

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

SPECIFIC COMMENTS

NGF Response to National Review into Model OHS Laws

Introduction

As a significant industry sector operating across the full range of Australian jurisdictions, the NGF operates in environments which are subject to not only different OHS legislation and regulations, but also different energy sector specific technical legislation and regulation – all having various degrees of regulation on the prescriptive / performance based continuum added to which are the different Workers Compensation legislation and regulations in each jurisdiction. The resultant division of resources or additional workload does not support the effective and efficient meeting of minimum standards as defined in each jurisdiction's legislation, and importantly also distracts and detracts from our efforts to drive genuine continuous improvement towards meeting and sustaining Zero Harm objectives across our industry sector. By way of introduction, the NGF offers the following points for consideration:

- Industry sector and organisation-wide Technical and OHS Management Standards and Systems are very difficult and costly to develop and maintain, with differences across state / territory boundaries leading to significant and unnecessary complexity and duplication - which also impacts on the clarity, useability and potential effectiveness of these systems in the workplace where it is critical that they make an ongoing difference to our performance in terms of the health and safety of people, and the safe / reliable operation of industry sector assets;
- Auditing processes should only be sized to verify with reasonable confidence that critical outcomes are being delivered - a "chock" just large enough to retain ground already taken on the continuous improvement journey to 'zero harm' and ongoing safe, reliable operations. The resources that are currently being consumed on satisfying / resourcing multiple external regulatory audit processes (e.g. those of the Technical Regulator, WorkCover Self-Insurance, legislative audits by State OHS Regulators) - all of which significantly overlap - are resources that aren't being invested in continuous improvement. The industry is unable to sustain this use of resources. National regulations and a single national regulator would reduce this auditing burden significantly (as well as increase the efficiency and arguably the effectiveness of regulators themselves).
- Currently with each state / territory and the Commonwealth resourcing the *production* of multiple sets of similar regulations with the same objectives but just enough difference to create confusion and thereby require an individually tailored approach in each jurisdiction, wasted resources do and must abound. The NGF suggest that a much reduced level of resources could be engaged in developing and implementing a single set of leading-edge, nation-wide Technical (industry sector specific) and OHS legislation / regulations, with the resources saved re-invested in quality OHS research and positive education / advice / support initiatives for proactive and targeted driving of continuous improvement.
- Differences in Regulations across state boundaries negatively impact the effective and efficient transfer of people within national organisations and across industry, and makes recruitment / movement of people to organisations in different states an exercise in retraining and competency assessment. A single Technical and a single OHS regulator with a single set of regulations would enable our entire industry to speak the same language, apply the same standards / procedures and make movement across the country less onerous, more efficient and significantly less costly. In addition, as access to skilled personnel decreases over time the need for increased levels of flexibility to meet business challenges and maintain asset reliability is increasing.
- Differences in Technical, OHS, and Workers Compensation legislation across jurisdictions within the National Electricity Market is a key factor in sustaining an uneven playing field, and facilitates competing agendas across states and territories (e.g. for business investment).

- The NGF does not believe that a 'National Harmonisation' approach (which will in fact fall unacceptably short of delivering National legislation and regulations), will significantly improve the status quo. As evidence of the confusion caused and the time, energy and resources that can be expended when individual state / territory jurisdictions differently interpret a single National Standard, reference should be made to the National Standard for Construction Work (see also the emphatic submission from the MBA on this issue), which has been applied in a variety of ways to the generation sector, even though neither the Standard nor the Final Report of the Royal Commission into the Building and Construction references the Power Generation Industry.

The NGF are of the firm view that national consistency is only possible through a single set of national legislation / regulations and a single national regulating body (this also strongly recommended by the Productivity Commission Report of 1995; and strongly supported by the findings of the COAG commissioned Parer Committee Report "*Towards a Truly National and Efficient Energy Market*" under the heading of 'Cooperative Approaches are not an Alternative to a National Regulator'). Pursuing a 'harmonisation' approach which permits modifications of and additions to national legislation, regulations, and related codes of practice and other guidance material will result in a great deal of time, energy, and resources invested with, at the end of the day, limited real change in outcomes on the ground delivered, and any brokered commitment to a National approach eroded over time by competing jurisdictions and changes of national and state / territory governments. Our track record over a long history re the consistent implementation of National Standards and Guidelines across jurisdictions is very poor. The waste of resources and the creation of confusion that currently exists will continue where a 'harmonisation' approach is pursued- all to the detriment of improving safety at the workplace. The NGF's response to the National Review into Model OHS Laws has been prepared on this basis - however, the NGF will support and seek to be actively involved in any process that leads towards genuine national consistency.

The NGF are aware that at the COAG meeting of 3 July 2008 it was agreed that there is to be no single National OHS Regulator. The NGF recommends that COAG reviews this decision and determines to pursue a genuinely national approach to OHS legislation and regulation. Failing this, it is essential that means are found to correct the current situation of different Regulators interpreting and applying National Standards / Legislation in different ways, and without adequately consulting the potentially impacted Industries.

Chapter 1 -- Legislative Approach	
Question	Response
<p>1.1 Regulatory Structure</p> <p><i>Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?</i></p> <p><i>Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?</i></p>	<p>As discussed above the NGF have a strong preference for a single National OHS and Technical Regulator (recognising that NSW's does not have a separate technical regulator for generators, and this may very well be the optimum approach nationally). Failing the capacity to combine Technical and OHS functions (understanding that currently in some jurisdictions separate Technical and OHS Regulators have coverage of safety related issues) the NGF's preference is for a single National Regulator for OHS and a single National Technical Regulator.</p> <p>Given the COAG position of 3 July 2008, the NGF would support and seek to be involved in the establishment of a regulatory structure based on a unitary approach which addresses the key concerns of inadequate consultation and differing interpretation and application of National Standards and National Legislation / Regulations.</p> <p>The legislation must be predominantly outcomes / performance based. While some direction (for example, that provided by the South Australian Occupational Health and Safety Regulations 1999) provides a very useful framework and guidance for businesses, the NGF believes that the principle focus of national legislation should be</p>

	<p>outcome / performance based rather than prescriptive.</p> <p>To focus on outcomes (for example, an objective of zero harm) provides organisations with sufficient flexibility to ensure that resulting systems are “fit for purpose” for various industry sectors and operations with different risk profiles and hazard control challenges, and that systems are not driven to become unnecessarily unwieldy or complex.</p> <p>Development of National Legislation and any associated Regulations, Codes of Practice, and Guidelines must be collaboratively developed with adequate industry sector specific involvement. The current National Standard for Construction Work is an excellent case in point – a Standard developed without reference to or inclusion of the energy sector, and then used as a basis for inclusion of the energy sector and applied differently within regulation by several state jurisdictions, again without adequate consultation with the energy sector. The result of this approach has been significant, unintended impacts on energy sector businesses, together with considerable time and effort being spent on negotiating exemptions to the applied regulations (with quite contrasting degrees of success across currently impacted jurisdictions).</p> <p>The NGF believe that without stringent mechanisms for genuine and effective involvement of specific industry sectors in drafting legislation that may significantly impact the sector’s businesses, and for consistent application of that legislation across all jurisdictions, the concept of nationally consistent legislation will fail.</p> <p>To this end the NGF also strongly support the ENA proposal for a single energy industry sector specific national regulator covering both technical and OHS regulations through a Safety Case approach.</p> <p>In particular, a National OHS Act should:</p> <ul style="list-style-type: none"> • Apply a “reasonably practicable” standard rather than an ‘absolute duty’ for the health and safety of employees and other persons at work (refer also response to Chapter 4 below). • Adopt a Victorian / South Australian style ‘reasonable care’ approach to personal liability in the event of alleged “reckless endangerment” - in contrast to deeming directors and managers personally liable for OHS offences committed by their companies unless they can prove one of the defences available to them (which is understood to be the current situation in NSW, Queensland, and Tasmania); • Reserve prosecution for the province of the Regulator – not third parties incentivised to pursue employers where the Regulator has determined not to prosecute (as is the current case in NSW)
<p>1.2 Title, Objects And Principles</p> <p><i>Q3. What is an appropriate title for the model OHS Act?</i></p> <p><i>Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?</i></p>	<p>The NGF submits that an appropriate title would be the “Australian OHS & 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. Alternatively, the ‘Australian OHS Act’ would be acceptable provided that the ‘welfare’ aspects of ‘health’ are more clearly defined in the Act.</p> <p>The Act should clearly state the Objectives – while a comparison of current Acts would be warranted, those contained in the South</p>

