NATIONAL REVIEW INTO MODEL OHS LAWS

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

Legislative Approach:

The Safety Institute of Australia (SIA) commends the Federal Government on commissioning the National Review into Model Occupational Health and Safety (OHS) Laws. The Institute considers that this review provides a unique opportunity to adopt a ‘top-down clean-sheet’ approach to establishing OHS legislation, as opposed to other approaches that, for example, might involve, in part, only extracting "the best" elements from existing Federal, State and Territory OHS legislation.

A ‘top-down clean-sheet’ approach would also enable the component parts of OHS to be clearly identified (by examining national and international benchmarks and trends) together with any potential or real "conflict of interest" areas. This would enable an exciting and timely "fresh approach" to be adopted that would firstly determine "WHAT is required by OHS legislation and associated (outcomes-based) regulations and guidance material" before identifying "HOW best to achieve it".

The SIA is aware that such an approach was successfully applied by the Federal Government some 15 years ago when considering the major elements that comprised the aviation industry. When regulation and services provision (Air Traffic Services, Rescue and Fire Fighting; and Airports) were contained with one piece of Commonwealth legislation many conflict of interest areas became apparent. The outcome was a major review that resulted in the separation of the regulatory function (Civil Aviation Safety Authority), service provision (Airservices Australia), incident investigation (Australian Transport Safety Bureau) and airport functions (Privatisation of Airports) from each other through the establishment, where required, of distinct and separate pieces of Commonwealth legislation and a tripartite structure.

The Civil Aviation Safety Authority (CASA) was established on 6 July 1995 as an independent statutory authority. Under section 8 of the, Civil Aviation Act 1988, CASA is a body corporate separate from the Commonwealth.

CASA's primary function is to conduct the safety regulation of civil air operations in Australia and the operation of Australian aircraft overseas. It is also required to provide comprehensive safety education and training programmes, cooperate with the Australian Transport Safety Bureau (ATSB), and administer certain features of Part IVA of the Civil Aviation (Carriers' Liability) Act 1959.

The Civil Aviation Regulations 1988 and the Civil Aviation Safety Regulations 1998, made under authority of the Civil Aviation Act, provide for general regulatory controls for the safety of air navigation. The Civil Aviation Act and CAR 1988 empower CASA to issue Civil Aviation Orders on detailed matters of regulation. The CASRs 1998 empower CASA to issue Manuals of Standards which support CASR by providing detailed technical material.

The Chief Executive Officer manages CASA, and is responsible to the Minister for Infrastructure, Transport, Regional Development and Local Government.
Tripartite structure

CASA, the **Department of Infrastructure, Transport, Regional Development and Local Government** (which includes the Australian Transport Safety Bureau (ATSB)) and **Airservices Australia** constitute a tripartite structure for providing safe aviation in Australia, each with separate and distinct functions, working together as an integrated system.

CASA and the ATSB have signed a Memorandum of Understanding (MoU) that sets out safety objectives and underlying values to guide the ongoing relationship between the two organisations. The MoU will maximise aviation safety outcomes and enhance public confidence in aviation safety.

Consideration should be given to separating regulatory activity from service provision in the OHS legislation to provide clarity around the roles of regulators and service providers and to improve safety performance, as has been demonstrated in the Aviation industry.

Scope, Application & Definitions:

Q3. What is an appropriate title for the model OHS Act?

It is noted that the principal South Australian legislation is titled Occupational Health, Safety and Welfare Act. This minor variation on the title compared with that of other jurisdictions provides a more holistic description of the intent of the legislation. The use of the term ‘Wellbeing’ may be a better descriptor than Welfare.

Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?

At this stage yes so that harmonisation between all States can be applied to OH&S. Rail has a National Rail Safety Reform Bill but already some States in their revised Rail Safety Bill’s have not aligned directly with the National Bill. Once each Regulator had applied their own National Framework, then a review could be conducted to see what harmonisation of all legislation could be introduced.

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

Consideration should be given to the model OHS Regulations including Mine Safety legislation, which in all States other than Victoria is separate to the principal OHS legislation (some states such as NSW have two sets of mine safety legislation - covering coal mining and hard-rock mining). Regulatory issues such as penalties, definitions, duty of care should be identical in both sets of legislation in each

State/Territory. The Commonwealth should also do this for any legislation covering off-shore platforms and shipping under their jurisdiction.

Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

Definitely. At present the overlap between various jurisdictions creates uncertainty for business operators as it is difficult to ascertain what is required by various Regulators.

Standardisation of definitions:

Consideration should be given to adopting globally accepted definitions of key terms (refer ILO/WHO definitions 1995) to align Australian practice with global practice.

Alternatively, we suggest harmonisation with ISO guide 73 (risk management definitions) so that OHS legislation is compatible with ISO 31000 which will replace AS4360 next year. At the moment the difference in definitions between legislation and AS4360 causes problems because many organisations require risk management according to AS4360 in OHS management systems.

A glossary or dictionary that is comprehensive enough to capture commonly used (but variously defined) terms such as, but not limited to, confined spaces, work at heights, safety professionals/safety advisers, high risk work, suitably qualified OHS advice, volunteers and outworkers would significantly clarify and enhance a common understanding of these terms.

Definition of 'Suitably qualified':

A definition of "suitably qualified OHS advice" must be introduced into OHS related legislation to underpin the professional competency required to execute the requirements of such legislation.

