming unnecessarily linked to OHS matters and the potential for corruption and political interference in the criminal justice system, as the decision to prosecute cannot be reviewed (as there is no public accountability for it) and there is no restriction on how the moiety of the fine is used.

OHS legislation should separate the functions of inspection and prosecution. The ABA believes that OHS legislation should provide for the establishment of a new independent prosecutor, possibly as part of the Department of Public Prosecutions (DPP). This would have a number of advantages, including:

- Ensuring that there will be a separation of the investigative and prosecutorial functions in the criminal justice system as the decision to prosecute will be made independently of those who are responsible for the investigation;
- Applying existing expertise (and supplementing specialist knowledge) within the DPP in respect of the prosecution of civil and criminal matters;
- Freeing up the OHS regulator to focus on compliance and enforcement, but importantly, to provide specialist guidance and assistance to businesses in compliance matters, particularly to small employers who do not have the resources to obtain specialist consulting and risk management advice;
- Removing the ability for unions to be involved in OHS prosecutions and hence decreasing the likelihood of industrial relations matters becoming unnecessarily linked to OHS matters;
- Removing the ability for unions to use moiety of a fine for purposes other than occupational health and safety and decreasing the likelihood that credibility of the OHS regime is undermined⁵; and
- Ensuring prosecutorial independence as a necessary safeguard against the potential for corruption and political interference in the criminal justice system.

8.6 Moiety

The payment of a moiety gives rise to a potential conflict of interest where there is no separation of the functions of inspection and prosecution.

An OHS regime that provides for prosecutions of OHS offences to be taken by the DPP means that no person or body should be entitled to a moiety in relation to OHS claims, on the basis that:

- The objectives of the OHS legislation would be sufficiently advanced if such matters are prosecuted by a completely independent prosecutor;
- The cost to the DPP, which is publicly funded, in bringing the claims are not as great as they would be for non-publicly funded bodies, due to economies and efficiencies arising from the DPP's experience; and
- The DPP is publicly funded and does not rely on income from successful prosecutions.

Prosecutions would be, and would be seen to be, more open and transparent if the prosecutor were independent and unable to derive any financial benefit from the conduct of a prosecution. This would promote impartial decision making and procedural fairness.

Notwithstanding, the ABA considers that to better promote good practice and continuous improvement in workplace health and safety, a Fund could be established that receives a portion of penalties and specifically provides further education, informational services and guidance to assist businesses to meet their OHS obligations.

⁵ If a union is able to use the moiety of the fine for purposes other than OHS, the credibility of the process is potentially undermined. For example, failure to restrict how the moiety of the fine can be used carries a risk that a union decision to prosecute OHS matters is driven by the desire to increase their revenue. As union memberships decline it is possible that the prevalence of union prosecution of OHS matters increases, not by a genuine desire to improve OHS, but by a desire to generate revenue.

8.7 Court jurisdiction

Where prosecutions can be heard varies across jurisdictions. Most jurisdictions follow the normal court system and appeals process of each jurisdiction, with cases taken before the Magistrates Court, then to the Supreme Court or the Federal Court, and then finally the High Court. However, some jurisdictions have prosecutions heard in the IRC.

Expertise and procedures adopted differs from court or tribunal. Entitlements and processes for appeal against conviction are also subject to the jurisdiction in which the prosecution is heard.

Given the severity of the penalties that can be imposed under the OHS legislation, there must be the ability to appeal to the Court of Criminal Appeal.

8.8 Liability of officers

OHS legislation provides that where a corporation contravenes its OHS duties, whether by act or omission, a director or other officer concerned in the management of the corporation may also be taken to have contravened the law. Interpretation of "officers" and the determination of liabilities differs across jurisdictions.

It is important that liability for individuals is appropriately contained and applies only where a director or other officer failed to take reasonable care (i.e. based on what the officer knew about the matter concerned; the extent of the officer's ability to make, or participate in the making of, decisions that affect the corporate in relation to the matter concerned; and whether the contravention by the corporate is also attributable to an act or omission of any other person).

There is a real threat to securing talented senior employees, to the detriment of the economic and competitive prosperity of Australia. Individuals should be accountable for individual responsibilities where individual fault exists. Therefore, liability for individuals must be limited to circumstances where the individual directly caused or contributed to the hazard or risk. Individual liability should allow for excuse where relevant events occur without an individual's actual or constructive knowledge of material facts and where relevant events are beyond an individual's control. Furthermore, the prosecutor should bear the onus of proving that the conduct of the individual was a direct and substantial contributing factor to the existence of the hazard or risk.

As a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct – that is, where they are "accessories". Furthermore, directors or other officers should not be criminally liable for misconduct by their company, unless they can make out a relevant defence. The law should not contain criminal sanctions on a strict liability offence without adequate defences. This position is also supported by the Corporations and Markets Advisory Committee (CAMAC)⁶.

8.9 Penalties

Penalties are most commonly imposed through fines. Currently, the penalties differ considerably across jurisdictions. Harmonisation of OHS laws should also include harmonisation of maximum penalties.