<p><i>Q5. Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?</i></p> <p><i>Q6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?</i></p>	<p>Australian OHS&W Act would suffice:</p> <p><i>The chief objects of this Act are—</i></p> <p><i>(a) to secure the health, safety and welfare of persons at work; and</i></p> <p><i>(b) to eliminate, at their source, risks to the health, safety and welfare of persons at work; and</i></p> <p><i>(c) to protect the public against risks to health or safety arising out of or in connection with—</i></p> <p><i>(i) the activities of persons at work; or</i></p> <p><i>(ii) the use or operation of various types of plant;</i></p> <p><i>(d) to involve employees and employers in issues affecting occupational health, safety and welfare; and</i></p> <p><i>(e) to encourage registered associations to take a constructive role in promoting improvements in occupational health, safety and welfare practices and assisting employers and employees to achieve a healthier and safer working environment.</i></p> <p>With regard to a set of principles, they may be better placed within the Regulations rather than the Act. We refer to the South Australian OHS&W Regulations:</p> <p><i>General principles for implementation of the regulations</i></p> <p><i>Subdivision 1—Responsibilities of employers</i></p> <p><i>1.3.1 Consultation</i></p> <p><i>1.3.2 Hazard identification and risk assessment</i></p> <p><i>1.3.3 Control of risk</i></p> <p><i>1.3.4 Information, instruction and training</i></p> <p><i>1.3.5 Induction to new work</i></p> <p><i>1.3.6 Supervision</i></p> <p><i>1.3.7 Employer action on reports</i></p> <p><i>Subdivision 2—Responsibilities of employees</i></p> <p><i>1.3.8 Responsibilities of employees</i></p> <p>The NGF support an approach to National OHS legislation that strongly underpins and drives effective self-regulation (as far as is reasonably practicable) and risk management approaches to achieving required OHS&W outcomes through:</p> <ul style="list-style-type: none"> • Quality <i>hazard</i> management; • Clear and applied ownership of stakeholders / duty holders; • Development of industry and industry sector specific standards and guidelines; and • Accountability mechanisms – with punitive measures / prosecutions reserved for wilful and reckless endangerment.
<p>Chapter 2: Scope, Application & Definitions</p>	
<p>2.1 Industry Sectors</p> <p><i>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?</i></p>	<p>The National OHS&W Act should in no way maintain the status quo. It should form an umbrella for nationally consistent industry sector specific legislations / regulations (e.g. mining; offshore oil and gas; maritime; gas supply; electricity supply; aviation; rail; etc.), with a National Regulator consisting of targeted industry sector specific teams (with industry specific skills, knowledge and experience) in order to manage both industry sector specific and general OHS&W regulation administration.</p> <p>By this means, the current situation, where in almost every</p>

<p><i>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)?</i></p> <p><i>Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?</i></p>	<p>jurisdiction there is both a technical safety regulator and general OHS&W regulator, will be eliminated. The implementation of this proposed model would provide people administering regulations to a particular industry sector (covering both industry sector specific 'technical' safety, and general OHS&W) who are best able to effectively and efficiently perform this role within the specific industry sector.</p> <p>In the light of the decision at the COAG meeting of 3 July 2008 to maintain the State jurisdictions – and in the absence of any movement to combine technical safety and general OHS regulation – the NGF seek to be involved at every level in correcting the current confusing and unacceptable situation where different regulators apply different standards to OHS, and where affected industry sectors are not adequately consulted. It is therefore essential that the National OHS Act contain provisions for:</p> <ul style="list-style-type: none"> • Improving co-ordination between jurisdictional regulators. • Consistent and sensible application of National Standards • Consulting affected industry sectors.
<p>2.2 Workplaces and Non-workplaces</p> <p><i>Q10. Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?</i></p> <p>Public Safety</p> <p><i>Q11. Should general duties of care under the model OHS Act be extended to members of the public? If so, how?</i></p>	<p>The NGF submits that general duties of care should be tied to the conduct of the work and the workplace.</p> <p>The OHS&W legislation should adequately cover duties owed to third parties (i.e. members of the public at the employer's workplace; members of the public in the vicinity of the employer's workplace; and members of the public potentially impacted by the 'conduct of the undertaking').</p>
<p>2.3 Responding to Change Work Organisation</p> <p><i>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?</i></p> <p>Emerging Hazards and Risks</p>	<p>The scope and application of the National OHS Act should focus on the nature of the work, and the relationship between the work and the worker. Concentration on the general principles of hazard identification, risk assessment and risk management should in the first instance achieve coverage of evolving types of work arrangements.</p> <p>With the addition of 'Welfare' within a National OHS&W Act, and with</p>

<p><i>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?</i></p>	<p>subsequent wording within the general duties to define / support the concept (e.g. ensure that definitions of hazard / risk are broad enough to cover the potential impact of 'welfare' and emerging trends), the NGF believe that current standards of scope and application are adequate.</p> <p>Workplace violence is a good example of an emerging trend, as are stress and mental well-being.</p>
<p>2.4 Definitions</p> <p><i>Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?</i></p> <p><i>Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?</i></p>	<p>The NGF believe that a full set of definitions within a single National OHS&W Act are needed, and suggest exploring the appropriateness of adopting globally acceptable definitions (refer ILO / WHO definitions 1995).</p> <p>The NGF favour national legislation that maximises consistency, but without recourse to prescriptive legislative / regulatory requirements – rather emphasising development of national and industry sector specific codes of practice, standards, guidelines, training requirements and competencies</p>
<p>Chapter 3: Duties of Care – Who Owes Them and to Whom?</p>	
<p>3.1 The Current Approach</p>	<p>The NGF support the concept of a contractor or sub-contractor, for example, being considered an employee when applying general duty of an employer. However, this obligation must, as indicated in the discussion paper, be limited to matters over which the host employer and / or principal has control as an element of 'reasonably practicable'. The responsibilities of the host and / or principal for the safety of contractors (or labour hire, apprentices, etc.) should, however, in no way diminish the responsibility of the contracting organisation or labour hire organisation. The responsibility of the host and contractor must be aligned and overlap.</p> <p>The discussion paper (3.8) lists a number of "activities" which impact on health and safety, namely Design, Manufacture, Supply, Import, Installation and Erection, and Decommission and Disposal. In some jurisdictions, Regulations which address these sorts of issues exist (e.g. the SA OHS&W Regulations). While some degree of prescription in such regulations provides guidance to industry and duty holders (and sets some clear standards), as noted above, the flexibility for industry to develop and use industry sector specific codes of practice, standards, and guidelines is also considered important.</p>
<p>3.2 Control</p> <p>Chain of Responsibility</p> <p><i>Q16. Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?</i></p>	<p>The national OHS&W Act should include a clear definition of 'control' both in terms of the terms application to duty holders as well as specific workplaces, with 'control' used as one of the factors in determining what is 'reasonably practicable'.</p>