The Victorian Code of Ethics and Minimum Service Standards for Professional Members of OHS Associations, launched by the Health and Safety Professionals Alliance (HaSPA) at the SIA's Safety In Action 2008 Conference in Melbourne on 29 April 2008 provides an excellent framework that the SIA considers has immediate national application. A copy of this documentation is attached for your consideration.

The background to this initiative started in late 2007 when WorkSafe Victoria identified opportunities to improve health and safety outcomes in Victorian workplaces by working with OHS associations and OHS education providers. After meeting to discuss and explore these opportunities it was agreed to establish HaSPA.

HaSPA is an alliance of OHS associations and OHS education providers facilitated by WorkSafe Victoria. HaSPA aims to:

- Promote OHS as an area of professional practice;
- Enhance the quality of OHS professionals;
- Improve OHS serve delivery to workplaces; and
- Improve OHS in Victorian workplaces.

The objectives of the Code of Ethics and Standards are to:

Ø Develop and maintain minimum standards of ethics and service for professional members of OHS associations;
Ø Provide guidance for professional members of OHS associations on ethical and service standard issues; and
Ø Strengthen and extend professionalism and promote self-regulation across OHS associations.

HaSPA and the associations and organisations it represents believe working with WorkSafe Victoria will deliver sustained OHS improvements across Victoria and help reduce workplace injury and disease.

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

Consideration should be given to expanding the definition of duty holders to better address the changing nature of the work environment and the responsibilities of various parties not previously addressed.

Clarification of the obligations of duty holders is particularly required for those involved in labour hire/onhire where the person conducting the work may be several administrative steps removed from the person who controls the location of the work and for volunteers and persons undertaking work experience.

In addition, consideration should be given to including persons who have control of the work environment in non-traditional workplaces and 'mobile' workforces such as home-help/domestic support services associated with community support agencies, and workplaces where the employees' management representatives are not present.

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

General duties need to be aligned to any area where work is conducted in association with that business.

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

General duties need to be applied to cover work areas where public have access, however, this needs to be carefully considered in terms of the degree to which control is able to be exercised and in those circumstances where behaviour of the public is outside strict controls by the duty holder.

Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

Yes, especially through the extension of labour hire organisations providing direct labour to a host employer. Job sharing arrangements to cover transitional matters need to be addressed as well as the need to cater for people who work from home or in alternative accommodation. There also needs to be OHS law to cover itinerant workers on fly-in/fly-out contracts.

Q13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

Issues need to be addressed as separate issues when they are identified. Emerging or evolving hazards anticipated by the SIA include:

- melanomas and other skin cancers
- alcohol and drug management,
- fatigue management,
- change management
- ongoing health issues
- biological hazards such as bird flu, horse flu or other potential pandemics.

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

Who is a worker, what work are they undertaking and what competency or training do they need to undertake that work.

Question 16: Should the model OHS Act include a 'control' test or definition? If so, why and when should it be?

There is a clear need to define the term 'control' and to identify a test which determines its applicability. The Victorian 2004 Review (Maxwell QC) recommended that 'control' be defined and included in a list of factors to determine what is 'reasonably practicable'. That recommendation was not implemented and worthy of further investigation within the notion of a set harmonised laws.

Question 17: What should the role of control be in relation to determining who is the duty holder, the nature of the duty, the extent of the duty and the defences?

Control should stay with the primary duty holder, based on contributory or 'influence' to what is reasonably practicable to the activity. The primary duty holder would have to be clearly defined.

Definitions of duty holders should be clear and have an explicit relationship with the definitions of employer/worker/manufacturer/designer.

Qn. 18: Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

No; as stated in Q 16 – 17, explicit duty holder roles and responsibilities down from employer to manager and employee will negate the requirement for delegation. There should be no available opportunities to relinquish control if duty holder descriptions are thorough. Delegation should allow the responsibilities to be shared, promoting the uptake of OHS by middle management. If the option was Yes, there may be a requirement to introduce a contract to take control of all duties.

Qn. 19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

Yes. Expand the definition of duty holders to capture the changing nature of work environment. In addition to existing duty holders (manufacturer, supplier, installer, designer, owner, etc) consider including labour hire/online services, persons who control non-traditional workplaces such as domestic premises and mobile workplaces, such as home help, community support agencies, and other workplaces where an employee's management representatives are not present. See also Q 20.

With regard to multiple duty holders, it may be necessary to include a clause that dictates that the multiple duty holder must adhere to all aspects of their applicable multiple duty holder responsibilities, and, where these are considered contradictory, the highest common denominator is applicable.

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

Yes, most definitely. However, we believe that it is important to clarify the obligations for duty holders involved in labour hire/on hire processes, as they may be several employers removed from the person who controls the work location. Moreover, asset owners should also be considered as they have far greater influence on workplace conditions.

Additionally, it may be 'legally' arguable that volunteers, work experience or visitors are considered outside the 'employment relationships' definition. It would be more solid to explicitly state all duty holders rather than rely on 'interpretations'. There may be a need to clarify the obligations for persons moving onto workplaces for work experience.

Qn. 21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Define a 'worker' as an individual who carries out work, whether for reward or otherwise under: (a) an arrangement and (b) in a business or undertaking.