⁶ CAMAC (2006). *Personal Liability for Corporate Fault*. September 2006. p33.
[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/Personal_Liability_for_Corporate_Fault.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/Personal_Liability_for_Corporate_Fault.pdf)

8.10 Prosecutions – recommendations

The ABA believes that:

- OHS legislation should contain a hierarchy of criminal, civil and administrative remedies.
- OHS legislation should clarify the concept of “reasonably practicable” as part of the offence. In the absence of a “reasonably practicable” qualifier, it will be necessary to ensure that a “reasonable steps” defence is explicitly available.
- The prosecutor should bear the onus of proving that a duty holder did not take “reasonable steps” to secure a safe and healthy workplace. Where a duty holder has taken “reasonable steps” to comply with their obligations under the law in respect to a particular OHS matter, this should constitute a defence.
- OHS legislation should make it clear that it is not a breach of the law where the immediate risk was substantially caused by the intervening act of a third party acting unlawfully and/or in a manner that a reasonable person would not have reasonably foreseen in the circumstances.
- OHS legislation should provide for procedural fairness and prosecutorial independence. Prosecutions for OHS offences should be taken by a new independent branch of the DPP.
- OHS legislation should not provide for the payment of any penalty as a moiety. Alternatively, a Fund, where a portion of a penalty may be contributed to provide funding for specific education, information and guidance to assist businesses meet their OHS obligations, should be established.
- OHS matters should initially be heard before the Magistrates Court, and follow the normal court system and appeals process thereafter. A right of appeal to the Court of Criminal Appeal should be available in all cases, at least in respect of questions of law and jurisdiction.
- OHS legislation should define “officer” as consistent with the *Corporations Act 2001*. Individuals should not face ‘strict liability’ for offences under the law. Individuals should only be liable for prosecution of offences in circumstances where the individual is an accessory to a breach of OHS duties.

9. Other issues

9.1 Regulation making and codes of practice

OHS legislation should be principles-based. Regulations, codes of practice and guidance notes should be used to provide further detail to assist duty holders meet their OHS obligations. OHS principles need to be flexible enough to address different circumstances, yet balanced so that companies and individuals know what their particular responsibilities are.

Codes of practice and guidance notes are important mechanisms to provide additional interpretation and guidance on OHS standards. Codes of practice should be developed only for areas that can apply across industry sectors. Guidance notes should provide meaningful and practical guidance, which may apply for certain industry sectors.

Codes of practice and guidance notes should be developed by the OHS regulator in consultation with businesses, employers, employees and other workers.

Fact sheets, bulletins and alerts should be published by the OHS regulator to highlight emerging OHS matters.

9.2 Notification and reporting

OHS legislation should provide for the notification and reporting of incidents to the OHS regulator. Notification and reporting assists authorities to target their compliance and enforcement efforts; collect, interpret, and analyse information about OHS risks and hazards; and report information and statistics relating to health and safety.

However, the compliance burden on businesses should be minimised. Currently, notification and reporting requirements differ across jurisdictions.

9.3 Mutual recognition and cross-jurisdictional cooperation

Common standards deliver better OHS outcomes, greater efficiency and effectiveness, lower compliance costs and regulatory burdens, and improved harmonisation of OHS requirements across Australia. Greater consistency across jurisdictions provides significant benefits to both employers and employees. National consistency is of utmost importance for banks, as generally they are national employers.

Ideally, OHS legislation should be a single, national OHS law, administered by a single regulator. However, in the absence of this model, it is important that a form of mutual recognition or harmonisation of OHS standards and rules is adopted. For example, common requirements should apply to training, education and competencies; authorisations, licences, permits and registrations; incident notification and reporting; and other rules (such as specifications for first aid kits, etc). OHS regulators should have to justify why they deviate from common standards.

9.4 Other issues – recommendations

The ABA believes that:

- OHS legislation should contain regulation making powers. Sub-ordinate legislation is important to ensure that the primary legislation remains principles-based.
- OHS legislation should recognise the importance of codes of practice and guidance notes issued by the OHS regulator. Codes of practice and guidance notes should only be developed through initial and ongoing consultation with industry representatives and employee representatives.
- OHS legislation should allow the OHS regulator to issue fact sheets, bulletins or alerts on emerging OHS matters.
- Notification and reporting requirements should be streamlined, such as those contained in the *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Commonwealth) or the *Occupational Health and Safety Act 2004* (Victoria), but with greater information on definitions.
- OHS legislation should establish an effective reporting system, which minimises compliance costs and regulatory burden on businesses.
- OHS regulators should be required to improve cross-jurisdictional recognition, cooperation and information sharing.

10. Conclusion

The ABA supports a robust OHS system that secures safety, health and welfare in workplaces and promotes a safety culture. Compliance is not just a legal obligation, but is a desirable and necessary element of doing business.

In a number of respects, the OHS laws across Australia differ, compromising efficiency of regulation, creating unnecessary compliance costs and regulatory burden for businesses and the community, and undermining healthy and safe workplaces. A nationally consistent, fair and reasonable OHS system is essential for employers and employees in Australia.

The ABA believes that OHS legislation should not simply apply a 'stick' approach, but also apply a 'carrot' approach. The prevention framework of the legislation should include incentives for improving standards of health and safety in workplaces, such as recognising employers that maintain continuous improvement in OHS.

Compliance can not, and should not, only be achieved via the threat of enforcement or punishment. Depending on the nature of the issue that has arisen, it may be appropriate for a balanced approach to be pursued, such as information, advice or assistance, rather than issuance of notices, pursuit of prosecutions or other sanctions.

Compliance with OHS principles and standards promotes a healthier and safer workplace, generally meaning there are less workplace accidents and illnesses – providing benefits for employees, employers and the wider community.

11 July 2008

Australian Bankers' Association