<p><i>Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?</i></p> <p><i>Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?</i></p> <p>Shared Responsibilities</p> <p><i>Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?</i></p>	<p>The relationship between parties is already adequately addressed within legislation in most jurisdictions which identify duty holders and define their duties. It would be helpful if a “test of control” could be applied to the work being done.</p> <p>In general, control should not be able to be delegated or relinquished.</p> <p>If a duty holder has a duty, it must be exercised to the degree of control that is ‘reasonably practicable’ – without regard to who else may have duties. Where multiple duty holders and multiple duties exist – each duty holder must look to meet their duties 100% to the reasonably practicable standard. Duties may ‘overlap’ several duty holders, but this is healthy and strongly preferred. Clearly defining each duty holder’s duty within the legislation is the key – no duty holder <i>refrains</i> from exercising control, but exercises the degree of control that is ‘reasonably practicable’ for that specific duty holder. In addition, duty holders should be defined from importer/initial supplier to disposal.</p>
<p>3.3 Work Relationships</p> <p>Self-employed persons</p> <p>The treatment of workers in OHS laws</p> <p><i>Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations?</i></p> <p><i>Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?</i></p> <p><i>Q22. Is there a broader concept that more effectively covers the various work arrangements?</i></p>	<p>Reliance on employment relationships is a valid starting point for framing safety obligations, but is by no means exclusive of all else. Duty of care relationships exist between all persons, irrespective of their terms of engagement.</p> <p>The NGF believe that an employers duty should be similar to that detailed in the West Australian OHS Act:</p> <p><i>Division 3 — Certain workplace situations to be treated as employment</i></p> <p><i>[Heading inserted by No. 51 of 2004 s. 8.]</i></p> <p>23C. <i>Terms used in this Division</i></p> <p><i>In this Division —</i></p> <p><i>“business” includes the operations of a public authority;</i></p> <p><i>“public authority” means —</i></p> <ul style="list-style-type: none"> <i>(a) a Minister of the Crown acting in the Minister’s official capacity;</i> <i>(b) a State Government department, State trading concern, State instrumentality or State agency; or</i> <i>(c) any other body or person, whether corporate or not and including a local government, that under a written law administers or carries on a social service or public utility for the benefit of the State or a part of the State.</i> <p><i>[Section 23C inserted by No. 51 of 2004 s. 8.]</i></p> <p>23D. <i>Contract work arrangements</i></p> <p><i>(1) This section applies where a person (the “principal”) in the</i></p>

course of trade or business engages a contractor (the “contractor”) to carry out work for the principal.

- (2) *Where this section applies, section 19 has effect —*
- (a) *as if the principal were the employer of —*
 - (i) *the contractor; and*
 - (ii) *any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned,**in relation to matters over which the principal has the capacity to exercise control; and*
 - (b) *as if —*
 - (i) *the contractor; and*
 - (ii) *any person referred to in paragraph (a)(ii), were employees of the principal in relation to matters over which the principal has the capacity to exercise control.*
- (3) *Where this section applies, the further duties referred to in subsection (4) apply —*
- (a) *as if the principal were the employer of —*
 - (i) *the contractor; and*
 - (ii) *any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned;**and*
 - (b) *as if —*
 - (i) *the contractor; and*
 - (ii) *any person referred to in paragraph (a)(ii), were employees of the principal.*
- (4) *The further duties mentioned in subsection (3) are —*
- (a) *the duties of an employee under section 20; and*
 - (b) *the duties of an employer under sections 23G(2) and 23I(3).*
- (5) *An agreement or arrangement is void for the purposes of this section if it purports to give control to —*
- (a) *a contractor; or*
 - (b) *a person referred to in subsection (2)(a)(ii),*
- of any matter that —*
- (c) *comes within section 19 or 23G(2); and*
 - (d) *is a matter over which the principal has the capacity to exercise control,*
- but this subsection does not prevent the making of a written agreement as mentioned in section 23G(3).*
- (6) *A purported waiver by a contractor of a right that arises directly*

or indirectly under this section is void.

- (7) *Nothing in this section derogates from —*
- (a) *the duties of the principal to the contractor; or*
 - (b) *the duties of the contractor to any person employed or engaged by the contractor.*

[Section 23D inserted by No. 51 of 2004 s. 8.]

23E. Labour arrangements in general

- (1) *This section applies where —*
- (a) *a person (the “**worker**”) for remuneration carries out work for another person (the “**person mentioned in subsection (1)(a)**”) in the course of trade or business;*
 - (b) *that person has the power of direction and control in respect of the work in a similar manner to the power of an employer under a contract of employment;*
 - (c) *there is no contract of employment between the worker and that person; and*
 - (d) *neither section 23D nor section 23F applies.*
- (2) *Where this section applies, section 19 has effect as if —*
- (a) *the person mentioned in subsection (1)(a) were the employer of the worker; and*
 - (b) *the worker were the employee of that person,*
- in relation to any matter that —*
- (c) *comes within section 19; and*
 - (d) *is a matter over which that person has the capacity to exercise control.*
- (3) *Where this section applies, the further duties referred to in subsection (4) apply as if —*
- (a) *the person mentioned in subsection (1)(a) were the employer of the worker; and*
 - (b) *the worker were the employee of that person.*
- (4) *The further duties mentioned in subsection (3) are —*
- (a) *the duties of an employee under section 20; and*
 - (b) *the duties of an employer under section 23I(3).*
- (5) *An agreement or arrangement is void for the purposes of this section to the extent that it purports to give control to the worker of any matter that —*
- (a) *comes within section 19; and*
 - (b) *is a matter over which the person mentioned in subsection (1)(a) has the capacity to exercise control.*
- (6) *This section applies despite anything to the contrary in, or any inconsistent provision of, an agreement, whether made orally or in writing.*
- (7) *A purported waiver by a worker of a right that arises directly or*

indirectly under this section is void.

[Section 23E inserted by No. 51 of 2004 s. 8.]

23F. Labour hire arrangements

(1) *In this section —*

“agent” —

- (a) *means a person that carries on a business of providing workers to carry out work for clients of the person; and*
- (b) *includes a group training organisation as defined in section 7(1) of the Industrial Relations Act 1979;*

“worker” includes an employee or a contractor.

(2) *This section applies where, under a labour hire arrangement, work is carried out for remuneration by a worker for a client of an agent (the “client”) in the course of the client’s trade or business.*

(3) *A labour hire arrangement exists where —*

- (a) *an agent has for remuneration agreed with the client to provide a worker to carry out work for the client;*
- (b) *there is no contract of employment between the worker and the client in relation to the work;*
- (c) *there is an agreement (which may be a contract of employment) between the worker and the agent as to the carrying out of work including in respect of remuneration and other entitlements; and*
- (d) *that agreement applies to the carrying out of the work by the worker for the client.*

(4) *Where this section applies, section 19 has effect as if —*

- (a) *each of the agent and the client were the employer of the worker; and*
- (b) *the worker were an employee of each of the agent and the client,*

in relation to any matter that —

- (c) *comes within section 19; and*
- (d) *as regards —*
 - (i) *the agent, is a matter over which the agent has the capacity to exercise control; or*
 - (ii) *the client, is a matter over which the client has the capacity to exercise control.*

(5) *Where this section applies, the further duties referred to in subsection (6) apply as if —*

- (a) *each of the agent and the client were the employer of the worker; and*
- (b) *the worker were an employee of each of the agent and the client.*