In this context an individual is an employee, independent contractor, outworker, volunteer and/or a person undertaking work experience and this should be explicitly covered in the model OHS Act. The duty of care to visitors to workplaces/areas of

control and a visitor's duty of care to others needs also to be included. There will be a requirement to define the meaning of 'outworker'.

Qn. 23: How and to what extent should the model OHS Act specify an employer's duty of care?

The duty of care should be specified under a general obligation requiring employers to ensure the health and safety of employees to the extent that is reasonably practicable. Follow the specific duties as spelt out as per Section 3.4 of the Issues Paper. We agree that employers must take reasonable care to ensure their own health and safety at work.

Qn. 24. To whom should these duties be owed?

Employees or workers, however defined, must include volunteers, outworkers and persons undertaking/performing work experience/visitors/contractors.

Qn. 25: How and to what extent, should the model OHS Act specify worker's duties of care?

As per current legislation; see also Q 16.

Qn. 26: Should the model OHS Act include duties of care for persons who are not performing work (eg visitors to a workplace, members of the public)? If so, what should the duties be?
Yes. Refer also to responses to Q 19 and 21. All state and territory legislation should be reviewed and the highest common denominator is utilised for **all duty of care definitions.** Most state legislation has this aspect well covered.

Qn. 27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Yes, however, it is our opinion that it is essential that the appointment of such a representative does not convey the impression that the responsibility and obligations of an entity have been devolved to the nominated person. As an example, the Queensland model with the WHSO seems to work well, but it is not clear whether there has been any review to determine the effectiveness of this model in improving workplace safety performance or its impact on management responsibility and its involvement in workplace safety performance. Consideration of the role that a "Responsible Officer" has under SA Legislation may be a useful further reference.

If specific responsibilities are assigned then any person so 'appointed' (as opposed to employed) must have mandatory, legislated training prior to commencement.

A requirement for compulsory and standardised training for managers and supervisors should be legislated. IOSH research in the Construction Industry – a report submitted to the IOSH Research Committee in the Construction Industry ***(Cameron, I. Hare, B., Duff, R. (2008) Superior safety performance; OSH personnel and safety performance)*** has shown that OHS training for management personnel representatives significantly improves workplace safety performance.

Qn. 28. What should the liabilities of such appointed persons be if the responsibilities are not met?

Liability should be assigned to Corporations, and only to individuals in the event of deliberate, negligent and/or reckless practice.

Qn. 29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

Responsibilities of each duty holder would apply and similar conditions apply as per Q 19 in relation to multiple duty holders. Specific duties and responsibilities/accountabilities could be stipulated through the employment/engagement contract.

Qn. 30. Should the model OHS Act include positive duties for officers of bodies corporate?

Yes. Issues such as the management of asbestos in older buildings would not be identified or met if these responsibilities are not documented. The obligations of Bodies Corporate should align to those of owners/controllers of premises and the duty of care should **not** be able to be delegated or relinquished and will encourage ownership of the safety systems being applied.

It is noted that the Building Regulations impose certain obligations on bodies corporate. There is much confusion emerging as to whether the OHS Act applies to residential type Bodies Corporate. A clear definition is required within any proposed new Act and it should consider what is already contained within existing building regulations across all states.

Qn. 31 Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom and under what circumstances the duty is owed? If not, how could this be clarified?

Yes; this could result in multiple duty holder situation; see Q 19. Consistency with the definition of control within any proposed sub-ordinate regulations is essential, as is consistency with how terms are defined in other legislation and regulations such as those covering Dangerous Substances.

Qn. 32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

Yes. Ensure there is consistency in the use of the terms ‘at work’ and ‘workplace’, or any premises under employer control. These terms should be clearly defined in the legislation.

Qn. 33: Should the model OHS Act establish H and S obligations for various activities which affect H and S for the whole life of an item, structure or system (ie conception to disposal)? If so, what should the duties be in relation to these activities?

Yes. Design, manufacture, importation, supply (including re-supply), distribution, installation, erection, decommission and disposal. Some of current jurisdictional legislation (e.g. from the ACT) expresses these duties quite strongly and should be similarly followed.

Qn. 34. How should the model OHS Act deal with situations where relevant upstream activity occurs in another jurisdiction or outside Australia, for example where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

This area has always been somewhat difficult to manage. Clearly there is a need to clarify and comprehensively define the term ‘effective control’ when it comes to design, manufacture, importer, etc of plant and equipment; and to <u>ensure constraining ‘proportionality to the liability’ on all duty holders</u> across the whole lifecycle of an item, system or structure.

Manufacturers should not be forced to accept deficiencies in the design work undertaken by another employer ie a designer; there must be appropriate ‘gate points’ in the whole lifecycle process. An example - this often applies to Defence when it acquires overseas foreign military equipment via off the shelf processes (Commercial or Military), where the manufacturer has no presence in Australia and results in Defence assuming a broad range of responsibilities as manufacturer, designer and employer. It is often extremely difficult and costly to manage.
<u>Note:</u> See also a recent Defence Legal Brief, Feb 2008, from Blake Dawson, *Defence Contracting: OHS Issues* which discusses these difficulties in some detail.

Qn. 35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand and gratis) or temporarily (loan or hire)?

It should be defined to include re-supply as this is the common interpretation of the requirement in industry. It is a reasonable requirement (and is common practice in industry) that second-hand and loan or hire equipment is subject to the same conditions of supply as initial supply. That is, the vendor (or the lender or hirer) undertakes appropriate investigation into fitness for safe use, makes good any known defects and provides safe operating procedures, technical and design parameters and maintenance instructions. In practice, plant that is supplied ‘gratis’ is typically supplied on condition that it is accepted ‘as is’ and no warranties are made as to its fitness for purpose. The receiver acknowledges these caveats in writing. Relevant documentation about safe use, technical and design parameters and maintenance is supplied.

It would be useful to investigate the experience in overseas jurisdictions such as Europe including UK or Canada. Is there some overseas benchmark which could be adapted to suit the Australian context/requirements?

It is noted that supply is a major issue as ownership of plant and equipment may not necessarily sit with the particular workplace.

Qn. 36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

Duties covering decommissioning and disposal of plant, and disposal of hazardous substances should feature as a separate duty.

<u>‘Reasonably Practicable’ & Risk Management:</u>

Qn. 37: Should the test of “reasonably practicable” be included in the model OHS Act?

Yes. The concept of reasonably practicable must be promoted and the definition must be defendable and explicit so that there are ‘no legal loopholes’. Again, there is a need to ensure that there is consistency of language and order of expression between legislation and regulations.

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

Comply with the relevant requirements of risk management principles, methods and procedures by identifying and assessing risks to safety that may arise in the activities or operations to be undertaken.

The level of control must be consistent with the level of risk. High level consequence (fatality, serious injury) must be regarded as being the determining factor in selecting effective risk control.

Proposed definition: Reasonably practicable can be defined as:

a) having regard to: the severity of any injury or harm to health, the degree of risk (or likelihood) of that injury or harm occurring;
b) how much is known about the hazard and the ways of reducing, eliminating or controlling it; and
c) the availability, suitability and cost of the safeguards.

The degree of risk *(likelihood x <u>consequence</u>)* of injury or adverse effect must be balanced against the cost in terms of money, time and physical difficulty of taking measures to reduce the risk. If the quantified risk of injury or adverse effect is insignificant compared with the measures needed to mitigate risk, *then it is probable that no action needs to be taken*. Also to be considered is the knowledge of a solution (to reduce the risk), the availability of a solution (to reduce the risk), the adherence to approved codes of practices, the application of industry standards and cost.

[Ref: ABR 6303 Royal Australia Navy – Navy Safety Systems Manual V4. The words in italics are an SIA variation on the base content of this ABR]

Qn. 40. Should control be an element of the standard? See Chap 3

Yes. Due to current inconsistent application and interpretation across the jurisdictions, we agree with the notion as discussed within the Chapter 3 of the Issues Paper. It is recommended that 'control' be defined and included as one of the factors to determine what is reasonably practicable.

Qn. 41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

This could appear in regulations that can provide examples or 'tests' to be applied.

There are many examples outlining compliance in the guidance material provided by the jurisdictions now. Collating the information and then aligning it with the new national model would assist workplaces and promote continuous improvement.

Guidance material that assists workplaces is an opportunity for the regulator to be seen to be making a positive contribution to workplace safety activities. If the only connection with the regulator is through the inspectorate following an incident, the wrong message will be received by the business community.

Qn. 42. Should 'hazard' and 'risk' be defined in the model OHS Act?

Yes. There is a need to ensure consistent use of terms throughout the Act and in any subordinate Regulations. (refer also to our previous comments on standardised definitions)

Include a reference to hazard management principles and processes [identifying hazards, assessing and controlling risks]. i.e. employee will be exposed to **hazards** not risks in the first instance.

Qn. 43. Should a definition of "reasonably practicable", or an alternative standard, include a reference to risk management principles and processes (haz. id, risk assess. and risk control)? If so, how?

Yes. See also Q 42.

A definition of the standard to be applied (which may be ALARP) needs to be included and that needs to be aligned to the principles of risk management. The hierarchy of controls then need to be applied at the respective level of practicality.

It is essential that use of the term 'hazard' is not supplanted by the term 'risk'. Hazard management principles are applied before risk management - you identify hazards first, then undertake a risk assessment.

Hazard has no time base, that is, employees will be exposed to **hazards,** not risks, in the first instance. A key principle which must be clarified is that the management of

risk explicitly includes systems for identifying and assessing hazard. Definitions must be aligned to those in the Australian Standard (or to whichever standard definitions are adopted, such as the ILO definitions).

Qn. 44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

Yes. There should always be provisions for employers to come up with a range of solutions, as opposed to always using the hierarchy of controls. Refer back to fundamental principles and/or reasonably practicable. Ensure that there is consistency of language and order of expression between legislation and regulations.

Consultation, Participation and Representation:

Qn. 45: What provisions should be made in the model OHS Act for consultation?

Duty holders should be responsible for consultative arrangements that promote effective and constructive dialogue between management and employees. Employers could be given latitude in the choosing a method of consultation that fits their business. However, the Act should dictate that consultation must involve employer management reps, employees and/or their representatives.

All state/territory legislation covers this adequately and the highest common denominator could be utilised, however, it is noted that consultation requirements in Commonwealth OHS legislation define evidence-based outcomes. Effective consultation between the parties involved is more important than the requirement for structured committees.