	<p>(6) <i>The further duties mentioned in subsection (5) are —</i></p> <p style="padding-left: 40px;">(a) <i>the duties of an employee under section 20; and</i></p> <p style="padding-left: 40px;">(b) <i>the duties of an employer under section 23I(3).</i></p> <p>(7) <i>This section applies despite anything to the contrary in, or any inconsistent provision of, an agreement, whether made orally or in writing.</i></p> <p>(8) <i>A purported waiver by a worker of a right that arises directly or indirectly under this section is void.</i></p>
<p>3.4 Duties of Employers</p> <p><i>Q23. How and to what extent should the model OHS Act specify an employer's duty of care?</i></p> <p><i>Q24. To whom should these duties be owed?</i></p>	<p>The NGF believe that an employers duty should be similar to that detailed in the South Australian OHS Act:</p> <p>(2) <i>An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular—</i></p> <p style="padding-left: 40px;">(a) <i>must provide and maintain so far as is reasonably practicable—</i></p> <p style="padding-left: 80px;">(i) <i>a safe working environment;</i></p> <p style="padding-left: 80px;">(ii) <i>safe systems of work;</i></p> <p style="padding-left: 80px;">(iii) <i>plant and substances in a safe condition; and</i></p> <p style="padding-left: 40px;">(b) <i>must provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and</i></p> <p style="padding-left: 40px;">(c) <i>must provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health.</i></p> <p>(3) <i>Without derogating from the operation of subsection (1), an employer must so far as is reasonably practicable—</i></p> <p style="padding-left: 40px;">(a) <i>monitor the health and welfare of the employer's employees in their employment with the employer, insofar as that monitoring is relevant to the prevention of work-related injuries; and</i></p> <p style="padding-left: 40px;">(b) <i>keep information and records relating to work-related injuries suffered by employees in their employment with the employer and retain that information and those records for such period as may be prescribed; and</i></p> <p style="padding-left: 40px;">(c) <i>provide information to the employer's employees (in such languages as are appropriate) in relation to health, safety and welfare in the workplace (including the names of persons to whom the employees may make inquiries and complaints about matters affecting occupational health, safety or welfare); and</i></p> <p style="padding-left: 40px;">(d) <i>ensure that any employee who is to undertake work of a hazardous nature not previously performed by the employee receives proper information, instruction and training before he or she commences that work; and</i></p> <p style="padding-left: 40px;">(da) <i>keep information and records relating to occupational health, safety or welfare training undertaken by any of the employer's employees during their employment with the employer; and</i></p> <p style="padding-left: 40px;">(e) <i>ensure that any employee who is inexperienced in the performance of any work of a hazardous nature receives such supervision as is reasonably necessary to ensure his or her health and safety; and</i></p> <p style="padding-left: 40px;">(f) <i>ensure that any employee who could be put at risk by a</i></p>

<p>3.6 Appointed Persons and Officers</p> <p><i>Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?</i></p> <p><i>Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?</i></p> <p><i>Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?</i></p> <p><i>Q30. Should the model OHS Act include positive duties for officers of bodies corporate?</i></p>	<p>The NGF submit that the appointment of persons with OHS responsibilities within an organisation should remain the province of that organisation.</p>
<p>3.7 Duties of Persons in Control</p> <p><i>Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?</i></p> <p><i>Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?</i></p>	<p>The NGF believe that current provisions re employer / owner / occupier duties are generally considered adequate. There is a natural overlap of duties which is necessary to ensure there are no gaps in responsibility. It is noted that unless the reason for this overlap is made clear, it can be used by some to pass off their responsibilities (refer also response to Q19).</p>
<p>3.8 Activities Which Impact on Health and Safety</p> <p><i>Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?</i></p> <p><i>Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in</i></p>	<p>The NGF are advocating a single jurisdiction to remove issues associated with differing Regulation within Australia. Ideally, there should be a mechanism that can enforce compliance on overseas organisations. Failing that mechanism, there should be duty of care obligations on local organisations who import goods/designs for local use.</p>

<p><i>another? Should the manufacturer be responsible for the failings of a designer in this situation?</i></p> <p><i>Q35. 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)?</i></p> <p><i>Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?</i></p>	
<p>Chapter 4: ‘Reasonably Practicable’ & Risk Management</p>	
<p>4.1 Concept of ‘Reasonably Practicable’</p> <p><i>Q37. Should a test of “reasonably practicable” be included in the model OHS Act?</i></p> <p><i>Q38. If not, what alternative standard should be included?</i></p> <p><i>Q39. How should the standard be defined? What level of detail should be provided?</i></p> <p><i>Q40. Should control be an element of the standard? (see Chapter 3)</i></p> <p><i>Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?</i></p>	<p>The NGF support the concept of a ‘reasonably practical’ approach rather than that of strict liability. There are some advantages in clearly defining in national legislation (or, failing National legislation, a National Standard) what ‘reasonably practicable’ is in terms that are more easily understood and interpreted from an industry perspective. The Victorian OHS Act includes the following which is considered to be helpful:</p> <p style="padding-left: 40px;"><i>To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in Relation to ensuring health and safety—</i></p> <ul style="list-style-type: none"> <i>(a) the likelihood of the hazard or risk concerned eventuating;</i> <i>(b) the degree of harm that would result if the hazard or risk eventuated;</i> <i>(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;</i> <i>(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;</i> <i>(e) the cost of eliminating or reducing the hazard.</i> <p>In general, a risk management approach to demonstration of reasonably practicable health and safety management is also supported, and this concept should be clearly defined in national legislation.</p> <p>A ‘definition’ rather than a ‘test’ of ‘reasonably practicable’ should be included.</p> <p>Another concept potentially worthy of consideration is the model used in the UK to determine an acceptable level of risk. The UK model uses a quantitative risk assessment method that is aligned with broadly accepted community standards for acceptance of risk, i.e. comparable with the quantified level of risk driving a motor vehicle, or taking an international flight.</p>
<p>4.2 Risk Management</p> <p><i>Q42. Should ‘hazard’ and ‘risk’ be defined in the model OHS</i></p>	<p>Yes - all relevant key / common hazard and risk management words should be defined (i.e. probability, likelihood, exposure,</p>

<p>Act?</p> <p><i>Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?</i></p> <p><i>Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?</i></p>	<p>consequence, etc.). Refer also our response to Q14.</p> <p>Currently risk management principles are generally inherent within jurisdiction's OHS Acts, with the specifics of risk management principles are detailed in regulations. The NGF support this approach – including reference to the hierarchy of control – however, the matching of detailed processes to those principles should be the province of organisations.</p>
<p>Chapter 5: Consultation, Participation & Representation</p>	
<p>5.1 Duty to Consult</p> <p><i>Q45. What provisions should be made in the model OHS Act for consultation?</i></p> <p><i>Q46. What are the work relationships to which a consultation provision should apply?</i></p> <p><i>Q47. Should there be different levels of consultation required for different work relationships?</i></p> <p><i>Q48. How should consultation be provided for:</i></p> <ul style="list-style-type: none"> – a multi-employer worksite; – an employer with operations across more than one worksite; – small business; – remote workplaces; – precarious employment; and – workers from culturally and linguistically diverse backgrounds. 	<p>The Act should focus on the need for an effective consultative process between all people on the worksite. Consultation with OHS representatives/committees should be mandated. It may be desirable to facilitate consultation through the provision of Guidelines.</p> <p>Consultation should be flexible, with employers and employees given some scope to agree on consultative / representative arrangements tailored to the specific workplace. Reference to the Victorian OHS Act provides a good platform for consultation:</p> <p style="padding-left: 40px;">(1) An employer who is required to consult with employees must do so by—</p> <p style="padding-left: 80px;">(a) sharing with the employees information about the matter on which the employer is required to consult; and</p> <p style="padding-left: 80px;">(b) giving the employees a reasonable opportunity to express their views about the matter; and</p> <p style="padding-left: 80px;">(c) taking into account those views.</p> <p style="padding-left: 40px;">(2) If the employees are represented by a health and safety representative, the consultation must involve that representative (with or without the involvement of the employees directly).</p> <p style="padding-left: 40px;">(3) Subject to subsections (1) and (2), if the employer and the employees have agreed to procedures for undertaking consultations, the consultation must be undertaken in accordance with those procedures..</p>
<p>5.2 Participation and Representation</p> <p>Health and Safety Representatives</p> <p>Health and Safety Committees</p> <p><i>Q49. Should there be a requirement for establishing HSRs and HSCs?</i></p>	<p>The NGF believe that there should be a requirement for establishing representatives and committees, and that the Act should make provision for effective participation and representation.</p> <p>The Victorian OHS Act provides a good example:</p> <p style="padding-left: 40px;">(1) An employer must establish a health and safety committee in accordance with this section—</p> <p style="padding-left: 80px;">(a) within 3 months after being requested to do so by a health and safety representative; or</p> <p style="padding-left: 80px;">(b) if required by the regulations to do so. Note An</p>

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?

Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

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

Q53. What should the powers and functions of HSRs be?

Q54. What should the structure and functions of HSCs be?

Q55. What training and qualifications should members of HSRs and members of HSCs have?

Q56. Are there alternative mechanisms that should be considered?

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

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

employer is required to consult employees on the Membership of the committee (see Part 4).

(2) At least half of the members of a health and safety committee must be employees (and, so far as practicable, health and safety representatives or deputy health and safety representatives) of the employer.

(3) The functions of a health and safety committee are—

(a) to facilitate co-operation between the employer and employees in instigating, developing and carrying out measures designed to ensure the health and safety at work of the employees; and

(b) to formulate, review and disseminate (in other languages if appropriate) to the employees the standards, rules and procedures relating to health and safety that are to be carried out or complied with at the workplace; and

(c) such other functions as are prescribed by the regulations or agreed between the employer and the committee.

(4) A health and safety committee must meet—

(a) at least once every 3 months; and

(b) at any other time if at least half of its members require a meeting.

(5) Subject to this Act and the regulations, a health and safety committee may determine its own procedures.

Where an election is required, all persons in the affected workgroup should be entitled to vote.

Regarding power and functions, we refer to the appropriate sections of the South Australian OHS&W Act:

A health and safety representative may, for the purpose of the health, safety and welfare of the employees in the work group that the health and safety representative represents—

(a) inspect the whole or any part of any relevant workplace—

(i) at any time after giving reasonable notice to the employer (which must state the name of any consultant who is to accompany the representative during the inspection and the purpose for which the consultant's advice is sought); or

(ii) immediately, in the event of an accident, dangerous occurrence or imminent danger or risk to the health or safety of any person;

(b) accompany an inspector during an inspection of any relevant workplace;

(c) investigate complaints relating to occupational health, safety or welfare made by employees in the work group;

(d) at the request of the employee, be present at any interview concerning occupational health, safety or welfare between an inspector and an employee;

(e) at the request of the employee, be present at any interview concerning occupational health, safety or welfare between the employer (or a representative of the employer) and an employee;

(f) make representations to the employer on any matter that relates to occupational health, safety or welfare at any relevant workplace.

(2) In relation to the inspection of a workplace under subsection

(1)(a), a health and safety representative may—

(a) be accompanied by such consultants as the representative thinks fit; and

Right of Entry

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

Q60. Should the model OHS Act specify training and qualifications for such persons?

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

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

Issue Resolution

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

Q64. When should issue resolution procedures be activated?

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?

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

Right to Cease Unsafe Work

Q67. Should a model OHS Act

(b) discuss any matter affecting health, safety or welfare with any employee at the workplace; and

(c) carry out any investigation that may appear appropriate.

(3) Subsections (1) and (2) are subject to the following qualifications:

(a) a health and safety representative is only entitled to be accompanied on an inspection by a consultant approved by—

(i) the Advisory Committee; or

(ii) a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents; or

(iii) the employer; and

(b) a health and safety representative should take reasonable steps to consult with the employer in relation to carrying out an investigation of any workplace and the outcome of any such investigation.

The NGF strongly supports the approach of no right of entry for 'authorised members of trade unions' on OHS matters. However, the NGF supports the right of OHS&W representatives to request to be accompanied by an accredited OHS&W consultant to assist an investigation. By this means organisation and legislated OHS&W issue resolution processes are applied as they should be, OHS&W and IR issues are not confused, and OHS&W issues are not utilised as drivers of other agendas. With reference to the South Australian OHS&W Act:

(2) In relation to the inspection of a workplace under subsection (1)(a), a health and safety Representative may—

(a) be accompanied by such consultants as the representative thinks fit; and

(b) discuss any matter affecting health, safety or welfare with any employee at the workplace; and

(c) carry out any investigation that may appear appropriate.

(3) Subsections (1) and (2) are subject to the following qualifications:

(a) a health and safety representative is only entitled to be accompanied on an inspection by a consultant approved by—

(i) the Advisory Committee; or

(ii) a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents; or

(iii) the employer; and

(b) a health and safety representative should take reasonable steps to consult with the employer in relation to carrying out an investigation of any workplace and the outcome of any such investigation.

The training and qualifications of 'Consultants' would be as per the South Australian model above, and should be generally specified in the Act, together with a list of appropriate consultants approved by the Act's Advisory Committee.

There should be no powers exercisable on entry – the purpose is solely to provide a consultancy service to the OHS Representative. The consultant must comply with the organisations OHS&W / security requirements.

The NGF support:

- The capacity (and responsibility) of any employee to refuse /

specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

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?

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?

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

cease 'unsafe' work (i.e. that a person who has removed themselves from a work situation that the worker has reasonable justification to believe presents a serious and imminent danger, should be protected from undue consequences), as well as the capacity of OHS Representatives to direct work to cease where there is reasonable justification to believe a serious and imminent danger exists (in consultation with the employer and OHS Committee first wherever possible);

- A requirement for reporting and application of organisation hazard management processes, and if necessary consultation with the work group OHS Representative as the first steps of that process;
- Utilisation of the OHS&W Committee to resolve issues if the first steps are unsuccessful within a reasonable timeframe;
- Utilisation of default notices where the above actions are unsuccessful within a reasonable timeframe given the risk;
- The use of WorkSafe inspectors or accredited OHS advisors (refer the UK model) in an advisory/mediatory capacity.

The NGF strongly do not support the use of formal 'notices' as the first resort – as this approach does little to contribute to developing a healthy consultative, collaborative, and responsible approach to issue resolution.

Once hazard reporting and resulting hazard management processes fail to resolve an issue within a reasonable timeframe (given the risk profile and scale) the formal issue resolution process could then be initiated. The South Australian OHS&W Act provides a suitable framework for consultation and the cessation of work:

(1) Where a health and safety representative is of the opinion that there is an immediate threat to the health or safety of an employee who is a member of the work group that the health and safety representative represents, the health and safety representative must consult with the employer in relation to the matter.

(2) If the health and safety representative and the employer are unable within a reasonable time to resolve a particular matter pursuant to subsection (1), the matter must, if there is a health and safety committee that has responsibility in relation to the matter, be referred to that committee or, if there is no such committee, the matter must be referred to an inspector.

(3) Despite subsections (1) and (2), if the health and safety representative is of the opinion that given the nature of the threat and degree of risk work should immediately cease, the health and safety representative may direct that work cease until adequate measures are taken to protect the health and safety of an employee.

(4) Where a health and safety representative gives a direction that work cease—

(a) if the direction is given without consultation with the employer or before the matter has been considered by a health and safety committee (if any) that has responsibility in relation to the matter, the health and safety representative must, as soon as practicable after giving the direction, consult with the employer and, if it is necessary or appropriate, with the committee; and

(b) the employer or the health and safety representative may request an inspector to attend the workplace.