The concept of effective consultation is open to interpretation. The availability of guidance material based on identified good practice (rather than prescriptive requirements) would significantly enhance consultation in workplaces and provide the basis for enforceability of a required practice.

Qn. 46. What are the work relationships to which a consultation provision should apply?

All work relationships. The changing nature of work means that a workforce is not necessarily on the site controlled by its employer. The issue of outsourced staff and protection of the people through inclusion in consultation in all workplaces needs to be addressed.

See also above - Q 45

Qn. 47 Should there be different levels of consultation required for different work relationships?

Yes. The model of formal consultative frameworks does not function when the workforce is as fluid and dynamic as it is in modern practice. Refer to response at Qn. 45 above about the need for guidance material on flexible models of known better practices in consultation.

Qn. 48. How should consultation be provided for:

- **A multi-employer site;**
- **An employer with operations across more than one worksite;**
- **Small business;**
- **Remote workplaces;**
- **Precarious employment; and**
- **Workers from culturally & linguistically diverse backgrounds.**

See also Q 46 & 47.

Each situation needs to be evaluated to determine the most effective means of communication.

Consultative arrangements should be developed by agreement between the following parties: employer principals, employees, contractors and their principals, labour hire personnel and their agency, and, any other parties to the work arrangement.

Consideration might be given to creation of rules of evidence to verify consultation arrangements such as records, meetings, timeframes, degree of relevance, communication arrangements to multiple or remote locations and how cultural and language matters have been addressed.

Q49. Should there be a requirement for establishing HSR's and HSC's?

This application does not suit all work operations and may not be effective in some areas. Provided a means of consultation is applied and results are achieved, the formal means is irrelevant.

Q50. What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

All need to be involved in the risk management process affecting their operations and be party to pre-work discussions relating to the controls to be applied.

Q51. How, and in what circumstances should HSR's be appointed or elected, and HSC's established?

Where there is relevance in this application it should be a majority decision that determines the most appropriate means of communication.

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

All personnel to whom the HSR/HSC has a responsibility to apply relevant safety standards for.

Q53. What should the powers and functions of HSR's be?

Facilitate the application of safety standards at the worksite and assist in continual improvement.

Q54. What should the structure and functions of HSC's be?

Equal representation from key stakeholders involved in the worksite operations. A person with decision making responsibilities needs to be included.

Q55. What training and qualifications should members of HSR's and members of HSC's have?

Training in legislation that covers their sector of industry should be mandatory. This may entail more than just one piece of legislation. The people should have a working knowledge of risk management as this is the most critical tool in the management of safety at the workplace. Note also comments at **Qn. 27** regarding mandatory training for managers and supervisors. A nationally consistent approach to the content of HSR training, and the costs, associated with it would be much better controlled under a national OHS legislation.

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

The specific requirements don't need to be prescribed but could be contained in relevant guidelines.

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

The specifics don't need to be prescribed other than to say the practice needs to be applied. How the process is applied needs to be contained in the safety management system of the employing organisation.

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

There needs to be a very clearly stated position if it is to remain, that clarifies exactly the position of right of entry as currently in some states, right of entry can only be allowed if there is dual accreditation in both the local legislation, and with the Workplace Relations Act right of entry in other words dual accreditation.

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

When the health and safety of people is being put at risk and the issue is clearly within the guideline of entry framework established between the respective parties.

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

The people involved in the operations and those enacting the right of entry provisions need to consult on the issues identified, confer on the actions to be taken and determine the most appropriate course to address the issue. If this results in the worksite operations ceasing then an additional party (usually the Regulator) needs to

be involved. This needs to be qualified on the basis that the person exercising the right of entry must follow any and all site based OHS provisions for their own protection and the protection of others.

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

Those currently contained in the (NSW) OHS Regulations should be able to address relative safety issues provided the Regulator engages in a co-regulated framework and not solely as a Regulator.

Q64. When should issue resolution procedures be activated?

When the health and safety of people are put at risk and the matter is unable to be resolved between the respective parties involved in the worksite operations.

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

In the Regulations

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

By having the issue included in the safety management systems needed to be applied at the worksite.

Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

Yes provided a risk assessment is conducted in consultation with all other relevant parties and clearly shows that effective controls are not being applied.

Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

If that is the means by which the safety management system stipulates when and how work will cease then that is what needs to be applied. However there may not be an HSR at the site so alternative provisions need to be determined.

Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?

Provided the correct protocols are applied and their actions are supported by fact through the risk management process.

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

It should be contained in supporting regulations.

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

The Act should include reference to the need to ensure people who raise safety concerns are protected under the Act and any case of victimisation or discrimination will not be tolerated. It may not be the employer who contributes to the above actions so the criteria needs to include other employees, clients and/or owners of premises if they are not the direct employer of the employee involved.

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

Any action needs to go to a third party and should be undertaken through the Regulatory body and if substantiated heard before a Workplace Commission or tribunal.

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

Yes provided the criteria are clearly defined and based on the relevant civil standard.

Q74. Who should have the burden of proving relevant elements of offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?

Relative to the authority under which the issues are applied and based on the relevant civil standard.

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

Yes, the same as other laws currently in place across the country.

Q76. What remedies should be available to the victims?

If termination had resulted it is not likely that reinstatement would be a viable option so a financial penalty imposed on the person instigating the victimisation or discrimination could be applied.

Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?

Yes. Refer Q72 response.