The OHS Act should not make reference to the payment of wages for workers who have ceased work on the basis of OHS. The payment of wages is the province of IR legislation, and should be dealt with as such. To include this reference in the National OHS

	<p>Act would blur the lines between OHS and IR, and could be used as a basis to cease all work on a worksite, where there may be alternate duties that could be undertaken while the safety issue is resolved.</p> <p>The NGF support the additional legislated resolution of disputes associated with cessation of work once organisation resolution processes have been exhausted, but with short timeframes for response / attendance by the Regulator (refer excerpt from South Australian OHS&W Act below):</p> <p><i>(1) Where a matter is referred to an inspector under this Division, the inspector must attend at the workplace as soon as possible but in any event—</i></p> <p><i>(a) if a direction has been given that work cease—</i></p> <p><i>(i) where the workplace is within the metropolitan area—within 1 business day;</i></p> <p><i>(ii) where the workplace is outside the metropolitan area—within 2 business days; or</i></p> <p><i>(b) in any other case—within 7 business days.</i></p> <p><i>(2) An inspector—</i></p> <p><i>(a) must attempt to resolve any occupational health, safety or welfare matter that remains unresolved; and</i></p> <p><i>(b) if a default notice has been issued, may—</i></p> <p><i>(i) confirm the notice; or</i></p> <p><i>(ii) confirm the notice with such modifications as the inspector thinks fit; or</i></p> <p><i>(iii) cancel the notice; and</i></p> <p><i>(c) if the inspector thinks fit, may issue a prohibition notice or an improvement notice; and</i></p> <p><i>(d) may make such recommendations or take such other action as appear appropriate.</i></p>
<p>5.3 Protection from Discrimination and Victimization</p> <p><i>Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?</i></p> <p><i>Q72. Who should be able to bring an action for unlawful</i></p>	<p>The NGF submit that the requirements of the South Australian OHS&W Act provide a good basis for protection from discrimination and victimisation:</p> <p><i>(1) An employer must not dismiss an employee, injure an employee in employment or threaten, intimidate or coerce an employee by reason of the fact that the employee—</i></p> <p><i>(a) is a health and safety representative or a member of a health and safety committee or has performed the functions of a health and safety representative or of a member of a health and safety committee; or</i></p> <p><i>(b) has assisted or given information to an inspector, health and safety representative or health and safety committee; or</i></p> <p><i>(c) has made a complaint in relation to a matter affecting health, safety or welfare.</i></p> <p><i>(2) An employer or prospective employer must not refuse or deliberately omit to offer employment to a prospective employee or treat a prospective employee less favourably than another prospective employee would be treated in relation to the terms on which employment is offered by reason of the fact that the prospective employee—</i></p> <p><i>(a) has been a health and safety representative or a member of a health and safety committee or has performed the functions of a health and safety representative or of a member of a health and safety committee; or</i></p> <p><i>(b) has assisted or given information to an inspector, health and safety representative or health and safety committee; or</i></p>

<p><i>discrimination? Should the model OHS Act allow representative actions?</i></p> <p><i>Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?</i></p> <p><i>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?</i></p> <p><i>Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?</i></p> <p><i>Q76. What remedies should be available to the victims?</i></p> <p><i>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?</i></p> <p><i>Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?</i></p>	<p><i>(c) has made a complaint in relation to a matter affecting health, safety or welfare.</i></p> <p>An action for unlawful discrimination on the basis of an OHS issue should be the province of the OHS Regulator, acting objectively, fairly, consistently, and transparently, and applying DPP Prosecution Guidelines.</p> <p>The burden of proving relevant elements of offences should be carried by the prosecuting arm of the OHS Regulator – and the standard should be that of reasonable doubt.</p> <p>Yes (Q75).</p> <p>Yes (Q77).</p>
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Chapter 6: Regulator Functions, Powers & Accountability

<p>6.1 Role and Functions of Regulators</p> <p>Accountability</p> <p>Education, Advice and Assistance</p> <p>Compliance and Enforcement Policies</p> <p><i>Q79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?</i></p>	<p>The NGF strongly support the separation of advisory and enforcement powers of regulators. The rationale for this is that the regulator should not be placed in a position where there is a potential conflict between advising and supporting industry to continuously improve OHS performance, and also potentially penalising or prosecuting in the event that - for example - a system fault is identified. Both industry assistance and enforcement are legitimate roles of a regulator, but do not sit well within the same area of responsibility. Industry should feel free to consult with regulators on any issues of uncertainty without fear of risk of prosecution. Where separation is not possible, the regulator's approach in the first instance (particularly where their involvement has been proactively initiated by the employing organisation) the approach should be predominantly 'advisory' except where exceptional measures are</p>
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<p><i>Q80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?</i></p> <p><i>Q81. Should the model Act include provisions that allow the making of interpretative documents?</i></p> <p><i>Q82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?</i></p> <p><i>Q83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?</i></p>	<p>required to ensure a significant and imminent danger to health and safety is effectively managed.</p> <p>Given the above, it would be far better for a Workplace Inspector to be able to issue a "Record of Observation" as an additional alternative to the current forms of Improvement and Prohibition Notices.</p> <p>Notices should be able to be modified in consultation with all parties - including the original inspector - if the notice or instrument issued is to be changed by another inspector, in circumstances such as where post-investigation when new information may become available, or workplace conditions change.</p> <p>In addition, it would be beneficial (in fact essential) – given the COAG position that state and territory jurisdictional regulators are to remain is not adjusted – for nationally consistent Guidance documents to be produced only by a single national body such as ASSC. By this means, a consistent reference nationally would be available as a mechanism to removing an additional level of confusion – however, it would also be necessary for ASSC to expand its role to ensure that relevant industry sectors are consulted in the production of those Guidelines.</p>
<p>6.2 Inspectors</p> <p><i>Q84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?</i></p> <p><i>Q85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?</i></p> <p><i>Q86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?</i></p> <p><i>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?</i></p>	
<p>6.3 Internal Review of Inspectors' Decisions</p> <p><i>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?</i></p> <p><i>Q89. Are there any other issues</i></p>	

<p><i>in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?</i></p>	
<p>Chapter 7: Compliance & Enforcement</p>	
<p>7.1 Enforcement Measures</p> <p><i>Q90. Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?</i></p> <p><i>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?</i></p>	<p>The NGF strongly support a hierarchy of enforcement measures in order of escalation - clearly tailored to the behaviour / performance and co-operation of the regulated person or entity.</p> <p>Where businesses have a commitment to health and safety, and this is demonstrated through behaviours, systems, historical performance, and, in the event of a failure, cooperation with regulators, this should be recognised in the application of the hierarchy of enforcement measures. Failure to recognise such a commitment in the event of an incident does not support a continuous improvement approach, and potentially closes / damages the relationship and collaboration between industry and regulator. An open, cooperative / collaborative relationship between industry and regulators, to the extent possible within the law, will promote the best OHS outcomes.</p> <p>The Act should include the full range of possible enforcement mechanisms including observations, informal warnings, improvement and prohibition notices, publicity orders, required training and education, community services orders, OHS&W project work, restoration orders, enforceable undertakings, prosecution in lower and higher courts, and penalties.</p>
<p>7.2 Measures Exercised at the Workplace</p> <p>Safety Directions, Warnings and Cautions</p> <p>Provisional Improvement Notices (PINs)</p> <p>Improvement Notices</p> <p>Prohibition Notices</p> <p><i>Q92. What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?</i></p> <p><i>Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?</i></p> <p><i>Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?</i></p> <p><i>Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or</i></p>	<p>The NGF submit that in addition to the normally legislated approach, provision be made for inspectors to make recommendations for improvement, provided that there is recognition of what is reasonably practicable, and to the depth appropriate given the profile of the breach / issue following adequate definition of the specific breach / issue, and provided organisations have freedom to achieve the desired outcome through actions other than those recommended.</p> <p>The NGF suggest that the South Australian OHS&W Act provides a good basis for measures to be exercised at the Workplace:</p> <p><i>39—Improvement notices</i></p> <p><i>(1) Where an inspector is of the opinion that a person—</i></p> <p style="padding-left: 20px;"><i>(a) is contravening a provision of this Act; or</i></p> <p style="padding-left: 20px;"><i>(b) has contravened a provision of this Act in circumstances that make it likely that the contravention will be repeated, the inspector may issue an improvement notice requiring the person to whom the notice is addressed to remedy the matters occasioning the contravention or likely contravention.</i></p> <p><i>(2) An improvement notice must—</i></p> <p style="padding-left: 20px;"><i>(a) state that the inspector is of the opinion that a person—</i></p> <p style="padding-left: 40px;"><i>(i) is contravening a provision of this Act; or</i></p> <p style="padding-left: 40px;"><i>(ii) has contravened a provision of this Act in circumstances that make it likely that the contravention will be repeated;</i></p> <p style="padding-left: 40px;"><i>and</i></p> <p style="padding-left: 20px;"><i>(b) state the grounds of the inspector's opinion; and</i></p> <p style="padding-left: 20px;"><i>(c) specify the provision of this Act in respect of which that opinion is held; and</i></p> <p style="padding-left: 20px;"><i>(d) make provision for a statement (a statement of compliance) that is to be completed by the person required to comply with the</i></p>

prohibition notices?