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

Not if the relevant issues impacting on the various employment modes are sufficiently covered.

Regulator Functions, Powers & Accountability:

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

Yes. Regulators are needed to develop applicable laws in consultation with key stakeholders. They need to enforce the legislation where required but must assist industry representatives have a clear understanding of what is required however it is recognised that systems need to protect the people providing information to industry.

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

Yes. Each Regulator needs to set out the terms and conditions of their enforcement and prosecution policies and consult with industry representatives how they are to be applied.

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

Yes, provided it assists industry representatives to understand the Regulator's application of the relevant legislation, along similar lines to the process of Private Tax Rulings as provided for under the Tax Act.

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

Yes to enable open discussion on key issues. The Regulator needs to be seen to be active and to apply constructive improvement mechanisms as well a robust enforcement.

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

By providing set criteria for the appointment etc of inspectors including training and recognised qualifications and competencies for the tasks to be undertaken.

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

Yes as this is one area that industry is seeking more information in relation to workplace safety issues.

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

No, this could result in ad-hoc management of the process through different streams.

Q87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

Yes if it is subsequently shown or proven that the original document contained incorrect information.

Q88. What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?

There needs to be a clearly defined process for when people request a review of any notice or instrument issued by the Inspector. The matters subject to review are those that have some supporting information as to the accuracy of the content of the information contained within the original document. The internal review mechanisms that reside within workers compensation legislation may be a useful point of reference.

A further appeal mechanism may be available through an OHS Ombudsman.

Compliance & Enforcement:

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

Yes provided the actions within prescribed timeframes are clearly identified and understood by all parties to the notice or undertaking.

Q91. Should these be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?

The Act provides offences that may be committed and the process of prosecution. If the offence is a blatant disregard for the safety of people at work then prosecution may be the only course of action to be taken. If other enforcement measures would have a suitable outcome to address certain issues then an enforcement framework should be contained in relevant guidelines.

Q92. What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?

It should be contained in the Act that such instruments may be issued by an Inspector.

Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?

No as this responsibility should lie with the offending party given that to rectify the matter they may need to seek assistance or guidance from the Regulatory authority.

Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?

Notices may be reviewed by the Regulatory authority if the information contained on the form is proven to be incorrect.

Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?

Yes but this would be subjective. The timeframe for a Prohibition Notice is dependent on the corrective action being taken. Improvement Notices should have a defined period if the activity is to be continued.

Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Given that there is limited application by the states of this form of penalty, it should be carefully thought out in regards to when it would apply, the precise offences to when it would apply and a set monetary figure. WorkSafe Victoria have Infringement Notice potential in the Act but not administered in the field, often this could be quite a specific deterrent to management in a workplace. If a fine of, say $1000, was issued for an office that should have been managed, it will in reality often require higher approval to be paid, this will in effect bring this issue to higher management authority, and may cause them to re-act more positively towards managing their risks more effectively and becoming more compliant.

From a national perspective the offences and penalties must be uniform and agreed on and applied universally.

Proceeds from the imposition of financial penalties for non-compliance should be channelled into research and preventive activities, thus promoting a continuous improvement approach, or alternatively, used to fund community activities that will enhance safety, such as OHS education for apprentices and secondary students.

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

Yes. This is a constructive and effective alternative which can have a lasting impact, particularly if the undertaking involves an activity or commitment to the local community. It could be applied to lesser offences and should not include those incidents which have resulted in serious injury or where a blatant disregard for common practice has been shown.

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

No.

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

Both

Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

Those that are intentional breaches of the legislation should have the people involved subject to criminal proceedings. Where it is evident that a safety systems process has been breached and no significant intentional breach of safety was applied then the process should be retained under civil proceedings.

Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

Magistrate's Court for most minor infringements when intentional breach was not evident. Supreme Court for all others.

Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

It appears that the knowledge and skill level of the judiciary in relation to the prosecution of workplace injury and illness produces wide variance in severity of penalty and interpretation of the concept of 'reasonably practicable' across jurisdictions.
The creation of a specialist safety court or tribunal has the potential to provide more informed judgement of alleged non-compliance, thus underpinning a continuous improvement approach. If complemented by standardisation of penalty across all jurisdictions this approach would also provide more certainty for employers operating across jurisdictions.
There may also be a mediation role through an OHS Ombudsman

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

The Regulator or possibly the person injured in any workplace incident.

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

Advice of a prosecution should be lodged with the employer within two years of the incident unless a special hearing allowed an extension of time. The timing of the prosecution and the handing down of the findings also needs to be determined as cases currently can only be finalised after years of processing.

Q114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?

Yes. Evidentiary rules should follow standard judicial practice and rules.

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

If the respective document is detailed in legislation and through the non-application of part of the process an incident occurs then the employer needs to defend why they failed to comply. The Regulator needs to have means by which the content and application of the various documents can be conveyed to those involved in the industry.

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

"So far as is reasonably practicable" is that which should be applied.

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

The prosecutor needs to prove that the standard was not applied.

Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?
No. The prosecutor needs to be able to prove beyond reasonable doubt that an offence was committed.

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

That it was reasonable or practicable for the employer or their representative to ensure that an action was undertaken by a person not directly under their immediate control.

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

Yes as a corporation should have access to greater resources than an individual.

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

Yes, if that officer willingly, negligently or knowingly contributed to the breach of the legislation.