Q96. Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices,? If so, what should the effect be?

Infringement Notices

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

Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?

Q99. What amounts should be specified as fines for infringements?

notice when the matters to which the notice relates have been remedied.

(3) An inspector may—

(a) include in an improvement notice directions as to the measures to be taken to remedy the contravention, or to avoid further contravention, of the Act;

(b) specify in an improvement notice a day by which the matters referred to in the notice must be remedied.

(4) Subject to this Act, a person who contravenes or fails to comply with an improvement notice is guilty of an offence.

(5) The person required to comply with an improvement notice must, within 5 business days after the matters to which the notice relates have been remedied in accordance with the requirements of the notice, complete and return to the Department the relevant statement of compliance.

(6) An expiration notice cannot be issued under subsection (5) after the third anniversary of the commencement of that subsection.

40—Prohibition notices

(1) Where an inspector is of the opinion—

(a) that there is an immediate risk—

(i) to the health or safety of a person at work; or

(ii) to the health or safety of any person in connection with the performance of any work, or from any plant to which this Act extends by virtue of Schedule 2; or

(b) that there could be an immediate risk—

(i) to the health or safety of a person at work; or

(ii) to the health or safety of any person in connection with the performance of any work, or from any plant to which this Act extends by virtue of Schedule 2, if particular action were to be taken or a particular situation were to occur, an inspector may issue to the person apparently in control of the activity or situation from which the risk arises or could arise (as the case may be) a prohibition notice prohibiting the carrying on of an activity or any other relevant action until the inspector is satisfied that adequate measures have been taken or are in place to avert, assess, eliminate or minimise any risk.

(2) A prohibition notice must—

(a) identify the activity or situation from which the risk arises or would arise; and

(b) state the grounds of the inspector's opinion on which the notice is based.

(3) An inspector may include in a prohibition notice directions as to the measures to be taken to avert, assess, eliminate or minimise the risk to which the notice relates.

(4) Subject to this Act a person who contravenes or fails to comply with a prohibition notice is guilty of an offence.

41—Notices to be displayed

(1) Where an improvement notice or prohibition notice is issued, to an employee, the employee must, as soon as is reasonably practicable after receiving it, give the notice, or a copy of the notice, to his or her employer.

(2) Where an improvement notice or a prohibition notice is issued, the person to whom the notice is addressed must, on receipt of the notice (or a copy of the notice)—

(a) supply a copy of the notice to any health and safety representative who represents any employees whose work is affected by the notice; and

(b) bring the notice to the attention of any person whose work is affected by the notice; and

	<p>(c) display the notice or a copy of the notice in a prominent place at or near any workplace or plant that is affected by the notice.</p> <p>(3) A person must not remove a notice or the copy of a notice displayed pursuant to subsection (2) while the notice is in force.</p> <p>42—Review of notices</p> <p>(1) Any of the following persons, namely—</p> <p>(a) an employer affected by an improvement notice or prohibition notice; or</p> <p>(b) a person in relation to whose work or plant an improvement notice or a prohibition notice applies; or</p> <p>(c) a health and safety representative who represents any employee whose work is affected by an improvement notice or a prohibition notice, may apply to the President of the Industrial Court to have the notice or the actions of an inspector reviewed by a review committee.</p> <p>(2) An application under subsection (1)(a) or (b) must be made by a person within 14 days of the receipt of the notice (or a copy of the notice) by the person.</p> <p>(3) Pending the determination of an application for review under this section the operation of the notice to which the application relates will—</p> <p>(a) in the case of an improvement notice—be suspended;</p> <p>(b) in the case of a prohibition notice—continue.</p> <p>(4) A review committee may if it thinks fit make an interim order suspending the operation of a prohibition notice until the matter is resolved.</p> <p>(5) An order under subsection (4) must be made subject to such conditions as may be necessary to protect the health and safety of any person.</p> <p>(6) Where a prohibition notice has been issued, the proceedings on a review under this section must be carried out as a matter of urgency.</p>
<p>7.3 Measures Exercised beyond the Workplace</p> <p>Remedial Orders and Injunctions</p> <p><i>Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?</i></p> <p>Enforceable Undertakings</p> <p><i>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?</i></p> <p><i>Q102. Should the giving of an enforceable undertaking result in an admission of fault or</i></p>	<p>The NGF support the use of enforceable undertakings as an alternative to prosecution, provided that consistent and publicly available Guidelines are used by regulators to set these undertakings.</p> <p>No – a more positive outcome and stronger acceptance of the process would be achieved if there was no admission of fault or liability applied / required (Q102).</p>

<p><i>liability?</i></p> <p><i>Q103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?</i></p>	
<p>8.1 Criminal or Civil Liability</p> <p><i>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?</i></p> <p><i>Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?</i></p>	<p>The NGF support the consideration of alternatives to prosecutions, namely: other Enforceable Undertakings, such as publicity orders, OHS projects and restoration orders. Such options - already available at a Commonwealth level, in Victoria, Queensland and the ACT (and to a degree in SA), would seem to have advantages in achieving a positive outcome for the working or wider community while still clearly “sending the message” to industry and individuals on OHS compliance. Such Enforceable Undertakings may also be an option as a penalty / deterrent of future non-compliance in the event of a successful prosecution.</p> <p>There is a place for ‘aggravated’ offences within National OHS&W legislation, though this should be limited to instances where there is a clear and wilful dereliction of duty or malicious behaviour on the part of the responsible person or entity. Situations where a genuinely reasonably practical approach to safety has predominantly been taken in the workplace (refer to the excerpt from South Australia’s OHS&W Act below) require a different and more positive approach in order to obtain the desired outcome. If it is demonstrable that a business has taken a documented, structured, and committed approach to identifying hazards and managing risks (using the appropriate skills and resources) which demonstrates a ‘reasonably practicable’ approach, this should provide protection from prosecution re ‘aggravated’ offences.</p> <p><i>(1) A person is guilty of an offence if—</i></p> <p><i>(a) the person, without lawful excuse, acts in a manner that creates a substantial risk of death or serious harm to another who is in a workplace; and</i></p> <p><i>(b) the person—</i></p> <p><i>(i) knew that his or her act or acts would create that risk; or</i></p> <p><i>(ii) was recklessly indifferent about whether his or her act or acts would create that risk.</i></p> <p><i>(2) An offence against subsection (1) is a minor indictable offence.</i></p> <p><i>(3) In this section act includes omitting to act.</i></p>
<p>8.2 Where prosecutions should be heard</p> <p><i>Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?</i></p> <p><i>Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?</i></p> <p><i>Q108. To where should appeals lie? Should the right to appeal</i></p>	

<p><i>be subject to any conditions and if so, what should they be?</i></p> <p><i>Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?</i></p>	
<p>8.3 Who may commence prosecutions and relevant procedures</p> <p><i>Q110. Who should be entitled to commence criminal proceedings?</i></p> <p><i>Q111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?</i></p> <p><i>Q112. What should appropriate time limits be for the commencement of a prosecution and why?</i></p> <p><i>Q113. Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?</i></p>	<p>The NGF believe that acts conducted with wilful criminal intent should be dealt with by the appropriate criminal legislation.</p> <p>The National OHS&W legislation must provide that the OHS&W prosecutor is required to abide by the ethical duties of a prosecutor to act objectively, fairly, consistently, and transparently in exercising prosecutorial functions, and the legislation require OHS&W regulators / prosecutors to be bound by DPP Prosecution Guidelines.</p>
<p>8.4 Evidence</p> <p><i>Q114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?</i></p> <p><i>Q115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?</i></p> <p><i>Q116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?</i></p>	<p>The NGF maintain that specific evidentiary procedures must be detailed to ensure a nationally consistent approach.</p>
<p>8.5 The Burden of Proof and Defences</p> <p><i>Q117. Is 'reasonably practicable' an appropriate standard for the model OHS</i></p>	<p>The NGF are of the firm view that 'reasonably practicable' is the only appropriate standard for the National OHS Act.</p> <p>In order to obtain a conviction the prosecution should prove that the standard of 'reasonably practicable' was not met beyond a</p>

<p>Act?</p> <p><i>Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?</i></p> <p><i>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?</i></p> <p><i>Q120. What, if any, defences should the model OHS Act provide?</i></p> <p><i>Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?</i></p>	<p>reasonable doubt. Defendants should prove ‘reasonably practicable’ as a defence on the balance of probabilities.</p> <p>The ‘reasonably practicable’ exercise of due diligence should be an acceptable defence – where a key element of defining ‘reasonably practicable’ is level of ‘control’. The reasonably practicable satisfaction of a specific regulation, ministerial notice, or code of practice is a sub-set of this defence.</p> <p>The burden of proof on the prosecutor re individuals should be higher than that for the corporation. The burden of proving defence should be lower on the individual than on the corporation.</p>
<p>8.6 Liability of Officers</p> <p><i>Q122. Should ‘officers’ of a corporation be liable to an offence because the corporation has committed an offence?</i></p> <p><i>Q123. How should officer be defined?</i></p> <p><i>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?</i></p> <p><i>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?</i></p> <p><i>Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?</i></p> <p><i>Q127. What should the approach to officers of unincorporated associations or volunteer officers be?</i></p>	<p>The NGF suggest the relevant section of the South Australian OHS&W Act as appropriate:</p> <p><i>For the purposes of proceedings for an offence against this Act—</i></p> <p><i>(a) the conduct and state of mind of an officer, employee or agent of a body corporate acting within the scope of his or her actual, usual or ostensible authority will be imputed to the body corporate;</i></p> <p><i>(b) the conduct and state of mind of an employee of an administrative unit of the Public Service of the State acting within the scope of his or her actual, usual or ostensible authority will be imputed to the administrative unit;</i></p> <p><i>(c) the conduct and state of mind of an employee or agent of a natural person acting within the scope of his or her actual, usual or ostensible authority will be imputed to that person,</i></p> <p><i>(but not so as to affect any personal liability of the officer, employee or agent).</i></p> <p>Officers should not be automatically guilty of an offence subject only to the proving of the offence – rather, the prosecution must prove the offence was attributable to the failure of the officer to exercise reasonable care or take reasonable steps to ensure compliance by the corporation (the ‘reasonably practicable’ standard).</p>
<p>8.7 Sentencing Options</p>	

<p>Fines</p> <p><i>Q128. For which offences should monetary penalties (fines) be imposed?</i></p> <p><i>Q129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?</i></p> <p><i>Q130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?</i></p> <p><i>Q131. Should there be a statutory minimum fine for some offences? If so, what?</i></p> <p><i>Q132. Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?</i></p> <p><i>Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?</i></p> <p>Other Sentencing Options</p> <p><i>Q134. What penalty options should be available in addition to or instead of fines?</i></p> <p><i>Q135. Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?</i></p>	<p>The NGF believe that a National Register of decided cases would assist in the provision of more consistent outcomes.</p>
<p>8.8 Workplace Death and Serious Injury</p> <p><i>Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?</i></p> <p><i>Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?</i></p> <p><i>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?</i></p>	

<p>8.9 Enforcement of Penalties</p> <p><i>Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?</i></p> <p><i>Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?</i></p> <p><i>Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?</i></p>	<p>The NGF acknowledge that a National OHS&W Act must be effective in its deterrent role, particularly where otherwise 'rogue' repeat offenders may take advantage.</p> <p>The NGF believe that National OHS&W legislation should provide for the recovery of costs in the event of a successful defence to an OHS&W prosecution. The decision to prosecute / not to prosecute should be reviewable.</p>
Chapter 9: Other Issues	
<p>9.1 Regulation Making Powers</p> <p><i>Q142. Should the power to make regulations be limited and if so, in what way?</i></p> <p><i>Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?</i></p>	
<p>9.2 Codes of Practice</p> <p><i>Q144. What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?</i></p>	<p>The NGF believe that provision must be made for the development of recognised industry sector specific standards / codes of practice / guidelines. Codes of Practice must be developed with adequate industry sector specific consultation and consideration.</p>
<p>9.3 Notification of Incidents and Reporting</p> <p><i>Q145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?</i></p>	<p>The NGF believe that there is a need for a clear and simple set of notifiable event triggers – which does not include a catch all (e.g. 'any event which had a significant risk'), which makes clear who has the responsibility of reporting, and where the reporting timeframes are clear and reasonable.</p>

	Continual improvement may be aided by the provision of an annual report against simple but key positive performance OH&S criteria, such as those developed by the ENA HSE Committee.
<p>9.4 External Appeals and Issue Resolution</p> <p><i>Q146. What provisions should be made in the model OHS Act for the external review of regulatory decisions?</i></p> <p><i>Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?</i></p>	
<p>9.5 Tripartite Mechanisms</p> <p><i>Q148. Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?</i></p> <p><i>Q149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?</i></p>	<p>The NGF support the tripartite approach, provided the parties adequately represent the affected industry sector/s. In order to achieve this outcome, there should be provision for tripartite committees based upon those industry sectors.</p>
<p>9.6 Mutual Recognition</p> <p>Permits and licensing arrangements for workers engaged in high risk work</p> <p><i>Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?</i></p> <p><i>Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:</i></p> <ul style="list-style-type: none"> • <i>better OHS outcomes;</i> • <i>greater efficiency and effectiveness;</i> • <i>lower regulatory compliance and enforcement burdens; and</i> • <i>improved harmonisation of the requirements for such permits and licensing for industry across Australia?</i> 	<p>The NGF note that delivery of a National OHS Regulatory framework would negate the need for mutual recognition of permits and licensing. Failing that framework, the need clearly exists, and the NGF understands that the areas have already been decided at the COAG meeting of 3 July 2008.</p> <p>Failing a National OHS&W Act, the most appropriate way to achieve national consistency is for there to be regulated restricted occupations, National competency standards, a single National point of issue, Nationally consistent refresher training and competency assessment, and regulated assessors and trainers. Regular reviews of high risk activities (based upon numbers or trends of incidents) would assist. In addition, an Industry specific skills passport rather than a process of all-trades licensing could be considered.</p>

9.7 Cross-jurisdictional Cooperation

9.8 Interaction of Federal and State Laws

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

In the event that there is to be no National OHS Regulator, nor a combining of technical safety and general OHS legislation, it is proposed that there be either:

- Identical legislation in each State and Territory; or.
- A co-operative approach amongst the Regulators, where one jurisdiction takes the lead, and all others adopt that legislation as their own as is without change.