It is noted that there have been instances where a business which has an impending prosecution has ceased operations before a prosecution is brought. Consideration should be given to ensuring the continuation of the liability of officers/principals even if the entity ceases operation.

Q123. How should “officer” be defined?

Consideration might be given to the provisions contained in the Companies and Securities Act in regard to Directors liabilities.

Q124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

If a person (an officer) contributed to an offence and it can be proved they acted outside of corporate guidelines then that person who has offences laid against them and the proof of guilt should lie with the prosecutor.

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

Did the officer contribute to the act or omission? If yes, then an offence may have been committed.

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

Yes the same as that which apply to others. Was it reasonable and practicable for the person to be able to comply with the provisions?

Q127. What should the approach to officers of unincorporated associations or volunteer officers be?

A national standard of competence for Volunteer Officers might be a useful innovation. The test for these people should be the same as for incorporated bodies.

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

Those serious offences where a monetary penalty would have an impact on the organisation should be applied evenly across the country. For other offences penalties that can add value to the OHS process should be applied.

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

Maximum fines can be applied for some cases but there is a need to move away from just the fine process. Legal undertakings, community work could also be applied.

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

Yes the more serious the offence and the greater the degree of damage the greater the penalty (fine or otherwise) needs to be.

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

No. The actions of the person who has failed in the process should determine a penalty for the damage resulting.

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

Yes. There should be a specific level of increase for repeat offenders perhaps linked to an original category of fine level, i.e. level 1 fine for serious injury has say 3 bands for repeat offenders – band 1 for first time repeat band 2 for 2nd time repeat, and band 3 or those that continue to re-offend.

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

Consistent outcomes may often be only achievable through similar issues and a thorough understanding of OHS compliance and practice in workplaces. The creation of a specialist court (refer to our response to Qn. 107) could remove this anomaly, or, the States could be required to bring their penalties in line.

Q134. What penalty options should be available in addition to or instead of fines?

Undertake community programs to improve safety in certain areas, requirement to develop technical elements that can prevent similar incidents, requirements for special programs to be developed and rolled out to address key health and safety issues.

Q135. Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?

If the offence and outcome is so serious that a person should serve a period of time in prison then there is a need for clear guidelines that are consistent with other offences of a similar nature i.e., culpable driving causing death compared to industrial death not involving recklessness or negligence.

Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?

Yes if that is the outcome of a workplace incident but it needs to be specific and occurring as a result of reckless intent.

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

Under OHS legislation unless the charge was for industrial manslaughter in which case the issue should be dealt with under the Crimes Act.

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

The consequence of the breach will be revealed during the hearing and with victim impact statements. These, together with the degree of culpability, should determine the penalty for all breaches. The legislation needs to determine what people/organisations need to comply with. The courts need to determine the guilt or otherwise of a person/organisation who may not have complied.

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

GENERAL COMMENTS

Other Issues:

Federal vs jurisdictional OHS legislation:

Many contributors to this submission have commented on the practice of other (larger) countries which successfully control OHS through a single piece of Federal legislation.

It is understood that in Australia this would be difficult to achieve due to Constitutional arrangements.

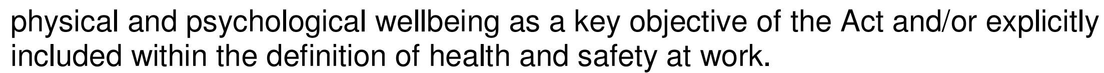
We note the undertaking by COAG for each State and territory to enact or give effect to their own laws to mirror the model OHS legislation and regulations. Further, if any Commonwealth, state or territory government wanted to amend its legislation or introduce legislation that would affect the operation of the model OHS laws it would have to submit a proposition to the Workplace Relations Ministers Council for consideration.

The National Rail Safety Reform Bill developed by the National Transport Commission was supposed to be the catalyst for the States to adopt that document and develop their own Rail Safety legislation from it. Unfortunately by reference to the respective State and Territory legislators they in turn have developed their own State based legislation which does not at all times mirror the National Bill.

We note the experience of the Rail Safety Reform Bill and how the lack of a requirement such as has been instituted by COAG may have affected the uptake of its provisions in each jurisdiction. It is suggested that the Rail Safety Reform Bill experience may provide a useful model to determine if any additional safeguards are required to ensure uniformity of adoption of model OHS laws to meet the objective of harmonisation.

Psychological wellbeing of persons in a workplace.

We consider that inclusion of an explicit reference to the psychological wellbeing of persons in the workplace is essential and that it must be defined as including both



physical and psychological wellbeing as a key objective of the Act and/or explicitly included within the definition of health and safety at work.

Standardisation of Regulations:

Regulations should be simple, standardised and harmonised across Australia with the flexibility to respond in a timely manner to emerging risk such as nanotechnology and biotechnology.

Guidance material:

Codes of Practice and Guidance material should be evidence-based and developed through research and resources funded by the regulator. The regulator would lead, co-ordinate and facilitate the development of materials by industry sectors and relevant professional bodies to capture known better practice and management of hazards common to particular industries. As well as industry sector and professional bodies, relevant technical experts/academics and unions should be involved.

The ASCC, Standards Australia or a body representing all states and territories might be a useful framework for development of guidance material for the harmonised legislation.

The involvement and approval of the regulator provides the authority for this guidance material to be enforceable.

Requirements of Small Business:

The particular requirements of small businesses require a strategic approach to supporting compliance. A model which identifies their requirements in dealing with regulators could be used to identify resource and assistance requirements to allow consideration to be given to whether government-brokered assistance could be provided by the regulator or private providers.

Research and development:

Research and development is critical to continuous improvement in OHS practice in Australia. Previous reference has been made to the role of the regulator in supporting research and the potential for the income derived from the imposition of penalties to be used to fund research and the implementation of trials.

Statistical database:

The development of a contemporary statistical database aligned to industry practice (not to claims data, as it is currently) is a critical element of continuous improvement in OHS performance. It is recommended that priority be given to the establishment of a National OHS Statistical database which provides contemporary information for research and benchmarking purposes.

Certification and education of OHS professionals and practitioners:

There are many providing OHS advice across Australia who have no formal qualifications. This impacts on the quality, reliability and cost effectiveness of the advice as well as depriving industry of workforce and productivity benefits that usually accompany qualified, knowledgeable and evidence-based OHS advice.

The legislation has been developed in the past with non-safety professionals in mind ie. for workers and employers. The way forward in harmonised OHS legislation should include minimum standards for certification of OHS practitioners and professionals providing independent OHS advice. Certification should be based on OHS education at the degree/graduate diploma level (or demonstrated equivalence), minimum experience with demonstrated competence and demonstrated continuing professional development. Such certification should also include agreement to a code of ethics and access to a peer-review process for managing any complaints about their work.

It is recognised that the detail of the process may not be appropriate for inclusion in the Act but the basic provision and expectation should be incorporated and related to the requirement for “engaging suitably qualified advice”.

OHS training in schools, universities and professional education and training for engineers, architects and managers should be legislated.

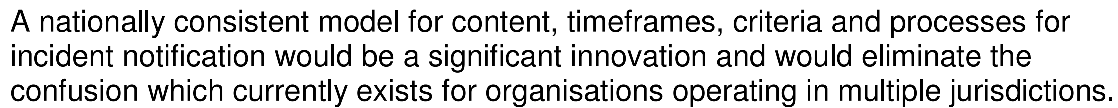
Cross functional information exchange:
It is noted that police officers often attend significant workplace incidents and are involved in preparation of a brief for the coroner in the event if a fatality. They also attend incidents which may not immediately be deemed to be workplace incidents (such as rail crossing incidents) and may be present at the aftermath of these incidents when the workplace safety regulator is not.
It is not clear how much, if any, of the information about causation and prevention of incidents attended by police only is then disseminated into the safety community. Consideration should be given to developing an information database to capture the lessons from these incidents and make it available to those with a legitimate interest in prevention of injury.

The Coroner’s database could be a useful source of vital information about causation and prevention if it were made available.

Notification of incidents:

There is significant variation between jurisdictions in the definition of notifiable incidents. Uniformity of notification requirements would simplify compliance for employers operating across multiple jurisdictions.

European models promote a ‘reverse notification’ approach whereby entities practising early reporting of incidents receive a reduction in penalty, where appropriate, for publicising the incident and effective methods of control. Consideration of options to encourage prompt reporting and an accompanying mitigation of penalties should be explored.



A nationally consistent model for content, timeframes, criteria and processes for incident notification would be a significant innovation and would eliminate the confusion which currently exists for organisations operating in multiple jurisdictions.

Notification of incidents is an important element in developing an evidence-based OHS body of knowledge.

Dissemination of information:

It is noted that in many jurisdictions information about the occurrence of a notifiable incident goes no further than the regulator. There is significant benefit to be gained in preventing incidents through timely publication of incidents and appropriate control measures. The creation of formal industry-based communication paths could be a useful tool in utilising the information reported to identify issues common to a particular industry and disseminating information about proven controls.

A system for National Industry Alerts:

Consideration should be given to the introduction of a system of national industry alerts, whereby an incident is publicised to the relevant industry, providing timely information which can be addressed by workplaces. It is not uncommon for a significant incident to go unreported to industry due to pending prosecution (which may take in excess of 12 months). Even then, there is no guarantee that information that is vital to the prevention of similar incidents is disseminated to those who have a legitimate interest. Typically, industry players exercise their networks and actively seek information from the organisation involved in a significant incident. This is an area where the regulator could and should play a role in ensuring that relevant information is distributed in a timely manner.

Fostering harmony:

Consideration might be given to the appointment of a national OHS Ombudsman to promote excellence in OHS and to ensure the highest possible standards of service delivery to all jurisdictions. The creation of such an office would provide a forum for all parties to seek guidance, mediation or question a regulator's decisions in a non-adversarial environment and provide constructive operational feedback to Regulators. An expansion of the duties beyond industrial relations of the existing Workplace Ombudsman may be a useful pathway to change.

SUMMARY OF RECOMMENDATIONS

- The Act should be titled the “Occupational Health, Safety and Welfare Act”
- The model OHS Act should maintain the status quo in each jurisdiction until clear commitments to reform are given by the States.
- The a model OHS Act should incorporate all industry specific safety legislation
- The model OHS Act should definitely contain provisions for improving coordination between safety regulators within jurisdictions
- Globally accepted definitions should be applied to align Australian practice with global practice
- Definitions should ensure consistency between legislation and those used in Australian standards related to risk management